

**UNDERSTANDING THE BENEFITS AND COSTS OF
SECTION 5 PRE-CLEARANCE**

HEARING
BEFORE THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
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UNDERSTANDING THE BENEFITS AND COSTS OF SECTION 5 PRE-CLEARANCE

WEDNESDAY, MAY 17, 2006

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

The Committee met, pursuant to notice, at 9:28 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Orrin G. Hatch presiding.

Present: Senators Hatch, Leahy, and Durbin.

STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Senator LEAHY. Good morning. As you can see, we have had some changes in the schedule today because of immigration on the floor, and I apologize to all of you. I am not Arlen Specter. He is a dear, good friend of mine for 35 years, but he has more hair.

We are marking the anniversary today of the Supreme Court's landmark decision in *Brown v. Board of Education*, one of the most remarkable decisions in the Supreme Court's history. It took a couple years to get it through. The Chief Justice at the time realized that he had to take a disparate group of Justices to get a unanimous opinion. The country was going to have a difficult enough time with it as it was, but would have even more had it been a 5-4 decision or less than unanimous. Now that we are reauthorizing the Voting Rights Act, I think it is appropriate to recognize the great civil rights struggle which led to it. Like *Brown v. Board of Education*, which began to bring to an end America's sorry history of racial segregation, the Voting Rights Act is helping bring equal participation in voting to all Americans, something we probably took for granted in my State of Vermont but a lot of other States did not, something that assume is guaranteed today, but we have generations to come, our children and grandchildren, who may not have it, be able to take it for granted, unless we reauthorize this.

I am encouraged that we have moved forward with the hearings and the introduction of our bipartisan, bicameral bill. I hope we can finish this before we recess for the Memorial Day break. I would hope this would be the major issue on the floor as soon as we come back. The House Judiciary Committee has been moving ahead. They reauthorized the Voting Rights Act by a vote of 33-1. If you look at the House Committee, it goes across the political spectrum in both parties. I think that is pretty amazing.

Here we are focusing on Section 5, required covered jurisdictions to pre-clear changes. We will hear more about the benefits of Sec-

tion 5. The chief benefit of it is that it furthers the very legitimacy of our Government, which is dependent on the access to the voting booth.

We have a distinguished panel. Mr. Gray, it is always good to see you here. He is one of the Nation's pioneering civil rights lawyers. He spent a lifetime fighting for those who were denied the rights to equal protection and equal dignity under the law. After graduating law school, he immediately went to work defending Rosa Parks and Dr. Martin Luther King, Jr., in the Montgomery bus boycott. Starting in the late 1950's, he brought landmark voting rights cases like *Gomillion v. Lightfoot* to the Supreme Court, paving the way for the expansion of voting rights that culminated in the Voting Rights Act of 1965.

Armand Derfner has had a distinguished career as a voting rights litigator and author. He began his career in 1965 working with the first Federal examiners under the Voting Rights Act to register citizens to vote in Greenwood, Mississippi, and he has worked with Congress each time Section 5 has been extended—in 1970, before I came to the Senate; in 1975, shortly after I came to the Senate; and in 1982.

Of course, Professor Drew Days is well known to all members of this Committee. He is one of the country's top constitutional lawyers. He was the Solicitor General of the United States from 1993 to 1996—I voted on your confirmation—and he has argued 23 cases before the Supreme Court of the United States. He also formerly served with distinction as the Assistant Attorney General for Civil Rights.

We have Abigail Thernstrom, a Senior Fellow at the Manhattan Institute in New York, a member of the Massachusetts State Board of Education, the Vice Chair of the U.S. Commission on Civil Rights, of course, written numerous books including "America in Black and White: One Nation, Indivisible," "No Excuses: Closing the Racial Gap in Learning." She has a Ph.D. from Harvard.

And Professor Nate Persily from Penn Law School, from the Chairman's home State, nationally recognized expert on election law, frequent practitioner, media commentator. I, like others, have seen you in that area. He was recently appointed by courts to help draw legislative districting plans for Georgia, Maryland, and New York, and by the California State Senate as an expert in their redistricting litigation. He wrote a Supreme Court amicus brief for the prevailing party in *Utah v. Evans*, published articles on legal regulation of political parties; B.A. from Yale, M.A. from Berkeley, J.D. from Stanford, Ph.D. in clinical science from Berkeley.

So I am glad we are here. I do regret—I have only one regret. We have given short shrift to the extension of Section 203 in the protection of language minorities. We may have to supplement our record before that. But, Mr. Gray, as I said, you are no stranger to this place. You are not shy. Why don't you go ahead?

**STATEMENT OF FRED D. GRAY, GRAY, LANGFORD, SAPP,
MCGOWAN, GRAY AND NATHANSON, MONTGOMERY, ALABAMA**

Mr. GRAY. Thank you very much, Mr. Leahy.

To Senator Leahy, to my Senator, Jeff Sessions, in his absence, and other members of the Committee, as you know I am Fred

Gray. I am honored today to testify in support of reauthorizing what many have called “the most important civil rights legislation in history.”

I probably bring a little different perspective to this Committee. I testify from a perspective as a civil rights lawyer who has been in the trenches for over 50 years in the Deep South, particularly in Alabama. I am still a trial lawyer, and as a matter of fact, I am in the middle of a trial but felt it was important enough to come to be here today.

I worked with African-Americans in Alabama in an effort to obtain—and then maintain—the right to vote. Some of these people, such as Dr. C.G. Gomillion, who is the lead plaintiff in *Gomillion v. Lightfoot*, and William P. Mitchell, these persons were filing lawsuits as early as 1945 in an effort to obtain the right to vote for African-Americans in Tuskegee, Alabama, the home of Tuskegee University where Dr. Washington did his work, Dr. Carver did his work, and the home of the Tuskegee Airmen.

This struggle culminated in the Supreme Court’s decision in *Gomillion v. Lightfoot*. In direct response to increased voter registration, the Alabama Legislature passed a law in 1957, changing Tuskegee’s city limits from a square to 28 sides, excluding substantially all of the African-American voters and leaving all the white voters in. The Supreme Court unanimously held that the boundary change violated the 15th Amendment.

The Voting Rights Act, passed in 1965, was the direct result of the Selma-to-Montgomery March. The first attempt to march was aborted on March 8, 1965, in what has become known as “Bloody Sunday,” when now-Congressman John Lewis and others were beaten back after they crossed the Edmund Pettus Bridge in Selma, Alabama. Within 24 hours of the time they were beaten back, I filed the of *Williams v. Wallace* to compel the State of Alabama to protect those marchers.

As a civil rights lawyer practicing both before and after enactment of the Voting Rights Act, I can and I do attest to its profound impact on the full participation of African-Americans in our society. On a more personal note, it was enforcement of the Voting Rights Act in redistricting cases that allowed me in 1970 to become one of the first two African-Americans to serve in the Alabama Legislature since Reconstruction.

I understand the question has been asked whether there is still a need for Section 5. Let me answer that question with a resounding “Yes.”

We all recognize the substantial improvements that have occurred because of the Voting Rights Act. African-American registration in Alabama indeed is higher now than it was. I knew the time when we had no elected officials in Alabama; now we have approximately 870.

But these successes that are directly attributable to a civil rights law should not and cannot provide a foundation or an excuse for those persons who would say now that you have obtained it, there is no need for the law to continue. If it was necessary in order to obtain these rights, to have that law and to have proper interpretations of it, certainly it is equally important or more important that

the law continues in effect so that these great successes which we have had will continue.

Unfortunately, Alabama still suffers from severe racially polarized voting. Only two African-Americans have ever been elected to statewide office: the late Oscar Adams and Ralph Cook to the Alabama Supreme Court. However, today, I am sad to tell this Committee we have no statewide office holders of African-Americans. There are two running in the primary now, but I am afraid that after June 6th we may—or after November, we still may have none.

Racial discrimination in voting has persisted in Alabama since the reauthorization of the Act. Let me give you a few examples.

In Selma—the birthplace of the Voting Rights Act—the Department of Justice objected to redistricting plans as purposefully preventing African-Americans from electing candidates of choice to a majority of the seats on the city council and county board of education.

Another example: The Department objected to Alabama Legislature's 1992 Congressional redistricting plan on the ground that fragmentation of black populations was evidence of a "predisposition on the part of the State political leadership to limit black voting potential to a single district."

Another example: In 1998, the Department objected to a redistricting plan for Tallapoosa County commissioners on the ground that it impaired the ability of black voters to elect a candidate of choice in order to protect a white incumbent.

In 2000, the Department objected to annexations by the city of Alabaster which would have eliminated the only majority black district, demonstrating that the boundary manipulations of *Gomillion* are not a relic of the past, but is still presently in existence in our State.

Since 1982, Federal courts have found violations of the Voting Rights Act across Alabama's electoral structures. *Dillard v. Crenshaw County* led to changes from an at-large to single-member district for dozens of county commissioners, school boards, and municipalities. You will also find in my report the other instances in which we set out these various conditions.

Finally, Section 5 provides a powerful deterrent force in preventing discrimination. As a civil rights practitioner, I have worked with countless office holders, and based on my experience, I strongly believe that the continued Section 5 coverage in Alabama is not only necessary but it is imperative if we are to continue to have these good successes.

Thank you, Mr. Chairman.

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

Senator LEAHY. Thank you, Mr. Gray.

Chairman Specter and I received a letter from Congressman John Lewis this morning. I am going to make it a part of the record, but I first would like to read a short excerpt from it, and this is Congressman Lewis speaking:

"I regret that some witnesses, as well as Senators, continue to quote a few words of my testimony"—this is from his testimony before this Committee—"in the case of *Georgia v. Ashcroft* and take

them out of context and improperly imply that I do not favor reauthorization of Section 5 of the Voting Rights Act or that my words justify their opposition to Section 5. I take issue with the use of my name to justify opposition to the renewal of Section 5 and assure you that I am a strong supporter of this provision.”

I was here for the testimony, and nobody could be stronger in a statement than Congressman Lewis, and without objection, that will be part of the record.

Professor Days, again, welcome. Thank you for being here.

STATEMENT OF DREW S. DAYS III, ALFRED M. RANKIN PROFESSOR OF LAW, YALE LAW SCHOOL, NEW HAVEN, CONNECTICUT

Mr. DAYS. Thank you, Senator Leahy, and thank you for your vote. I want to thank—

Senator LEAHY. You kind of earned that one.

[Laughter.]

Mr. DAYS. I want to thank you and the Committee for inviting me to participate in these hearings concerning the reauthorization of the Voting Rights Act of 1965. As my colleague Fred Gray pointed out, and, of course, it comes as no surprise—I think everybody understands this—it is one of the most important pieces of legislation in our entire Nation’s history.

I have become very enamored of a quotation from the opinion written by Chief Justice Warren in the *South Carolina v. Katzenbach* case upholding the constitutionality of the Voting Rights Act. He focused on Section 5 and described it, in essence, as a way in which Congress shifted “the advantage of time and inertia from the perpetrators of the evil to its victims.”

I don’t know whether I want to call people “perpetrators of evil” these days, but I really think the central issue before this Congress is at heart whether 40 years after the Act’s passage, the time has come to shift this advantage of time and inertia back to the jurisdictions covered by Section 5. My answer is that it has not. Instead, the Voting Rights Act and Section 5, in particular, should be reauthorized in order to promote further progress in achieving truly equal participation in the political process free of racial discrimination and exclusion or to prevent backsliding that may result in undermining what success the Act has already achieved.

Now, I have not had a chance to review all of the testimony and statements of witnesses or the studies that have been submitted to the Committee and to the House Committee with respect to reauthorization, but based upon my 4 years administering Section 5 and other provisions of the Act, I believe that this record offers ample evidence of contemporaneous and continuing problems of electoral practices discriminatory in both purpose and effect sufficient to support renewal. I have in mind especially the reports prepared by the National Commission on the Voting Rights Act and by the Voting Rights Project of the American Civil Liberties Union.

Of course, there has been evidence of progress since 1965. I think it would be hard to deny that. But I have noted that some others who have been appearing before the Committee and the House Committee have pointed to, for example, the small number of objections lodged by the Attorney General in the pre-clearance process

to support their contention that Section 5 is no longer needed. Apparently, their view is that jurisdictions have simply stopped discriminating on their own. But relying once again on my experience in administering that regime, I believe those same figures can be explained in a number of different ways. One that I think is most significant is that it reflects vigorous enforcement of Section 5 in the past, and more recent active informational efforts by the Department with respect to the pre-clearance process have resulted in a higher level of compliance. During my time at the Justice Department, compliance was increased markedly to the extent that a covered jurisdiction anticipated that there would be a forceful response if pre-clearance was not sought and to the degree that they expected fair, prompt, respectful, and constructive treatment of their submissions, which we certainly tried to afford them.

It is also not surprising that members of this Committee and some witnesses have also expressed concern that a reauthorized Section 5 might be open to successful challenge in the Supreme Court. For the Court has, over the last decade, found several civil rights laws unconstitutional—that is the *Boerne* case and its progeny—because they failed to satisfy what the Court has described as a “congruence and proportionality” standard.

You are familiar with that case and the standards that have been set out, but I would like to make several points with respect to this line of cases and their potential impact on any challenges to reauthorization of Section 5.

First, the Court has pulled back in recent years from what for a time appeared to be its unwillingness to uphold any civil rights legislation providing private damage remedies in suits brought against States. We have now seen in *Tennessee v. Lane* under the ADA and *Hibbs* with respect to the Family and Medical Leave Act that the Court can actually identify and uphold constitutional exercises of Congress’ Section 5 powers. In so doing, the Court has recognized that Congress has to have wide latitude in determining between remedial legislation, which it is authorized to do, and substantive redefinition.

Second, unlike the earlier laws struck down by the Court, these latter two have involved both a suspect classification—women in the workplace—and a fundamental constitutional right—access to the courts. And given this new interpretation, I think that the Court should view what Congress does in reauthorizing Section 5 with a certain amount of deference. It is directed at eradicating racial discrimination, a suspect classification, and is addressed to voting, one of the most basic rights.

Third, it is supported further by the fact that the Court has upheld the enactment of the Voting Rights Act and Section 5 as model examples of Congress’ exercise of its prophylactic and remedial constitutional powers. I think given this background, Congress should approach what Congress—the Court should be doing, I think, a deferential review of what Congress achieves in this regard.

I have some brief comments and perhaps I can answer those in connection with questions.

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

Senator LEAHY. On that, Professor Days, I get concerned because of the Supreme Court, *City of Boerne* and others, where they question whether we have overstepped. I understand and I accept that the Congressional power to enact anti-discrimination remedies to enforce the 14th and 15th Amendments is at its highest level when addressing racial discrimination, protecting fundamental rights such as voting. Is that your understanding?

Mr. DAYS. Exactly right, yes.

Senator LEAHY. And with the current standard of review by the Supreme Court, what do they have to—what kind of a standard are they going to apply if there is litigation? Assuming we renew the Voting Rights Act, what kind of standard are they going to apply?

Mr. DAYS. Well, they might well start because it is a racial classification, in effect, as the need to show a compelling interest. But we have seen in the past that the Court has recognized that what Congress is doing in addressing discrimination in voting as responding to a great, great threat to the country, to the democracy, and, therefore, a compelling interest justifying what Congress is doing. And I do not see any reason why that should not carry over.

For one thing, this legislation is a continuation of what Congress has been doing for many, many years. The record has been developed over that time. Without sanctioning in any way, even if I had the power to do so, what the Supreme Court has done in some of these other cases, because I think they are basically wrong, Congress was dealing with a number of issues that were unfamiliar to the Court, had not had the same type of long-term, very rich development of congressional understanding of what is and is not a threat to the democratic process.

Senator LEAHY. Thank you. Well, I asked that question because I just got handed a note that we may have a vote in the next 10 to 15 minutes, and we have these things that interfere, like having to actually vote on matters, in this case the immigration bill, and we will probably do some tag team. I assume Chairman Specter will be able to come back here after I go there.

But, Ms. Thernstrom, let's go to your testimony, and then Mr. Derfner's and Mr. Persily's, and if we can keep somewhat within the time—your whole statement, of course, will be part of the record, and then we can go back to questions. But thank you for being here.

**STATEMENT OF ABIGAIL THERNSTROM, SENIOR FELLOW, THE
MANHATTAN INSTITUTE, NEW YORK, NEW YORK**

Ms. THERNSTROM. Senator Leahy, I am delighted to be here. Thank you for the opportunity to allow me to testify. Does that turn it on?

Senator LEAHY. The little button should show red. Try go. Every one of these Committee rooms has a different set of things.

Ms. THERNSTROM. Well, I started out by thanking you for allowing me to testify today. I am delighted to be here. And given the time constraint, I am going to focus only on one issue: the pernicious impact, in my view, of the pre-clearance provision as it has come to be interpreted and enforced—not the original provision but as it has come to be interpreted and enforced, or more precisely,

the pernicious impact of race-based districting on America's racial fabric.

I understand how tough it is for Members of Congress to come out against a civil rights bill. Race is still the American dilemma, our great unhealed wound. Nevertheless, I am here to suggest that a vote to support a renewal of the temporary emergency provisions of the Act is a vote against racial progress and racial equality.

The original Voting Rights Act was about disenfranchisement. This bill is not. It aims instead to maximize minority office holding by protecting minority candidates from white competition, for that is precisely the point of safe black and Hispanic districts. And, inevitably, providing such protection involves racial sorting, racial classifications, which have had such a long and ugly history.

Today, by numerous measures, blacks and Hispanics are becoming integrated into mainstream American life, and yet simultaneously our Federal Government has signed on to what Justice Sandra Day O'Connor and others on the high Court have called "political apartheid."

Just a bit of evidence on black integration. Today, 88 percent of whites, 82 percent of blacks say they have good friends of the other race. That is a remarkable change. Moreover, less than a third of African-Americans live in census tracts that are over 80 percent black, and the rate of black suburbanization in recent decades has significantly outpaced that for whites. And yet blacks who move up the economic ladder and escape inner-city neighborhoods are not necessarily allowed to join their new friends and neighbors in a legislative district defined by common economic and other non-racial issues. For political purposes, they are stuck in the putative community they have worked so hard to leave. Their old district lines more likely than not chase them, the result being those familiar, bizarrely shaped, race-driven districts.

American law contains important messages about our basic values, and these race-conscious maps send the wrong message. Implicitly, they seem to say: Blacks are different than whites; it is OK for the State to label them as such. Statements that say, in effect, blacks are X or blacks believe Y. They pose no problem.

It is these messages that Justice Anthony Kennedy so strongly rejected in expressing concern that the State was assigning voters on the basis of race and, thus, engaging in "the offensive and demeaning assumptions that voters of a particular race, because of their race, think alike, share the same political interests, and will prefer the same candidates at the polls." In part he was quoting Justice Sandra Day O'Connor.

The point can be put slightly differently. When the State treats blacks as fungible members of a racial group, they become, in Ralph Ellison's famous phrase, "invisible men whose blackness is their only observed trait." But that view, the view that racial identity is defined by race, that group racial traits override individuality, is precisely what the civil rights movement fought so hard against.

Race-based districts amount to a form of political exclusion masquerading, of course, as inclusion, and the overwhelming majority of Americans don't like them.

In 2001, a national poll contained the following question: In order to elect more minorities to political office, do you think race should be a factor when boundaries for the U.S. congressional voting districts are drawn? Seventy percent of blacks, 83 percent of Hispanics said race should not figure into map drawing.

I urge distinguished members of this Committee to be careful what they wish for. This bill may bring champagne on the day it is passed, but tears down the road. Racial classifications, however prettily they are dressed up, are and always will be the same old classifications that have played such a terrible role in this great and good Nation. They separate us along lines of race and ethnicity, reinforcing racial and ethnic stereotypes, turning citizens into strangers. Haven't we as a Nation had enough of that miserable stuff?

One final word. Yesterday, the NAACP filed a suit in Omaha to block the creation of racially identifiable school districts. Explaining the purpose of the suit, an NAACP representative told the Associated Press, "Segregation is morally wrong, regardless of who advocates it."

Senator LEAHY. Ms. Thernstrom, I am not trying to cutoff your testimony, but either Mr. Derfner or Mr. Persily will not get to testify if—

Ms. THERNSTROM. OK. I have got one more sentence, Senator Leahy.

Senator LEAHY. All right.

Ms. THERNSTROM. Let's remember this applies to the way we draw our voting districts as well. Thank you for the opportunity to present these views.

[The prepared statement of Ms. Thernstrom appears as a submission for the record.]

Senator LEAHY. Thank you very much, and your full statement will be made part of the record because you—

Ms. THERNSTROM. Well, I just—

Senator LEAHY. You raise a strong point of view that we—

Ms. THERNSTROM. Yes, I have got a much fuller statement in the record.

Senator LEAHY. This Committee wanted it to be heard.

Mr. Derfner?

STATEMENT OF ARMAND DERFNER, DERFNER, ALTMAN AND WILBORN, CHARLESTON, SOUTH CAROLINA

Mr. DERFNER. Senator Leahy, thank you for the opportunity to testify here and thank you for your kind words about my participation in earlier times.

Yes, I have been involved with the Voting Rights Act since its beginning, and so I guess I have had a lot of experience with it, not only with litigating under it but also with living under it. I have lived in the South for most of the past 40 years and in Charleston for about 35. I live there. I love my city. I love my State. I have married there. I have raised my children there. I belong to a congregation there. I play cards there. I root for baseball, football, and basketball teams there. And I know that we are good people. This Act is not a statement that the people in the covered States are evil people. They are friends of mine.

The problem is that all too often people in power, the elected officials, the elected bodies, the legislatures, the city councils, take the opportunity, which is given them often, to rig elections and to deal with voting in discriminatory ways. All too often, they cannot resist the temptation to look back to the old ways to achieve certain political purposes and racial purposes.

What I know from living in the South this long time is that the Voting Rights Act has made it better. There has been enormous progress. The Voting Rights Act has been an important part of that progress. I want to see my State, my city, and our surrounding areas be the best that they can be, and I think that the Voting Rights Act plays an important part in having that happen.

We are here today to talk about the benefits and the burdens, and I understand that in that, in particular, you are going to be interested in recent times, not in ancient history.

I wish I could say that it was all ancient history. If that were true, we would not be here today. We would not be here suggesting, as I do suggest, that the Act and the temporary provisions do need to be extended.

What are the benefits? I think the prime benefit is one—and here I have to disagree with Dr. Thernstrom—one of reaching the hearts and minds of our people. I think many people in the covered States, certainly in my State and my city, many people have internalized the idea that voting discrimination is wrong, that voting should be available in every way to all people in a fully equal way. And that is a lesson, a civics lesson, that comes through because of the Voting Rights Act, because Section 5 is something that does not just come up when there is a lawsuit now and then over some crisis issue, but it does come up whenever a governmental body wants to make some changes. It is reminded again—and I know from talking to officials, with lawyers, with city attorneys, with Attorneys General, it reminds them that that is a constant requirement that they think of it. So in that sense, that is the first benefit.

The second benefit is that when that does not happen, when as, unfortunately, all too often the opposite happens, and elected officials take the opportunity to make a change that is discriminatory, that there is a remedy, a swift and effective remedy under Section 5 of the Voting Rights Act. And I will come back a little bit later on and talk about some examples. The one most often cited—and it is in my testimony—has to do with the Charleston County School Board, which is almost a textbook case of the value of Section 5.

I want to talk about burdens for a minute. The administrative burden is not great. I know this because I have had the job of preparing submissions. I know very well lawyers, people in the Attorney General's office, in the city attorney's office who prepare submissions, it is not a burdensome task. It is a task that is typically a tiny reflection of the work, thought, planning, and effort that had to go into making the change to begin with.

For example, even a polling place change, it is a small change, but the submission is also small, and typically the work involved in submitting a polling place change is less than the work it took to find a new polling place to begin with.

The administrative process is swift. A change has to be pre-cleared within 60 days, and in some cases, it can be pre-cleared al-

most overnight. For example, if there is a sudden need for a new polling place, that can be pre-cleared very swiftly if there is an election coming up. So the administrative burden is not great.

I do not minimize the philosophical burden. I am not going to get into that debate because, obviously, that is what this whole Act is about. We are talking about a remedy that is an unusual remedy, brought on by unusual circumstances.

I do want to talk about the burden, very briefly—

Senator LEAHY. Mr. Derfner, I have 5 minutes and 38 seconds to get to the floor. I would like to hear Professor Persily before I leave, and somebody else will come back to continue, and I have questions which I am going to submit for you.

Mr. DERFNER. OK. If I could have just one sentence, I would say—

Senator LEAHY. Of course.

Mr. DERFNER. Thank you.

Senator LEAHY. And we will take it out of Professor Persily's time.

[Laughter.]

Mr. DERFNER. One sentence. I would like to respond to Dr. Thernstrom in one way, that the idea that the Act causes division to my mind is backward. And Professor Everett Carl Ladd, a noted political scientist, was asked that very question in testifying in a redistricting case some years ago, and what he said—and he was quite a conservative person philosophically and politically. He said, "It is backward. The division is already there, and to say that districting causes division is like saying that a fever causes a cold." I think he had it right.

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

Senator LEAHY. Professor Persily?

**STATEMENT OF NATHANIEL PERSILY, PROFESSOR OF LAW,
UNIVERSITY OF PENNSYLVANIA LAW SCHOOL, PHILADELPHIA,
PENNSYLVANIA**

Mr. PERSILY. Thank you for inviting me here today. I will keep to my 5 minutes, and I want to give you the perspective of someone who works under the Voting Rights Act and who draws lines. If you have questions about the constitutionality of the Act, I can speak as a law professor, or about the politics of this, I can speak as a political scientist. But specifically I want to talk about three things: the first is where I think that Section 5 has been most successful, and that is at the local level; the second is what does the "ability to elect" standard that is part of this law mean; and then, finally, I want to urge some broad thinking on the Voting Rights Act or see this Act as an opportunity for a more substantive discussion about the right to vote.

First, I don't think there has been enough testimony here in the Senate about the effect of the Voting Rights Act and the pre-clearance process on local jurisdictions, which is what most of the DOJ pre-clearance submissions are about. And I think here of the inglorious issues like annexations and the small things that happen—which are not notorious and where the partisan stakes are seen as relatively low. Often those are the areas where the Section 5 pre-

clearance process is most important. When you get to issues such as statewide redistricting plans, then the potential for partisan infection of the pre-clearance process grows and the overhanging deterrent of Section 2 often proves to be more important.

Second, let me talk a little bit about this “ability to elect” standard that is in the bill, what is known in the business, I guess, as the *Ashcroft* fix.

First of all, let’s just review for a moment what *Georgia v. Ashcroft* was about. It was about the cracking of the minority community into several districts, or at least that was the way that the DOJ perceived it. In particular, you had districts that were hovering around 50 percent minority that were then reduced and, therefore, the Supreme Court said that you could tradeoff influence districts with “ability to control” district. The risk of *Georgia v. Ashcroft* is that it would not then apply just to evenly balanced districts that are around 50 percent but, rather, under the cloak of influence districts, a jurisdiction would then break up a cohesive minority community into much smaller districts in which they really had no influence at all.

One point that I want to make sure is clear in the legislative history here is that the *Ashcroft* fix, what is known as the “ability to elect” standard, prevents both cracking of the minority community, retrogression by the way of dispersing them among too many districts, as well as packing them, because I think that over the 25-year proposed tenure of this bill, actually packing and overconcentration of the minority community are actually going to prove to be tactics which are more often used to dilute the effect of minority voting. And so let’s just make sure that the legislative record is clear that the bill prevents overconcentration as well as excessive dispersion of the minority community.

And then, second, what do we mean by the words “ability to elect”? They are not code for something like majority-minority districts. In some areas of the country, in order for the minority community to elect its candidate of choice, it is going to be substantially more than 50 percent; in some areas it is going to be substantially less.

What is going to be required of the Department of Justice or the U.S. district court when they are reviewing these pre-clearance submissions is to make a pretty sensitive inquiry that looks at each region that is at issue in the pre-clearance process and find the extent of racially polarized voting in the jurisdiction. They will need to ask: To what extent are whites willing to vote for the minority candidate of choice? What is the incumbency status of the district? Because what is meant by the ability to elect will depend on whether the district is an open seat or whether it is one in which there is an incumbent already there.

They are going to have to know the rates of registration and turnout and citizenship and eligibility in these districts, as well as whether the minority community is going to be able to control the primary, and what the potential for cross-racial coalition building is.

I mention these factors so that we are not under the illusion that for some reason this bill is going to freeze the minority percentages in districts for the next 25 years. It prevents both, as I was saying

before, the excessive dispersion or cracking of the community as well as the overconcentration or packing of them. But you cannot make generic conclusions about how it is going to operate in the abstract. It requires a very sensitive inquiry on the ground.

Let me conclude, though, with just a plea that this Act really be the first step toward eliminating what are the major barriers to enfranchisement and participation for voters of color in the U.S. This Act, for either political reasons or the constitutional overhang that always hangs over these laws, does not deal with issues such as felon disenfranchisement or partisan administration of elections or the voter ID controversy, and I understand why. But this discussion over voting rights in this country would be anemic if we did not at least talk about those issues and try to solve those as well.

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

Senator LEAHY. Thank you very much. You did do it on time.

Each of you could spend an hour or more with your expertise and the issues involved. I am going to just recess until the Chairman or someone else comes back. And as I said earlier, I also want to get into the question—not here, but at another hearing—on the problems of languages, which has become of a significant one.

Thank you. We will stand in recess for a few minutes.

[Recess 10:10 a.m. to 10:35 a.m.]

STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

Senator HATCH [presiding]. We will resume. I apologize. I hadn't planned on coming to this hearing, but I didn't want to leave such a distinguished panel without an opportunity for all of you to express your viewpoints on this very important set of issues. They let me know if I didn't come, we might not get all of the things in that we should.

Mr. Gray, I have such respect for you, as you know, and for all you have gone through in your life. I just want you to know we are honored to have you here.

And Drew Days, one of the most respected civil rights lawyers in the country and a wonderful professor.

Mr. DAYS. It is good to see you, Senator.

Senator HATCH. I remember the days when you were here and I was kind of a difficult person for you. I kind of feel badly about that, but you are a good man. Even though we may differ from time to time, I think a lot of you and your honesty and your opinions.

There is no question that Abigail Thernstrom is one of my favorite people. She is an honest, very tough, smart and good human being who really has tried to resolve problems in these areas, but who is a true intellectual in these areas, as are you, Professor Days.

Ms. THERNSTROM. Thank you so much, Senator Hatch.

Senator HATCH. We are grateful to have you here. I don't know you other two, but we are grateful that you have taken time out of, we know, busy schedules to be here and to help us to understand this.

Mr. DERFNER. Thank you, Senator.

Senator HATCH. You have all given your statements, so let me just ask some questions. We will start with you, Mr. Gray, and go across in each case, unless I have specific questions to one or more of you.

I might just preface it with this. I think, Drew, you would remember—if you don't mind me calling you by your first name from time to time.

Mr. DAYS. Not at all, Senator. It is a pleasure to see you.

Senator HATCH. Yes, a pleasure to see you. I think you remember back—and I know Ms. Thernstrom will remember this—when we fought these battles back before, I was very concerned about putting the effects test in Section 5 and I made every argument I could against doing that. And when I lost, I voted for the bill because I consider the Voting Rights Act the most important civil rights bill in history. There are others that are certainly very, very important and maybe just as important, but not in my eyes. In my eyes, it is the bill that enfranchised African-Americans in this country, and other as well.

I won't go into all the arguments that I made then, but I have to say that some of the arguments I made then have come true. I am very concerned about this. I am going to vote for the bill, no matter what it is in the end, because I do consider it so important, but this issue about Article 5 is important to me.

No one can dispute the fact that Section 5 has been tremendously successful in preventing discriminatory behavior in covered jurisdictions. Indeed, minority voter registration and turn-out rates in covered jurisdictions meet or exceed nationwide rates and those in non-covered jurisdictions as a whole.

Given the tremendous progress that Section 5 has produced—I am asking this of each of you—do you support expanding its scope to other localities where racial discrimination or racial block voting are proven to be problems?

Mr. Gray?

Mr. GRAY. I didn't quite hear your—

Senator HATCH. Given the tremendous progress that Section 5 has produced, do you support expanding it to other communities or localities where racial discrimination or racial block voting are proven to be problems? Would you expand it over what the current law is?

Mr. GRAY. Well, what I believe, Senator—and what I set out in my statement didn't go into all the detail, but it is there. I gave about seven or eight examples of situations which have occurred in Alabama from, say, 1990 through 2000 where we are still having real serious problems, where there have been objections.

I am the first to say that we have made a tremendous amount of progress. We had no elected officials before. We now have over 800 elected officials, but the only reason we have them is because of the Voting Rights Act in the first place, and, second, proper courts interpreting the Act.

I don't think we should use the successes that we have obtained under the Act and then say that we don't need it. I believe that the deterrent, the fact that it is there and the fact that I think it works both ways—for the persons who would like to have something pre-cleared or like a new procedure to come into effect, they

can have someone who would objectively review and if, based on the law, there are no problems with it, then they are protected not legally, but it would mean that a person may think two or three times before suing if they know the Justice Department has approved it.

On the other hand, for those persons who need some help—and we still have a majority of the African-Americans in Alabama relying upon white persons basically for their livelihoods, and there are still some areas where they really still have some real problems about raising issues themselves for what may be reprisals.

So if there is some other thing or some mechanism where you must go and let an objective person look at it, it protects both parties. And I just think that the deterrent is so important, and what we would lose if we discontinue it as to what we have gained and what we still stand to gain outweigh the other and I think we should continue to have it.

Senator HATCH. Well, thank you, Mr. Gray.

Mr. Days.

Mr. DAYS. Senator, I don't think that extending Section 5 beyond the covered jurisdictions at this point can be justified. As we all know, Section 5 is very strong medicine, and it was medicine that Congress thought was necessary, given the long and really terrible history of discrimination against blacks with respect to voting.

Section 2 is available to deal with other parts of the country, but I think for our purposes in thinking about the reauthorization of Section 5, the fact that there is evidence, based upon what I have seen of the record already before you and before the House, of discrimination based upon race in those very jurisdictions that were covered by Section 5 to begin with—it seems to me that that is one of the core problems that Congress has to really grapple with this time around.

Senator HATCH. Would you reduce the number of jurisdictions in any way? Would you find some where Section 5 would no longer apply?

Mr. DAYS. Well, there is a bail-out provision and I think there is some question about why the existing bail-out provision has not been utilized. I am not sure I know, but if I think back to the school desegregation situation, there were circumstances where the court would perhaps give school districts more latitude in student assignment.

And I would go to the superintendent or the lawyer for the school district and she would say, no, no, no, we like what we are doing; we like the fact that we have a court order that requires us to do this and that because it provides stability. Maybe that is an explanation for why the current bail-out provision is not being utilized.

As you know far better than I do, in 1982 that was a matter that occupied a great deal of time of the Congress trying to figure out what would be a fairer way of dealing with this particular issue.

Senator HATCH. Thank you.

Ms. Thernstrom.

Ms. THERNSTROM. Well, in the first place, Senator Hatch, I still, as I have done before, want to thank you for your role in 1982, very heroic. And the arguments you made there turned out to be very, very prescient. You got the picture right, and your basic point was

that the results test which, of course, is different than the effects test in Section 5—the results test in Section 2 was going to turn into a mandate for proportional racial and ethnic representation. You were right.

My old friend here, Armand Derfner, on my left, said at those hearings, as you will recall, that it would be the very unusual jurisdiction, the jurisdiction in which racial considerations absolutely overrode any other considerations in the political process; only that kind of outlier, as it were, would be affected by Section 2. Indeed, that has not turned out to be the case. We were also promised that Section 2 would be hard to win. In fact, they are hard to lose.

I think both Section 2, as originally envisioned, and Section 5, the pre-clearance provision, have been horribly distorted in the intervening years. When people talk about the transformation, the number of black office-holders today, the level of black political participation, in general, well, yes, that is due in part to the original Voting Rights Act. I very much celebrate that original Act.

But we have lived in the last 40 years through an incredible transformation in racial attitudes in this country, and so what you are looking at in terms of race and politics throughout the country reflects that transformation in racial attitudes in a broader sense, not simply the impact of the Voting Rights Act.

Pre-clearance was an emergency provision. It was really analogous to a curfew put in place after a riot and, you know, when the emergency was over, it was supposed to be lifted. And, of course, originally it was for 5 years only. It was considered so constitutionally extraordinary that nobody envisioned in 1965 even having it extend for ten years.

That emergency was over a long time ago. As Rick Hazen elects to say, who is on the political left, I should say, Bull Connor is dead. And it seems to me it is extremely hard today to say that there is—in terms of minority political participation or by any other measure, extremely hard to say there is a distinction between the covered jurisdictions and the non-covered jurisdictions and the real voting problems are in the covered jurisdictions.

I mean, even in the 2000 election when there were a lot of charges about black disfranchisement and Spanish disfranchisement in Florida, they were not in the Florida counties that were covered by the Voting Rights Act. In 2004, the complaints were not about covered jurisdictions, the complaints about Ohio, and so forth.

I think the distinction between the covered and non-covered jurisdictions in terms of the problems that we have had have long ago been erased. And, no, I would not extend Section 5, particularly because of the way it has been distorted, to the whole country. I would sunset Section 5, as the original framers of the Act envisioned. I know that is not going to happen, but my role here is to say—I am not a politician and my role is to say what I believe should happen.

Senator HATCH. Well, thank you.

Mr. Derfner.

Mr. DERFNER. Senator Hatch, I am happy to be here. I agree that Bull Connor may be dead, but I think unfortunately some of his relatives live on. Mr. Gray talked about the recent history of Sec-

tion 5 in Alabama. I think maybe it is the same in South Carolina. My testimony talks about we have had nine separate objections under Section 5 to discriminatory enactments in South Carolina just in the last 5 years. Most of those have been State legislation, not simply some city or county or school board doing something.

I had the opportunity to debate with you a little bit back in 1982 about purpose versus effect.

Senator HATCH. Yes, you did.

Mr. DERFNER. Most of the objections have really dealt with situations which, when you look at them, really are purposeful. Our Governor not long ago made a statement that he didn't expect to see a statewide black office-holder ever. Then he backtracked a little bit and said, well, not in the foreseeable future. That is our Governor, former Congressman Mark Sanford.

One of the objections just took place less than 2 years ago to the Charleston County School Board. We had just won an arduous case against the Charleston County Council in which not only the district court, but the Fourth Circuit, in an opinion by Judge J. Harvie Wilkinson, found discrimination in the Charleston County Council system.

As soon as that case was over, the State legislature adopted a bill to change the county school board to the same system that had just been condemned in the county council. The reason they did that, frankly, was because under the former, or still in existence system, five blacks had been elected out of nine seats in the years 1998 to 2000. So the legislature decided it was not going to have that anymore. That bill was objected to by the Justice Department—probably the clearest showing of why Section 5 is needed.

Let me just add one last thing. One of the things that tells me that we still have too much of a disease is an exhibit I attached to my testimony. This is an ad that a white candidate for probate judge in 1990 published showing a picture of his opponent. I know as a politician you don't typically do that, but he wanted to make sure that everybody could see that his opponent was black. We still see that routinely.

Congressman James Clyburn had that happen to him in 1992 and 1994. It happened in another election that I know of in the year 2000. Race sells in South Carolina, and that is why we need something like the Voting Rights Act, Section 5.

I would like to give you a specific answer to your original question. There is a provision in the Voting Rights Act—I think it is in Section 3—that does allow a court, under a sufficient showing in a particular case, to say that as one of the remedies it will order a pre-clearance type remedy for that jurisdiction as a remedy for that particular case. So that may be a way of expanding a Section 5 type remedy in the specific case where it is called for without a wholesale expansion.

Senator HATCH. Thank you.

Mr. Persily.

Mr. PERSILY. I do support expanding Section 5, in theory, to other jurisdictions. The difficulty is with the cost, then, that the structure would impose on the newly covered jurisdictions. But also there is a hydraulic relationship between the coverage formula and

the other parts of the bill with respect to the constitutional analysis.

So I think there is real concern that the broader the coverage formula, the more likely the Supreme Court might end up striking it down. So we are in a sort of difficult position right now. It is abundantly clear that there are voting problems in non-covered jurisdictions of the type that Professor Thernstrom was talking about. In many ways, the most notorious national problems have been outside the covered jurisdictions. So that calls for national legislation to address those problems.

Now, that to some extent is a separate argument than whether the covered jurisdictions should be expanded or not, and then we have to think of what would be the trigger, and what would be the kind of inquiry that we would go through as to which jurisdictions should be covered.

It has historically been the case that the trigger in Section 5 has been this dual-pronged trigger where Congress has been providing some measure of the probability that a racially disparate impact with respect to voting is going to develop. It is very difficult right now to figure out what that sort of neutral trigger is going to be.

In my testimony, I try to go through a little bit of this, but just adding jurisdictions sort of willy nilly is not going to cut the mustard, and so we have to think of what kind of formula would capture those types of jurisdictions that we think are most likely to erect these kinds of barriers.

Ms. THERNSTROM. Senator Hatch, can—

Mr. GRAY. Senator Hatch, may I mention one other thing, speaking of change of attitudes, but I yield to—

Senator HATCH. No. We will go to you first, Mr. Gray, and then we will go to Ms. Thernstrom.

Mr. GRAY. I would really like to believe that there has been a change of attitudes, but let me give you three examples of long-running cases in Alabama which are still there.

We celebrate the 52nd anniversary of *Brown v. Board of Education*. Under those cases, in 1963 I filed the case of *Lee v. Macon*, which was a single school district expanded to all of the school districts in Alabama not then under court order, 99 of them. My boys were very small then. We still have some elementary and secondary school districts in Alabama that have not reached a unitary system. Fred, Jr. was in Dothan a week or so ago dealing with one.

A second example: Back in 1985, they had a test for teachers and the test was found to discriminate against African-Americans. The State of Alabama decided, rather than to come up with a test that would be fair to everybody, not to have teacher testing. They didn't have it until the Congress passed what is known as the No Child Left Behind Act. Then we had to all come back, and the case is still going on. They are now designing a teacher testing that is non-discriminatory.

Alabama still has the case of *Knight v. State*. It has been going on since 1985. All of the institutions of higher learning in the State still have not gotten to the point where all the vestiges of racial discrimination are done away with.

I think with that kind of record that is still here, it is compelling that the Voting Rights Act be extended.

Senator HATCH. Thank you.

Ms. Thernstrom.

Ms. THERNSTROM. Thank you. I wanted to answer, but I will add something to it, as well. I want to talk about the trigger that Professor Persily raised. The trigger for coverage today rests on voter registration and turn-out, and it is really turn-out that counts, since it trumps registration.

Voter turn-out in 1972—that is absurd in terms of identifying the jurisdictions that today require coverage, if any. In 1965, that trigger of less than 50 percent total registration and turn-out was designed to precisely hit the States that everyone knew needed to be covered, and it worked. The 50-percent figure would have been changed if it hadn't so precisely targeted the right jurisdictions. To be relying as a trigger today for coverage on 1972 turn-out figures makes no sense at all. And if we were to use the turn-out figures for 2004 today, I believe only two States would be covered—California and Hawaii.

People are coming up with anecdotes. I am a social scientist. I am sure a lot of their anecdotes are right. Anecdotes don't tell me what I need to know. I want rigorous data, and that is what any consideration should rest on.

In terms of things like teacher testing, well, yes, teacher testing has a disparate impact on minority applicants. Do we want teachers in our schools who really do not know their subject? The answer to teacher testing is to start in kindergarten. I mean, we are talking here about the racial gap in academic achievement. The answer to that is not to abolish tests, is not to do away with No Child Left Behind or State teacher tests. It is to start in kindergarten teaching the kids. That is really not so hard to do. We are not doing it. It is not so hard to do; it is doable.

Finally, those who worry about the disappearance of Section 5—there is Section 2, which is the permanent. There is the 14th Amendment, obviously permanent. They aren't going away. Plaintiffs can rely on them. I cannot understand the argument against simply trusting that the permanent provisions of the Voting Rights Act will stop anything that remotely resembles disfranchisement.

Mr. DAYS. Senator Hatch, I want to make a couple of brief comments. To call examples that are quite concrete of violations of the Voting Rights Act or failure to comply with the Voting Rights Act as anecdotes, I think, is really to miss the point that I think Congress should be focused on, and that is that these jurisdictions were properly identified and covered in 1965, and the question is what is going on now.

Now, Professor Thernstrom wants to look at registration or actual voting figures, but that doesn't tell the whole story either.

Ms. THERNSTROM. I wasn't suggesting it did.

Mr. DAYS. I think that to the extent that Congress really wants to come to an understanding of what it would mean to lift Section 5 and release these jurisdictions, I think the so-called anecdotes go right to the very heart of the matter.

The other thing is that the fact that the trigger is not really contemporaneous, if you will, and there are other parts of the country that—as she said, California and Hawaii might not make the grade, but we are really not talking, I don't think, about extending

Section 5 to the entire country. I know that was one of your questions, but the issue is what about the current coverage of Section 5? Does it make sense? Is it constitutional? Will it continue to promote the objectives that the original Section 5 was designed to promote? I think the answer is yes to all of those questions.

By the way, on the bail-out issue, there are jurisdictions—there are apparently 11 jurisdictions in Virginia that have taken advantage of the bail-out provision. Any application that has been submitted has not been denied, and so we do have some evidence of it working in real time. The question of whether it can be used more often is something that I know the Committee wants to look at.

Senator HATCH. Mr. Derfner.

Mr. DERFNER. Senator, I would say one thing about the notion that a Section 2 case is an adequate substitute for a Section 5 pre-clearance requirement. I don't mean to pull rank as a lawyer, but I think you were a lawyer back in your earlier life.

The notion that a Section 2 case, which is a very arduous case requiring enormous expert testimony, enormous time, is an adequate substitute—those are not easy cases. In the Charleston County Council case, it took over 3 years and the county alone spent over \$2 million on that case.

The Administrative Office of U.S. Courts ranks different types of cases by complexity and Section 2 cases, and voting rights cases in general, have among the highest rating. They are up there with securities cases and antitrust cases in the complexity and time requirements rating. A Section 2 case is not a picnic. It is one of the hardest things to do that there is, and Section 5 was designed exactly to avoid that kind of difficulty.

Senator HATCH. This has been very interesting to me.

Have any of you read the Stuart Taylor article this last week or so?

Ms. THERNSTROM. I have.

Mr. PERSILY. Yes.

Senator HATCH. Stuart is certainly not a Republican, I don't believe.

Ms. THERNSTROM. No, he is not. He is a good friend of mine, but he is not a Republican.

Senator HATCH. No, and I mean he is certainly not a conservative, but he is very, very intellectually compelling in his writings. I mean, I have really enjoyed them over the years. I have agreed with an awful lot of what he says. He comes down pretty hard on Section 5.

If I read it correctly—I am extrapolating from it—I think he believes that some of the current partisanship in Congress comes from the fact that they have gerrymandered various districts to accommodate people of color, and that the Congress has gotten more and more left because of that. And because they have gerrymandered the districts—and maybe I am misconstruing that—and have gotten people to the left, the rest have gone to the right, or a lot of them have, to the point where his suggestion, if I read it right—I just read it hurriedly a while back—his suggestion was that if we didn't do that, gerrymandered the districts to accommodate African-Americans, in those districts you would have more

moderate people and on the Republican side you would have more moderate people coming to the Congress.

It is a pretty poor explanation, I know, because I can't remember the whole thing, but I suggest you read that and give us your opinions of his article because I think it is a pretty interesting article.

I personally believe that we have got to do something about the total partisanship that is going on here in Congress. I mean, it is just awful. The Democrats don't know how to act in the minority, and sometimes Republicans don't know how to act in the majority. We had been in the minority for so many years, and vice versa when the switches occur.

I have been here 30 years and I have seen some real changes. In the early years, yes, we had knock-down, drag-out battles, but there wasn't the bitterness and the partisanship. There has always been partisanship, but not like it is today, and as somebody who has lived through it all, I can truthfully say that.

Now, he kind of attributes some of that—and you can't attribute all of it, of course—to some of the interpretations of the Voting Rights Act. I am not saying he is right. I am just saying it is an intellectually interesting article in the National Journal, and you might want to read that and write to us and give us your opinions on that.

Look, I want to do what is right. I have always wanted to do what is right. I may have missed it a few times in the past, but as a general rule I think I have tried to do what is right in these areas. I have always tried to do what is right, but I am concerned.

We all know that Section 5 can be very onerous and burdensome to certain States, but you make a pretty good case, and some of the rest of you do, that just the fact that it is there keeps things level and straight. That may be a compelling argument, but I would like you to look at Stuart Taylor's set of arguments.

Mr. PERSILY. Could I respond to that, because I did read it? I think that is a very important point to raise.

Senator HATCH. Was I mischaracterizing it?

Ms. THERNSTROM. No, no. You have got it right.

Mr. PERSILY. I think that is right, but that is why it is very important that the legislative history on this bill be quite clear that it is not sanctioning the over-concentration of minority districts; that it does require that for the next 25—

Senator HATCH. That is what has practically happened, according to Taylor.

Mr. PERSILY. Well, it is sort of an empirical question as to which areas of the country we are talking about.

Senator HATCH. Yes.

Mr. PERSILY. In a sense, Congress is changing the standard here with the ability-to-elect language that it is putting into the law. So I think it is important that everyone who is voting on this bill recognize that this is not freezing in place the minority percentages that are in these districts for the next 25 years, nor is it giving its blessing to the excessive over-concentration of minority districts.

It is not even code for saying majority/minority districts. Rather, it requires a much more sensitive inquiry as to the opportunity and the ability of minorities to elect their candidate of choice in these covered areas. I think it is important that that be part of the legis-

lative history because we don't want this law to be interpreted in such a way that for the next 25 years it leads to over-concentration and excessive packing, which itself would be detrimental to the interests of minority voters.

Senator HATCH. Did you want to say something?

Ms. THERNSTROM. I was just going to say, Senator Hatch, that you have got Stuart Taylor's argument precisely right.

Senator HATCH. Well, I am concerned about that.

Ms. THERNSTROM. And, you know, he joins me. I concentrated in my testimony earlier today on the whole question of whether we are creating a system of what Justice O'Connor called political apartheid, whether, you know, we aren't perpetuating the old, familiar, ugly racial classifications, racial sorting in America. And Stuart Taylor very much joins me in that concern.

As much as I respect Professor Days here, the fact is two things. One, on the trigger, my point is simply that the existing trigger makes no sense and that if it were revised, if it were updated to include turn-out figures for 2004, you would be left with only two States covered. I mean, we simply do not have the same problem we had in 1965 when the trigger was designed, or in 1972 when—well, it was the 1975 amendments, of course, but it relied on the 1972 turn-outs.

A number of panelists assume that Department of Justice objections indicate something very bad going on. My view is that because the legal standards have become so wacky under Section 5, an objection doesn't necessarily mean that something bad has gone on, but simply that a jurisdiction often has failed to draw the maximum number of minority/majority districts that it could have. And then the word "purpose" is labeled to that failure to maximize the number of safe minority districts. That, to me, is a gross distortion of the original Act.

Mr. DERFNER. That might be a gross distortion of the original Act if it were going on, but I challenge Dr. Thernstrom to come to South Carolina. I challenged her once to come to Charleston and I think she did.

Ms. THERNSTROM. I did.

Mr. DERFNER. We found some different answers even then, but I challenge her to come to South Carolina and look at these objections and see if the fears that she is expressing really hold up.

I mean, the trigger was designed to identify jurisdictions that had a sickness in those days. The sickness was reflected in literacy tests, understanding tests, moral character tests. And the way we know that those were working was that the turn-out was so low. That is why, for example, at the original time, a State that had a literacy test and still had a high turn-out—that was an indication that that literacy test—

Senator HATCH. But do you still think that same sickness exists?

Mr. DERFNER. The sickness doesn't exist in that same form, but what Mr. Gray and I have been talking about with regard to our particular States is that there is too much of a hang-over and that is why Section 5 dealing with a new variety of problem or what is sometimes called dilution, which I think is really an abridgement, is still there.

Let me give you an example about the Charleston County School Board. I hate to keep coming back to that one example because we have got plenty others, but 2 years ago that was State legislation that was clearly discriminatory purpose. Everybody knew it.

In the Charleston County School Board back in the early days, the old days of the 1960's or around then, blacks couldn't vote at all. Then when blacks started voting a little bit, actually, in the late 1950's and the early 1960's, what the legislature did was to change the rules. At that time, I think there were nine school districts in Charleston. In six, the population was majority white. In three, the population was majority black; I think St. James Santee, District 20 downtown, and District 9, Johns and Yonge's Island.

So what the legislature did was to change the rules so that in those three districts, the right to vote was taken away. In those three districts, the school board members would be appointed, not elected, whereas in the remaining districts, the white-majority ones, they still got to elect. That stayed the law until the mid-1970's.

Once that went away, they went to at-large elections. Those at-large elections have been disputed back and forth, but they are still in existence. But then when blacks in 1998 achieved five members out of nine on the school board, that is when the attempt to change the school board elections by putting in a majority requirement to make basically—I think everybody was clear that it was to make certain that blacks could not win a significant number of seats. That came in. The legislature passed that in, I think, 2000 or 2001.

It was vetoed by the then-Governor. They came back again in 2003. Directly after the Federal courts had thrown out a similar system for the county council, they came back and passed it again. At that time, then-Governor Sanford, who was the new Governor, let it become law. He still refused to sign it. He wouldn't sign the bill. He let it become law. At that point, the Department objected to it. So what you have here is a change over a period of years in the types of tactics or the types of mechanisms, but the need is still there.

Ms. THERNSTROM. The last I knew, purposeful discrimination was forbidden by the 14th Amendment.

Senator HATCH. Well, you are right.

Let me just say this: I would like each of you to read that article. I will put it in the record. It is a May 13th, this last Saturday, 2006, article, called "More Racial Gerrymanders."

One thing he says in here, and then I will yield to my colleague, "So effective have other Voting Rights Act provisions been that little evidence exists that most governments in the nine covered States are more hostile to minority voters than are governments that the law doesn't cover. Indeed, there is little evidence of systematic discrimination by any State government, despite a huge research effort by the civil rights lobby to find and magnify such evidence." That is just one quote out of here that bothered me.

He also says on the front page of this, "Second, many Republicans also believe, perhaps incorrectly, that drawing so-called majority/minority urban districts for black and Hispanic Democrats will bleach the surrounding suburban districts and thus help Republicans beat white moderate Democrats there. That was the re-

sult of the racial gerrymanders of the 1990's. The number of very liberal black and Hispanic Democrats in the House went up. The number of more moderate white Democrats went down, and this helped Republicans take and keep control of the House. This was good for black and Hispanic politicians. It was not so good for black and Hispanic voters," at least from Stuart Taylor's point of view.

Drew, go ahead.

Mr. DAYS. I just wanted to say that I have a lot of respect for Stuart Taylor, as well. He is a straightforward and I think a very honest and incisive reporter.

Senator HATCH. Yes. I have a lot of respect for him.

Mr. DAYS. I don't have the exact figures, but my understanding is if we are talking about creating this tension and politicization and partisanship, if one looks at the congressional Black Caucus members' districts, one finds that they are not max-black districts, that they actually reflect a combination of white and black and perhaps other racial groups in those districts. So they are models. That is the good side.

The bad side is that we have—and I think the record up to this point establishes that we have significant problems of racially polarized voting. That is one of the major problems that needs to be addressed and continues to bedevil what otherwise would be, I think, a very happy and very positive movement toward greater racial interaction and cooperation.

Senator HATCH. Well, thank you.

Senator Durbin, I am sorry to take so long.

**STATEMENT OF HON. RICHARD J. DURBIN, A U.S. SENATOR
FROM THE STATE OF ILLINOIS**

Senator DURBIN. Thank you, Mr. Chairman. I want to welcome our distinguished panel, and especially Mr. Days and Mr. Gray, for being here today.

Mr. GRAY. Thank you, Senator.

Mr. DAYS. Thank you.

Senator DURBIN. I know today is the 52nd anniversary of the *Brown v. Board of Education* decision. That case perhaps more than any other in our history demonstrated the power of the Supreme Court in safeguarding civil rights. The Voting Rights Act, perhaps more than any other law in our Nation's history, demonstrated the power of Congress to safeguard the civil rights of all Americans. So, Mr. Chairman, this is a particularly important and historic set of hearings that we are having.

Mr. Gray, you have lived in Alabama for many years. We would all agree that the State of Alabama has changed. I can recall my friend, John Lewis, taking me for a walk across the Edmund Pettus Bridge a couple of years ago. It was the first time I had ever been in Selma. I recall as a college student wanting to be there, but I couldn't go, and regretting it for the rest of my natural life.

We talked about what that meant to America and what it meant to him. We talked about Judge Frank Johnson, whom Congressman Lewis credits with being one of the heroes of the civil rights movement who needs more recognition for giving legal opportunities for the march to even take place.

How do you think the voting rights of African-Americans would be affected in Alabama if Congress failed to reauthorize Section 5 of the Voting Rights Act?

Mr. GRAY. I think there is a very serious chance of our losing some of what we have gained, and I say that because—and in my prepared statement, I set about seven or eight specific situations that the Justice Department objected to, and as a result of that, to have African-Americans serving.

Incidentally, Senators, we have with us Mr. T.C. Coley, from Tallapoosa County. In my statement, I talk about the fact that what they did there was to preserve an incumbent white and deny African-Americans the right to have a district where they could select persons of their choice. And there was an objection and as a result of that, T.C. Coley now serves in that capacity and has served on the county commission for 2 years, and even has served as chairman. And I think every member of that commission—and he is only one of four—feels that he plays a major role.

I think, and I mentioned it earlier, that what we have been able to accomplish is so important that we shouldn't take those gains and now say because you have gained it, we are going to use that to say we don't need it.

The deterrent effect of it is so important, I think that the administrative details that these local officials and all of the local officials now who are familiar with what they need to do as far as pre-clearance is not difficult to do. It is a small administrative act. And if you take and weigh the benefits we have obtained by having the Act as against the possibilities of what we will lose if we don't extend it, I am afraid that the great heroes that we have—including Frank M. Johnson in my first case, civil rights case, *Browder v. Gale*, he was on that bench. And the State of Alabama—again, to show you we have some great things, the State of Alabama Bar Association for its Law Day program on May 4th celebrated all day the case of *Browder v. Gale* which integrated the buses, and the chief judges of the three district courts in Alabama were there.

So we have made progress, but we need to keep the—the Voting Rights Act needs to be extended so that we will have a deterrent to keep us on the right track.

Senator DURBIN. Mr. Derfner, your career has included working on voting rights cases for 40 years, winning the extensions of the Voting Rights Act in 1970, 1975, and 1982. Could you address that same issue and also the question about whether or not the extension should be for 25 years? Do you believe this is a reasonable amount of time for extension?

Mr. DERFNER. The first question as to what would we look like, I think I would have to agree with Mr. Gray. I think what we could go back to is the year 1970 at which time people had registered under Section 4 in large numbers, but I think we could backslide a lot with the gains that have been made since then.

And I want to say that the one thing that Dr. Thernstrom and I clearly agree on is both our hope—and the hope of everybody here, I am sure—that we will get at some point to a fully integrated society in which every citizen plays an important part. I think the way we get there is by ensuring that everybody gets to

play a part, that everybody is included. And I think Section 5 has been a very important part of that process.

As to your question about the length of time, the one thing I would say there, Senator Durbin, is that the bill has in it a provision for a review by Congress at the end of 15 years. I think Congress will take that very seriously at that point, and, in fact, Congress can take a look at any time—if it reauthorizes for 25 years, it can take a look at any time along the way and say, you know, I think we have gotten to the point where we do not need it anymore.

So I do not see any problems with the 25-year extension because I think there are available methods if it turns out not to be necessary. But Congress, having found an effective method, should not be quick to let it go before it is necessary. In my testimony, I refer to the repeal by Congress of most of the civil rights laws in 1894. That was done in the hope that equality was there or was coming. It turned out to be just a disaster. And so I would urge Congress to err on the side of making sure that we all, all of our citizens of all races, are included, and that is what Section 5 does.

Senator DURBIN. Professor Days, we have had academics come before this Committee over the past few weeks and say that the Voting Rights Act would not withstand constitutional scrutiny. You have certainly had quite a background as Solicitor General in serving this country. What is your opinion?

Mr. DAYS. Well, one can never be absolutely certain, but I think that the history of the Voting Rights Act and Congress' actions with respect to discrimination and voting, its special constitutional status under Section 2 of the 15th Amendment and the record that has been established of Congress addressing this issue would incline, I would say, the Supreme Court to show a high level of deference to determinations that Congress made. It is important, of course—and you know this, and that is why we are here—that Congress make a record to show not only what it has done before, but what it has learned about the current circumstance. And, again, one can't be absolutely certain, but for the United States Supreme Court to substitute its judgment for that of Congress with respect to voting rights and the best and most effective way of dealing with continued problems would be unfortunate. I don't know that it would happen, but I think it would certainly be out of character, given what we know up to this point about the way the Supreme Court has pointed to Congress' work under the Voting Rights Act as kind of the gold standard of what Congress should be doing pursuant to its powers under Section 5 of the 14th Amendment and in dealing with issues of this kind.

So I think it has to be viewed as occupying a unique place in terms of the relationship between Congress and the Court.

Senator DURBIN. Dr. Thernstrom, my memory of apartheid was a segregated society where the majority black population in South Africa was denied very basic and fundamental rights to things like education. And yet you said today in your testimony, "at long last, blacks are moving towards becoming another American ethnic group. No thanks to the Federal Government," you said, "or I, should say specifically, with no help from Congress, the courts, and the Department of Justice, all of whom have amended a once-per-

fect statute and turned it into a system that's much too close to political apartheid."

Do you believe that the desegregation of the schools of America in *Brown v. Board of Education* was a step toward political apartheid?

Ms. THERNSTROM. No, of course I don't. *Brown v. Board* struck down a system of political—of apartheid in one region of the Nation, a system that didn't look that different from what existed in South Africa.

So that question a little bit bewilders me, but let me go back for a second—

Senator DURBIN. The testimony—

Ms. THERNSTROM. Can I go back for a second to your question about the 25 years, the emergency provision? I mean, do we have a permanent emergency on our hands? Again, this provision, Section 5, was supposed to be a temporary provision since it does distort our constitutional structure. It did so legitimately in 1965, but it is not 1965 today. And as for the deterrent effect, I mean, how does one measure the deterrent effect of the Voting Rights Act and the deterrent effect of a transformation in American racial attitudes and the fact that blacks are voting, are participating in politics at a very high level? The real deterrent in the South today is the fact that every elected official—almost every elected official has black constituents. I wish more did and—I mean, I wish everyone did, and more would have black constituents if we were not so racially gerrymandering the districts.

But, look, I do not like—and that was the point of quoting Justice O'Connor, and obviously that phrase has been used by other Justices on the Supreme Court. I do not like any form of racial sorting, racial classifications. I think they are poisonous. I think that has been the history of America, and I do not want to keep perpetuating that history. We need to move beyond it. We need to move on. It is not doing us any good. It is doing us harm. And that is my point. And that phrase "political apartheid" was obviously taken from Justice Sandra Day O'Connor's opinion in *Shaw v. Reno*.

Senator DURBIN. I can recall as a college student when the march on Selma occurred and the passage of civil rights legislation and my naive belief, very naive belief, that I would have to describe racism to my children and grandchildren because we had achieved so much with the passage of law. I believe we have achieved a lot, but I believe we have a long way to go. Two hundred and fifty years of slavery, a century of racial segregation in full force before the Voting Rights Act, and to suggest now that these were temporary measures, we are finished with those, let's move on, is to overlook the obvious.

Ms. THERNSTROM. But most of the Voting Rights Act is permanent, and I think you are perfectly right to say that the heart of the disagreement between the two sides here is the level of racism today in America. And I will offer my hard data against anybody else's to show the amazing change that has—and the degree to which we are now down to a level which we only dreamed of in 1965 in terms of real racism in America.

Senator DURBIN. Let me just say, you can offer your hard data, and I will offer the hard reality. And the hard reality is that racism, sadly, is still a problem and a challenge for America. I know we have made progress. I celebrate that progress. My colleague in the United States Senate is an African-American. The State of Illinois, which had never even had the courage to run a woman for office until about 20 years ago, has now two statewide elected African-American officials who are the biggest vote-getters in my State. Progress is being made, and I am proud of it. I am proud of my State for it.

But to suggest that we can now walk away from this is to ignore what has happened recently in elections, not only at the local level but at the national level, where not only race but poverty combined with it have created some serious inequities, serious challenges, going as high as the Supreme Court as to whether people were treated fairly in the State of Florida during the *Gore v. Bush* controversy.

Ms. THERNSTROM. In non-covered counties in Florida.

Senator DURBIN. But let me just tell you, that is not the end of the story, as you know—I hope you know—because there are issues involving voting opportunities and questions being asked and demands on State legislation that I think really make this still a very viable and important issue. I think the hard reality requires us to reauthorize the Voting Rights Act.

Thank you, Mr. Chairman.

Senator HATCH. Well, thank you.

I can see why some in these covered jurisdictions are very, very upset, because we have made such great strides, and especially when they compare themselves to other jurisdictions. And just to cite Illinois for an illustration, this article documenting discrimination, you know, it says in Boston, Massachusetts, it says the enactment of a redistricting plan in 2001 described by the court as “a textbook case of packing,” concentrating large numbers of minority voters within a relatively small number of districts devised by the House leadership, which knew what it was doing. Now, this is Massachusetts. The manipulation of district lines “to benefit two white incumbents” where the State House did not “pause to investigate the consequences of its actions for minority voting opportunities,” thereby using race “as a tool to ensure the protection of incumbents.”

I could go through all of them. Let me just take Illinois since it has been raised here. The retention and defense—and this is a quote. “The retention and defense in a 1984 lawsuit of a city districting plan that ‘packed’ and ‘fractured’ minority voters to ensure the reelection of an incumbent Senator, a plan that exposed how ‘the requirements of incumbency are so closely intertwined with the need for racial dilution that an intention to maintain a safe, primarily white district for Senator Joyce is virtually coterminous with the purpose to practice racial discrimination.’”

It goes on to say, documenting discrimination, “The conduct of poll officials in the city of Reading who ‘turned away Hispanic voters because they could not under their names’ or refused to ‘deal’ with Hispanic surnames.” The county’s imposition of more onerous requirements for applicants seeking to serve as translators at the

polls than those applying to be other types of poll officials, a requirement that impeded the court's order requiring the county to hire bilingual poll officials, and boasts by county officials and poll workers flaunting their racially discriminatory motivations and practices to Federal officials observing elections in May 2001, November 2001, May 2002, and November 2002, including statements from poll officials in the city of Reading to Justice Department observers "boasting of the outright exclusion of Hispanic voters during the May 15, 2001, municipal primary election."

Now, look, you could go on. The fact is this may make an argument for—you know, this is a comprehensive University of Michigan study. This may make an argument that if you are going to apply it to one State, you ought to apply it to all of them, I guess, because there is racial discrimination, I believe, because of evil people in most every State. But the question is: Is it fair to single out these mainly Southern States? Because there are instances that you can point to of discrimination and leave some of these other States out where there may be even worse illustrations of discrimination.

We all know that there is discrimination in our society. We all know that people do not act properly. We all know that people are misled sometimes into thinking that racism is a good thing. And I have seen it in various States that I have been in that are not covered by Section 5.

One of the purposes of this hearing is to establish or not establish whether there is enough reason to continue the Section 5, and we have had some interesting comments here today. I respect each and every one of you. I personally do not believe we should allow discrimination in any way in this country. Then you get into all kinds of questions, what is and what is not discrimination. It is a very complex area. And I commend each of you for being experts in this field because it is a tough field. It is difficult. And in the past, I have to say some of the illustrations of discrimination are abominable. And true discrimination is abominable.

Well, I would appreciate you taking this Stuart Taylor article just as one illustration and writing to us and giving us your reasons why he is wrong or why he is right, or wrong and right, because I found it to be an intellectually stimulating article, and I happen to know Stuart Taylor. I know that he abhors discrimination. But he is very strongly against continuing Section 5, as I read that article.

So I would just like to have your viewpoints on that just for my review and hopefully others on the Committee. But you are all great people, and we appreciate having all of you here. Like I say, I think the Voting Rights Act has been the most important civil rights bill in history. That is not to discount the other bills, but I just think this is the one that really has enfranchised people who before have been treated terribly.

I am currently in the middle of reading "A Team of Rivals" by Doris Goodwin, and it is a very stimulating book to me, and I will continue to read that until I finish it. It is not a short book. But I am used to reading not short books.

But you all are interesting and good people, and I have known Abigail Thernstrom for years, and I have known you two for years, Mr. Derfner, I have known you for—I guess since 1982.

Mr. DERFNER. Right.

Senator HATCH. When you beat me up way back then.

Mr. DERFNER. Oh, no, no, no.

[Laughter.]

Ms. THERNSTROM. Oh, yes, yes, yes.

Senator HATCH. Oh, yes, yes, yes. And I am not easy to beat up, I got to tell you. And, Professor Persily, we are aware of your work in a variety of States, and we are just honored to have you all here. I did not intend to keep you so long, but this has been stimulating to me, and hopefully we can arrive at doing what is right and just. And so I want to congratulate all of you and thank you for being here.

With that, we will recess until further notice.

[Whereupon, at 11:39 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



Yale Law School

DREW S. DAYS, III
Alfred M. Rankin Professor of Law

June 16, 2006

The Honorable Arlen Specter, Chairman
United States Senate
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

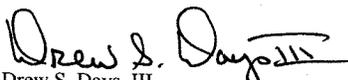
Attn: Barr Huefner, Hearing Clerk

Dear Senator Specter:

Thank you for the opportunity to offer my testimony during the May 17, 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 26, 2006, letter requesting responses to questions from Senators Kennedy, Leahy, Cornyn, Schumer and Coburn. 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.

Sincerely,


Drew S. Days, III

**Written Responses of Professor Drew S. Days III, Alfred M. Rankin Professor of Law,
Yale Law School, to Questions from Senator John Cornyn
June 16, 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 vs. non-covered jurisdictions.*

I am not aware of any comprehensive empirical studies that have compared covered and non-covered jurisdictions in this way. As I testified before Congress in 1982, most available empirical research on voting patterns has focused on covered jurisdictions.¹ If such studies have been conducted, I am not familiar with them.

2. *Currently, the Voting Rights Act identifies those jurisdictions subject to an 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 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?*

I have not studied the impact of the use of the 2000 and 2004 elections in the formula, so I am unable to offer a recommendation on whether to add those election years in the coverage formula. As in 1982, however, I believe Congress should preserve the use of the presidential elections of 1964, 1968, and 1972 in the reauthorized formula, given the past reliability of the formula in appropriately targeting jurisdictions for pre-clearance with a historical pattern of

¹ *Extension of the Voting Rights Act: Hearing Before H. Comm. on the Judiciary, Subcomm. on Civil and Constitutional Rights, 97th Cong. 2121 (July 13, 1981) (Prepared statement of Prof. Drew S. Days III, Professor of Law, Yale University) (noting the absence of "similarly detailed and persuasive evidence of the need for preclearance in jurisdictions other than those presently covered") [hereinafter, Days 1981 testimony].*

voting discrimination that Congress must consider.⁴ The original coverage formula considered whether a jurisdiction had employed a test or device *and* the level of voter turnout and registration. Accordingly, it bears emphasis that the depressed turnout and registration levels were an indicator of the larger problem of entrenched discrimination in voting that Congress intended to address and not the end itself.

During the earlier reauthorizations of the Voting Rights Act, Congress *added* years to the formula, but never *replaced* earlier election years with more recent ones. If recent presidential election years are added to the formula at all, Congress should similarly preserve those years currently in the formula. The Supreme Court considers both the history and ongoing nature of voting rights infringements in weighing Congress's legislative power to enforce voting rights.³ In this regard, the years 1964, 1968, and 1972 are still relevant in recognizing the long history and ongoing nature of voting rights abuses and in identifying those jurisdictions in which minority voters are most in need of Section 5 protections.

There is no evidence in the record, however, that a revised formula is needed to pick up new jurisdictions. Rather, the existing Section 5 bail-in provision sometimes referred to as the "pocket trigger" is an adequate mechanism for requiring pre-clearance for previously non-covered jurisdictions that demonstrate evidence of voting discrimination. Although courts have been judicious – perhaps at times very judicious – in their use of the provision, it is structured to provide another tool for federal courts to protect minority voters where the evidence justifies future oversight. Given the existence of the bail-in provision as a mechanism for placing new

² Days 1981 testimony, *supra* note 1, at 2123-24 (noting "the record amply confirms the utility of the current trigger" and that "the trigger formula has been tested and measured repeatedly . . . [and] has been found each time to be extraordinarily appropriate when tested by the realities of experience).

³ *See, e.g., Tennessee v. Lane*, 541 U.S. 509, 528 (2004) (upholding the constitutionality of the Americans with Disabilities Act as applied to access for disabled to the courts based on the "long history" of discrimination adduced in the record).

jurisdictions under the preclearance requirements, it is unnecessary to change the preclearance formula itself to accomplish this goal. Since the current trigger formula still works in most instances to correctly identify those jurisdictions where preclearance is necessary given past and current patterns of discrimination, I see little support for substantially altering the trigger formula at this point.

In the 1982 reauthorization process, proposals were also on the table to change the trigger formula. I now reiterate my testimony at that time that the bail-out and bail-in provisions will continue to serve as “safety valves for both overinclusion and underinclusion” of jurisdictions that should or should not be covered under preclearance requirements,⁴ allowing adjustments as necessary for jurisdictions where the trigger formula does not yield the appropriate result. The use of evidence of historical discrimination, coupled with more recent evidence that this discrimination continues to persist, is appropriate and necessary in determining the jurisdictions to which Section 5 should continue to apply. As I stated in 1982, “the trigger formula has been tested and measured repeatedly” and has continued to effectively identify those jurisdictions where minority voters are most likely to be deprived of their full voting rights. With no compelling evidence to suggest the trigger formula is any less effective now than in the past in identifying these jurisdictions, there is no compelling reason to revise the formula significantly now.

Although there may be overlap with jurisdictions charged with Section 2 violations, the existing Section 5 mechanisms are doing their job, rendering it unnecessary to also use Section 2 data in identifying jurisdictions that will be subject to preclearance requirements. The bail-in mechanism described above is available in Section 2 cases as well; thus, I see no reason to endorse the seemingly broad expansion to any jurisdiction that has been “subject to litigation.”

⁴ Days 1981 testimony, *supra* note 1, at 2123.

Of course, some jurisdictions that have been “subject to litigation” prevail and some do not. The existing bail-in provision is a much more finely calibrated standard for assessing the need for future oversight.

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?*

Because Congress must rely on both the historical patterns and ongoing nature of discrimination, evidence from the 1964 elections, as part of a longer pattern of discrimination, is still relevant to Congress’s power to enforce the protections of the Voting Rights Act. Evidence of discrimination from the 1964 presidential election would be rendered “old” only if it was left as a stand-alone, one-time example of voting discrimination that has not been repeated since in form or scope, but this is not the case. To the contrary, the record before Congress indicates a long-term pattern of historical discrimination, which includes 1964 and continues to the present day.

This can be distinguished from the situation in *City of Boerne v. Flores*,⁵ in which the Court cited the absence of contemporary examples of religious discrimination and disallowed the use of older examples that appeared unconnected to a historical pattern of discrimination. In *Boerne*, all of the evidence provided was more than 40 years old. Moreover, the Religious Freedom Restoration Act (RFRA), unlike the VRA, was newly-enacted legislation facing review for the first time. A reauthorized VRA, which has successfully protected minority voting rights for four decades, would likely not face the same scrutiny. Since Section 5 is directed at

⁵ 521 U.S. 507 (1997).

eradicating racial discrimination, a suspect classification, with respect to voting, one of the most basic rights, the Court's deference to Congress should be at its greatest in this context, which the Court itself suggested in the *Boerne* decision.

The Court in *Boerne* specifically distinguished that case from its reasoning in *South Carolina v. Katzenbach*, in which the Court previously upheld the constitutionality of the Voting Rights Act.⁶ Whereas in *Katzenbach*, the Court “noted evidence in the record reflecting the subsisting and pervasive discriminatory-and therefore unconstitutional-use of literacy tests” and “the necessity of using strong remedial and preventive measures to respond to the widespread and persisting deprivation of constitutional rights[,]”⁷ the Court in *Boerne* cited the wholesale absence of contemporary evidence of discrimination in striking down RFRA. In doing so, it *specifically* contrasted its voting rights cases from the religious freedom context.⁸

As the record before you indicates, in the context of voting rights, there are many examples of modern instances of discrimination that are connected to a long-term pattern of discrimination that Congress is empowered to address through civil rights legislation. Therefore, evidence from 1964 is still relevant and permissible in the coverage formula. Indeed, Congress is required to establish an adequate record when addressing voting rights discrimination through the Voting Rights Act. The use of long-term data allows Congress to target preclearance requirements to those jurisdictions with the most serious records of discrimination; a jurisdiction with serious problems in 1964 that continues to demonstrate

⁶ *City of Boerne*, 521 U.S. at 525-26 (1997).

⁷ *Id.*

⁸ *Id.* at 530. The Court wrote:

In contrast to the record which confronted Congress and the Judiciary in the voting rights cases, RFRA's legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry. The history of persecution in this country detailed in the hearings mentions no episodes occurring in the past 40 years.

Id.

discrimination today is one in which preclearance mechanisms are most needed. The combination of historical and current data enables Congress to tailor the VRA and ensure “congruence and proportionality” between voting rights infringements and targeted preclearance mechanisms. As I noted in Question 2 above, the record does not indicate that the current formula fails to accomplish these goals.

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?*

Section 5 has been effective both in raising DOJ objections to voting changes submitted for pre-clearance, but, as importantly, in preventing covered states and local jurisdictions from proposing discriminatory changes in the first place. The figures you cite do not encompass the full record of success of Section 5 in providing a strong disincentive to covered jurisdictions in considering changes that would diminish minority voting rights in those jurisdictions. These numbers do not support the contention that covered jurisdictions have simply stopped discriminating on their own. Instead, based on my experience administering Section 5’s pre-clearance requirements at the DOJ, I believe that these figures can be correctly interpreted to indicate that vigorous enforcement of Section 5 over the years has resulted in a high level of compliance among covered jurisdictions. In the absence of the pre-clearance requirement, I expect that these same jurisdictions would lack the incentive to avoid objections to proposed changes by actively tailoring changes in a non-discriminatory fashion, as is currently the case. During my time at the DOJ, I observed substantially increased compliance by covered jurisdictions that anticipated a forceful federal response if preclearance was not sought.

Furthermore, as these covered jurisdictions expected fair, prompt, respectful, and constructive treatment of their submissions, they became increasingly likely to submit changes that were non-discriminatory in nature and in compliance with the Voting Rights Act requirements.

Additionally, as I noted in my testimony in 1982, these numbers vastly underestimate the true degree to which covered jurisdictions are making voting changes that disadvantage minority voters. Even with vigorous enforcement by the Justice Department, hundreds of changes that would not meet Section 5 preclearance requirements are never submitted for consideration. Given time and resource constraints, the Justice Department is unable to ensure that every electoral change influencing minority voters will be subject to preclearance.

Thus, while the figures you cite are small, they do not accurately reflect the broader impact of Section 5 on jurisdictions' decision-making processes on electoral changes, nor the full extent to which voting rights abuses still occur in these jurisdictions.

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

As I stated above in response to Question 1, I am not aware of any empirical studies that have compared covered jurisdictions and non-covered jurisdictions, nor any studies that demonstrate a "lack of clear differentiation" between the two types of jurisdictions. To the contrary, in my experience both enforcing the Voting Rights Act for four years as the Assistant Attorney General in the Civil Rights Division and as a legal scholar studying voting rights issues for many years, there is some differentiation in the level of voting rights discrimination in covered jurisdictions compared to non-covered jurisdictions.

I believe that a reauthorization term of 25 years is appropriate, although the length of the term is a policy determination that must be made by Congress. By establishing a 25-year term

during the last reauthorization in 1982, Congress correctly recognized that eliminating voting rights infringements and racial discrimination will not happen overnight, but rather is a long-term process. Accordingly, the 25-year term made sense then and would make sense now, as the record before Congress indicates that much progress still needs to be made in addressing and eradicating voting rights abuses.

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 reauthorization 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?

Under *Georgia v. Ashcroft*, which interpreted the existing language of the Voting Rights Act, the Court replaced Section 5’s concrete “ability to elect” retrogression standard with the more nebulous “influence district” concept. Since the *Georgia v. Ashcroft* “influence” standard is poorly defined and virtually impossible to meaningfully administer, its effect will be to undermine progress made under the Voting Rights Act and dilute minority voters’ participation in the electoral process. As I stated in my testimony to the Committee, I believe the amorphous, easily manipulable *Georgia* standard is an open invitation to mischief. A return to the well-established and well-understood *Beer* non-retrogression test, which is not similarly open to manipulation or confusion, is recommended.

Although the proposed legislation would not overturn *Georgia*, it would strengthen the statutory language to create a clear, workable framework and effectively reestablish this previous “opportunity to elect” standard. Under this standard, impermissible retrogression would occur if the number of Congressional districts that could viably elect a minority representative decreased after a proposed redistricting plan. It is important to note that, depending on the specific

demographics and voting patterns within a district, there is no absolute percentage of minority voters within a district to create a viable opportunity to elect a minority representative. Some majority-white districts may have the ability to elect non-white representatives, which may be impossible in other majority-white districts or districts with small majorities of minority voters, where persistent patterns of racial bloc voting preclude the election of minority representatives.

Prior to *Georgia v. Ashcroft*, the Voting Rights Act did not focus on minority voters' ability to "influence" majority-white districts, however that term is defined, nor was that the intent of Congress in enacting the VRA. The ability to effectively measure that "influence," if it exists, will be difficult or impossible in many circumstances. As a result, left unchecked, the *Georgia* decision may allow jurisdictions to return to intentional discrimination when redistricting, with no viable check on their ability to do so. The proposed legislation would restore the proven, workable "ability to elect" standard that allows effective enforcement, eliminating the host of problems and enforcement difficulties that would arise from the unclear influence framework introduced by the Court for the first time in that decision.

**Response of Professor Drew S. Days III, Alfred M. Rankin Professor of Law,
Yale Law School, to Questions from Senator Tom Coburn
June 16, 2006**

With the improved state of race relations in the US since 1965, including vastly improved minority voter registration and turnout, is the Section 4 trigger for coverage under Section 5 still appropriate to the proposed reauthorization of the Voting Rights Act?

Yes. In my view, the correct analysis for determining whether the trigger is appropriate is whether citizens in jurisdictions covered under Section 5 continue to suffer from persistent methods of voting discrimination.¹ Where the record before Congress shows sufficient evidence in that regard its power to leave the Section 5 mechanisms in place is clearly authorized by the Fourteenth and Fifteenth Amendments.

The Section 5 coverage formula was established after careful review of the evidence before Congress in 1965, 1970, 1975, and 1982 and was adopted to eradicate entrenched as well as new methods of discrimination against minority voters. The continued evidence of persistent violations of minority voting rights in covered jurisdictions in the record before this Congress highlights the necessity of continued review of voting changes that may have a retrogressive effect on minority voters in these jurisdictions.

I am generally aware that some academics or others have undertaken to craft proposals that modify the trigger formula for Section 5 to account for “improved race relations” in some covered jurisdictions and what some would characterize as worsening race relations in some uncovered jurisdictions. Although I am unfamiliar with specific proposals, in my opinion these modifications are without sufficient support in the record before Congress. Moreover, the Act already provides for the inclusion of uncovered

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

jurisdictions under section 3(c) of the Act and the exclusion of covered jurisdictions under the bailout provisions of the Act.² It is my understanding that there is no credible evidence in the record that these measures, along with Section 5, (1) have not proven extremely effective in addressing some of the worst systemic failures in our constitutional democracy; or (2) precluded responses tailored to specific situations where circumstances warrant through the “pocket trigger” and bailout provisions.

If the trigger is to be maintained as 1972 presidential election participation, is it appropriate to extend coverage for 25 years?

Yes. The period of time between congressional review of the Voting Rights Act’s temporary provisions is a policy choice soundly committed to Congress to be determined in light of the evidence presented in this renewal process, as well as previous ones. When it enacted the Voting Rights Act in 1965, Congress hoped that issues of racial discrimination in elections would be resolved quickly. The four occasions on which Section 5 of the VRA previously was considered arguably make it the most carefully reviewed civil rights measure in our nation’s history. Each time the duration of the law was weighed in light of Congress’s assessment of the persistence of discrimination that it sought not to lessen, but to eradicate. Today, as in 1982, we have learned that voting discrimination is more entrenched than we had hoped. In fact, though some historical means of discrimination are less pervasive, new and creative methods of discrimination in the political process continue to emerge.³ Consequently, a Congressional policy decision to apply a renewed Section 5 provision for another 25 years should be based on the full record of Congressional experience under the Act.

² See e.g. *Jeffers v. Clinton*, 740 F. Supp. 585 (E.D. Ark. 1990); *McMillan v. Escambia County*, 559 F.Supp. 720, 727 (N.D. 1983).

Take the following case in point. A federal judge in Georgia, a covered jurisdiction, recently ruled preliminarily that a newly enacted voter identification measure was the modern equivalent of a poll tax.⁴ I do not believe any of the witnesses who testified at the 1982 renewal hearings envisioned, I certainly did not, that voting rights litigators would have to familiarize themselves with the constitutional, statutory, and case law sources associated with poll taxes. Yet, that is precisely what was required in the fortieth anniversary year of the Voting Rights Act. It might be suggested that the Georgia identification bill is not relevant because the measure was precleared by the Department of Justice. I do not believe the analysis ends there, however, since that decision was the subject of robust debate within the Department. Moreover, in the context of the limited point that I urge here, namely that new methods of discrimination in voting continue to be devised, it seems to matter less where a given court or fact finder comes down, than it does that very serious contemporary legal analyses were necessary to address a *bona fide* poll tax allegation. Although neither the Department of Justice nor the courts are infallible, over time Section 5 has proven to be remarkably effective at addressing both familiar and more innovative forms of voting discrimination when they appear.

On the record before Congress, it seems fairly apparent that Congress has met its duty under the *Boerne* doctrine. In this regard, it is worth noting that the Supreme Court has recognized that Congress acts as a continuous body when reviewing evidence. As the Court stated in *Fullilove v. Klutznick*,

Congress has no responsibility to confine its vision to the facts and evidence adduced by particular parties. Instead, its special attribute as a legislative body lies in its broader mission to investigate and consider all facts and opinions that may be relevant to the resolution of an issue. One appropriate source is the information and expertise that Congress acquires

⁴ *Common Cause v. Billups*, 406 F.Supp.2d 1326 (2005).

in the consideration and enactment of earlier legislation. After Congress has legislated repeatedly in an area of national concern, its Members gain experience that may reduce the need for fresh hearings or prolonged debate when Congress again considers action in that area.⁵

Each time Congress sits it is not being reconstituted, therefore all of the previous records (1965, 1970, 1975, 1982 and 1992) are properly part of the record. For practical as well as doctrinal reasons, it also stands to reason that Congress should not be required to make this substantial investment of resources every 5 years. More importantly, the frequency of the undertaking should be left to Congress' sound discretion in light of the substantial separation of powers costs that *Boerne* itself imposes.

Are there alternative conceptualizations of the trigger that might address concerns of critics who wish to update the trigger, while also alleviating the concerns of "backsliding" if the trigger is updated from 1972?

I am not aware of any alternative conceptualizations with that effect.

Does leaving the trigger unchanged increase the likelihood that a reauthorization until 2031 will be struck down by the Supreme Court?

No. When Congress reauthorizes the Voting Rights Act, it acts under the authority expressly granted by the Fourteenth and Fifteenth Amendments, which were specifically designed to expand federal power, and to effect a concomitant contraction of state authority with respect to racial discrimination. It is perhaps unsurprising, therefore, that the Supreme Court has consistently pointed to the Voting Rights Act as an example of Congress's striking an appropriate, if delicate, balance between the respective states and the federal government. For, as I have mentioned, the Act is among the most carefully and consistently reviewed by Congress and the Court.⁶ Moreover, recent

⁵ *Fullilove v. Klutznick*, 448 U.S. 448, 502-503 (1980).

⁶ *City of Rome v. U.S.*, 446 U.S. 156, 180 (1980); see *South Carolina v. Katzenbach*, 383 U.S. at 315.

Supreme Court decisions suggest that remedial legislation enacted by Congress to vindicate fundamental rights will pass constitutional muster.⁷

An unchanged trigger and a 25-year sunset provision will not render the Voting Rights Act unconstitutional because the 25-year period is not arbitrarily applied. Congress is prepared to act on a carefully developed record that spans from 1965 to the present day. In addition, the bailout provisions of the Act provide an incentive toward progress and eradicating discriminatory voting practices. Covered jurisdictions that eliminate racial discrimination in voting in 2017, ten years after reauthorization, can bailout of the preclearance provisions before 2031. Thus, the 25-year sunset provision of the Voting Rights Act and the current trigger formula do not enlarge the Congressional authority granted by the Fourteenth and Fifteenth amendments.⁸

Please discuss how a possible broad-based “bailout” of covered jurisdictions might be implemented?

Congress addressed this issue fully the last time around. I have seen nothing in the record that suggests more realistic or effective alternatives to those rejected at that time.

Are there alternative conceptualizations of the bailout provision that would increase the opportunity for a jurisdiction to succeed in a bailout attempt?

Perhaps, but I am unaware of their existence and am very uncertain of their necessity in light of my own experiences at the Department of Justice, and the record

⁷ See *Lopez v. Monterey*, 525 U.S. 266 (1999) (specifically upholding section 5 preclearance against a constitutional attack post-*Boerne*, just after the Court invalidated Congressional legislation during the same term in *Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank*, 527 U.S. 627 (1998) and before the Court in *Nevada Dep’t of Human Resources v. Hibbs*, 538 U.S. 721 (2003) and *Tennessee v. Lane*, 541 U.S. 509 (2004) upheld Congressional remedial legislation under the Civil War Amendment enforcement powers).

⁸ See *Lopez*, 525 U.S. at 282-284 (1999).

before Congress. Moreover, the current bailout provision was enacted in 1982 after Congress discussed many alternative bailout provisions during the 1982 reauthorization. As I have set out above, the current bailout provisions balance concerns that jurisdictions that continue to abridge or deny the voting rights of minorities remain covered by the Act while encouraging compliance. Congress should not relax the bailout requirements in view of the fact that no jurisdiction has demonstrated that the current provisions present unreasonable obstacles. For Congress to do so in light of hearing evidence of serious VRA violations in the twenty-first century would send an unfortunate message.⁹

In the Unofficial Transcript of the hearing on May 16, 2006, page 35-36, Professor Pam Karlan said in reference to Georgia's redistricting plan at issue in Georgia v. Ashcroft, that the Department of Justice "got it right" because two of the white Democrats elected under the new plan switched party affiliation and became Republicans. She said "Now I am sure that the Republicans in Georgia are very fair folks, but those black voters have no influence in those districts." Do you agree with Professor Karlan's assertion that minority voters in Republican districts "have no influence"?

I did not attend the May 16, 2006 hearing, and was not provided with the full hearing transcript to review the quoted text in context. However, given testimony that I and other witnesses have offered that the standard in *Georgia v. Ashcroft*, which calls for the measurement of influence, is unworkable and lacks useful guidance, I find it hard to quantify what "influence" Black voters may have in the general circumstances posited.

⁹ In fact, there are some jurisdictions that continue to defy the requirements of the Act, despite the long application of the voting rights act, and fail to submit voting changes for preclearance. See Written Testimony of Jerome A. Gray before the House Judiciary Committee, November 1, 2005 at 3 (noting that an Alabama county failed to submit voting changes for preclearance from 1995 to 2005); See also Laughlin McDonald, *The Voting Rights Act in Indian Country: South Dakota, A Case Study*, 29 AM. INDIAN L. REV. 43, 43-44 (2004) (discussing South Dakota Attorney General Bill Janklow's advisement that his state not comply with the VRA's preclearance requirement. For example, between 1976 and 2002, South Dakota enacted more than six hundred statutes and regulations having an effect on elections or voting in Shannon and Todd Counties, but submitted fewer than ten for preclearance.).

Response of Professor Drew S. Days III, Alfred M. Rankin Professor of Law,
Yale Law School, to Questions from Senator Edward Kennedy
June 16, 2006

According to Dr. Thernstrom, the Voting Rights Act makes “sure that majority-black districts stay black” and creates “racially safe boroughs.” Based upon the most recent round of redistricting in 2000, does the evidence support Dr. Thernstrom’s argument? Why or why not?

See attached response to Stuart Taylor column.

Dr. Thernstrom contends that taking race into account in redistricting is “political exclusion – masquerading, of course, as inclusion.” Do you agree with Dr. Thernstrom? Why or why not?

See attached response to Stuart Taylor column.

Some have questioned whether the Voting Rights Act needs to be extended for twenty-five years. Can you explain why you believe the protections provided by the Voting Rights Act need to be extended for that period of time?

Although the period of time between Congressional reassessments of the temporary provisions of the Voting Rights Act is a policy choice made in light of the evidence and the well-recognized fact that the right to vote is fundamental and “preservative of all other rights.” The goal of our democracy is to ensure that all citizens, including minority citizens, have an opportunity to access the political process without facing racially discriminatory practices that abridge or deny their right to vote. When enacting the Voting Rights Act in 1965 Congress hoped that issues of racial discrimination in elections would be resolved quickly. Today, as in 1982, we have learned that racism is more entrenched than initially contemplated. In fact, although some historical means of discrimination are less pervasive, new and creative methods of discrimination in the political process continue to emerge. The Act is remarkably

effective at addressing all of these methods when they appear by blocking some and deterring others.

That is why I believe that twenty-five years is an appropriate period of time for which to reauthorize the Act. We continue to face challenges to minority citizens' equal opportunity to participate in the political process. In fact, some covered jurisdictions fail to submit voting changes for several years, if at all, while others submit changes so close to elections that the timeframe in which the Civil Rights Division can evaluate these changes is severely truncated.¹ The goals of the Voting Rights Act are to achieve equal access for minority voters, enhance political participation, and prevent discrimination through dilution of minority voting strength, as well as backsliding that may undermine the success the Act has achieved. Congress can justifiably and proudly point to examples of improved race relations in many jurisdictions fostered by enforcement of the voting rights act. But the ultimate goal of the Voting Rights Act is not simply the reduction of racial or ethnic group discrimination in the political process to levels of acceptable infringement, but rather the eradication of such discrimination in the political process. Inherent in this goal is the notion that the voting discrimination, openly tolerated for nearly a hundred years after the passage of the Fifteenth Amendment, diminished everyone's vote. I believe that 25 years is an appropriate coverage period because the evidence in the record shows that discrimination on account of race and/or language minority status in covered jurisdictions continues after 40 years of preclearance and

¹ See e.g. Written Testimony of Jerome A. Gray before the House Judiciary Committee, November 1, 2005 at 3 (noting that an Alabama county failed to submit voting changes for preclearance from 1995 to 2005); See also Laughlin McDonald, *The Voting Rights Act in Indian Country: South Dakota, A Case Study*, 29 AM. INDIAN L. REV. 43, 43-44 (2004) (discussing South Dakota Attorney General Bill Janklow's advisement that his state not comply with the VRA's preclearance requirement; between 1976 and 2002, South Dakota enacted more than six hundred statutes and regulations having an effect on elections or voting in Shannon and Todd Counties, but submitted fewer than ten for preclearance.).

vigorous enforcement of Section 5, and more recently Section 203. The work of Section 5 remains incomplete.

On the record before Congress, it seems fairly apparent that Congress has met its duty under the *Boerne* doctrine. In this regard, it is worth noting that the Supreme Court has recognized that Congress acts as a continuous body when reviewing evidence. As the Court stated in *Fullilove v. Klutznick*,

Congress has no responsibility to confine its vision to the facts and evidence adduced by particular parties. Instead, its special attribute as a legislative body lies in its broader mission to investigate and consider all facts and opinions that may be relevant to the resolution of an issue. One appropriate source is the information and expertise that Congress acquires in the consideration and enactment of earlier legislation. After Congress has legislated repeatedly in an area of national concern, its Members gain experience that may reduce the need for fresh hearings or prolonged debate when Congress again considers action in that area.²

Each time Congress sits it is not being reconstituted, therefore all of the previous records (1965, 1970, 1975, 1982 and 1992) are properly part of the record. For practical as well as doctrinal reasons, it also stands to reason that Congress should not be required to make this substantial investment of resources every 5 years. More importantly, the frequency of the undertaking should be left to Congress' sound discretion in light of the substantial separation of powers costs that *Boerne* itself imposes.

² *Fullilove v. Klutznick*, 448 U.S. 448, 502-503 (1980).

**Response of Drew S. Days III, Alfred M. Rankin Professor of Law, Yale Law School
to Written Questions of Senator Patrick Leahy
June 16, 2006**

1. *Some have argued that Section 5 imposes too high of a cost on the states for the Supreme Court to uphold it in light of its recent federalism cases. However, in City of Boerne, the Supreme Court held up the VRA as an example of Congress properly exercising its powers. Does that decision address the scope of Congress' powers to enforce the 14th and 15th Amendment?*

As I and several others have testified, while *City of Boerne v. Flores*, and the cases that followed, contemplate certain limitations on Congressional enforcement powers under the 14th, and 15th Amendments, this decision does not drastically inhibit Congress's ability to enact remedial and prophylactic legislation to protect the fundamental rights of traditionally excluded groups in the face of widespread discrimination.¹ As you have recognized, in *Boerne* itself the Court points to the Voting Rights Act of 1965 ("Act") as model legislation under the enforcement provisions of the Civil War Amendments, despite the fact that some VRA provisions clearly "prohibit conduct which is not itself unconstitutional and intrudes into 'legislative spheres of autonomy previously reserved to the States.'"² One aspect of the Court's decision in *Boerne* that grew out of the Supreme Court's seminal Section 5 precedent in *South Carolina v. Katzenbach*, and bears emphasis is its acknowledgment that "[t]he appropriateness of remedial measures must be considered in light of the evil presented."³ Abridgements of the right to vote through vote denial and dilutions alike, seriously threaten the fundamental right that the Supreme Court has called "preservative of all

¹ See *City of Boerne v. Flores*, 521 U.S. 507, 519-520 (1997) (striking Religious Freedom Restoration Act but noting Congress's right to enforce measures that remedy or prevent unconstitutional actions and stating that Congress must have "wide latitude" in determining whether an action is remedial in scope citing Voting Rights Act as exemplar.)

² *Id.* at 518 (1997) (quoting *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976)).

³ *Id.* at 519 (citing *South Carolina v. Katzenbach*, 338 U.S. 301, 308 (1966)).

other rights”.⁴ Accordingly, infringements of voting rights threaten the very foundation of our democracy.

The *Boerne* line of cases appear to require that Congress act only after careful assessment and documentation of a problem of constitutional dimension, and that its legislative response be “congruent and proportional” to the constitutional violation at issue.⁵ While this developing framework calls for Congress to be deliberate in the exercise of its enforcement powers under the Civil War Amendments,⁶ it does not establish clearly discernible limits on Congressional authority in the context of prophylactic legislation regarding race or other areas traditionally subjected to higher levels of judicial scrutiny. For example, in *Nevada Dept. of Human Resources v. Hibbs*, the Court upheld Congress’s abrogation of states’ sovereign immunity under the Family Medical Leave Act (FMLA) because the act was intended to prevent sex discrimination.⁷ Likewise, in *Tennessee v. Lane*, the Court upheld Congress’s abrogation of state’s sovereign immunity under Title II of the Americans with Disabilities Act because it protected citizens’ fundamental right of access to the courts as applied.⁸ In reaching these decisions, the Court has given effect to its early acknowledgment in *Boerne* that “Congress must have wide latitude” in determining “when congruence and proportionality between the injury to be prevented or remedied and the means to be adopted to that end” have been achieved.⁹

⁴ *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

⁵ *Id.* at 520.

⁶ See, e.g., *Bd. of Trustees of University of Alabama v. Garrett*, 531 U.S. 356 (2001) (where Court very carefully reviewed the Congressional record relied upon to justify passage of Title I of the Americans with Disabilities Act and found it wanting).

⁷ *Nevada Dep’t of Human Resources v. Hibbs*, 538 U.S. 721 (2003).

⁸ *Tennessee v. Lane*, 541 U.S. 509 (2004).

⁹ *Boerne*, 521 U.S. at 520.

In sum, *Boerne* and its progeny, when read collectively, stand for the proposition that Congress continues to possess significant enforcement powers to remedy problems traditionally subjected to heightened scrutiny. In fact, these cases suggest that Congressional power is at its apex when Congress acts to protect fundamental rights and traditionally excluded groups. Consequently, when renewing the VRA, Congress acts at the height of its enforcement powers because it is enacting a remedial and prophylactic measure for discrimination against racial and language minorities that protects their fundamental right to equal voting access.

2. *You have litigated Voting Rights Act cases in the Supreme Court, including Miller v. Johnson (1995). In 1999, the Supreme Court decided Lopez v. Monterey County, which came after City of Boerne. In Lopez, the Court again upheld, as it has many times, Congress' authority under the Fifteenth Amendment to require a jurisdiction to pre-clear voting changes. It did so even where that voting change was required to implement a state law in a non-covered state and the jurisdiction in question had no discretion in making the voting change. The Court recognized "that Congress has the constitutional authority to designate covered jurisdictions and to guard against changes that give rise to a discriminatory effect in those jurisdictions...." Does Lopez provide strong evidence that the Supreme Court will continue to give deference to Congress in reauthorizing the remedies in the VRA, even after City of Boerne?*

While no single precedent can necessarily dictate the outcome of future challenges to Congress's renewal of the Voting Rights Act, it is fair to say that *Lopez* presents the clearest indication of how the Supreme Court would evaluate a constitutional challenge to Section 5 of the VRA in the post-*Boerne* world. In *Lopez*, the court stated plainly but unmistakably that even though "the Voting Rights Act, by its nature, intrudes on state sovereignty, [t]he Fifteenth Amendment permits this intrusion."¹⁰ Additionally, it is important to note that *Lopez* was decided before *Hibbs* and *Lane*, discussed above. There, the Court arguably gave even *greater* deference to Congress than it had in earlier

¹⁰ *Id.* at 284-285.

cases with respect to remedial legislation preventing discrimination against protected groups. Taken together, these cases provide strong evidence that the Supreme Court will continue to give deference to Congress in reauthorizing elements of the VRA. Though the Court's assessment of the record is of paramount importance, the precedent cases suggest that even its review of the record itself should be more deferential in the context of the VRA.

3. *The Supreme Court requires a strong record of discrimination to uphold laws that impinge on the states. In enacting the VRA and reauthorizing it 4 times, Congress has relied on extensive fact-finding showing the recurring use of discriminatory tactics in covered jurisdictions. We are now in the process of trying to extend this existing remedy. Do you believe that the Court views evidence of state discrimination as perishable – with some kind of constitutional expiration date – even after Tennessee v. Lane, in which the Supreme Court upheld key portions of the Americans with Disabilities Act on the basis of older evidence of discrimination?*

No, I do not believe that the Court views evidence of state discrimination as perishable. Even *Boerne*, which sets forth high evidentiary requirements to justify federal legislation, looks for a history and pattern of discrimination. In *Boerne*, the legislation at issue was deemed problematic because the legislative record lacked any modern proof of discrimination and all of the discrimination considered was more than 40 years ago.¹¹ As I read *Boerne*, it does not bar all older evidence but rather requires more recent evidence as well. The Court's decisions in *Lane* and *Hibbs* further support the proposition that while historical evidence, standing alone, may be insufficient to warrant Congressional enactments under the Fourteenth and Fifteenth Amendments, it remains relevant, nevertheless.¹²

¹¹ *Boerne*, 521 U.S. 507 (1997).

¹² 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

As I view the portions of the record that I have had the opportunity to examine, while not identical to that of 1982, it shares many critical features: there is progress side-by-side with continuing discrimination; there are many egregious examples of violations of voting rights; last minute, drastic polling place changes, and familiar dilutive tactics through methods of “cracking” and “packing”; and racial campaign appeals¹³ but also a more carefully considered record on Section 5’s deterrent effects,¹⁴ and the operation of Section 203. Overall I believe that the record is consistent with that assembled in 1982. Both the quantity and quality of the evidence is strong.

4. *In 1982, I helped amend the VRA to include a new bailout provision to give covered jurisdictions without recent violations the opportunity to get out of Section 5 coverage. Even though no jurisdiction that has tried to bail out has failed, fewer than a dozen jurisdictions have sought to remove themselves from Section 5 coverage. What is the constitutional significance to the fact that jurisdictions have been choosing not to exercise the option to bailout from Section 5 coverage?*

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 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.”).

¹³ See e.g. Laughlin McDonald, Janine Pease and Richard Guest, *Voting Rights in South Dakota 1982-2006*, 15-21 LEADERSHIP CONFERENCE ON CIVIL RIGHTS (March 2006); *Asian-Americans and the Voting Rights Act: The Case for Reauthorization*, 21-22 ASIAN AMERICAN LEGAL DEFENSE & EDUCATION FUND (May 2006) (documenting numerous examples of racist behavior by poll workers in elections between 1988 and 2006); Robert McDuff, *Voting Rights in Mississippi, 1982-2006*, LEADERSHIP CONFERENCE ON CIVIL RIGHTS (May 2006) (discussing recent examples of the use of racial campaign appeals); *Kilmichael Mississippi*, Protect Voting Rights: Renew the VRA, <http://renewthevra.civilrights.org/resources/detail.cfm?id=190> (last visited June 13, 2006) (discussing an incident in 2001 when three weeks before election day in Kilmichael, Mississippi, the all-White town council decided to cancel the municipal election); Debo P. Adegbile, *Voting Rights in Louisiana 1982-2006*, 27-29 LEADERSHIP CONFERENCE ON CIVIL RIGHTS (March 2006) (noting that at least 11 Parishes in Louisiana were “repeat offenders,” and that on 13 instances the DOJ caught jurisdictions resubmitting objected-to proposals with cosmetic or no changes).

¹⁴ 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).

According to Gerald Hebert, who has served as legal counsel to all of the jurisdictions that have bailed out since the 1982 amendments, the jurisdictions that have bailed out have expressed several advantages that they derive from the current bailout formula, including being “afforded a public opportunity to prove it has fair, non-discriminatory practices[,] . . . [and] once bailout is achieved . . . [being] afforded more flexibility and efficiency in making routine changes, such as moving a polling place.”¹⁵ Hebert also opined that the problem is not that the bailout provisions are difficult or that jurisdictions are applying and being denied, but simply that “jurisdictions are just not applying.”¹⁶ This is consistent with some of my testimony before this Committee, and suggests that claims that Section 5’s is terribly onerous may be overstated.

Moreover, I am not aware of any affirmative evidence in the record showing that the bailout provisions are particularly onerous, as compared to 1982 when there was a more fully developed record on this question. While we obviously cannot predict the future with any great certainty, it seems reasonable to suggest that the bailout provisions – particularly if the Department makes increased efforts to share information about the process -- will continue to provide an important incentive for covered jurisdictions to comply with Section 5 as intended in 1982. Because there is no evidence that the existing bailout provisions are placing an undue burden on covered jurisdictions, in my view, it presents no constitutional problem.

5. *Professor Gaddie testified that in his view Section 5 should not be extended as presently constituted because his report found evidence of discriminatory tactics in both covered and non-covered jurisdictions. In order to establish the kind of*

¹⁵ 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].

¹⁶ *Id.*

record Congress needs to extend Section 5, is Congress required to find that there is more discrimination in covered jurisdictions than in non-covered jurisdictions? Because of the history of discrimination in covered jurisdictions, which Congress has established in previous reauthorizations and the Supreme Court has upheld as a constitutional basis for Section 5, is it enough for Congress to find that there are recurring instances of discrimination in covered jurisdictions?

My understanding is that the *Boerne* line of cases and its progeny do not change the fact that a demonstrated pattern of widespread, historical and recurring instances of discrimination in covered jurisdictions is sufficient to warrant the extension of Section 5. As I have described above, in 1999, the Court in *Lopez v. Monterey County* reaffirmed the constitutionality of Section 5 and the preclearance regime.¹⁷ The court cited *Boerne*, and then cited both *Katzenbach* and *City of Rome* favorably, upholding preclearance for “jurisdictions properly designated for coverage.”¹⁸ From my reading of that case, there is nothing in the *Lopez* decision that suggests that after *Boerne*, the constitutionality of Section 5 must rest on a state-by-state comparative analysis, nor am I aware that any comprehensive study of that kind has been performed.

It also bears emphasis that Section 5 coverage is not fixed under the statutory framework. As you are aware, the bailout provision of Section 4(a) provides a means through which covered jurisdictions with clean records of compliance for ten years can cease their preclearance obligations. Moreover, under Section 3(c) non-covered jurisdictions that intentionally discriminate may be ordered to submit future voting changes for preclearance at a court’s discretion. Finally, the State by State reports submitted to the record by LCCR, among other things, clearly illustrate continued patterns and practices of discrimination in all of the currently covered States, and make a strong case for the need to extend Section 5 as currently enacted.

¹⁷ *Lopez v. Monterey County*, 525 U.S. 266 (1999).

¹⁸ *Id.*

6. *The bill introduced in the House and Senate includes a correction to the Supreme Court's decision in Reno v. Bossier Parrish Sch. 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? Is such a result consistent with the purposes of the Voting Rights Act?*

One problem with *Bossier II*, as the question suggests, is that its holding is contrary to the purposes of the Voting Rights Act. *Bossier II* created a preclearance standard under which intentionally discriminatory voting changes (e.g. those motivated by racial animus) that do not clearly worsen the position of minority voters must be precleared.¹⁹ Of course, such changes violate the Constitution, and Section 5 should not be construed to allow one of the very types of discrimination that it was enacted to remedy.

Consider, for example, an analogy to "at will" employment. It is well recognized that in an "at will" employment state employees can be fired for any reason at all except a discriminatory reason. In the context of Section 5 preclearance, why should a covered jurisdiction – subject to the preclearance requirements as a result of a history of discrimination in voting – be free to make voting changes tainted by intentional racial discrimination? Following the analogy – under the logic of *Bossier II*, an employer could be barred from enacting a policy with the purpose or effect of purging a company of African-American employees under the prophylactic statute, but could continue to bar African-Americans for racially discriminatory reasons, even if written evidence of a no-blacks policy were uncovered. The standard thus permits absurd results. As I have testified previously, it strikes me that the decision is basically at war with the spirit of Section 5 in that it places a burden on those that the Act was designed to protect. It

¹⁹ See *Reno v. Bossier Parrish Sch. Bd. II*, 528 U.S. 320 (2000).

subjects them to additional discriminatory practices that can be remedied only by way of individual lawsuits. The plain language of the VRA, not to mention common sense, both counsel strongly against such an interpretation of Section 5. Amending section 5 to prohibit *all* unconstitutional discrimination with respect to the right to vote, not just discrimination that is also retrogressive, poses no constitutional difficulties with respect to theories of Congressional power, and is consistent with and essential to the VRA's core purpose of eradicating historic and long-maintained voting discrimination.

7. *The bill we have introduced also corrects the Supreme Court's holding in Georgia v. Ashcroft by restoring the VRA's intent to ensure that minority communities can elect preferred candidates of choice. Can you explain why the Supreme Court's ruling in Georgia v. Ashcroft is inconsistent with this purpose?*

I share the broadly held view that the new standard set forth by *Georgia v. Ashcroft* has substituted an amorphous, easily manipulable standard for determining Section 5 violations for the previously well-established and well-understood non-retrogression test as outlined by *Beer*.²⁰ In *Georgia v. Ashcroft*, 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."²¹ The problem with the *Georgia v. Ashcroft* "influence" test is not that there could never be a situation where minority influence is discernible and important, but as a former DOJ official responsible for administering the Voting Rights Act it seems clear to me that ferreting out such instances consistently is simply unrealistic. Furthermore, I believe that such a standard in many ways constitutes an open invitation to mischief. For instance, the pursuit of an influence trade-off theory could be used to cloak purposefully

²⁰ See *Beer v. U.S.*, 425 U.S. 130 (1976).

²¹ *Georgia v. Ashcroft*, 539 U.S. 461, at 482 (2003).

retrogressive or discriminatory acts from effective Section 5 review. Additionally, under the *Georgia v. Ashcroft* regime it is difficult if not impossible to identify how to weigh when the number of “influence districts” would suffice as a substitute for viable opportunity districts. Given these difficulties and potential dangers, I strongly support the proposed legislation that properly 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*.²²

8. *I have heard from practitioners and professors that the test set forth in Georgia v. Ashcroft is difficult to administer and provides little guidance to lower courts. Can you describe how the bill would fix these problems?*

The *Georgia v. Ashcroft* influence standard not only provides little guidance to lower courts but as I mentioned above is essentially unworkable for DOJ officials to administer. The central problem with *Georgia v. Ashcroft* is that the tradeoffs made in pursuit of political advantage for minority voters may or may not pan out, and could ultimately result in dilution of their electoral power. This, in turn, could do long-term damage to the rights of minorities to elect candidates of their choosing. The proposed bill would fix these problems by re-establishing the “ability to elect” standard that courts and DOJ administrators are familiar with, and that the original VRA statutory language envisioned. This standard has a long track-record of protecting against elimination of minority voting strength and advancing the aims of Section 5 of the VRA.

²² *Id.*

**Response of Professor Drew S. Days III, Alfred M. Rankin Professor of Law,
Yale Law School, to Questions from Senator Charles Schumer
June 16, 2006**

1. Do you agree that the bill, as drafted, mandates racial gerrymandering?

In addition to asking you to consider my response to Stuart Taylor's May 15, 2006 Article that I have annexed here, I provide a brief response below.

No. In my view, the pending Voting Rights Act ("VRA") renewal bill promotes full inclusion consistent with history and purposes of the historic 1965 law that has aptly been described as the most successful civil rights legislation ever enacted. The claim that "the bill, as drafted, mandates racial gerrymandering" is presumably based upon the view that the Section 5 preclearance standard would unavoidably lead to this outcome. Any suggestion that the bill as proposed mandates racial gerrymandering: (1) misunderstands both the historical and contemporary justifications for the VRA; (2) misconceives the application of Section 5 of the VRA; (3) manifests a selective understanding of underlying redistricting principles; and (4) misreads controlling Supreme Court precedent. I will explain the responses set out above in order.

1. The "racial gerrymandering" claim misunderstands both the historical and contemporary justifications for the VRA

The VRA was passed by Congress to enforce the guarantees of the Fifteenth Amendment after nearly a century during which its constitutional promises were disregarded in significant portions of the nation. Section 5 was a strong remedy that was necessitated by even stronger resistance to African-American political participation in the political process. It was designed to shed light on, block and/or deter discrimination

against minority voters specifically because case-by-case adjudication had proven inadequate. Federal review of voting changes in covered jurisdictions is advantageous because it “shifts the burdens of time and inertia” in favor of the groups long discriminated against. When viewed in this context it is fairly apparent that the VRA generally, and Section 5 in particular, serve to level the political playing field by placing a statutory mandate upon minority inclusion in the political process. Section 5 has been interpreted to stop deliberate efforts or those that result in the minority backsliding in the political process. Since its enactment, Section 5 has been applied to a wide range of voting changes because an equally wide range of changes have been designed to dilute minority voting power, and/or have resulted in backsliding. As previous Congressional renewal records make clear, Section 5’s preclearance provisions were not rigorously enforced for the first five years of their existence but over the last 35 or so years they have proven extremely effective. All of these Congressional reassessments have also clearly shown that voting discrimination in covered jurisdictions is persistent and entrenched. Accordingly, it is entirely improper as a matter of constitutional law, history, and/or policy to equate Section 5 with a mandate for racial gerrymandering. This provision instead serves to enforce the equality mandate in voting to which our constitution, our history, and public policy have consistently committed us since 1965.

2. The claim misconceives of the application of Section 5

Since *Beer v. U.S.* Section 5 has been interpreted to stop backsliding. For the great majority of the statute’s existence in the context of redistricting – which is the only context in which one can test the claim – Section 5 has been interpreted to protect the ability or opportunity of cohesive minority communities to elect candidates of their

choice. In practical terms it blocks or deters jurisdictions from trying to dilute minority voting strength by “cracking” or “packing”. Thus, the provision is limited in that it begins its assessment of retrogressive effects with the *status quo* or the existing level of opportunity to elect and weighs the proposed change against it. Measuring the opportunity to elect has always been a case specific analysis that takes into account a number of factors but focuses primarily on the level of racially polarized voting. This assessment requires a careful examination of election returns to determine the extent to which a white voting bloc consistently negates minority-preferred candidates. Where bloc voting is intense it may be necessary to preserve an existing majority-minority district or a district with a minority voting population that is very close to preserve the ability-to-elect. Maintaining existing minority ability-to-elect districts against deliberate efforts or efforts which result in dilution is not a mandate for “racial gerrymanders.” Legislators remain free to configure districts in a variety of ways and even to alter the configurations of majority-minority districts; they simply cannot destroy a cohesive minority group’s ability to choose its representatives.

3. The claim manifests a selective understanding of underlying redistricting principles

Several factors guide map drawers in the redistricting process, including: incumbency protection, traditional districting principles such as maintaining communities of interest, and contiguity. In addition, fidelity to one-person one-vote principles and geographic considerations substantially shape the choices available to map makers. In light of our nation’s history of residential segregation which endures (see attached Taylor response), and the national preference for single member districts, it is not surprising that majority minority districts exist – indeed it is entirely appropriate. The majority of

districts in the country are majority white due to the very same housing patterns. In view of these realities, it distorts the record to suggest that Section 5 mandates “racial gerrymandering.” Indeed, because the standard protects existing opportunities, and in light of the Supreme Court case *Shaw v. Reno* and its progeny, which limit the use of race in redistricting, the claim has very little merit.

4. The claim misreads controlling Supreme Court precedent

Finally, the bill as proposed cannot “mandate racial gerrymandering” because existing caselaw arising from the 1990’s limits the extent to which any jurisdiction can rely on race in drawing districts. The Supreme Court’s Equal Protection decisions in *Shaw v. Reno*, and *Miller v. Johnson*, among others, establish constitutional limits on so-called racial gerrymanders. The bill does not, and could not, disturb these constitutional constraints.

2. *Under the proposed 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 explain and give an example of a district that is not majority-minority that could be considered an “ability to elect” district.*

Yes – under the proposed standard, districts that are not majority-minority may still be in a position to elect their preferred candidate of choice. As I read the new, or perhaps more accurately, restorative standard, it does not lock in current racial percentages, nor does it place primary importance on protecting “majority-minority” districts as a bright-line test. The percentage of racial minority residents in a district does not, in and of itself, mean that a minority group will or will not be able to elect its candidate of choice. In some jurisdictions, minority populations below 50% will still allow for the election of their candidate of choice; in other jurisdictions the percentage

may need to be higher. A recent example of a district that is not “majority minority” but was able to elect its candidate of choice is the Twelfth District of North Carolina that recently re-elected Mel Watt, Chairman of the Congressional Black Caucus, to the House of Representatives. Congressman Watt, who has been a key Congressional sponsor of the VRA’s renewal bill, was recently re-elected by a district that is approximately 44% black and 44% white.¹ This district presents an example of a successful “coalition district” within the meaning of *Georgia v. Ashcroft* that is not majority-minority.

3. *Under the proposed bill, must a preferred candidate of choice be a minority? If not, please explain and give an example of a non-minority who is the preferred candidate of choice for minority voters under the pre-Georgia v. Ashcroft standard.*

No. Under the proposed bill you can often, but not necessarily predict that the candidate of choice will be a minority. It is my understanding that Lloyd Doggett in the 25th Congressional District of Texas is a “non-minority preferred candidate of choice” of minority voters.

¹ MICHAEL BARONE & RICHARD E. COHEN, EDS. THE ALMANAC OF AMERICAN POLITICS 2006 1278 (2006).

Response of Professor Drew S. Days, Alfred M. Rankin Professor of Law, Yale Law School, to Stuart Taylor's May 15th Article "More Racial Gerrymanders"

The Stuart Taylor article "More Racial Gerrymanders," published in the May 15th edition of the *National Law Journal*, and described by Senator Hatch during the May 17th, Judiciary Committee hearing restates a number of the common misconceptions about the operation and effects of Section 5. I appreciate the opportunity to clear up some of these misconceptions that may have facial appeal but that fail upon closer scrutiny. I hope to provide you, in contrast, with a more accurate picture of the reality of how Section 5 operates based upon my experience and analysis.

Taylor makes three main claims. First, he claims that Section 5 is "much misunderstood" and "would turn back the clock on racial progress by requiring more racial gerrymandering of election districts than under current law." Second, he claims that these purported "racial gerrymanders" distort district lines to create majority-minority districts that have the effect of increasing partisanship in the House, electing more liberal Democrats and more conservative Republicans. Third, he argues that "the ideological obsessions of the civil rights lobby" cause it to fail to recognize that racially polarized voting is a thing of the past, and that the discrimination that the VRA is designed to remediate is now confined to "scattered localities where old-fashioned racism remains strong." Each of these arguments is rooted in Mr. Taylor's own misunderstanding of both the operation of Section 5 itself as well as the history and ongoing nature of the violations that it is Section 5's purpose to remediate. His claim about the declining role of polarized voting is demonstrably false as the record before Congress illustrates. I will address each of the claims in turn.

Section 5 Does Not Require "Racial Gerrymanders" or Majority-Minority Districts

The article is built on the premise that Section 5 has either the purpose or the effect of creating what he characterizes as "racial gerrymanders"—districts that are unnaturally and unnecessarily packed with minority voters. To appreciate why this premise is false, one must start from an understanding, largely absent in his critique, that American politics did not begin from a baseline of racial fairness that was interrupted by the historic bi-partisan passage of the VRA. Instead, there is, now as in the past, intense racial residential segregation in the United States, caused by the legacy of slavery, Jim Crow, redlining and other factors. As my Yale Law School colleague Owen Fiss has written:

"State complicity in the creation of the ghetto has taken various forms. Some of the state's responsibility derives from the failure, for most of our history, to prevent acts of discrimination and violence aimed at keeping blacks out of white neighborhoods. In other instances the state played a more active role, for example, by enacting racial zoning ordinances or enforcing racially restrictive covenants. Though these practices were outlawed—the first in 1917, the second in 1948—they played a crucial role in the formation of the black ghetto The means by which

residential segregation has been established and maintained in the United States . . . are sinister, and their effects as lasting, as Jim Crow segregation in the South, especially when coupled with the country's traditional economic and social policies."¹

Given the intersection of this racial segregation, population density, and a national preference for single member election districts, one would have expected that some districts, fairly drawn, would place minorities in the position of the electoral majority, and thus provide the opportunity to elect at least some African-American representatives. But for nearly a century, in the Deep South, this expectation went unrealized. From the end of the Nineteenth Century until the mid-1980s or in some states the early 1990s, well past the time of the most recent renewal of the Voting Rights Act, not a single black was elected to Congress from Louisiana, Mississippi, Alabama, South Carolina, North Carolina, or Virginia.² Slightly earlier, in the 1970s, black voters were able to elect one black representative in Georgia and two in Texas.³ In many of the rest of the Southern states covered in their entirety by Section 5, it was not until after the most recent VRA reauthorization that a single black representative was elected. For most of a century, and in some states for over a century, racially discriminatory practices thwarted the ability of black voters to elect even a single black representative. While Taylor focuses his criticism on and draws conclusions from the VRA's impact on Congressional redistricting (which is a comparatively minor aspect of the Section 5 story), he ignores the import of Section 5 at the local level, where it is particularly effective, and where many problems still persist. Section 5 of the Voting Rights Act, far from being "misunderstood," clearly serves to prevent vote dilution practices through which district lines were widely used to "fragment" cohesive minority communities or "pack" them—that's the very harm over which Taylor is so concerned—into a too few districts. In this way, the VRA ensures greater political fairness for all citizens, and enhances rather than erodes our democracy. These are among the factors that have led the Voting Rights Act to be widely regarded as the single most successful piece of Civil Rights legislation ever passed.

The remedial role of Section 5 can best be understood against this backdrop. Over time, Section 5 has helped minority voters escape voter disenfranchisement and dilution, and thus to approach something closer to political fairness, by requiring that districts be drawn to ensure that minority voters have the opportunity to elect candidates of their choice. But make no mistake: minorities still are dramatically under-represented in Congress. The end result of what Taylor and others call "racial gerrymandering" is that, according to one recent study, African Americans now comprise 7.5% of Congress, as compared to almost 12.9% of the population; Latinos comprise 4.7% of Congress, as

¹ Owen Fiss, *A Way Out: America's Ghettos and the Legacy of Racism* (2003) at 37-38.

² See Amicus Curiae Brief of the Congressional Black Caucus, *United States v. Hays et al.*, 515 U.S. 737 (1995), at Appendix A (LA 113 years (1990), MS 104 years (1987), AL 118 years (1993), SC 96 years (1993), AL 118 years (1993), NC 92 years (1993), VA 103 years (1993)).

³ In Georgia, Andrew Young was elected in 1973; in Texas, Barbara Jordan and Mickey Leland were elected in the 1970s. *Id.*

compared to 12.5% of the population.⁴ Minorities in fact remain *under*-represented in Congress, and also in nearly all state legislatures.⁵ It is difficult to understand how the renewal of an “anti-backsliding provision” like Section 5 would serve to “turn back the clock.” Given these facts, Tyler’s use of the phrase seems particularly misplaced.

The Voting Rights Act does not demand proportional representation nor do I argue that it should. I note the above-cited figures, however, in order to illustrate that it is a gross misreading not only of history, but also of the current state of minority representation in America, to pretend that “racial gerrymandering” has distorted our politics by *over*-representing minorities. In view of the well documented history of persistent voting discrimination,⁶ it seems, a gross exaggeration, at best, for Taylor to blame our nation’s recent experiment in legislative diversity for Congress’s institutional failings. We do not face a Hobson’s choice that pits diverse legislatures, on the one hand, against more monolithic but enlightened bodies on the other. Nor can we sacrifice the political fairness to which our Constitution and history commit us to the pursuit of what would prove, if Tyler’s advice were heeded, to be elusive partisan balancing.

Additionally, in contrast to the overwhelming majority of white electoral districts nationwide, the VRA-protected Congressional districts are not racially segregated enclaves of minorities: in fact, they tend to be among the most diverse districts in the United States. Characterizing these comparatively closely balanced minority opportunity districts—such as those from which the members of the Congressional Black Caucus in covered jurisdictions in the South are elected—as “racial gerrymanders,” and districts that share a similar racial balance but tip more comfortably toward the white majority as “more racially integrated,” raises questions about what principle guides Tyler’s vision of “integration.” The practice of evaluating claims of minority vote dilution is a nuanced process, not a mechanical one, in which DOJ attorneys engage in careful case-by-case analysis.⁷ The crucial consideration, as Nate Persily and others pointed out at the hearings, is not “majority-minority” but “opportunity to elect”: what the VRA demands is nothing more or less than the opportunity for minority voters to elect candidates of their choice.

In every debate about the Voting Rights Act, and certainly in the reauthorization 25 years ago, opponents regularly misunderstand or misstate its purpose, treating it as a mechanism for separation or exclusion. In fact, the Act elevates political inclusion as a value in a system where political exclusion was the rule. To treat the current gains by blacks and other minorities as a the product of a pathology that causes political problems—partisanship or anything else—is to undermine the very gains that have given

⁴ Carol Hardy-Fanta et al., *Race, Gender, and Descriptive Representation: An Exploratory View of Multicultural Elected Leadership in the United States*, Paper Delivered to the 2005 American Political Science Association, September 4, 2005, at 7.

⁵ *Id.* at 8. The only state legislatures in which African Americans are *not* under-represented are states that lie partly or entirely outside Section 5: Ohio, Illinois, and Florida.

⁶ See generally Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the United States* (2000).

⁷ See Mark A. Posner, *The Real Story Behind the Justice Department’s Implementation of Section 5 of the VRA: Vigorous Enforcement, As Intended By Congress*, 1 DUKE J. CON. LAW & PUB. POL’Y 120 (2006).

minorities a serious foothold in the political life of the nation for the first time after centuries of exclusion.

The VRA Should Not Be Blamed for Today's Partisan Atmosphere

The article suggests that the inclusionary changes that have brought blacks, and other minorities, some representation in Congress have also caused increased partisanship in the House. This argument is oft-repeated but remains unsubstantiated. Offered in this conclusory way, it lays at the feet of black voters not only the supposed pathology of their own political views (which Taylor assumes are too liberal), but also the blame for what he perceives as the Republicans' partisanship and extremism. The theory is a version of the so-called "perverse effects" theory, which argues that VRA-created districts generate pro-Republican gerrymanders, and that these Republicans then vote against the interests of the minority voters whose electoral power the Act was intended to protect. Indeed, Taylor makes this claim as well. Interestingly, this theory effectively excuses the Democratic party from any responsibility for losses that may be attributable instead to that party's failures to sharpen its message or appeal.

The trouble with the perverse effects theory is that it simply does not appear to bear the tremendous weight that its proponents foist upon it. In the immediate wake of the 1994 elections, in which Republicans took control of Congress, a great deal of ink was spilled detailing perverse effects explanations and attempting to blame the VRA for Democrats' defeat. But more recent empirical work has shown that the initial wave of studies relied on various false assumptions.⁸ One recent study found that "there is no significant difference in the level of partisan bias observed under redistricting plans with majority-minority districts and those without majority-minority districts. The claim that majority-minority districting has 'perverse effects' is not supported by the data."⁹

This is not to say that the Republicans have reaped no political gains at the margins from the Voting Rights Act's protection of minority votes—but it seems plain that Democrats can make the case for benefits as well. I want to caution against the very common misconception that these partisan effects are highly significant, or account for any significant portion of either the political balance in the House, or the level of partisanship. One of the most comprehensive studies of the 1990 round of redistricting found that as few as two, and at the most five, of the Congressional seats that went from Democratic to Republican in 1994 were directly attributable to changes in the racial composition of districts.¹⁰ The basic reason that Republicans gained seats in 1994 was that they received more votes.¹¹ The impact of the VRA on that year of political change

⁸ Delia Grigg and Jonathan N. Katz, *The Impact of Majority- Minority Districts on Congressional Elections*, Midwest Political Science Association, April 7-10, 2005, at 1.

⁹ *Id.*

¹⁰ Bernard Grofman and Lisa Handley, *Estimating the Impact of Voting-Rights-Related Districting on Democratic Strength in the U.S. House of Representatives*, in Bernard Grofman, ed., *Race and Redistricting in the 1990s* (1998) at 56-57.

¹¹ Richard L. Engstrom, *Race and Southern Politics: The Special Case of Congressional Redistricting*, in Robert P. Steed and Laurence W. Westmoreland, *Writing Southern Politics: Contemporary Interpretations and Future Directions* (2006), at 106.

has been greatly exaggerated.¹² Similarly, while the VRA is a convenient scapegoat for the current era of increased political partisanship, it obviously cannot explain increased levels of partisanship in the Senate. Nor should the VRA be blamed for the successful partisan gerrymanders that computer technology has recently allowed enterprising political partisans to use to draw maps that more accurately protect their incumbents, rendering fewer races competitive and potentially increasing partisanship.

The Persistence Of False Claims About the Purported End of Racial Polarization

Taylor repeatedly implies that we now live in a racially harmonious world in which racial polarization is a thing of the past; he would have his readers believe that whites are always ready to vote for minority candidates, and that the ongoing remedial policies aimed at ending discrimination are *themselves* the main remaining obstacle to the realization of John Lewis' vision of "all-inclusive community where we would be able to forget about race and color, and see people as people, as human beings, just as citizens." This is news that would come as a surprise to minority candidates and voters.

Throughout my career, I have listened to those who oppose the continued enforcement of civil rights laws repeat the very familiar refrain that these laws have done their work and are no longer needed. I heard that message both before and since 1982. Unfortunately, this optimistic refrain remains at odds with reality. Unfortunately, racially polarized voting is alive and well in many jurisdictions, not just a "scattered" few.¹³ Out of 6,667 House elections in white majority districts between 1966 and 1996—including special elections—only 35 (0.52%) were ever won by blacks.¹⁴ During the 1980s and early 1990s, according to one comprehensive study, not a single black candidate won in a majority-white district in the South.¹⁵

Of course, as Taylor points out, it is sometimes possible for notable candidates like Bill Richardson in New Mexico and Douglas Wilder in Virginia to win white voters' support in a way that would have been unthinkable decades ago. This is a hopeful development. But these cases are notable, and so widely discussed, precisely because they are still so very rare. It is not an accident that 74% (8,798 out of 11,867) of the non-white elected officials in 2003 were elected from VRA-protected districts.¹⁶ Indeed, in the same year that Douglas Wilder was elected in Virginia, 1989, David Duke won his

¹² *Id.* at 97-111.

¹³ See e.g. *The Voting Rights Act: The Continuing Need for Section 5: Hearing before the H. Comm. on the Judiciary*, 109th Cong. (October 25, 2005) (testimony of Prof. Richard L. Engstrom) (noting the continued presence of racially polarized voting throughout the covered southern states during the last round of redistricting, following the 2000 census); *The Continuing Need for Section 5 Preclearance: Hearing before the Senate Comm. on the Judiciary*, 109th Cong. (16 May 2006) (Written Responses from Prof. Theodore S. Arrington) (noting that throughout covered jurisdictions in the south, the effects of historical and current racial discrimination in voting echo to this day).

¹⁴ David Cannon, *Race, Redistricting, and Representation: The Unintended Consequences of Black Majority Districts*. Chicago: University of Chicago, 1999.

¹⁵ *Id.*

¹⁶ Hardy-Fanta et al., *supra* note 4, at 17.

seat in the Louisiana state house; he attracted majorities of white voters in credible statewide campaigns for both Senator and Governor in 1990 and 1991.¹⁷

Taylor argues that only “scattered localities” continue to discriminate against minorities. Although claims of this kind are widely repeated, there is strong direct evidence of the continued violations of African American, Latino, Native American, and Asian-American voting rights. When I look today at the record of post-1982 cases under Section 2 and objections under Section 5—as well as the record of voting changes withdrawn after the DOJ asks a jurisdiction for more information, and the reports of discriminatory changes averted by the prospect of a Section 5 preclearance fight—I see a picture of ongoing discrimination regrettable reminiscent of what I saw when I headed the Civil Rights Division. Yes there has been progress, which I and other supporters of the VRA welcome, but the fact that voting discrimination persists forty-one years after passage of the Act is itself powerful evidence of the deep-seated nature of the problem. It does not appear to me that Taylor’s article adequately accounts for either the history, or persistence of the efforts to dilute the electoral power of minority voters. He sees instead the accumulation of this evidence as a “huge research effort by the civil-rights lobby to find and magnify such evidence.” The effort may be huge, but in my experience, there has been no need to “magnify” anything: the evidence speaks for itself. What took “effort” was simply the immensity of the task: cataloguing the great volume of continued incidents of discrimination over a 25-year period.

Taylor cites John Lewis for his vision of an “all-inclusive community where we would be able to forget about race and color, and see people as people, as human beings, just as citizens.” It is important to consider what this vision does and does not mean. John Lewis’s goal remains the guiding principle of civil rights enforcement. We are not there yet. We will not get any closer to this goal by pretending we have reached it and abandoning the quest mid-stream. Achieving the “all-inclusive community” will require reauthorizing and continuing to enforce our civil rights laws, particularly Section 5. It is that provision’s unusual remedial power that offers genuine promise that minority voters will be brought still closer to fair levels of representation and political power.

¹⁷ Debo Adegbile, *Voting Rights in Louisiana 1982-2006* (March 2006) (report submitted to the H. Comm. on the Judiciary on Mar. 8, 2006), at 10.

D · A · W

D E R F N E R
A L T M A N &
W I L B O R N

July 17, 2006

The Honorable Senator Arlen Specter
Committee on the Judiciary
United States Senate
Washington, DC 20510-6275

Dear Senator Specter:

It was a pleasure to appear before your Committee on May 17, 2006, to provide testimony on the Voting Rights Act. The Committee staff were very helpful in every respect.

Thank you for that opportunity to testify, and than you also for the opportunity to respond to supplemental questions posed by several members of the Committee. Attached to this letter are my responses to the questions of Sens. Cornyn, Coburn, Leahy, Kennedy and Schumer. Also attached is a law review article published this year in the South Carolina Law Review, that I believe will be very informative to the Committee.

Finally, Senator Hatch asked each witness who testified on May 17 to comment on an article by Stuart Taylor. I responded to that request in a letter directly to Sen. Hatch, and I am attaching to this letter a copy of my letter to Sen. Hatch.

With best regards.

Sincerely,

Armand Derfner



AD/sah
Enclosure

Armand Derfner
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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.*

If the question is meant to suggest that Congress has a constitutional obligation to find a significant difference today between covered and non-covered jurisdictions, I do not agree. Congress' task under cases like *City of Boerne v. Flores* is to determine whether the record shows a continuing need for the section 5 remedy in the jurisdictions where it has been held to be appropriate thus far. The record presented in support of the current reauthorization bill clearly does that.

There are several forms of empirical data that show that Congress has more than met its burden under *Boerne* for the covered jurisdictions, data which also indicates differences between the covered jurisdictions and other jurisdictions. These data include items such as: the number of successful Section 2 cases; court findings of high levels of racially polarized voting that interact with certain election methods and procedures to deny minorities equal opportunities to elect their candidates of choice; successful Section 5 enforcement actions; and the Justice Department's Section 5 objections, More Information Requests, and resulting withdrawals of discriminatory voting changes. The Senate has received thousands of pages of empirical evidence supporting reauthorization. The fourteen state reports and the ACLU's summary of its litigation (some of which were cases I participated in), among other sources, describes this evidence in detail.

I will provide one example to illustrate the continuing need for Section 5 in one of the covered jurisdictions, my home state of South Carolina. Just two years ago, the South Carolina General Assembly – Senators and Representatives from the entire State – voted to adopt for the Charleston County School Board the precise election method that a federal court had already held was racially discriminatory. The school board bill was widely recognized to be discriminatory. The Justice Department objected to the new law under section 5 of the Voting Rights Act. I have searched in vain in non-covered states for examples of such blatant efforts to

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adopt laws that were known to discriminate on account of race, particularly so closely on the heels of a federal court decision striking down the same method of election.

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 & 2004, instead of 1964, 1968, and 1972? Why or why not?*
- a. No. The trigger is not a routine remedy for low voter participation. Rather, we have had a historical malignancy of discrimination with regard to the right to vote, and the trigger (a literacy test combined with low voter turnout) was designed as a litmus test to see where the malignancy was present in 1964, 1968 and 1972. Based on the records before Congress at those times, the litmus test was remarkably accurate in pinpointing those places where the malignancy existed and in generally leaving alone those places where it did not. Thus, the purpose of the original triggers has no logical connection with mere showings of low voter participation in a particular recent election in a given jurisdiction.
- As discussed in my response to the first question, Congress has developed an extensive record showing the persistence of voting discrimination in the covered jurisdictions.
- 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 jurisdiction that have begun discriminating since the 1970s? Why or why not?*
- b. No. There is no showing of any general rise in non-covered jurisdictions of discrimination serious enough to make the special provisions of the Act generally applicable. If there is a specific showing of such discrimination in a particular case, section 3(c) authorizes a court to impose such remedies in a judicial order. Federal courts have not been reluctant to do so, adding Section 5 coverage to

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several states (Arkansas and New Mexico) and localities (Escambia County, Florida; Buffalo County, South Dakota; and Cicero, Illinois).

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?*

No. You have misunderstood what *Boerne* says in two ways. First, the Voting Rights Act identified then-current discrimination, so the question is not whether passing the Act in the first instance today would be justified, but whether the covered jurisdictions – which had engaged in such shameful conduct for a century – have changed enough to allow Congress to remove its protections. Secondly, the evidence on which Congress has acted in previous reauthorizations, and which it must judge now, is the evidence of continuing voting discrimination in the present and the very recent past (namely, since the last reauthorization in 1982). There is abundant evidence since 1982 of a need to continue protecting minority citizens in the covered jurisdictions from their own governments. Therefore, the evidence here is not 40 years old. There is a substantial record of discrimination that supports reauthorization using the existing trigger.

In 1894, Congress repealed most of the civil rights laws it had passed a quarter century before, believing or hoping that minority citizens in the southern states would have their rights protected. How tragically wrong Congress was! The 1894 repeal was followed by more than a half century of the most lawless conduct by state officials, a giant conspiracy to despoil the Constitution. Congress should beware of doing the same thing again. Evidence of current and recent voting discrimination in the covered jurisdictions demonstrates the real dangers of removing the most effective tool ever adopted to stop that discrimination.

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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?*

The example I gave above of the determination of the South Carolina General Assembly – two legislative houses representing the entire state – to enact discrimination is hardly an “anecdote.” To use that word trivializes the right to vote, and treats racial discrimination as a minor peccadillo. In any event, these “anecdotes” are backed up by numbers in my state, where in the last five years there have been nine Section 5 objections including: four discriminatory countywide redistricting plans; two annexations and the reduction in the size of an elected body that diminished minority voting power; a numbered post and majority vote requirement that would have prevented the election of the only successful Black candidate; and South Carolina’s enactment of the discriminatory method of election struck down in the Charleston County litigation.

Even if the quoted statistics are accurate, they would not be an excuse for scuttling the Act. Congress has been engaged in a painstaking examination of all the circumstances surrounding this fundamental issue, not looking for magic numbers. Bearing in mind that each objection is the equivalent of an injunction, these objections are part of the tapestry depicting a continuing major problem. Moreover, section 5, as a prophylactic, prevents many potentially discriminatory voting changes that never get reflected in an objection – for example, proposed changes that don’t get enacted or that are withdrawn in the face of requests for more information. In addition, the number of objections has been artificially reduced by the Supreme Court’s misreading of the Act in *Bossier Parish v. Reno*, which blocked objections even to changes that are grossly discriminatory in purpose.

Finally, many of the recent objections have involved statewide voting changes, thus having the broadest effect on the most voters. These statewide objections have prevented many sophisticated efforts to disenfranchise minority voters, as I have discussed above.

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

I do not agree with your premise that there is no clear differentiation. In any event, Congress has a duty under the 14th and 15th amendments to protect minority citizens from their own state and local governments. Where the evidence shows that such protection is still necessary, it would be irresponsible for Congress to scrimp on its protections. Congress can always end the protections at any time – and certainly the Senators and Representatives, all of whom come from states – will be alert to insure that protections go on no longer than necessary. In fact, the Act has a built-in look-and-see provision calling for a review after 15 years, which provides a perfect opportunity for a progress review.

We do not deal here with a transient problem, but with the most ingrained determination to discriminate, going back generations. Why would you and Congress be ready to abandon necessary protections before you have the clearest proof that the lessons have been *completely* learned? The record before Congress shows the contrary, and it is not surprising because this type of discrimination doesn't end overnight.

The Senate has developed a very fact-intensive record that supports re-authorization. The Court has made it clear that it is not going to second guess Congress's choice of a reasonable duration as long as this burden is met.

6. *Putting aside the constitutional questions with regard to overturning Georgia v. Ashcroft - I want a 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?*

I prefer to leave this answer to other witnesses who may be more familiar with the precise language being considered.

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SENATOR COBURN

1. *With the improved state of race relations in the US since 1965, including vastly improved minority voter registration and turnout, is the Section 4 trigger for coverage under Section 5 still appropriate to the proposed re-authorization of the Voting Rights Act?*

Yes, for the reasons in my responses to Senator Cornyn's questions 2 and 3.

2. *If the trigger is to be maintained as 1972 presidential election participation, is it appropriate to extend coverage for 25 years?*

Yes, for the reasons in my responses to Senators Cornyn's questions 2 and 3.

3. *Are there alternative conceptualizations of the trigger that might address concerns of critics who wish to update the trigger, while also alleviating the concerns of "backsliding" if the trigger is updated from 1972?*

I have considered possible alternatives, without finding any.

4. *Does leaving the trigger unchanged increase the likelihood that a reauthorization until 2031 will be struck down by the Supreme Court?*

No. In considering the length of time that the special provisions of Act will have been in effect, the Supreme Court will be aware that racial discrimination has been part of the backbone of our Nation and has affected every aspect of individual and national life. To expect that a problem as serious as voting discrimination – so ingrained for so many generations – can be solved in a few decades is simply being unrealistic or disingenuous. The persistence of voting discrimination in the covered states since 1982, as demonstrated by Congress's substantial record supporting reauthorization, confirms this point.

In *Louisiana v. United States*, 380 U.S. 145 (1965), the Supreme Court held that courts have "not only the power but the duty" to eliminate discrimination of the past and prevent its recurrence in the future." Congress, a coordinate branch of government, has an equal power and duty under the Constitution, and its evaluation of its own constitutional obligation is entitled to the Court's respect.

5. *Please discuss how a possible broad-based "bailout" of covered jurisdictions might be*

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implemented?

I do not see any need for a "broad-based" bailout when the current bailout has not proved to be an obstacle.

6. *Are there alternative conceptualizations of the bailout provision that would increase the opportunity for a jurisdiction to succeed in a bailout attempt?*

I do not see a need for any such.

7. *In the Unofficial Transcript of the hearing on May 16, 2006, page 35-36, Professor Pam Karlan said in reference to Georgia's redistricting plan at issue in Georgia v. Ashcroft, that the Department of Justice "got it right" because two of the white Democrats elected under the new plan switched party affiliation and became Republicans. She said "Now I am sure that the Republicans in Georgia are very fair folks, but those black voters have no influence in those districts." Do you agree with Professor Karlan's assertion that minority voters in Republican districts "have no influence"?*

Professor Karlan's comment obviously applied to the two districts in question, and as to them her point is self-evidently correct: if minority voters had significant influence in those districts, the two elected officials would doubtless not have changed parties after being elected with black voters' support.

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SENATOR LEAHY

1. *Mr. Derfner, in your testimony you noted that opponents of minority voting have "simply shifted from denial to abridgement of the right to vote." Can you explain how the barriers have changed throughout your many years litigating VRA cases and whether the legislation we are considering is flexible enough to protect against these ever-evolving tactics?*

After literacy tests were banned and federal examiners put an end to outright denial of the right to register and vote, the tactics shifted to methods of abridgement, sometimes called dilution, which aimed at limiting the effectiveness of black voters. Much of this was what could be called "rigging" elections, such as shifting to at-large elections so that black voters who were a majority in some areas of the city or county but a minority overall would be unable to win any seats on the city or county council. The Supreme Court took note of the shift in approach in the early Voting Rights Act cases, including *Allen v. State Board of Elections* (1969), and *Perkins v. Matthews* (1971).

In those cases, the Supreme Court held that Section 5 was broad enough to cover these methods, which could be just as effective in limiting minority voters' rights as outright denial. That is the genius of Section 5. It did not aim at specific tactics, but was a broad prophylactic measure. In effect, Congress said "we don't know exactly what you will try next, but whatever it is, we'll be ready." That is why Section 5 has adapted to meet new methods of discrimination, and what we have learned under Section 5 has been of great value in other areas of the law. Earlier voting laws, such as the Civil Rights Acts of 1957 and 1960, were ineffective because they dealt only with specific problems, and it was easy for state and local officials to come up with new tactics to sidestep the laws. The drafting of section 5 to sweep broadly at any voting change was necessitated by that lawless pattern of conduct by officials in the covered jurisdictions.

2. *Your testimony is full of concrete examples of continuing discrimination and abridgement of the right to vote in South Carolina. In your professional opinion, what are the benefits of Section 5's pre-clearance process? And is Section 2 litigation a sufficient substitute?*

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Section 5 not only prevents discrimination in advance, without requiring burdensome litigation by the victims, but it also encourages compliance with the Constitution, because government officials in the covered jurisdictions have to keep Section 5 constantly in mind as they consider voting legislation or changes.

Section 2 is not an adequate substitute because it puts the burden on the victim. Unlike Section 5, Section 2 allows the discriminatory voting change to go into effect. In addition, Section 2 cases are expensive and time-consuming to litigate and hard to win. The Federal Judicial Center studies the complexity of different types of cases, and has reported that voting cases rank near the top of all civil cases in complexity. See 2004 Case-Weights Study, Appendix Y, Table 1. In my recent Charleston County case, the County spent over \$2,000,000 defending the case, and we had to put in over 2000 hours representing the plaintiffs, in addition to many more hours that the Justice Department put in. Lay persons may not be fully aware of the realities and burdens of litigation, but they are real.

Those who would narrow or do away with Section 5 often claim, without support, that Section 5 is not needed because other litigation will do the job. A stark example of this kind of naked assertion is Justice Scalia's statement in *Reno v. Bossier Parish School Board*, 528 U.S. 320, 337 n.6 (2000), that if a covered state had passed a "good moral character" test in 1965, "it would have been precluded from doing so under Section 4, which bans certain types of voting tests and devices altogether, and the issue of Section 5 preclearance would therefore never have arisen." Of course, Section 4 does not "ban" or "preclude" anything unless someone brings a lawsuit and gets an injunction. (Justice Scalia may not have been aware that laws do not enforce themselves.) The whole point of Section 5 – which Justice Scalia says would "never have arisen" – was to nip such discriminatory laws in the bud without requiring a burdensome lawsuit. Moreover, even Section 4 lawsuits were burdensome. For example, the suit to require Louisiana to comply with the Voting Rights Act continued on for nearly two years after the Act was passed and more than a year after the Supreme Court's decision in *South Carolina v. Katzenbach*.

3. *From your experience working with state and local officials on VRA compliance, do you have a sense of the burdens imposed under Section 5? Do the burdens outweigh the benefits in your opinion?*

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The burden is not great, and is invariably a tiny fraction of the time needed to consider the voting change. I have represented or assisted a number of jurisdictions in making submissions, and the work is less than the paperwork associated with other state or federal regulations.

4. *Other witnesses have testified that racially polarized voting has subsided or is no longer an issue what we should consider in crafting legislation. What have you observed in the many voting rights cases you have litigated?*

My most recent experience is in South Carolina, where the federal court in *Colleton County v. McConnell*, the most recent statewide reapportionment case, found continuing, pervasive and universal racial polarization in voting. The same was found again in the Charleston County Council case, where even the defendant's statistical expert agreed that there was polarized voting. Even in non-partisan races, with no political party designations, the voting was completely racially polarized.

5. *Some witnesses have testified that Section 5 should be amended to include an exception to pre-clearance in covered jurisdiction for so-called "de minimis" voting changes, such as the relocation of a polling place. Do you agree that changes such as moving a polling place have such a minor effect of the ability of minority citizens to vote that they should not require pre-clearance? What is your opinion of such an exception?*

Such a change would open a wide gap in the Act's protections of minority voters. So-called "de minimis" changes are hardly that, because they are often the easiest to manipulate and have the most drastic impact. For example, in a recent election in Charleston County, a last minute polling place change helped affect the outcome, and the election had to be run over again.

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SENATOR KENNEDY

1. *Some of our witnesses have told us that the percentage of Section 5 submissions resulting in Justice Department objections has been very low in recent years. In South Carolina, haven't there been quite a few Department of Justice objections since 2000? As a general matter, does an overall reduction in the percentage of objections mean that we no longer need Section 5?*

A report by John Ruoff and Herb Buhl shows at least nine objections in South Carolina in the past five years, which are summarized in my response to Senator Cornyn's fourth question. In fact, as I look at their list, the first two are objections to voting changes in Sumter County and Union County. I represented voters in successfully suing Union County in the 1970s and Sumter County in the 1980s, and yet here they are again. How long will it take my state to learn the lessons of the Voting Rights Act?

Second, a small number of objections does not mean the problem has gone away, but may simply mean the medicine (the Voting Rights Act) is effective. Almost no one gets diphtheria today, but we are not yet ready to stop giving our children diphtheria shots. On the other hand, we *have* stopped giving smallpox shots, but only because we are sure that smallpox has in fact been *completely* eradicated.

Finally, sometimes a single objection tells volumes. In 2004, South Carolina enacted state law adopting a known discriminatory method of elections for school board immediately after a federal court held that the same method of election discriminated against black voters in Charleston County. This is strong evidence that the South Carolina General Assembly – the statewide legislature – does not hesitate to discriminate, even by using such obvious and known discriminatory methods.

2. *Some witnesses suggested as exemption from Section 5 coverage for voting changes they view as minor, such as changes in polling place locations. Others suggest that preclearance for such local changes is even more important than for statewide changes. They argue that preclearance of statewide redistricting is unnecessary, because the political parties are certain to litigate any problems related to minority voters. In your view, what would be the impact of exempting so-called de minimis changes and/or*

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statewide changes from the preclearance requirements of Section 5?

Either one of these changes would cut the head or the tail off the Act. So-called "de minimis" changes are hardly that, because they are often the easiest to manipulate and have the most direct impact. For example, in Charleston County, a last minute polling place change helped affect the outcome, and the election had to be run over again.

At the other extreme, although it is true that statewide redistricting plans attract lots of attention, the political parties and other litigants have their own agendas which may not coincide with protecting the rights of minority voters.

An excellent law review article detailing the experience under section 5 shows how dangerous it would be to make snap judgments that one type of change or another can be excluded from section 5 coverage on the theory that it doesn't have "much" potential for damage. Peyton McCrary, *How the Voting Rights Act Works: Implementation of a Civil Rights Policy*, 57 U.S.C.L.REV. 785 (2006). I am taking the liberty of attaching this article to this statement, for the Committee's consideration.

3. *According to Dr. Thernstrom, the Voting Rights Act makes "sure that majority-black districts stay black" and creates "racially safe boroughs." Based upon the most recent round of redistricting in 2000, does the evidence support that argument? Why or why not?*

I do not know why I keep hearing this claim with no evidence ever offered in support. The districts that Dr. Thernstrom is complaining about are in fact the most racially integrated districts. For example, in my recent case involving Charleston County, the newly adopted single-member district plan has three majority-black districts, and these districts are 58%, 53% and 52% black. These are the most racially competitive districts we have ever had.

It is in fact the persistence of racial bloc voting, in jurisdictions where large numbers of white voters will not vote for a minority-preferred candidate – especially for candidates who are minority persons themselves – that makes it necessary to take account of race in drawing districts. The persistence of racial

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bloc voting is not assumed – as some believe – but has to be proved separately in each case. And the findings are strong, for example in the last South Carolina redistricting, *Colleton County v. McConnell*. Thus, it is the opponents of the Voting rights Act who make the unwarranted assumption: they assume that racial bloc voting has disappeared, and they charge that the Act creates divisiveness. But, as Professor Everett Carll Ladd testified, that is like believing that a fever causes a cold rather than the reverse. He said the divisiveness is there – as shown by the voting patterns – and drawing districts to bring all voters into the process reduces divisiveness rather than increasing or creating it.

4. *Dr. Thernstrom also contends that taking race into account in redistricting is "political exclusion - masquerading, of course, as inclusion." Do you agree with Dr. Thernstrom? Why or why not?*

She is wrong on two counts. First, race has always been taken into account by those who draw districts, but in the past it was done covertly for purposes of excluding or marginalizing minority voters.

The best evidence of this comes from the two periods, just before the coming of total disfranchisement in the late 19th century and just after the ending of total disfranchisement in the aftermath of the Voting Rights Act. In both periods, when white officials and politicians had to recognize that there would be black voters, the tactic of choice was racial manipulation of districts. In the late 19th century, South Carolina was carved up to put every conceivable black voter in a single district, to insure white control of the other districts. In this century, Mississippi's congressional district lines had been traditionally drawn from south to north, which meant that the Mississippi Delta was one congressional district. The Delta had a large black population majority. That was no "problem" as long as blacks couldn't vote in Mississippi. However, as soon as blacks started voting, and especially with the Voting Rights Act, that pattern made it too likely that black voters would control the "Delta district." Solution? Change the historic pattern so that the new congressional lines went from east to west, thus fragmenting the black population in the Delta.

Recognizing race in drawing districts limits politicians' ability to use it in this

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covert, discriminatory way.

Second, the evidence just does not support her rhetorical turn of phrase that this districting is exclusionary. Just ask white voters who live in Rep. James Clyburn's 6th Congressional District in South Carolina. They have never had such effective representation that is responsive to all voters, regardless of their race.

5. *Some have questioned whether the Voting Rights Act needs to be extended for twenty-five years. Can you explain why you believe the protections provided by the Voting Rights Act need to be extended for that period of time?*

Please see my response to Senator Cornyn's fifth question.

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SENATOR SCHUMER

The proposed reauthorization bill, S. 2703, 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. Some opponents to the bill have suggested that the pre-*Georgia v. Ashcroft* mandates racial gerrymandering in covered jurisdictions.

1. *Do you agree that the bill, as drafted, mandates racial gerrymandering?*

No. The Voting rights Act has always been designed to create "equal opportunity," that is, an equal opportunity for minority voters to nominate and elect candidates of their choice. That opportunity had to be realistic, but it was only that, an opportunity, not a racial gerrymander. The proposed bill is consistent with that meaning, and with the Supreme Court's rulings that race may be taken into account in drawing districts.

2. *Under the proposed 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? Is so, please explain and give an example of a district that is not majority-minority that could be considered an "ability to elect" district.*

The key again is a realistic opportunity to nominate and elect candidates of choice. In a district where, for example, the concrete evidence shows that racial bloc voting is not strong, or where there is a demonstrated history of coalitions across racial lines, minority voters who are numerically in the minority may have that realistic opportunity. These conditions must exist as fact, not just surmise, and be based on an intensely localized appraisal, to rely on them.

3. *Under the proposed bill, must a preferred candidate of choice be a majority? If not, please explain and give an example of a non-minority who is the preferred candidate of choice for minority voters under the pre-Georgia v. Ashcroft standard.*

No. If minority voters in a given district vote in favor of a non-minority

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candidate, he or she can be their candidate of choice. However, for this to be a realistic assessment, there must have been a real choice for the minority voters in casting their ballots. For example, if two white candidates are both unresponsive to minority voters, the mere fact that one of them wins more minority votes than the other (as will *inevitably* be the case) doesn't necessarily make that candidate the minority voters' candidate of choice.

D · A · W

D E R F N E R
A L T M A N N
W I L B O R N

July 17, 2006

The Honorable Senator Orrin Hatch
Committee on the Judiciary
United States Senate
Washington, DC 20510-6275

Dear Senator Hatch:

It was a pleasure to appear before the Senate Judiciary Committee on May 17, 2006, to testify about the Voting Rights Act. One of the best parts of testifying was the care and attention you gave to the issues.

You asked each of us to comment on Stuart Taylor's article in the National Journal on May 15, 2006. I read the article carefully, and then re-read it. Unfortunately, whatever serious issues Mr. Taylor raises are obscured by his redispotion that it is impossible to give a ready response. Just one example is enough to make my point: his treatment of the *Bossier Parish* cases.

In paragraph 13 of his article, he describes the original purpose of Section 5: "to prevent evasion by the state and local governments with the worst histories of suppressing the black vote." This is a goal he evidently approves.

Yet, eight paragraphs later, he points with obvious distaste to a provision in the pending bill which would reverse the Supreme Court's ruling in the *Bossier Parish* cases. He trivializes the issue by describing the *Bossier Parish* change simply as one the Justice Department "subjectively" found "unfair to minorities," and further dismisses it because minority voters "were no worse off than before."

Well, what was at issue in *Bossier Parish*? Before the Voting Rights Act, no black person had ever been elected to the Parish Council, and that situation remained unchanged into the 1990s, when it was undisputed that Parish Council members drew a new redistricting plan with the fixed purpose of guaranteeing that blacks would continue to be shut out. It is hard to imagine a clearer case of a Parish seeking to *evade* the Act which had enfranchised so many black voters, even though by insuring continuation of a white supremacy Council, the evasion left black voters "no worse off than before."

Senator Hatch
July 17, 2006
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One can debate whether the Supreme Court correctly interpreted the Act in the *Bossier Parish* case. One might even debate whether the Act should apply to a *Bossier Parish*-type of case of intentional discrimination. Mr. Taylor has done neither of these things. Instead, he has presented a skewed view of the facts that turns his article into propaganda more than analysis.

Again, Senator Hatch, it is always a pleasure to appear before you. Thank you for that opportunity and for the opportunity to comment on Stuart Taylor's article.

With best regards.

Sincerely,


Armand Derfner

AD/sah

RESPONSE OF FRED GRAY TO WRITTEN QUESTIONS FROM SEN. JOHN 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.

It is my understanding that the question of whether Section 5 should be renewed turns on whether or not there is still a demonstrable need for this important provision of the Act in the covered jurisdictions. Given this and given that my views are informed by my long experience litigating civil rights matters in the covered State of Alabama, I will briefly address the evidence in the record that speaks to continuing and persistent forms of discrimination in Alabama.

Since the 1982 reauthorization, the Department of Justice has interposed objections to forty-six submissions under Section 5. In addition, DOJ has deployed observers to monitor elections throughout Alabama sixty-seven times since the time of the last renewal.¹ Moreover, federal courts have found several times that the State of Alabama and/or its political subdivisions have engaged in intentional discrimination. Although improvements have been made that have provided minority voters with greater access to the political process, these gains are owed, in large part, to the protections provided under the Voting Rights Act. Given this evidence, in combination with persistent racially polarized voting, I believe that there is a sound basis for this Congress to renew the Section 5 preclearance requirement.

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?

¹ See generally Voting Rights in Alabama, 1982 – 2005 (unpublished manuscript)(forthcoming).

See response to Question #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 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?***

I believe that Congress has sweeping power and authority under the Fourteenth and Fifteenth Amendments to extend the expiring provisions of the Act.² Congress has exercised its 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, and should continue to exercise that authority today.³

Questions 2 and 3 appear to be in response to the Supreme Court’s ruling in *City of Boerne*. As my testimony did not specifically address the concerns of the *Boerne* Court, I will defer to the other witnesses and experts who have testified in this area. However, I will note that the *Boerne* Court recognized that the VRA was enacted to protect the right to vote against racial discrimination and found that Congress’ power was at its “zenith” when enacting remedial legislation that reaches problems of racial discrimination.⁴ In light of the breadth of these expressly granted Congressional powers under the Fourteenth and Fifteenth amendment and significant evidence in the record that illustrates the continuing need for Section 5, I believe that revisions to the coverage formula are not necessary.

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

² South Carolina v. Katzenbach, 383 U.S. 301, 315 (1966).

³ See U.S. Const. 14th Amendment, § 5; 15th Amendment, § 2.

⁴ Nevada Dep’t of Human Resources v. Hibbs, 538 U.S. 721, 735 (2003); see also Tennessee v. Lane, 541 U.S. 509, 529 (2004).

submissions. Is that sufficient to warrant Section 5 coverage? Why or why not?

As I noted above, the Department of Justice has interposed 46 objections to proposed voting changes in Alabama since the 1982 renewal. However, in my view, we cannot measure the success of Section 5 through objection statistics alone. For example, objection statistics do not reflect the success of the statute in providing leverage to minority elected officials who seek to ensure that the legislative process leads to the adoption of changes that do not put minority voters in a worse position. In addition, these statistics do not account for the many voting changes that were rescinded.

I have helped provide assistance to a number of jurisdictions that file submissions with the Justice Department pursuant to the preclearance requirements of Section 5. I know from my work with these jurisdictions that Section 5 has a strong deterrent effect and helps ensure that officials in these areas consider the impact of a particular change on the minority community before adopting it. In my experience, Section 5 has always served as a guidepost to help steer jurisdictions in the right direction to ensure that their legislative actions do not result in retrogressive and/or discriminatory voting practices that would worsen the position of minority voters.

Given the complexity of the Section 5 process, I believe that we must look beyond objection statistics in order to appreciate the impact that the preclearance requirement has had on helping ferret out retrogressive and discriminatory voting practices.

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?

My perspective is informed by over five decades of experience litigating some of the most seminal civil rights cases in the State of Alabama. Based on that experience, I recognize that Section 5 of the Voting Rights Act has been tremendously successful in barring many jurisdictions from implementing voting changes that would have otherwise placed minority voters in a worse position. Despite its success, the Department of Justice has interposed objections to various types of voting changes since the Act was last amended in 1982. Moreover, in those jurisdictions where minority voters and/or elected officials were able to help ensure that jurisdictions adopted non-retrogressive plans, Section 5 played a decisive role. Given my experience in the State of Alabama, I believe that Congress should extend the Act for an additional 25 years. This time period will help ensure that the Act is in place to provide leverage for minority elected officials seeking to ensure that their jurisdictions properly figure Section 5 requirements into their analysis when considering the adoption of voting changes. Most importantly, I believe that experience shows that 25 years provides a reasonable period for jurisdictions to properly comply with this mandate of the Act.

As a practical matter, some of Alabama's recent voting crises have taken many years to resolve. *Dillard v. Crenshaw County*⁵ led to changes from at-large to single-member districts for dozens of county commissions, school boards and municipalities. Filed in the 1980s, the litigation took over two decades in order to fully implement the protections of the Voting Rights Act around the state. I believe that these long struggles to resolve voting discrimination provide a sound basis for a 25 year renewal of the Act's expiring provisions.

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?

I support the language in the bill that will address the impact that the Supreme Court's ruling in *Georgia v. Ashcroft* on the effectiveness of the Section 5 preclearance process. In this case, the Court described an “influence district” as one in which 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.”⁶ I believe that this definition is unclear and will invite jurisdictions to eliminate those majority Black districts that have provided opportunities for minority voters to elect candidates of their choice. I think that this is particularly problematic given that Alabama still suffers from severe racially polarized voting.⁷ Only two African Americans have ever been elected to statewide office: the late Oscar Adams and Ralph Cook to the Alabama Supreme Court. Currently, no African American holds statewide office.

As for the question regarding influence districts, I am presently aware of a single example in the state legislature where an African American was elected from a district that is not majority Black. This district is 48% African American and, in my view, provides minority voters an opportunity to elect candidates of their choice. I believe that even these kinds of districts are subject to the protections of Section 5 of the Voting Rights Act.

⁵ *Dillard v. Crenshaw Co.*, 640 F. Supp. 1347 (M.D. Ala. 1986).

⁶ *Georgia v. Ashcroft*, 539 U.S. 461, 482 (2003).

⁷ *See, e.g., Dillard v. Baldwin County Commission*, 222 F. Supp.2d 1283, 1290 (M.D. Ala. 2002), *aff'd*, 376 F.3d 1260 (11th Cir. 2004).

RESPONSES OF FRED GRAY TO WRITTEN QUESTIONS OF SENATOR PATRICK LEAHY
May 23, 2006

1) *Mr. Gray, some have argued that Section 5 has been so successful that is no longer needed. You practice in a covered jurisdiction and have no doubt witnessed significant progress in minority participation and representation over the decades. I wonder if you have an opinion on the deterrent effect of Section 5 pre-clearance. Can a successful deterrent still be a success if it is no longer operational? Will softening or removing this successful deterrent risk the emergence of new abuses?*

As I noted during my testimony, I have witnessed Alabama move from a point in time where there were no black elected officials to the point where the state stands today with over 870 Black elected officials. This progress is attributable, in large part, to the success of the Voting Rights Act. Despite this progress, there are some facts that illustrate the continuing need for Section 5.

Since the 1982 renewal, the Department of Justice has interposed dozens of objections to proposed voting changes in Alabama. However, these numbers do not reflect the powerful deterrent effect that Section 5 has had in the political process. I have talked to officials from jurisdictions in Alabama who indicate that Section 5 serves as a guidepost that helps to ensure that they consider the impact that a voting change might have on minority voters. Section 5 helps to ensure that jurisdictions reach out to and solicit the input of minority elected officials in the process leading up to the adoption of a change. Indeed, we cannot underestimate this deterrent effect when talking about the role that Section 5 plays. Jurisdictions have expressed support for the Voting Rights Act; I attach resolutions passed by almost three dozen local jurisdictions in Alabama supporting reauthorization of the Voting Rights Act.¹

In addition, Section 5 often provides needed leverage to minority elected officials who seek to ensure that fellow legislators do not adopt changes that retrogress minority voting strength. Without this capital, many minority elected officials would be subject to the whim of the majority.

¹ Resolutions from the following jurisdictions are attached as Exhibit A: City of Andalusia, City of Ashland, Barbour County Commission, City of Birmingham, Bullock County Commission, Butler County Commission, Chambers County Commission, Clay County Board of Education, Clay County Commission, Township of Colony, Dallas County Commission, Elmore County Commission, Escambia County Commission, Etowah County Commission, City of Evergreen, Five Points, City of Florence, City of Gadsden, Town of Geiger, City of Goodwater, Houston County Commission, City of Huntsville, City of Jacksonville, Jefferson County Commission, City of Monroeville, Montgomery City Council, Town of Mt. Vernon, City of Opelika, City of Prattville, City of Russellville, City of Slocomb, Sumter County Commission, City of Union Springs, and Washington County Commission.

Finally, base objection statistics do not account for the many voting changes that were rescinded after the Department of Justice requested more information about the change. I have helped provide assistance to jurisdictions that file submissions with the Justice Department pursuant to the pre-clearance requirements of Section 5. I know from my work with these jurisdictions that Section 5 has a strong deterrent effect and helps to ensure that officials in these areas consider the impact of a particular change on the minority community before adopting it.

I believe that Section 5 has had a significant deterrent effect and that Congress should renew this expiring provision to help provide necessary guideposts to covered jurisdictions, provide leverage for minority elected officials seeking to prevent the adoption of retrogressive voting changes, and to help ensure that there is a mechanism in place to ferret out retrogressive and discriminatory voting practices.

2) In your view, what risks would we face to the progress we have made if we were to let Section 5 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?

Racial discrimination persists in the State of Alabama. This reality suggests that the gains made with respect to minority voting rights are extremely fragile and that Section 5 of the Voting Rights Act has played, and continues to play, a major role in helping secure and protect these rights.

As evidence of this persisting discrimination, I would like to highlight a recent voter referenda campaign to remove discriminatory language from Alabama's 1901 Constitution.² This effort was unsuccessful and thus, illustrates the racial challenges that continue to exist in Alabama. On November 2, 2004, voters defeated referenda that would have removed language requiring the racial segregation of schools, struck language inserted in 1956 as part of Alabama's massive resistance to federally imposed desegregation, and repealed the state's poll tax provisions.³ Despite the fact that well-settled Supreme Court precedent has rendered these state constitutional provisions unenforceable,⁴ and despite support on the part of the state's Republican Governor and other key leaders around the state, the referenda failed. Analysis conducted following the

² See generally Voting Rights in Alabama, 1982-2006 (unpublished manuscript)(forthcoming).

³ Ala. Act No. 2003-203; State of Alabama, Amended Certification Results, (Dec. 17, 2004), <http://www.sos.state.al.us/downloads/dl3.cfm?trgturl=election/2004/general/statecert-amendment2-recount-12-17-2004.pdf&trgtfile=statecert-amendment2-recount-12-17-2004.pdf>.

⁴ Brown v. Board of Education, 347 U.S. 483 (1954); Knight v. Alabama, 787 F. Supp. 1030 (N.D. Ala. 1991), *aff'd in relevant part*, 14 F.3d 1534 (11th Cir. 1994); United States v. Alabama, 252 F. Supp. 95 (M.D.Ala. 1966).

election revealed that very few white voters supported the referenda thus, illustrating the high levels of racial polarization that characterized the election.

In my view, this recent struggle in the State of Alabama illustrates that we have not solidified gains in minority voting rights and that without Section 5, there is the great potential for the type of backsliding that Congress sought to prohibit when it enacted the Voting Rights Act. If the Act was necessary in order to obtain these rights, certainly it is equally important, or more important, that the law continue in effect given persisting levels of racial discrimination in Alabama and other covered jurisdictions.

3) *In your professional opinion, what are the benefits of Section 5's pre-clearance process?*

Perhaps no benefit of the Section 5 preclearance process is more important than its deterrent effect in helping ensure that jurisdictions do not implement voting changes that will worsen the position of minority voters. In addition, the Section 5 preclearance process provides needed capital and leverage to minority elected officials seeking to work with other legislators to adopt changes and laws that will not impair minority voting strength. Finally, the preclearance process provides a guidepost for jurisdictions to help ensure that they appropriately weigh the concerns of minority voters when adopting changes and assess the likely impact of proposed changes on minority voters. Although this process has not been perfect, as illustrated by objections interposed by the Justice Department since 1982; recent litigation; and changes that are withdrawn or improved after jurisdictions receive formal letters requesting more information about a particular change, these benefits are tangible ones that would be lost were Congress not to renew Section 5 of the Act.

4) *During these hearing we have heard about the significant progress in minority representation and minority registration in your home state of Alabama. In your opinion, is racially polarized voting still a problem in Alabama? Why is this an important factor for us to consider?*

Voting remains extremely racially polarized in the State of Alabama.⁵ These patterns have been formally recognized on a statewide basis by the Department of Justice,⁶ experts who have testified in recent voting rights cases⁷ and in the judicial

⁵ See generally Voting Rights in Alabama, 1982-2006 (unpublished manuscript)(forthcoming).

⁶ Letter from John Dunne, Assistant Attorney General for Civil Rights, to Jimmy Evans, Attorney General of Alabama (Mar. 27, 1992) (Section 5 Objection Letter)

⁷ See Report of Gordon G. Henderson, PhD., Sinkfield defendants Exhibit 184, in Kelley v. Bennett and Sinkfield, 96 F.-Supp.2d 1301 (M.D. Ala.) (3-judge court), *rev'd on other grounds*, 531 U.S. 28 (2000).

findings of federal courts.⁸ As further evidence of this polarization is the fact that only two African Americans have ever been elected to statewide office in the State of Alabama. Although there are twenty-seven African Americans currently serving in the State House of Representatives and eight African Americans in the State Senate, all but one have been elected from majority-black districts. Where such polarization exists, it is important that “election systems and arrangements [] be able to provide equal opportunity for the minority voters to elect representatives of their choice.”⁹ Indeed, Section 5 has played an important role in the matrix of systems and arrangements that help secure minority voting rights by ensuring that jurisdictions do not adopt changes that would result in impermissible backsliding.

⁸ *White v. Alabama*, 867 F. Supp. 1519, 1552 (M.D. Ala. 1994), *vacated on other grounds*, 74 F.3d 1058 (11th Cir. 1996) (citing testimony of Dr. Gordon Henderson and Letter from Assistant Attorney General Deval L. Patrick to Alabama Attorney General Jimmy Evans, dated April 14, 1994 (file document no. 65), at 5); *Dillard v. Baldwin County Comm’n*, 222 F.Supp.2d 1283, 1290 (M.D. Ala. 2002), *aff’d*, 376 F.3d 1260 (11th Cir. 2004) (“The plaintiffs have shown that black citizens of Baldwin County still suffer from the racially polarized voting and from historically depressed conditions, economically and socially.”); *Wilson v. Jones*, 45 F. Supp.2d 945, 951 (S.D. Ala. 1999), *aff’d sub nom. Wilson v. Minor*, 220 F.3d 1297 (11th Cir. 2000) (acknowledging the weight given to polarized voting enhances the ability of African-American residents to elect representation of their choosing); *Dillard v. City of Greensboro*, 946 F. Supp.2d 946, 952 (M.D. Ala. 1996); *Dillard v. Town of Louisville*, 730 F. Supp. 1546, 1549 (M.D. Ala. 1990); *Dillard v. Town of Cuba*, 708 F. Supp. 1244, 1246 (M.D. Ala. 1988) (“Applying a principle known as ‘threshold of exclusion’”); *Dillard v. Chilton County Bd. of Educ.*, 699 F. Supp. 870, 874 (M.D. Ala. 1988), *aff’d* 868 F.2d 1274 (11th Cir. 1989) (table) (deciding that racially polarized voting in the county permits black residents to elect representation of their choosing); *Dillard v. Crenshaw County*, 649 F. Supp. 289, 295 (M.D. Ala.), *vacated on other grounds*, 831 F.2d 246 (11th Cir. 1986), *reaff’d*, 679 F. Supp. 1546 (M.D. Ala. 1988) (“the evidence reflects that racially polarized voting in Calhoun, Lawrence, and Pickens Counties is severe and persistent, and that this bloc voting has severely impaired the ability of blacks in three counties to elect representatives of their choice.”); *Clark v. Marengo County*, 623 F. Supp. 33, 37 (S.D. Ala. 1985); *Brown v. Bd. of Sch. Comm’rs of Mobile County, Alabama*, 542 F. Supp. 1078, 1091 (S.D. Ala. 1982), *aff’d*, 706 F.2d 1103 (11th Cir.), *aff’d*, 464 U.S. 1005 (1983) (examining previous cases permitting racially polarized voting); *Bolden v. City of Mobile*, 542 F. Supp. 1050, 1076-77 (conceding that racial bloc voting continues) (S.D. Ala. 1982).

⁹ See Reauthorization of the Voting Rights Act Before the Comm. on the Judiciary, 109th Cong. (2006) (statement of Theodore S. Arrington, Chair, Dept. of Political Science, University of North Carolina, Charlotte).

RESPONSE OF FRED GRAY TO WRITTEN QUESTIONS OF SENATOR TOM COBURN***1. With the improved state of race relations in the US since 1965, including vastly improved minority voter registration and turnout, is the Section 4 trigger for coverage under Section 5 still appropriate to the proposed reauthorization of the Voting Rights Act?***

In my view, the central question during these reauthorization hearings is whether there is still a demonstrable need for Section 5 in the covered jurisdictions. The history of discrimination that gave rise to the coverage formula helps us understand why Alabama and other states are today covered under this special provision of the Act. However, we must then look to see whether there is sufficient evidence of persisting voting discrimination today that warrants extension of the Act in these covered jurisdictions.¹

2. If the trigger is to be maintained as 1972 presidential election participation, is it appropriate to extend coverage for 25 years?

I do not believe that it is necessary to revise the coverage formula that identifies which jurisdictions are subject to coverage under the Act today. Further, given my experience litigating some of the major civil rights cases in the State of Alabama, I believe that Congress should extend the Act for an additional 25 years. This time period will help ensure that the Act is in place to provide political capital and leverage for minority elected officials seeking to make sure that jurisdictions properly incorporate the requirements of Section 5 into their analysis when enacting voting changes.

Moreover, I believe that experience shows that 25 years provides a reasonable period for jurisdictions to properly comply with this mandate of the Act. Some of Alabama's recent voting crises have taken many years to resolve. *Dillard v. Crenshaw County*² led to changes from at-large to single-member districts for dozens of county commissions, school boards and municipalities. Filed in the 1980s, the litigation took over two decades in order to fully implement the protections of the Voting Rights Act around the state.

3. Are there alternative conceptualizations of the trigger that might address concerns of critics who wish to update the trigger, while also alleviating the concerns of "backsliding" if the trigger is updated from 1972?

See response to Question 4.

4. Does leaving the trigger unchanged increase the likelihood that a reauthorization until 2031 will be struck down by the Supreme Court?

¹ 42 U.S.C. § 1973b.

² *Dillard v. Crenshaw Co.*, 640 F. Supp. 1347 (M.D. Ala. 1986).

Most of the concerns that have been expressed regarding the potential for a constitutional challenge to Section 5 stem from the Supreme Court's recent ruling in *City of Boerne*. In this case, the Supreme Court announced the new doctrine of "congruence and proportionality" which appears to place some limits on Congressional power under the Reconstruction Amendments by requiring that Congress develop a thorough legislative record before acting.³ Despite this new principle, I do not believe that the *Boerne* ruling places any clear limitations on Congressional power to enact prophylactic legislation that addresses issues of a racial dimension.⁴

The *Boerne* Court recognized that Congressional powers were at their "zenith" when enacting the VRA and noted that the Act, in its present form, exemplified Congress's enforcement power under the Reconstruction Amendments. Moreover, in *Lopez v. Monterey Co.*, 525 U.S. 266 (1999), the post-*Boerne* Court recognized that the Voting Rights Act "intrudes on state sovereignty" but noted that the "Fifteenth Amendment permits this intrusion."

Others have expressed concern regarding the trigger formula and the inclusion of certain presidential turnout figures that are currently incorporated into that formula. Opponents believe that these dates make Section 5 vulnerable to a legal challenge.⁵ However, unlike the legislation at issue in *Boerne*, Congress has here developed a substantive record of recent and persisting discrimination in Alabama and all other covered jurisdictions.

Because the coverage formula is appropriately complimented by evidence of continuing voting discrimination, I do not believe that Section 5, in its current form, would be vulnerable to a constitutional challenge.⁶ Moreover, because of the statutory safeguards that are built into the VRA, I do not believe that revision of the coverage formula is necessary as the bailout and bail-in safeguards (described in greater detail in Response #5) allow for change and revision where appropriate.

³ See *Lopez v. Monterey Co.*, 525 U.S. 266, 282-283 (1999) (citing *City of Boerne*, 521 U.S. at 518).

⁴ See *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003); *Tennessee v. Lane*, 541 U.S. 509, 529 (2004) (suggesting that where Congress acts to remedy problems in areas traditionally subject to higher judicial scrutiny, the sweep of its power is greater).

⁵ 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.

⁶ Moreover, in *Lopez v. Monterey Co.*, 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, 269.

5. Please discuss how a possible broad based “bailout” of covered jurisdictions might be implemented?

I do not support a broad based bailout option given the current framework of the Act. In my view, the Act is appropriately structured to allow for change and revision with respect to those jurisdictions that are covered under the Act. Specifically, the bail-in mechanism set forth in Section 3(c) and the bail-out mechanism set forth in Section 4(a) of the Act work to ensure that the scope of Section 5 is expanded or restricted, where appropriate. I believe that Congress sufficiently revised and liberalized these provisions of the Act during the 1982 reauthorization effort. I also believe that the bailout process is reasonable and achievable for any jurisdiction that might have a political process that is open to minority voter participation. Given these features of the Act, the broad-based bailout option suggested by this question appears unnecessary.

6. Are there alternative conceptualizations of the bailout provision that would increase the opportunity for a jurisdiction to succeed in a bailout attempt?

In my experience providing counsel to jurisdictions seeking to make Section 5 submissions to the Justice Department, the Department’s Guidelines have been very instructive as to the information that DOJ needs in order to review any proposed voting changes. These Guidelines identify specific information that jurisdictions must provide in order for their submission to be deemed complete and reviewable. Further, the Guidelines are written in easy to understand language that generally avoids “legalese.” I believe that similar Guidelines would be helpful for those jurisdictions that may want to consider taking advantage of the Act’s bailout provisions. Because there are steps that can be taken administratively to educate jurisdictions about the availability of the bailout option that is outlined in Section 4(a) of the Act, I believe that revision of this particular provision is unnecessary.

7. In the Unofficial Transcript of the hearing on May 16, 2006, page 35-36, Professor Pam Karlan said in reference to Georgia’s redistricting plan at issue in Georgia v. Ashcroft, that the Department of Justice “got it right” because two of the white Democrats elected under the new plan switched party affiliation and became Republicans. She said “Now I am sure that the Republicans in Georgia are very fair folks, but those black voters have no influence in those districts.” Do you agree with Professor Karlan’s assertion that minority voters in Republican districts “have no influence”?

I understood Professor Pamela Karlan’s statement to mean that there are problems with the “influence district” standard articulated in the Supreme Court’s *Georgia v. Ashcroft* ruling and that aspects of the Court’s opinion are hard to define. Indeed, it is

difficult to identify when the number of “influence districts” would suffice to replace a viable opportunity district or to identify when “influence operates in tandem with other factors such as the appointment of minorities to positions of power” to create a non-retrogressive outcome. The bill will restore the central feature of Section 5 analysis which looks to ensure that voting changes do not eliminate or reduce the number of districts that provide minority voters a tangible opportunity to elect candidates of their choice. Concerns of partisanship cloud this analysis and make it difficult to render clean preclearance determinations.

The retrogressive effect of a voting change has always been measured by looking to see whether or not the minority community’s ability to elect candidates of choice changes under the benchmark and proposed plans. In this regard, the bill restores the tangible “opportunity to elect” standard and does not allow jurisdictions to destroy or erode gains in minority voting strength under the intangible framework set forth by *Georgia v. Ashcroft*.⁷

As a final point, I note that there are instances in which minority voters may be vested with the ability to elect candidates of choice and these districts are and should remain protected under the Voting Rights Act. For example, there is currently a single state legislative district in Alabama, House District 85, that is 47.8% black, and in which the incumbent African-American member was re-elected in 2002. Certainly, this district provides minority voters an opportunity to elect candidates of their choice. Although this is the only non-majority Black district that provides such an opportunity statewide, this kind of district is subject to the protections of Section 5 of the Voting Rights Act.

⁷ *Id.*

RESPONSE OF FRED GRAY TO WRITTEN QUESTIONS OF SENATOR EDWARD M.
KENNEDY

Question 1

According to Dr. Thernstrom, the Voting Rights Act makes “sure that the majority-black districts stay black” and creates racially safe boroughs.” Based upon the most recent round of redistricting in 2000, does the evidence support Dr. Thernstrom’s argument? Why or why not?

Contrary to the views of Abigail Thernstrom, I am not aware of any provision in the Voting Rights Act that requires the maintenance of majority-minority districts that meet some particular threshold. The central inquiry in the Section 5 review process is whether or not the particular voting change places minority voters in a worse position. In the redistricting context, jurisdictions may satisfy the Section 5 preclearance requirement even where they have reduced the minority population percentage of a particular district. Moreover, districts that are not majority Black may be ones that provide minority voters an opportunity to elect candidates of their choice and these districts would be subject to protection under the Act. For example, there is currently a single state legislative district in Alabama, House District 85, that is 47.8% black, and in which the incumbent African-American member was re-elected in 2002.¹ Certainly, this district provides minority voters an opportunity to elect candidates of their choice. Although this is the only non-majority Black district that provides such an opportunity statewide, this kind of district is subject to protections of Section 5 of the Voting Rights Act. This particular example in the State of Alabama defies Thernstrom’s claims that the Act requires the maintenance of majority Black districts.

Despite this, there may be certain circumstances in which legislators may not be able to reduce the Black population percentage of a district because of persisting racial segregation which, in many places, is the legacy of slavery, Jim Crow and de jure discrimination. In other instances, legislators may draw plans that maintain such districts where they are balancing certain other districting criteria. Moreover, as a practical matter, many districts that provide an opportunity to elect a majority minority. This reality is attributable, in large part, to persisting racially polarized voting. Because of the unwillingness of white voters to extend support to Black candidates, and given lower turnout and registration rates among minorities, there is still a need to maintain majority Black districts.

Finally, Thernstrom suggests that districts that have minority population percentages above 50 percent are “racially safe boroughs” but does not apparently use such a label for majority white districts which represent the vast majority of local, state and federal districts in the covered jurisdictions.

¹ See Voting Rights in Alabama, 1982 – 2006 (unpublished manuscript)(forthcoming).

Question 2

Dr. Thernstrom contends that taking race into account in redistricting is “political exclusion-masquerading, of course, as inclusion.” Do you agree with Dr. Thernstrom? Why or why not?

I do not agree with this statement. There is firm evidence of the political exclusion of African Americans in the redistricting context. Section 5 of the VRA helps ensure inclusion by requiring that legislators be conscious and aware of the impact that these voting changes have on minority voters when undertaking the complex task of redistricting.

The assertion that considerations of race in the redistricting context have *caused* the marginalization of Blacks is false. Here, it is important that we distinguish between a cause and effect, as Thernstrom fails to do. Accounting for race in the redistricting context today is the *effect* or *result* of the historical exclusion of African-Americans from the political process. In the Section 5 process, race figures into the process by helping ensure that legislators weigh the impact of a proposed voting change on minority voters. The goal of this process is to bar implementation of those changes that result in impermissible backsliding or a retrogression of minority voting strength. The Section 5 review process and its consideration of race, along with other factors, has been upheld by the Supreme Court on several occasions.²

Question 3

Some have questioned whether the Voting Rights Act needs to be extended for twenty-five years. Can you explain why you believe the protections provided by the Voting Rights Act need to be extended for that period of time?

The extensive record compiled by the House and Senate, civil rights organizations, legal scholars, and congressional staff illustrates the continuing need for the expiring provisions of the Voting Rights Act. While the VRA has brought about marked change in the State of Alabama, and throughout other covered jurisdictions, there is still more work that needs to be done. Alabama still suffers from severe racially polarized voting, and jurisdictions continue to adopt voting changes that, if implemented, would have worsened the position of minority voters. For example, in 2000, the Justice Department objected to an annexation in the Town of Alabaster which would have eliminated the town’s only majority black district. In 1998, DOJ interposed an objection to the redistricting plan for Tallapoosa County Commission finding that the plan impaired the ability of black voters to elect a candidate of choice in order to protect a white incumbent.³ In addition, DOJ objected to the State Legislature’s 1992 congressional redistricting plan finding that fragmentation of cohesive black populations illustrated the “predisposition on the part of the state political leadership to limit black voting potential

² Lopez v. Monterey County, 525 U.S. 226 (1999).

³ DOJ Section 5 Objection letter from Bill Lann Lee, Feb. 6, 1998.

to a single district.”⁴ Finally, even in Selma – the birthplace of the Voting Rights Act – the Department of Justice has objected to redistricting plans as purposefully preventing African Americans from electing candidates of choice.⁵

Given my experience litigating some of the major civil rights cases in the State of Alabama, I believe that Congress should extend the Act for an additional 25 years. This time period will help ensure that the Act is in place to provide leverage for minority elected officials seeking to ensure that their jurisdictions properly incorporate the requirements of Section 5 into their analysis when enacting voting changes. Moreover, I believe that experience shows that 25 years provides a reasonable period for jurisdictions to properly comply with this mandate of the Act. Some of Alabama’s recent voting crises have taken many years to resolve. *Dillard v. Crenshaw County*⁶ led to changes from at-large to single-member districts for dozens of county commissions, school boards and municipalities. Filed in the 1980s, the litigation ultimately took over two decades in order to fully implement the protections of the Voting Rights Act around the state.

Although Alabama’s legacy of segregation and racism have weakened over time, there is still much work to be done. The Voting Rights Act is widely considered to be the gold standard of civil rights legislation, but successes that are directly attributable to this law should not and cannot provide the foundation for eliminating protection under that law.

⁴ DOJ Section 5 Objection letter from John Dunne, March 27, 1992.

⁵ See e.g., *Dillard v. Baldwin County Commission*, 222 F. Supp.2d 1283, 1290 (M.D. Ala. 2002), *aff’d*, 376 F.3d 1260 (11th Cir. 2004).

⁶ *Dillard v. Crenshaw Co.*, 640 F. Supp. 1347 (M.D. Ala. 1986).



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Nathaniel Persily
Professor of Law

June 13, 2006

VIA E-MAIL AND OVERNIGHT MAIL

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

Dear Senator Specter:

Attached please find supplemental testimony answering the written questions I received from your office in a letter dated May 26, 2006. In this supplement I have attempted to answer all of the written questions submitted by Senators Coburn, Cornyn, and Kennedy, as well as questions asked by Senator Hatch during the hearing held on May 17, 2006, at which I testified.

Please do not hesitate to contact me if I can provide further assistance to the Committee.

Sincerely yours,

Nathaniel Persily

**Supplemental Testimony of
Professor Nathaniel Persily
University of Pennsylvania School of Law**

**Submitted to the United States Senate Committee on the Judiciary in Response to
Written Questions Received from Senators Tom Coburn, John Cornyn and
Edward Kennedy**

Submitted June 13, 2006

I. Introduction

This supplement to my written testimony submitted on May 16, 2006, and oral testimony from May 17, 2006, answers written questions that I have received from Senators Tom Coburn, John Cornyn, and Edward Kennedy, and oral questions asked by Senator Orrin Hatch at the hearing on May 17, 2006. The questions fall into three general categories: (1) the relationship of the legal and political developments of the 1990s to the present reauthorization; (2) the meaning of the new, proposed standard for retrogression, otherwise known as the *Georgia v. Ashcroft* fix; and (3) the potential constitutional deficiencies of the proposed law and the legislative record accompanying it.

II. The recent legal and political evolution of section 5 of the Voting Rights Act

A. Legal changes

The 1990s witnessed a remarkable growth in the creation of majority-minority districts and the subsequent election of minority office holders. This growth occurred because of aggressive enforcement of section 5 of the Voting Rights Act (VRA) by the Department of Justice, coupled with the threat of litigation under section 2, as amended in 1982. The widespread creation of majority-minority districts for the United States House of Representatives following the 1990 census, for example, led to the election of an unprecedented number of African Americans (39 in 1993, as compared to 27 in 1991) and Hispanics (17 in 1993, as compared to 11 in 1991) to that body. The Department of Justice viewed the creation of these districts as flowing from its mandate under section 5 to deny preclearance to plans that had a *discriminatory* purpose or effect, regardless of whether the plan had the purpose or effect of making minorities worse off (that is, *retrogressing*). The result was an increase in minority percentages in a great number of districts, plus a subsequent series of court decisions that undercut the legal justifications for this interpretation of the VRA.

The Bossier Parish cases held that the DOJ had been applying the wrong interpretation of the VRA in requiring these districts. In *Reno v. Bossier Parish I*, 520 U.S. 471 (1997), the Supreme Court made clear that mere discriminatory effect, akin to that proven in a case brought under section 2 of the VRA, was not a sufficient basis for a preclearance denial. In other words, the Court held that illegal plans must still be precleared so long as they are not retrogressive. Similarly in *Reno v. Bossier Parish II*,

528 U.S. 320 (2000), the Court held that preclearance must be granted to plans with a mere discriminatory, but not retrogressive, intent. The result of these two decisions was to constrain greatly the capacity of DOJ to force the creation of majority-minority districts.

Even before the Bossier Parish cases, however, the Court had placed a constitutional constraint on the use of the VRA to create such districts. In *Shaw v. Reno*, 509 U.S. 630 (1993), and *Miller v. Johnson*, 515 U.S. 900 (1995), (and their progeny) the Court struck down districts in which it deemed race to be the predominant factor in their creation. Although leaving the door open to districts that were narrowly tailored to avoid a VRA violation and therefore would survive strict scrutiny, the Court issued a series of decisions that called into question the constitutionality of the districts that led to an unprecedented rise in the number of minority officeholders.

It is from these cases that we received the language Abigail Thornstrom quoted in her testimony concerning “political apartheid” and “segregation.” Despite the fact that many of the districts in those cases were the most integrated in the country (that is, hovering around 55 percent African American) and that whites were not underrepresented by the creation of such districts, the Court viewed them as expressing and calcifying racial stereotypes, particularly but not exclusively because of their bizarre shapes. Of course, no one could possibly think these districts are on a par with the violent and oppressive tactics of either the South African apartheid governments or the Jim Crow South. Nevertheless, the analogy to “homelands” persevered and remains part of our jurisprudence, even as the teeth of the *Shaw* cases may have been taken out by the Court’s decision in *Easley v. Cromartie*, 532 U.S. 234 (2001). That case declared that

one could create a majority-minority district or “its functional equivalent” and avoid triggering the strict scrutiny reserved for *Shaw*-violative districts if doing so was justified more by an appeal to the partisanship, rather than race, of the community in the district. Perhaps as a result of that case, as well as the fact that armed with the power of incumbency the officials elected from those districts did not need to pump up the racial minority percentages in their districts to the heights that were needed to elect them in an open seat, not a single *Shaw*-style case reached the Supreme Court from the 2000 round of redistricting until the Texas gerrymandering case, *League of United Latin American Citizens, et al. v. Perry*, that the Court is now considering.

The caselaw arising from the 1990s redistricting is relevant to the present debate over reauthorization because the decisions in *Bossier Parish I* and *Shaw* remain as constraints on potentially overzealous behavior in the preclearance process that some fear will result from the proposed bill. Therefore, in addition to the reasons discussed later concerning what I see as the proper interpretation of the *Ashcroft*-fix, the persistence of those precedents should allay the fears of racial gerrymandering expressed both in Abigail Thernstrom’s testimony and in Stuart Taylor’s article that Senator Hatch read during the hearing. See Stuart Taylor, “Opening Argument: More Racial Gerrymanders,” *National Journal*, May 13, 2006. The Court’s interpretation of the Equal Protection Clause and the boundaries of preclearance review under section 5 will prevent any single-minded focus on majority-minority districting as a result of the proposed bill.

With respect to the section of the bill overturning *Bossier Parish II* and establishing that preclearance may be denied because of discriminatory purpose, thus far I do not think anyone has raised any objection. Indeed, I have not yet heard someone

explain why the DOJ or U.S. District Court for the District of Columbia should allow voting changes with discriminatory purposes to take effect. Perhaps one might argue that partisan infection of the preclearance process will lead the DOJ to find discriminatory purposes where none exist or might lead them to adopt a maximization strategy for majority-minority districts, but such an argument is largely addressed in this context by the jurisdiction's right to seek review from the District Court and the constraints placed by the *Shaw* cases.

B. Related political changes

At the hearing, Senator Hatch voiced a widespread concern as to the effect of the Voting Rights Act on polarization in Congress. As the quoted Stuart Taylor article puts it, racial gerrymanders of the 1990s led to packed minority districts that elected liberal Democrats and led to the victories of conservative Republicans from the adjoining "bleached" districts. The aggressive creation of majority-minority districts thereby led to the demise of moderate Southern Democrats, increased homogeneity of the party caucuses, and produced a greater ideological distance between the average Democrat and Republican representative. This question touches on an active current debate among political scientists as to the cause of political polarization in the House of Representatives and other institutions of government.

My own view is that the DOJ-inspired redistricting of the 1990s accelerated what was an inevitable demise of the Democratic Party in the South. The conservative white Southern Democratic incumbents who lost their seats likely would have been replaced by conservative Republicans once they retired, if not long before. Draining their districts of

reliable black Democratic voters expedited their day of reckoning, but the Republican takeover of Southern politics loomed on the horizon. The increasing success of Republicans in statewide elections in the South attests to the rising Republican tide that swamped Southern Democrats in the 1990s, irrespective of how the districts were drawn.

Gerrymandering may be responsible for some of the widely recognized and maligned polarization in the House. In her recently published book, *Fight Club Politics: How Partisanship is Poisoning the U.S. House of Representatives* (Rowman and Littlefield, 2006), Juliet Eilperin blames gerrymandering, including racial gerrymandering, for the polarization in the House. Most critics who make the gerrymandering-polarization connection blame incumbent protection, in general, as opposed to minority districts in particular. See Morris Fiorina, *Culture War?: The Myth of a Polarized America* (Pearson, 2005). Fewer than 10 percent of House districts have been competitive in recent years, and while minority districts are particularly safe, the problem of incumbent protection, if it is one, is one widely shared by districts and incumbents of whatever race. Moreover, some of the safest minority districts are actually in the non-covered jurisdictions, in densely populated, compact urban areas.

Finally, the rising polarization in the ungerrymandered Senate undercuts the power of gerrymandering as a causal factor in explaining the growing distance between the two parties. It suggests that, perhaps, top-down pressures, such as increased party hierarchy and greater reliance on party fundraising, are the principle source of cohesion and polarization among partisans, rather than the bottom-up electoral forces of safe districts. The short answer is that we do not have a good idea what is causing

polarization in legislative institutions at both the state and federal level, but if gerrymandering is to blame, it is an equal opportunity phenomenon.

III. *Georgia v. Ashcroft* and the new “ability to elect” standard

A. The history and reasoning of *Georgia v. Ashcroft*

The Supreme Court’s decision in *Georgia v. Ashcroft*, 539 U.S. 461 (2003), changed the standard for retrogression that the Department of Justice had seemed to apply to redistricting plans leading up to that case. The proposed legislation attempts to overturn *Georgia v. Ashcroft* by defining the standard to be applied in the preclearance process. It provides that preclearance should be denied whenever a voting change “diminish[es]” the ability of a racial group “to elect [its] preferred candidates of choice.”

There is some disagreement among observers as to what the pre-*Ashcroft* standard for retrogression entailed. Some look at the history of preclearance denials and suggest it reveals a *de facto* policy of reifying the number of majority-minority districts in a redistricting plan and preventing the diminution of minority percentages in such districts. Others believe DOJ applied a more flexible standard akin to the one presented in the reauthorization bill, which focuses on changes in the ability of minorities to elect their candidate of choice but does not freeze minority percentages in place. (Indeed, in the underlying plan that gave rise to *Ashcroft* itself, the DOJ did, in fact, preclear many districts in which minority percentages dropped substantially.) Given the fact that the Supreme Court reversed the previous DOJ policy of denying preclearance for plans with discriminatory, but not retrogressive, purposes or effects, analyzing preclearance

behavior under the pre-*Ashcroft* regime is confounded by the fact that the DOJ thought it could deny preclearance for all types of reasons that the Court now says it could not. As detailed in the next subsection, however one assesses the pre- and post-*Ashcroft* standards and whatever drawbacks may exist in the *Ashcroft*-fix, the standard proposed in the bill is clearer in that it requires a single-minded focus on the “ability to elect” minorities’ preferred candidate of choice.

The facts in *Georgia v. Ashcroft* were unique and unprecedented for a section 5 case, and given political changes in the South, will be increasingly rare in the near future. A coalition of black and white Georgia State Senators supported a Democratic partisan gerrymander that would have dropped the black percentages in many districts with the hope that the Democratic Party would retain control of the Senate. Ultimately, the rising Republican tide in the state, which included the defections of some white Democratic State Senators from districts with substantial black populations, proved too much for the plan and Republicans took control.¹

However, for the Supreme Court, the plan’s underlying intent shared by white and black Democratic Senators alike to retain control of the Senate was a strong factor arguing in favor of a finding of non-retrogression. The black Democrats elected from majority-minority districts, who would have retained very powerful committee assignments and chairmanships, had much to gain from spreading out black voters more efficiently to maximize the number of seats Democrats would win, and, as the Court viewed the plan, the black voters in the districts of these powerful legislators had much to lose if the Senate were to change hands (as it eventually did). The Court, therefore,

¹ As the Committee is aware, I was appointed by the three-judge court in a later case, *Larios v. Cox*, 314 F.Supp.2d 1357 (N.D.Ga., 2004), to redraw the plans for the Georgia Senate and House to remedy a one-person, one-vote violation. With some minor modifications those plans are currently in effect.

found that blacks' overall influence was not necessarily diminished by risking a few "control" or "ability-to-elect" districts for a greater number of "influence" or "coalitional" districts. "The State may choose, consistent with § 5, that it is better to risk having fewer minority representatives in order to achieve greater overall representation of a minority group by increasing the number of representatives sympathetic to the interests of minority voters." *Achsroft*, 539 U.S. at 483.

What is meant by an "influence" or "coalitional" district is not readily apparent from the Court's opinion. The Court describes 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." *Ashcroft*, 539 U.S. at 482. Whereas in an ability-to-elect district the "first choice" candidate of the minority community (to the extent he or she is identifiable) will likely be elected, in an influence district the votes of the minority community may often determine who wins the district, although the winner will usually not be the first choice of the minority community. Similarly, a representative of an influence district, under the Court's theory, is likely to be someone who will listen to and be responsive to the minority community because the representative relies on that community's votes to win. In this way, the Court in *Ashcroft* established a totality of the circumstances test for retrogression that required attention to the effect of a new redistricting plan on the number of ability-to-elect, influence and coalition districts, the degree of support from minority elected officials, the likelihood that the minority community's favored party would win control of the legislative chamber at issue, and the place of power of minority legislators in the winning coalition.

Given the case's unique facts, I consider the actual holding of *Georgia v. Ashcroft* less controversial than the implications of its reasoning. Because electoral and legislative influence are such malleable concepts, outside the rare context of maintaining a fragile pro-Democratic redistricting plan supported by minority legislators it is difficult to ascertain whether trading control districts for alleged influence districts passes the *Ashcroft* test. Indeed, without a better definition of influence districts, covered jurisdictions may read the *Ashcroft* standard as allowing them to trade control districts for districts in which minorities comprise a substantial share of the district's population but really will exercise no influence over the election or the representative who emerges. Conversely, jurisdictions may read the license to trade off influence districts and control districts as permitting overconcentration of minority districts – that is, the aggressive creation of a few super-control districts at the expense of a greater number of influence districts or districts that hover at the ability-to-elect threshold. Indeed, the recent preclearance of the Texas Congressional redistricting plan, in which the DOJ line attorneys and their superiors apparently disagreed as to whether the plan should be granted preclearance under *Ashcroft*, is one indicator of the malleability of the standard.² Both sides in that particular debate have a plausible reading of *Ashcroft*.

B. The Proposed Standard

The proposed legislation is clear that it intends to overrule *Georgia v. Ashcroft* and establish a standard that focuses on whether a new redistricting plan diminishes minorities' "ability to elect their preferred candidates of choice." This phrase too

² The memo of the line attorneys urging a denial of preclearance was leaked to the public and is available at <http://www.washingtonpost.com/wp-srv/nation/documents/texasDOJmemo.pdf>.

requires some interpretation, although it is less susceptible to manipulation than the current one. In this subsection, I attempt to lay out what I understand the intent of the drafters of this language to be and how those drawing redistricting plans will behave as a result of this new requirement.

1. Threshold considerations

There are three points that all supporters of this revised standard agree upon concerning its meaning. First, the standard does not freeze in place minority percentages in districts for the 25 year tenure of this reauthorization. Second, the standard does not place special emphasis on majority-minority districts – that is, districts in which minorities comprise 50 percent of the voting age population (VAP), citizen voting age population (CVAP), or registered voter population. Third, the standard prevents retrogression by way of overconcentration, as well as underconcentration. These are the baseline considerations that I think lead to the analysis in the next subsection concerning what the standard means in practice, but they are worth exploring in somewhat more detail here to answer some of the questions posed concerning my testimony.

a. Allaying the fear of calcification of racial percentages in districts

The principal criticism of this standard concerns a fear that it will freeze district racial percentages, as they exist today in covered jurisdictions, for the next 25 years. Doing so would be both impossible and unconstitutional, but the concern highlights an important feature of the standard: namely, that the changes in racial percentages in districts, by themselves, do not indicate whether the new districts diminish the racial

group's ability to elect. In order to understand the effect of a district change on the racial group's ability to elect, one needs to know the relative probabilities of the racial group electing its preferred candidates under the old and new plans. In some contexts today and in an increasing number of contexts in the future, we should expect reductions in racial percentages to have no effect on the minority community's ability to elect its preferred candidate. Indeed, the aspiration of this bill is that over time, it will become more and more difficult to identify who the minority's preferred candidate is because candidate preferences will not correlate with racial group membership. As explained in greater detail below, the change in racial percentages in a districting plan is the starting point, not the conclusion, of the proposed retrogression analysis.

b. "Ability-to-elect" does not mean majority-minority

For the same reasons that the standard does not lock-in current racial percentages, it does not place primacy on so-called majority-minority districts. That a racial minority group might constitute 50 percent or more of the population, voting age population, citizen voting age population, eligible voters, or registered voters does not tell us the degree to which the group has the ability to elect its candidates of choice. There is nothing special about the 50 percent threshold of any of the above denominators that can allow one to make the sweeping assumption across states or regions of a state that maintaining percentages at such a level is necessary to prevent diminution in the ability of the minority community to elect its candidates of choice. In some states or regions, minority percentages well below 50 percent will lead to minorities being able to elect their candidate of choice and in others the percentages will need to be higher.

Moreover, the standard does not limit itself to districts in which candidates are currently able or successful in electing their candidates of choice. It protects minorities' "ability to elect" from diminution – in other words, a redistricting plan cannot reduce the probability that the minority community will be able to elect its candidate of choice. Therefore, just because current district lines have not resulted in the minority electing its preferred candidates does not mean the minority community in such districts can be chopped up or packed together with other districts. This new standard will require that the DOJ or U.S. District Court for the District of Columbia undertake a sensitive analysis like the one described below to establish what the probability of the minority electing its preferred candidates of choice is under the benchmark plan and a proposed plan.

c. The new standard prevents retrogression by way of packing as well as cracking

Just as the standard does not require the maintenance of current district percentages or the creation of majority-minority districts, it affirmatively prevents retrogression either by way of dispersion (cracking) or overconcentration (packing). Most of the section 5 redistricting caselaw, such as *Georgia v. Ashcroft*, involved situations where the jurisdiction split up the minority community or lowered the minority percentages across districts. In the coming years, however, as racial polarization declines, overconcentration (or packing) will present the greater threat as a strategy to diminish minorities' ability to elect their preferred candidates.

This point partially answers the question asked by Senator Hatch in reference to the Stuart Taylor article he read at the hearing. This proposal does not require packing of the minority community, *nor does it even allow it* when doing so will diminish the

minorities' ability to elect their preferred candidates across districts. For example, this law would deny preclearance to a proposed combination of two districts each with a 70 percent probability of electing the minorities' candidates of choice, into one district with a 100 percent probability and another with a 10 percent probability of electing the minority's preferred candidates. It should be read as preventing the kind of racial gerrymandering that gives rise to true segregation that ultimately thwarts a minority community's ability to coalesce with like-minded white voters in support of candidates the minority community prefers.

It is also worth stating the obvious, lest there be any doubt: the "preferred candidate of choice" of the minority community does not mean minority candidate. Minorities can prefer particular white candidates, just as white communities can prefer particular minority candidates. I have drawn districts that happen to be majority-minority, even substantially so, that still elect white candidates. It is important to make this point in case the ability to elect standard be seen as affirmative action for minority candidates. It is not. Its focus is on minority voters and ensuring that their ability to elect their preferred candidates, whatever their race, is not diminished by changes in voting laws.

2. What the ability to elect standard will mean in practice

Because mere changes in racial percentages in districts do not fully capture the impact of a new redistricting plan on racial groups' ability to elect their preferred candidates, preclearance determinations will depend on context-specific inquiries according to a number of factors. Dropping minority percentages in a highly racially

polarized district with no incumbent, low minority turnout and voter eligibility, and high levels of partisan competition, will have a different effect than will an identical drop in a district that does not experience either racial polarization or partisan competition and where the incumbent already is the minority candidate of choice. There will be some close calls in evaluating retrogression under this or any standard, but recognizing the multifactor inquiry involved in these determinations should allay the fear of those who see the ability-to-elect standard as some kind of license or impetus for racial gerrymandering.

- a. The extent of racial polarization in voting patterns in the district and the prevalence of whites willing to vote for the minority-preferred candidate

The extent of racial polarization in the benchmark and proposed districts is perhaps *the* critical factor that must be determined, in addition to the relative size of the racial groups in the relevant electorate. To put the point most starkly: in an area without any racial polarization in voting patterns, no change in district lines should be deemed retrogressive. If a region has reached the point where race does not correlate with candidate preferences, then there is no “preferred candidate of choice” for the minority community and no new district plan will diminish the community’s ability to elect such candidates.

Of course, we have not reached that point in many areas of the country yet, as the record of section 2 violations in the House Report demonstrates. However, the centrality of racial bloc voting analysis to the new retrogression determination suggests both the flexibility of the ability-to-elect standard and the inaccuracy of adopting rules of thumb

(such as “majority-minority” districts or “65 percent” districts) to predict ability to elect in the abstract. In some cases, for example, reductions in minority percentages in districts will be significantly offset by the additions of whites genuinely willing to vote for the minority’s candidate of choice. In others, the replacement of such whites willing to vote for the minority-preferred candidate with others who are not could cause retrogression, regardless of whether the minority percentage in the district remains constant.

Therefore, we should expect drops in racial percentages in districts in different states and in different regions of the same state to be met with different determinations of retrogression. A move from a 55 percent to a 45 percent black district in Georgia will have a different effect than would such a move in South Carolina, and such a change in Atlanta will have a different effect than would a change in Savannah. Moreover, we should also hope and expect that over time such regional variations will disappear as in each jurisdiction race becomes a poor predictor of candidate preferences.

b. The incumbency status of the district

The ability of a minority community to elect its candidate of choice will depend on whether its candidate of choice is currently the incumbent in the district. All other things being equal, a lowering of the minority percentages in a district will have the greatest retrogressive effect if the minority’s preferred candidate is a challenger to an established incumbent, the second greatest effect when the seat is open and no incumbent is running, and the least retrogressive effect when the minority’s candidate of choice currently holds the seat.

The history of the widespread creation and dismantling of the majority-minority districts held unconstitutional in the 1990s, most of which reelected their incumbents once the minority percentages in those districts decreased, demonstrates the often critical role that incumbency can play in determining the political effect of demographic changes in a district. But for the creation of those districts in the early 1990s, most of those representatives would not have been elected. However, once these candidates enjoyed the benefits of incumbency – that is, greater potential to raise campaign funds, lower likelihood of experiencing a primary challenger, higher name recognition, greater support from a political party, free and widespread media coverage, and other electorally relevant prerequisites of office – they were able to run and win from districts with much lower black and Hispanic population percentages. We should expect that lesson to guide preclearance decisions: When the candidate of choice of the minority community is the incumbent running for reelection, we should expect drops in the minority percentages in the incumbent’s district to have less of a potential for retrogression than in districts with open seats.

c. The ability of the given minority group to control the outcome in the primary election

The effect of a change in a redistricting plan on the “ability to elect” requires a two-stage inquiry that includes evaluating the effect both on the primary and general election. In some districts the critical question in determining retrogression will be whether the minority candidate of choice will be able to emerge from the primary. Some whites will vote for any candidate nominated by their party in the general election, but in the primary election they are unlikely to vote for the minority’s candidate of choice. The

greatest hurdle then for the minority's candidates of choice will be to win the primary, because once in the general election the candidates can rely on the allegiance of fellow white partisans to support them.³

This analysis reinforces the importance of racial bloc voting to determining retrogression under the new standard. There will be some circumstances where dropping the minority percentages in a district results in no diminution in the ability of the minority community to elect its preferred candidate of choice because the only election that matters in the jurisdiction is the primary election and minorities make up a substantial majority of the relevant primary electorate. In other areas, where party affiliation and candidate preferences correlate perfectly with race, even small changes in minority percentages could be deemed retrogressive if they lower the probability that the minority preferred candidate will win the general election.

d. The rates of registration, turnout, citizenship and eligibility among the various racial groups

As described above, mere changes in population percentages will not be sufficient (and will be increasingly insufficient over time) to determine whether a proposed redistricting plan retrogresses. However, comparing descriptors of the population represents the beginning of a retrogression analysis. In order to assess with specificity the precise ways in which a redistricting change will affect a minority community's ability to elect its preferred candidates, one needs to know more than who lives where, but also whether they are able and willing to vote.

³ On this point, see generally Bernard Grofman et al., "Drawing Effective Minority Districts: A Conceptual Framework and Some Empirical Evidence," *North Carolina Law Review*, 79:1383, 1407-09 (2001).

It has always been a traditional part of retrogression analysis to examine changes in aggregate population and voting age population, and where available, statistics describing the racial composition of the citizen voting age population and the population of registered voters. Less often available are race-specific turnout data and data concerning voter eligibility. In states where a large share of the black voter population is disenfranchised due to previous felony convictions – amounting to 20 percent of the black male population in certain states – those crafting redistricting plans must build in a margin of error into their analyses to account for differential rates of voter eligibility among racial groups. The same is true with respect to citizenship status. For example, the ability of Hispanics to elect their candidates of choice in any given district will be affected significantly by the rates of citizenship among that community. If one is going to evaluate a given Hispanic community's ability to elect its preferred candidates, one must have an accurate idea as to the share of that community ineligible to vote because of their citizenship status. Moreover, when contemplating the effect of changes between plans it is important to know the citizenship status of the Hispanic population added or subtracted from a district because replacing citizens with non-citizens may appear non-retrogressive according to population but in reality diminishes the minority community's ability to elect its candidate of choice.

e. The potential for coalitions among minority groups

Racial bloc voting analysis is not limited to comparisons of the voting behavior of whites and any given minority group. In some areas today and in an increasing number in the future, the ability of a given minority group to elect its candidates of choice will

depend on the potential for coalition formation with other minority groups. When originally passed, the Voting Rights Act operated in a space defined largely by a two-race paradigm, usually black and white, and then with the later amendments, Hispanic and Anglo. The picture has become increasingly complicated since then with some regions covered by section 5 having three or four large racial groups. In such contexts, the proposed ability-to-elect standard requires judgment calls as to the potential for cross-racial coalition building and the willingness of different minority groups to vote for the candidate of choice of others. Just as the preclearance decision must be sensitive to the willingness of whites to vote for the minority candidate of choice, so too must it evaluate how changes in district composition among minority groups affects the probability of each group electing its preferred candidates.

IV. Constitutional concerns with the proposed legislation and the record supporting it

Many of the submitted questions concern the potential constitutional shortfalls of the proposed reauthorization bill. As I read them, Senators are concerned that the record fails to demonstrate either a continuing need for the kind of extraordinary measures section 5 mandates, or even if it does, that the regionally specific character of the legislation is unwarranted. Moreover, if the proposal is on shaky constitutional ground what should be done about it?

A. Threshold Issues

The Supreme Court's recent decisions interpreting the enforcement clause of the Fourteenth Amendment do not provide the kind of crystal clear signals that would be

useful in predicting how it will handle the proposed reauthorization. Some precedent points in a direction suggestive that the Court would strike down the proposed bill, while other precedent suggests they will uphold this reauthorization as they have previous ones. It is also worth noting that the unpredictability of the “congruence and proportionality” standard chills potential creativity in legislative experimenting with approaches to voting rights reform different than ones currently in effect and previously upheld as constitutional. Although each of us might have our own view as to what an ideal section 5 would look like, I understand the hesitancy of those who view the legal and political constraints on this process as biasing in favor of the legal architecture we know as opposed to the one we do not.

Although it is perfectly appropriate for the Senate to attempt to anticipate how the Supreme Court may treat the current proposal, I see the ultimate resolution of this constitutional controversy resting on whether five justices have the audacity (or courage, if you prefer) to strike down *The Voting Rights Act*. To do so would be seen as the most activist decision of the Supreme Court at least since the New Deal. Both because of its historical significance and its admitted federalism costs, the Voting Rights Act is qualitatively unlike any other piece of legislation that the Court has struck down in the course of its federalism revolution, in general, or its recent interpretations of the 14th Amendment’s enforcement clause, in particular. Indeed, in virtually all of the Court’s recent enforcement clause cases, the Voting Rights Act has been the gold standard and point of comparison for the other laws it has considered.

I would join the other witnesses who have testified that Congress has the greatest power when it is both enforcing a fundamental right and preventing discrimination

against a suspect class. The Voting Rights Act is therefore unlike other laws the Court has recently struck down, such as the Violence Against Women's Act, Age Discrimination in Employment Act, or Americans with Disabilities Act (ADA), which can only be justified as trying to prevent discrimination against classes less suspect than those defined by race. Nor does the Voting Rights Act operate in a constrained space, such as the ADA's protection of access to courthouses at issue in *Tennessee v. Lane*, 541 U.S. 509 (2004), which merely protects a fundamental right and not a suspect class. Rather, the Voting Rights Act protects against racial discrimination (indeed, "the classification of which we [the Court] have been most suspect", *M.L.B. v. S.L.J.*, 519 U.S. 102, 135 (1996)) and does so with respect to a fundamental right (indeed, the "fundamental political right, because [it is] preservative of all rights." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)).

With that said, the Voting Rights Act enforces the constitutional commands of the 14th and 15th Amendments in a way unlike any other law. Its special characteristics – particularly, its limited application to only certain jurisdictions – which the Court had once thought to be the saving grace of the law, now are seen as its greatest constitutional vulnerabilities. As the questions indicate, Congress and the civil rights organizations that have laid the groundwork for this reauthorization are now preoccupied like never before with the question of what constitutes an adequate record for a reauthorization of the Voting Rights Act along the lines in the proposed bill.

The central point of disagreement, it appears to me, between those who find the bill constitutionally vulnerable and those who see it as secure concerns whether the record in this case must merely demonstrate continuing voting rights violations in the

covered jurisdictions or whether it must reveal a greater threat or record of voting rights violations in the covered than in the non-covered jurisdictions. On this central question I do not think the precedent provides a definitive answer. To be sure, the more congruent the record of constitutional violation is to the geographic scope of the legislation, the more likely the law is to be held constitutional. However, section 5 of the Voting Rights Act has always been over and underinclusive in its scope, and the Court has not viewed the enforcement clause as preventing Congress from addressing such violations one step at a time. See *South Carolina v. Katzenbach*, 383 U.S. at 331 (“Legislation need not deal with all phases of a problem in the same way, so long as the distinctions drawn have some basis in practical experience.”). All of the legislation that has failed (or passed) the new congruence and proportionality standard has been national in scope, so we have not encountered the problem of how congruent region-specific legislation needs to be.

Furthermore, the development of the record of constitutional violations for this proposed reauthorization is confounded by the effective working of the current legislation itself. Those who point to the lack of constitutionally significant differences between the covered and non-covered jurisdictions or to the steady drop in the number of preclearance denials could attribute these developments either to the successful deterrent effect of section 5 or to section 5 outliving its usefulness. We simply do not know the ratio of bad to good actors among the currently covered jurisdictions nor can we predict with any certainty what would happen if the section 5 stranglehold were lifted.

In addition, if the differences between the covered and non-covered jurisdictions remained as stark today as they were thirty years ago, then we would be running into a similar problem of incongruence and disproportionality: How could Congress justify the

continued operation of a law that has not made a difference in the regions to which it has been applied? If the law is successful, then it appears unnecessary and overly burdensome; if it is unsuccessful, then its burdens and considerable federalism costs are unjustifiable. The constitutional inquiry here is not unlike the policy inquiry often made when an increased police presence lowers the crime rate in a previously high crime neighborhood: At what point can one say crime has dropped enough such that the additional police presence is disproportionate to the potential threat?

With that said, the record contains notable examples of DOJ denials of preclearance, requests for more information (MIRs) that are often followed by a change in voting laws, as well as numerous successful and settled section 2 lawsuits in the covered jurisdictions. As mentioned in my original testimony, I think all agree that the greatest effect of section 5 can be felt at the local level, where elections are usually nonpartisan and the stakes as viewed by the national parties and interest groups are seen as relatively low. The overwhelming majority of preclearance submissions concern changes at the local level. *See* U.S. Department of Justice, Civil Rights Division, Voting Section Home Page, "Section 5 Changes by Type and Year," available at http://www.usdoj.gov/crt/voting/sec_5/changes.htm. By themselves, annexations, precinct redefinitions, and polling place moves constitute the majority of the total number of preclearance submissions, and when added to the number of local redistrictings and other miscellaneous local voting changes, the number of such submissions dwarfs those at the statewide level.

The same is true with respect to the pattern of denials of preclearance. Of the 40 objections interposed by the Attorney General between January 1, 2000 and January 1,

2005, 37 involved changes made by a local, rather than a state government. See Michael J. Pitts, “Let’s Not Call the Whole Thing Off Just Yet: A Response to Samuel Issacharoff’s Suggestion to Scuttle Section 5 of the Voting Rights Act,” *Nebraska Law Review*, 84:605-30, 612 (2005). The experience of DOJ attorneys in the Voting Section confirms the greater likelihood of a deterrent effect for potentially retrogressive voting changes at the local level. *Id.* at 613-14. Unlike state laws and redistricting plans, which operate under the threat of a likely section 2 lawsuit, for local voting changes the DOJ is often the only one “in the room,” as it were, reviewing the laws and giving voice to the concerns of the minority community.

B. The relevance of old and new levels of voter turnout to the contemporary need for a reauthorized section 5

When Congress first set out to enact the unique region-specific remedy of the original 1965 Voting Rights Act, it reverse-engineered a facially neutral coverage formula that would capture a foreseeable group of jurisdictions, mostly in the South. Those early triggers for the original Act and its two subsequent reauthorizations used a two-pronged formula focusing on the presence of a test or device (later to include provision of English-only language materials) and voter turnout levels below 50 percent. Although the relationship between unconstitutional behavior and low voter turnout was hardly a stretch, the focus on voter turnout was always a proxy or correlate for what was considered the principal problem the Act addressed: laws and other state behavior that tended to inhibit minority electoral participation.

It is clear from the record that both aggregate and racially differential rates of turnout today do not map as well onto the covered jurisdictions as they did previously.

Section 5 and the Voting Rights Act, in general, have been very successful in this regard. Although with each election different states do better or worse, rates of voter turnout in most of the covered Southern states in the 2004 election are near the national mean or below. *See* Census Bureau, “Voting and Registration in the Election of November 2004,” Mar. 2006, available at <http://www.census.gov/prod/2006pubs/p20-556.pdf>. (The clustering of the covered Southern states at the bottom of the distribution is not as stark for the 2000 election, and for either of the two most recent elections, the differences between the top quartile and bottom quartile do not exceed ten percent, although the covered States are generally at or below the median.)

Moreover, as the supplement to Professor Ronald Keith Gaddie’s report makes clear and as the House Report erroneously suggests otherwise, in most of the covered Southern states, like the rest of the country, black turnout continues to lag turnout of non-Hispanic whites. *See* Census Bureau, “Voting and Registration in the Election of November 2004,” Table 4a, available at <http://www.census.gov/population/socdemo/voting/cps2004/tab04a.xls>. The House Report, like Professor Gaddie’s original report, states differences in voter turnout and registration between blacks, whites, and Hispanics; however, the white category also includes Hispanics, thereby lowering the turnout of whites (due to the very low turnout of Hispanics) and reducing the black-white differences in turnout. When comparing the estimates of turnout of blacks and non-Hispanic whites in the 2004 election, the only two covered Southern states where black turnout appears to exceed non-Hispanic white turnout are Alabama (where the difference is within the confidence interval) and

Mississippi (where the estimates differ by 6.8 percentage points).⁴ So while it would be wrong to suggest that racially differential rates of turnout have not shrunk over time or to suggest that the South is qualitatively different in this regard than the rest of the country, blacks tend to lag non-Hispanic whites in the covered jurisdictions in their registration and turnout rates and sometimes do so to a significant degree.

C. Evidence presented in support of renewal

The story with respect to turnout is similar to much of the other evidence in the record: Although the political conditions of racial minorities have improved markedly over time and across regions, in no small measure because of the existence of the Voting Rights Act, the covered jurisdictions still show room for improvement, sometimes substantially so. Therefore, the record of section 2 violations, which appear to remain more prevalent per capita in the covered Southern states but are far from absent outside the covered jurisdictions, do not provide the kind of distinctive “in-your-face” geographic patterns that some of the questions seek and that could be confounded by the effectiveness of the section 5 regime. Nevertheless, the record reveals 653 successful reported and unreported section 2 cases in the covered states since the last reauthorization. See The National Commission on the Voting Rights Act, *Protecting Minority Voters: The Voting Rights Act at Work 1982-2005* (Feb. 2006), at Table 5 (including Virginia and North Carolina as covered states).

The best evidence to distinguish the covered Southern states from the rest of the country, it seems to me, is the greater level of racial polarization in the electorate. By

⁴ In North Carolina, which is only partially covered by Section 5, the estimate of black turnout in the 2004 election exceeded white turnout, although the 1.6 percentage point difference is within the confidence interval.

racial polarization I do not mean to suggest the greater presence of racist voters. I simply mean that blacks and non-Hispanic whites tend to prefer different candidates at the polls. The differences between the South and non-South according to this measure have decreased over time, just as levels of racial polarization in the South have similarly decreased. However, as the Gaddie-Bullock reports in the record suggest and as others have similarly found, blacks must constitute a higher share of the population of a district in the South than in the non-South in order to elect their candidates of choice. David Epstein and Sharyn O'Halloran estimate the difference between the "point of equal opportunity" for blacks in the South and non-South as approximately three percentage points. By this the authors mean that blacks must constitute about three percentage points more of a district's voting age population in the South than in the non-South for them to have a 50-50 probability of electing their candidates of choice. *See* David Epstein and Sharyn O'Halloran, "Trends in Substantive and Descriptive Minority Representation, 1974–2000," in David Epstein, Richard Pildes, Rodolfo de la Garza and Sharyn O'Halloran, eds., *The Future of the Voting Rights Act*, New York: Russell Sage, forthcoming 2006, available at <http://paradocs.pols.columbia.edu/WorkingPapers/RevRSConf.pdf>. It must be admitted that comparisons between the South and non-South are crude proxies for differences between covered and non-covered jurisdictions. Given the hunger evinced in the questions for measurable differences between different classes of states, however, it is worth presenting what seem to me to widely accepted distinctions between most of the covered and most of the non-covered states.

As the Gaddie and Bullock studies in the record rightfully point out with respect to individual states, racial polarization in voting patterns in much of the South correlates with partisan preferences. In other words, blacks almost always vote for Democrats, and Southern whites are more likely (on average) than Northern whites to vote Republican. This fact does not undermine the importance of racial polarization in distinguishing among states or justifying the preclearance regime for some of them. The Voting Rights Act has always been concerned with the interaction of voting behavior with voting rules to produce racially disparate results. Partisan polarization may now be the engine that erects the hurdles to equal political opportunity, but the evolution of the cause or correlates for racially differential results should not justify dismantling the legal regime that seeks to prevent such results.

D. Evaluating proposed reforms

Several of the submitted questions propose different types of reforms for the coverage formula, bailout and expiration date for the proposed legislation. These aspects of the section 5 framework should not be considered in isolation; there is a symbiotic or hydraulic relationship between them such that increased stringency along one dimension ought to justify relaxation along another. As I mentioned at the hearing, I would join the chorus of those who urge national legislation more transformative and comprehensive than anything Congress is currently considering. However, if Congress is to work within the section 5 framework, the familiarity and predictability of the current regime has a few advantages that some of the riskier and more intrusive proposals do not.

1. Reforming the coverage formula

Alternative triggers akin to the formula originally adopted or included in the later amendments deserve to be considered, but many have even greater constitutional problems than the one currently in place. For reasons mentioned above, altering the coverage formula based on contemporary voter turnout statistics does not make sense to me. Expanding coverage to all jurisdictions where racial minorities constitute a certain share of the population, without easing bailout, is likely to be struck down by the Supreme Court. The same is probably true if one based the trigger on levels of racially polarized voting or the percent of the aggregate or racial minority population legally disenfranchised. Such triggers would also lead to a great deal of controversy as to which jurisdictions are, in fact, covered. Adding jurisdictions that have committed section 2 violations is unobjectionable, but would add just a few jurisdictions and would somewhat duplicate the so called “bail in” provision of section 3(c) of the law.

Despite concerted effort I have not been able to come up with a coverage formula akin to the dual-pronged trigger in place that would capture a foreseeable group of jurisdictions most likely to be voting rights violators. One could adopt a catch-as-catch-can approach – releasing from coverage any jurisdiction where racial minorities constitute less than 5 percent of the population, such as the covered townships in Michigan and New Hampshire, and adding Florida and Ohio due to their voting rights problems in the 2000 and 2004 elections. However, abandoning a seemingly neutral formula for ad hoc judgments about the relative threat certain jurisdictions pose necessarily opens one up to charges of political cherry-picking and threatens both the passage and survival of section 5 at the Court.

2. Reforming bailout

It remains a mystery to me why more jurisdictions – especially those that have almost no racial minorities – have not bailed out of coverage from section 5. Congress should study the problem if it hopes to enact a reform of the bailout regime that has the intended effect of rewarding good behavior and releasing non-violators from the burdens of the preclearance regime. At this stage, I simply do not know what may be responsible for the fact that only 11 counties in Virginia have bailed out since 1982, while a great number of jurisdictions bailed out during the early years of the VRA.

I can think of four reasons why more jurisdictions have not bailed out. First, the requirements for bail out simply may be too strict or difficult or fulfill. Second, the jurisdictions for which bailout will be easiest, as in the case of the covered Michigan and New Hampshire townships, find the burdens of section 5 to be almost costless because preclearance is barely even a formality and remains largely unenforced. Third, a politician's decision to seek bail out for his jurisdiction – to free oneself of the Voting Rights Act, no less – is fraught with such political and public relations dangers that no one would seek to pursue it. Fourth, jurisdictions actually prefer to stay covered by section 5: They have become accustomed to the preclearance regime and are happy to receive a DOJ grant of preclearance as a stamp of approval for voting changes that someone else might later challenge in court. I have no idea which of these reasons explains the current pattern of behavior so I do not know what changes to the bail out regime might best address its alleged shortcomings.

3. Reforming the duration for the proposed bill

The choice of the 25 year sunset period for the proposed bill models the decision made in 1982. Although a shorter period may be more likely to be held constitutional, it is very difficult to decide on what the optimal time horizon for the proposal should be. I certainly hope that Congress will reconsider the section 5 architecture sometime before 2031 as part of a comprehensive reform of federal election law. However, the choice of 25 years may be geared toward ensuring that section 5 is in place for three redistricting cycles. If Congress were to change the duration of the proposed bill, while keeping its other provisions in tact, it makes sense to structure the expiration date around the time periods when preclearance submissions and objections tend to be most frequent, namely the three or four years following each census.

V. Conclusion

As mentioned in my original testimony, I hope the debate over voting rights reform that the impending expiration of section 5 has forced will not end with the reauthorization bill. Fundamentally, the bill represents a glance backward toward the ugliest aspects of our nation's history, rather than a hopeful sign that we are ready to tackle the most pressing problems that have plagued recent elections. That ugly history remains relevant in many parts of the country today, but we should take advantage of this unique opportunity to structure our democracy for the twenty first century, in addition to addressing the problems most prevalent in the last one.

Responses of Abigail Thernstrom to questions submitted by Senators Cornyn and Coburn

*Senator John Cornyn
Questions for Witnesses for ALL Voting Rights Act Hearings
May – June 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 vs. non-covered jurisdictions.*

Minorities in the covered jurisdictions participate in the electoral process at very high levels, clearly suggesting that their “ability” to do so should not be in doubt. The old barriers to participation are gone, of course—the barriers that made the Voting Rights Act so essential in 1965.

The high level of minority participation in the covered jurisdictions is clear in the Charles Bullock and Keith Gaddie studies that were commissioned by me and a former colleague. They are part of the record. Just to take one state as an example, while Georgia once had a terrible history of black disfranchisement, in the most recent presidential elections, black participation rates actually slightly exceeded those of whites. And if one compares Georgia to states outside the South, black registration is slightly higher and turnout is roughly the same. Georgia is not unique.

As the political theorist Michael Walzer once wrote, in a true democracy every citizen is “a *potential* participant, a *potential* politician.” Of course not every citizen will have equal power. It is not power itself but the “*opportunities* and occasions of power” that must be properly shared. The covered jurisdictions now clearly meet this test.

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?*

Updating the trigger is certainly better than leaving it as is. But it’s important to remember why the original trigger used the 1964 participation figures. In 1965, total registration and turnout below 50 percent of the voting-age population combined with the use of a literacy test was clear circumstantial evidence that blacks were deliberately being kept from the polls. And without explicitly naming a single state, the trigger perfectly targeted the states and counties with egregious histories of Fifteenth Amendment violations.

Even in 1970, however, the use of the 50 percent cut-off, using political participation figures for 1968, no longer made sense. The trigger brought three New York City boroughs under

coverage, for instance, although blacks had been freely voting in the state for a century and had been elected to public office for fifty years. Coverage of assorted counties in Wyoming, Arizona, California, and Massachusetts was equally arbitrary.

Updating the trigger didn't make sense in 1975, either. Remember, the use of a literacy test was an essential element in 1965; the low political participation figures were indisputable evidence that an illegitimate test was being used for nefarious purposes. But the states and counties that the turnout figures in 1972 brought under coverage had a literacy test only in the form of English-only ballots—which by no stretch of the imagination were equivalent to racist registrars asking applicants to read the Beijing Daily in the Jim Crow South.

Moreover, if ballots in English were a problem, the solution was simple: bilingual material. What justified imposing on Texas and other jurisdictions the burden of having to preclear all newly instituted methods of election (a category that included the *retention* of at-large voting in municipalities that decided they would benefit economically from an annexation)? The 1975 hearings did not provide evidence that these were jurisdictions that had been deliberately keeping Hispanics from the polls—that were deeply suspect and required extraordinary federal oversight, with the burden of proof on them to show an absence of wrongdoing every time they moved a polling place.

Resting coverage today on turnout in 2004 is preferable to the continuing and indefensible use of 1972 data, but levels of political participation by now are unrelated to deliberate efforts to disfranchise minority voters—and that relationship was the entire basis of the trigger's legitimacy in the 1965 act. Why not move on, and recognize that the problems with America's electoral procedures in 2006 are unrelated to those that made section 5 of the Voting Rights Act so necessary forty-one years ago.

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?

I would not for the following reason: the legal standards that govern the enforcement of section 2 are a mess and hard to justify. As a consequence, jurisdictions that have been subject to section 2 litigation have not necessarily been engaged in discrimination.

Section 2 was supposed to be used only to attack those rare jurisdictions in which race dominated the political process, such that a racial census could be taken and the outcome of an election would be known beforehand. (See the 1982 testimony of Armand Derfner, e.g.—a witness this year as well.) Such cases were supposed to be hard to win; in fact, plaintiffs prevail easily since all they have to show, as it turns out, is that the three “preconditions” outlined in the *Gingles* decision have been met. Whether the “totality of circumstances” indicates that minority voters have less opportunity than whites to participate politically and elect the representatives of their choice is a question that has disappeared along with the

promises of Derfner and others. The difficult task of assessing equal electoral opportunity has been replaced by a crude formula that includes a definition of polarized voting that only Justice Brennan signed on to, and that makes no distinction between whites voting for partisan reasons and for reasons of racial animus.

In 1982, Senator Hatch warned that “future courts and future Justice Departments will look [at] proportional representation as the standard against which all electoral and voting practices [will be] assessed.” He was the one and only Senator who saw what was coming down the road with the passage of section 2, which has indeed become an instrument to insist on districting arrangements that promote (to the degree possible) minority officeholding in proportion to the minority population. Note: Not proportionate minority *representation*, but proportionate minority officeholding has become the right. And yet section 2 does not refer to “minority representatives of their choice, but just “representatives”; elected officials representing minority interests can come in all colors.

A case currently being litigated in Springfield, Massachusetts illustrates the problem with section 2 today. The issue is an at-large voting system, under which both blacks and Hispanics have been elected to public office. In fact, the percentage of blacks on the school committee has sometimes been disproportionately high relative to their population numbers in recent decades. If Puerto Rican turnout in the city were not quite so low, they too would likely do very well. Despite this record of electoral success, the plaintiffs want the court to order race-based single-member districts on the theory that minorities are entitled to their “fair share” of seats and would more likely be assured of proportionality on the school committee and the city council with ward voting. If the plaintiffs win, would this be a clear case in which a city had engaged in electoral discrimination and deserved to be under section 5 coverage? Are single-member districts the only form of organizing the electoral landscape that is compatible with democratic government?

In amending section 2, Congress unequivocally and wisely rejected the notion of group entitlement to even one legislative seat. Group membership was to count as a qualification for office only where blacks and other minority citizens could prove themselves distinctively excluded from the electoral process. But today true black and Hispanic political exclusion is hard to find, and thus I have a problem with a great many cases in which plaintiffs in section 2 suits have prevailed. If the provision had turned out as intended and had provided a remedy only where legislative seats seemed largely reserved for whites, then using section 2 litigation as a measure of the need for continuing coverage would make sense.

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?*

See my answer above—in response to question 2. Registration and turnout as the basis of a trigger makes no sense. The connection between fraudulent literacy tests and low levels of political participation legitimized the original trigger. Literacy tests are gone, and political participation under the 50 percent mark is no longer a reliable indicator of electoral discrimination.

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?*

You are perfectly right that supporters of reauthorization and amendment rely mainly on anecdotes, some quite old. I'm a social scientist; I want data.

The data to which you refer is indeed very telling. The report on "Voting Rights Enforcement & Reauthorization" recently released by the U.S. Commission on Civil Rights contains a great deal of data that tell the same story as the one above. As the report says, "during the last decade, objections have virtually disappeared, particularly with respect to change types that represent the bulk of the submitted changes."

Section 5 was supposed to sunset in 1970. It's an extraordinary emergency provision. The emergency was not permanent; indeed, it's over. Neither section 2 nor the Fourteenth Amendment have been repealed; plaintiffs retain plenty of power to attack electoral discrimination wherever they believe they have found it. Section 5 is no longer needed.

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?*

My views should be clear by now. I would prefer a short reauthorization to a longer one, but my real preference is to recognize the provision was supposed to last only five years and it's now more than four decades old. Time to wave goodbye.

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?

The new language in the bill that is described as overturning *Georgia v. Ashcroft* is so murky that it's hard to know precisely what the consequence of its adoption would be.

Let's begin with my view of the decision, however. The Supreme Court, starting with *Miller v. Johnson* in 1995, had expressed considerable concern about racially gerrymandered districts that rested on the "offensive and demeaning assumption that voters of a particular race, because of their race, 'think alike, share the same political interests, and will prefer the same candidates at the polls.'" In *Georgia v. Ashcroft*, the Court added another concern to that of racial stereotyping. Perhaps black votes were being "wasted" in what the ACLU approvingly referred to as "max-black" districts. That is, perhaps the goal should be to concentrate only as many blacks (or Hispanics) in a district as necessary to elect a minority representative, then to assign minority voters beyond that number to other districts.

Justice Sandra Day O'Connor's opinion for a majority of five was a classic study in just how lost courts can become when trying to sort out questions of racial fairness and political representation.

Georgia's state senate districting plan had lowered the percentage of black voters in some districts (although not below 50 percent), but increased the number of districts certain to elect white Democrats. This was an unusual legislative step, but Justice O'Connor explained the logic. "No party contests that a substantial majority of black voters in Georgia vote Democratic," she wrote, and thus any increase in the number of Democratic state senators--even if they were white--would boost minority representation. Correspondingly, the implication was, any decrease in the number of Republican legislators would be good for blacks.

In other words, white Democrats count as minority "representatives." It was a remarkable *legal* conclusion for the Court to reach.

Before *Georgia v. Ashcroft*, majority-black districts were sacrosanct; they couldn't be eliminated in a new map. That's still true. But the logic of O'Connor's opinion makes all existing Democratic districts that contain a significant number of blacks equally untouchable, since the assumption is that Democrats speak for the interests of blacks.

With *Georgia v. Ashcroft*, the Voting Rights Act became not just a charter for black enfranchisement and officeholding but also a statute to protect certain safe seats for white Democrats. Never mind that Georgia is majority-Republican. With *Ashcroft*, Democratic districts in which blacks are an "influence" (the Court's term) appear to have become another permanent entitlement.

On the other hand, O'Connor's starting point was right. Minority "representation" is not so easy to define. Who counts as a "representative"? Blacks can clearly represent "white" interests; are we to argue that whites cannot represent "black" interests—assuming (erroneously) that interests are racially defined?

"The ability of minority voters to elect a candidate of their choice is important but often complex in practice to determine," she said. In calculating the level of "minority representation," there were factors to be weighed even beyond whether a white incumbent was "sympathetic to the interests of minority voters"—factors such as whether a white incumbent occupied a position of legislative power.

With *Ashcroft*, we have arrived at the equivalent of Justice Potter Stewart's famous definition of pornography: You know minority representation when you see it. O'Connor's opinion is a nightmare; it provides no coherent legal standards. Moreover, the decision hands to the Justice Department a task totally unsuited to the process of swift administrative preclearance—that of assessing the setting in which voting takes place and determining whether one plan is more racially "fair" (by some elusive but inevitably subjective definition) than another. Overturning it has the virtue that the old retrogression standard, which involved simply counting minority officeholders, would be revived. (Or so it seems; there are a number of law professors who are not so sure that it would do so.) But do members of Congress really want to sign on to the notion that only blacks can represent black voters, and thus we know the level of black representation by counting African Americans in public office?

In *Ashcroft*, within the majority of five, only Justice Clarence Thomas kept his wits about him. He concurred with the Court's bottom line—remanding the case for further consideration in light of the majority opinion. But he reiterated his belief that his colleagues had "immersed the federal courts in a hopeless project of weighing questions of political theory." Even worse, by segregating voters "into racially designated districts . . . [they had] collaborated in what may aptly be termed the racial 'balkaniz[ation]' of the Nation."

The solution is the politically difficult one that I have already urged: abandon preclearance. What's the argument against asking plaintiffs in these suits to rest their cases on either section 2 or the Fourteenth Amendment? Complicated questions of racial equality in the political arena demand, at the very least, what the Court once called "an intensely local appraisal" of the sort that only an actual trial affords.

And, by the way, overturning *Bossier Parish II* creates the same problem: the DOJ will have to sort through complicated issues of intentional discrimination in settings that do not resemble Mississippi in 1965—a process that no one should have much confidence in. Moreover, it should not be forgotten that the burden of proof under section 5 is on the jurisdiction to show an *absence* of discrimination—a burden that was appropriate 41 years ago, but can hardly be justified today.

Thank you for allowing me the opportunity to respond to these thoughtful questions.

Senator Coburn
Questions submitted to Witnesses
Reauthorization of The Voting Rights Act

1. *With the improved state of race relations in the US since 1965, including vastly improved minority voter registration and turnout, is the Section 4 trigger for coverage under Section 5 still appropriate to the proposed reauthorization of the Voting Rights Act?*

The short answer is, no. It is not still appropriate. It is wildly inappropriate.

In 1965 the single aim of the Voting Rights Act was ballots for southern blacks, and the Section 4 trigger was designed to target precisely those jurisdictions that had been violating basic Fifteenth Amendment rights. That is, the framers of the act worked backwards: Knowing which states were using fraudulent literacy tests and turning a blind eye to violence and voter intimidation, they fashioned a statistical trigger that would bring under coverage only those jurisdictions in which blacks would remain disfranchised without drastic federal intervention. In this and other ways, the 1965 act was perfect legislation.

It's important to remember why the original trigger used the 1964 participation figures. In 1965, total registration and turnout below 50 percent of the voting-age population combined with the use of a literacy test was clear circumstantial evidence that blacks were deliberately being kept from the polls.

Critics complained that "fair and effective enforcement of the 15th amendment call[ed] for precise identification of offenders, not the indiscriminate scatter-gun technique evidenced in the 50 percent test." But the 50 percent turnout test, using the 1964 figures, was, in fact, "precise" and "effective."

Had the scope of the act been wider and the trigger less accurate—had it hit states outside the South and allowed federal intrusion into traditional state prerogatives to set electoral procedures where there was no evidence of appalling Fifteenth Amendment violations—it would not have survived constitutional scrutiny. The emergency provisions were passed in the context of the "unremitting and ingenious defiance of the Constitution," Chief Justice Earl Warren noted a year later in upholding the constitutionality of the act. But, in recognition of their extraordinary nature, these special provisions were designed to expire permanently in 1970.

When the trigger was updated in 1970, the original logic had already been forgotten. Again, in 1965 those who wrote the Voting Rights Act knew which states they wanted to cover and designed a test to single them out. But that same formula—a literacy test combined with turnout below 50 percent—made no sense using political participation in the 1968 presidential election. The result was to bring under coverage assorted counties in such disparate states as Wyoming, Arizona, California, and Massachusetts with no history of black disfranchisement. None of these counties were in the South, and

no other evidence suggested that these were jurisdictions in which minority voters were at a distinctive disadvantage.

The evidence, in fact, pointed in quite another direction. For example, under the revised act, three counties in New York City were covered, despite the fact that blacks had been freely voting since the enactment of the Fifteenth Amendment in 1870 and for decades had held public office in the city. But turnout for the 1968 presidential election had been low across the nation, and participation in New York, reflecting the national trend, had dropped slightly to just under the determining 50 percent mark. This did not mean the city had changed; the doors of political opportunity had not suddenly been closed to blacks and Puerto Ricans. Rather, faced with a choice between Nixon and Humphrey, more New Yorkers than before had stayed home.

In 1975 the trigger was updated to include registration and turnout in the 1972 presidential election. The elements were still low voter participation and the use of a literacy test—but the latter was now redefined as ballots (or other voting material) provided only in English where more than 5 percent of the voting-age citizenry were members of a single "language minority" group. That is, English-only election material became the equivalent of the fraudulent southern test that barred blacks from the polls.

In fact, surely if English-only ballots were "disfranchising," bilingual election material was a sufficient remedy. The 1965 act had permitted an interference of *intentional* disfranchisement from the combination of literacy tests and low levels of voter participation. Now, however, the act permitted a similar inference where voting fell short of the 50 percent mark and where no bilingual ballots were provided for language minorities. And yet no discriminatory aim had been shown to lie behind the absence of bilingual election materials in the Southwest and elsewhere.

In short, the trigger—as originally designed—made sense in 1965 and only 1965. Most law professors and others who write on the Voting Rights Act do not know the history of the original logic and structure of the act, and seem indifferent to the increasingly arbitrary nature of the trigger, starting in 1970. Registration and turnout figures were once indicators of the use of fraudulent literacy tests for the obvious purpose of black disfranchisement. Today low levels of political participation, where they occur, are unrelated to deliberate efforts to keep blacks (or Hispanics) from the polls.

2. If the trigger is to be maintained as 1972 presidential election participation, is it appropriate to extend coverage for 25 years?

The trigger no longer targets jurisdictions that are intentionally disfranchising minority voters. And, indeed, the 1972 figures did not serve that purpose. See above.

If—a big if—some jurisdictions still deserve to be singled out for coverage, the traditional trigger is not the appropriate means to do so.

3. *Are there alternative conceptualizations of the trigger that might address concerns of critics who wish to update the trigger, while also alleviating the concerns of "backsliding" if the trigger is updated from 1972?*

Frankly, I am not concerned about backsliding. Black (and/or Hispanic) voters are such an important presence today in every covered state that the old model of legislative seats in effect reserved for whites, with the outcome of races determined by the racial composition of the electorate, is way out of date. It is not section 5 that stops backsliding, but the power of black votes in the new South and elsewhere.

Some of the witnesses at the hearings pointed to the number of DOJ objections as an indicator of the danger of backsliding. But as a just-released report of the U.S. Commission on Civil Rights notes, "during the last decade, objections have virtually disappeared, particularly with respect to change types that represent the bulk of the submitted changes."

Section 5 was supposed to sunset in 1970. It's an extraordinary emergency provision. The emergency was not permanent; indeed, it's over. Neither section 2 nor the Fourteenth Amendment have been repealed; plaintiffs retain ample legal power to attack electoral discrimination wherever they see it. Section 5 is no longer needed.

4. *Does leaving the trigger unchanged increase the likelihood that a reauthorization until 2031 will be struck down by the Supreme Court?*

I do not believe the preclearance provision can withstand constitutional scrutiny if renewed. And I believe the proposed amendments overturning *Bossier Parish II* and *Georgia v. Ashcroft* just exacerbate the problem.

There is no congruence and proportionality between wrong and remedy today—more than forty years down the road of racial change. Section 5 was designed to attack the problem of states determined to disfranchise black voters. Where is such a jurisdiction to be found today? And if spokesman for the organized civil rights community do smell racism in a particular setting today, they have both section 2 and the Fourteenth Amendment as bases upon which to bring suits, as noted above.

In addition, it is unlikely that the Court will turn a blind eye to the revolution in racial attitudes and in the status of African Americans over the last four decades. Already the decision in *Georgia v. Ashcroft* suggests that a majority on the Court will not be willing to do so. Justice O'Connor's opinion in that case asks a question that would not have been posed four decades ago: Don't whites sometimes count as a minority "representatives"? In 2006 elections are not a racial census, and the interests of voters are

no longer racially defined. In Texas, Democrats argued that Martin Frost was “a candidate of choice” for minority voters and, as such, was entitled to his seat under the Voting Rights Act. Rep. Gene Green (also white) was described in a DOJ memo as “basically Hispanic himself.” The world that many advocates of reauthorization seem to think they live in—the world of black subjugation and white privilege, such that only blacks can represent black interests—is basically gone. And that fact makes the argument for proportionality and congruence between wrong and remedy in the Voting Rights Act basically unpersuasive today.

In addition, it might be worth remembering that Chief Justice Roberts in 1982 raised questions about the “results” test built into section 2 of the Voting Rights Act, predicting that it would create a minority entitlement “to electoral representation proportional to their population in the community.” He was convinced that “before the law ... we do not ... stand as black or white, Gentile or Jew, Hispanic or Anglo, but only as Americans entitled to equal justice.”

Precisely the problems that Roberts as a young attorney worried about with respect to section 2 plague the preclearance provision. As interpreted by the Department of Justice, it was reinvented as a means to force covered jurisdictions to draw a maximum number of majority-minority districts. Black and Latino voters came to be seen as entitled to egregiously race-driven majority-minority districts—to representation on the basis of group membership. A “fair shake” became a “fair share,” as one witness at the 1982 hearings put the point. (And as Senator Hatch, at the time, predicted it would.)

The Supreme Court decisions (*Ashcroft* and *Bossier Parish II*) that Congress is now poised to overturn did force a partial modification of that reinterpretation, but most of the advocates of reauthorization and accompanying amendments believe in a “fair share”—that is, proportionate racial and ethnic representation as a matter of high principle. That is a view that the Supreme Court has already rightly rejected in *Miller v. Johnson* and subsequent Fourteenth Amendment cases dealing with the dangers of race-based districting. If the Court views the enforcement of the Voting Rights Act—accurately—as perpetuating the notion, as Senator Hatch put it in 1982, that individuals are “elected to office to represent ethnic and racial blocs of voters,” they are likely to see the statute as raising serious constitutional questions.

5. Please discuss how a possible broad-based “bailout” of covered jurisdictions might be implemented?

As stated above, I don’t believe section 5 should be reauthorized. Period. Neither section 2 nor the Fourteenth Amendment have been repealed; plaintiffs retain plenty of power to attack electoral discrimination wherever they believe they have found it.

Proponents of reauthorization will say, but the burden of proof in section 2 and constitutional cases is on the plaintiff. Well, yes. But what justifies the burden-shifting of section 5 in 2006? In 1965, the covered jurisdictions were all in the South and all had

records that made them deeply racially suspect. That they should carry the burden of showing an absence of wrongdoing—given their track record—was right. There is no justification today for continuing to have these and other jurisdictions (with no history of racist exclusion) under a form of federal receivership.

However one describes our racial problems today, it should be clear that they are nationwide and have nothing to do with access to the polls. In 1965, the Voting Rights Act responded to the emergency of southern black disfranchisement that had continued ninety-five years after the passage of the Fifteenth Amendment. The emergency today takes quite a different form: black and Latino underachievement in school, a high out-of-wedlock black birth rate, a disproportionately high crime rate, alienation from mainstream American values.

Keeping (just to pick a few examples) Monterey County in California, the Bronx in New York City, and the entire states of Georgia and Arizona under the federal preclearance thumb on the basis of an alleged desire to perpetuate white supremacy ignores the radically altered racial landscape by now—and does nothing to attack the serious race-related problems that demand our attention. Indeed, reauthorization is a distraction from the urgent tasks at hand.

6. *Are there alternative conceptualizations of the bailout provision that would increase the opportunity for a jurisdiction to succeed in a bailout attempt?*

This is a difficult question for me to answer, since I believe section 5 has outlived its usefulness and can no longer be justified. But if preclearance is maintained, bailout should not depend on absence of either section 2 or section 5 objections.

The legal standards that governing the enforcement of both provisions are a mess. As a consequence, jurisdictions that have sued on the basis of section 2 or have been subject to a section 5 objection have not necessarily been engaged in electoral discrimination, by any reasonable definition of the term.

Section 2 was described in 1982 as a means of attacking only those rare jurisdictions in which race dominated the political process, such that a racial census could be taken and the outcome of an election would be known beforehand. (See the 1982 testimony of Armand Derfner, e.g.—a witness this year as well.) Such cases were supposed to be hard to win; in reality, they are hard to lose. Plaintiffs prevail by showing that the three “preconditions” outlined in the *Gingles* decision have been met. Whether the “totality of circumstances” indicates that minority voters have less opportunity than whites to participate politically and elect the representatives of their choice is a question that has disappeared along with the promises of Derfner and others. The difficult task of assessing equal electoral opportunity has been replaced by a crude formula that includes a definition of polarized voting that only Justice Brennan signed on to, and that makes no distinction between whites voting for partisan reasons and for reasons of racial animus.

Thus jurisdictions can be found guilty of a section 2 violation even though, if the “totality of circumstances” were really explored, plaintiffs would lose. Such a finding of “guilt” should not bar a jurisdictions from bailing out of section 5 coverage.

In 1982, Senator Hatch warned that “future courts and future Justice Departments will look [at] proportional representation as the standard against which all electoral and voting practices [will be] assessed.” He was the only Senator who saw what was coming down the road with the passage of section 2, which has indeed become an instrument to insist on districting arrangements that promote (to the degree possible) minority officeholding in proportion to the minority population. The point has applied with equal force to the enforcement of section 5, as it has evolved over the years, as noted above. As a consequence, as a condition for bailout, the absence of section 5 objections would be quite unjust. Jurisdictions that have agreed to new districting lines or other changes in the method of voting but have failed to secure federal approval have not necessarily been engaged in discrimination. In *Miller* and other cases, the Supreme Court itself has made the point.

7. In the Unofficial Transcript of the hearing on May 16, 2006, page 35-36, Professor Pam Karlan said in reference to Georgia’s redistricting plan at issue in Georgia v. Ashcroft, that the Department of Justice “got it right” because two of the white Democrats elected under the new plan switched party affiliation and became Republicans. She said “Now I am sure that the Republicans in Georgia are very fair folks, but those black voters have no influence in those districts.” Do you agree with Professor Karlan’s assertion that minority voters in Republican districts “have no influence”?

The leaked Justice Department memo to which Professor Karlan refers certainly got very little “right.” It was ideologically driven work by career attorneys in the Justice Department who spun a tale based on highly dubious assumptions about racial identity and minority representation. Moreover, throughout the memo, these career attorneys attempted to read political tea leaves, predicting the race or political sympathies of candidates to be elected from the various districts under a new Texas congressional districting map that the Attorney General precleared, over their objection. Inevitably, attorneys sitting in Washington are not very good at making such predictions about states they have only the most cursory knowledge of. In this case, for instance, the state argued that a new District 9 would add a third black congressman to the Texas delegation; the authors of the DOJ memo said it would not. Election results in 2004 proved the state right.

But there is a larger point here: If Professor Karlan is suggesting that a black voter has influence only if he or she is represented by Democrat, the argument is nonsense. What politicians today ignore any constituents—any potential supporters. Who in politics writes blacks off because they’re the “wrong” race? If two white Democrats became Republicans and blacks before the switch had influence, why would they lose that influence just because the partisan label of the state senators changed?

Professor Karlan’s statement reflects not reality but her own deep partisan loathing for Republicans.

Thank you for giving the opportunity to answer these thoughtful questions.

SUBMISSIONS FOR THE RECORD

**Assessment of Voting Rights Progress in
Jurisdictions Covered Under Section Five
of the Voting Rights Act**

*Submitted to the United States Senate
Committee on the Judiciary
May 17, 2006*

**American Enterprise Institute
The Project on Fair Representation**

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After collecting and analyzing extensive data on the state of voting rights in jurisdictions covered by section 5 of the Voting Rights Act, we conclude that there is no longer sufficient justification for the preclearance mandate. Greatly increased minority voter registration rates, minority voter turnout rates, and number of minority elected officials all indicate that the aim of the act has been fulfilled—voting rights and representation for minorities have solidified and section 5 should be allowed to expire.

Introduction to the Studies

In anticipation of congressional hearings on the reauthorization of section 5 of the Voting Rights Act (VRA) in 2007, the Project on Fair Representation at the American Enterprise Institute, led by Visiting Fellow Edward Blum, commissioned two social scientists to gather data on the state of minority participation in the election process in the jurisdictions covered by the statute.

The authors of these studies, Ronald Keith Gaddie, Professor of Political Science at the University of Oklahoma and Charles Bullock III, Richard B. Russell Professor of Political Science at the University of Georgia, have produced extensive voting behavior scholarship in addition to acting as expert witnesses in dozens of voting rights cases throughout the country.

Section 5 of the VRA requires all of nine states and parts of seven others to seek permission—or, "preclearance"—from the United States Attorney General or from the United States District Court for the District of Columbia before any election practices or procedures can be changed. The states fully covered by section 5 are: Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia. Also covered are various townships and counties in California, Florida, Michigan, New Hampshire, New York, North Carolina, and South Dakota.

The Bullock-Gaddie studies analyze all of the covered jurisdictions in the fully- and partially-covered states. For the purposes of comparison, Bullock and Gaddie also analyze the voting behavior of three states and one city not covered by section 5: Arkansas, Oklahoma, Tennessee, and the city of Milwaukee, Wisconsin. The studies examine a variety of election criteria, including:

1. Black and Hispanic voter registration rates.
2. Black and Hispanic election turnout rates.
3. Success and failure of black and Hispanic candidates.
4. White cross-over support for minority candidates.
5. Racial polarization levels using three different methodologies.

Although the trends in minority election criteria vary from state to state, the data makes quite clear that **(a) there is no crisis in minority voting rights in 2006** compared to what there was in 1965 when the act was passed or in subsequent years when additional jurisdictions were added; and **(b) there is no quantifiable difference in the voting**

rights exercised by minorities in covered jurisdictions than in non-covered jurisdictions. Moreover, many of the minority electoral criteria we studied indicate that the covered jurisdictions often afford greater opportunity to blacks and Hispanics than many jurisdictions not covered by Section 5.

Assessment of Voting Rights Progress in the Section Five Covered Jurisdictions Since 1965

The Bullock-Gaddie studies examine the electoral opportunities for blacks and Hispanics in the states fully- and partially-covered by section 5 of the Voting Rights Act.¹

Voting Registration Rates, Voter Participation Rates, Growth of Minority Officeholders

The Voting Rights Act of 1965 had one central objective: eliminating the voting barriers that faced millions of African-Americans living in the South. The act accomplished this by banning literacy tests, providing federal voting registrars, and criminalizing harassment of African-American voters in targeted jurisdictions.

Section 4 of the Voting Rights Act is known as the “trigger” mechanism because it presents the formula to identify which jurisdictions are “covered” by the act. If a jurisdiction met two different criteria during the 1964 presidential election year, it was swept into coverage under section 4. The first was whether the jurisdiction used a literacy test or other device in the voter registration process. Although many jurisdictions throughout the country used literacy tests, southern registrars tended to use fraudulent ones with the specific aim to keep blacks from registering. Whether it was requiring an applicant to interpret a complex section of the state’s constitution or read from a newspaper written in a foreign language, the results in most of the South were the same: blacks failed while whites passed. The second criterion in determining coverage was voter registration and turnout rates. A jurisdiction was eligible for section 4 coverage if its voter registration rates as of November 1, 1964, or its electoral participation rates in the November 3, 1964, presidential election were below 50 percent. To be covered by section 4, the state or jurisdiction had to meet both criteria. In other words, if a state or jurisdiction used a literacy test *and* if registration or turnout was below 50 percent, then that state or jurisdiction was swept into coverage.

The Bullock-Gaddie studies measure growth rates in minority voter registration, election participation, and number of elected minority officials. As the tables below demonstrate, by 2000, the gaps between whites and blacks in these categories had virtually been eliminated. Moreover, in some section 5 jurisdictions, minority registration and turnout rates exceed those of whites.

¹ The states examined in their entirety are: Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia; counties and townships studied are in California, Florida, Michigan, New Hampshire, New York, North Carolina, and South Dakota.

Understanding the Data

Table 1 depicts the 2000 election voter registration and turnout data for the six southern states covered by section 5 of the Voting Rights Act in 1965. The average registration and turnout for the six states are both higher than the national average. The black deficit shows the gap between white and black rates, which in most states is negligible and well below the national average. In Georgia, Mississippi, and South Carolina, blacks now register at higher rates than whites.

Table 2 displays the 2000 election Latino registration and turnout rates for two other states covered by section 5 which were added in 1975: Texas and Arizona. While the gap between white and Latino voter participation persists, the gap in states covered by section 5 is smaller than it is in non-covered states with comparable Latino populations.²

Table 3 examines the number of black elected officials in states covered and not covered by section 5. The percentage increase in first ten year period, 1970 to 1980, was huge, especially for states in the South. States covered by section 5 saw increases from 203 to 750 percent; however, southern states not covered by section 5 made impressive gains as well. Tennessee gained 261 percent and Arkansas 312 percent. Growth from 1980 to 2000 was less dramatic but the trends in non-covered states again follow those of covered states. It is difficult to argue, then, that section 5 drove the change in the number of black elected officials in the six covered states; it seems more likely that broader changes in the South opened the door to increased election of black officials everywhere.

Table 4 compares the percentage of black elected officials, by state, to the black percentage of the state population in 2000. In states covered by section 5, the percentage of officials who are black is much higher than in non-section 5 states, even when their taking higher percentage black populations into consideration.

² Latinos as a percentage of the total state population. See U.S. Census 2000 Data, U.S. Bureau of the Census, www.census.gov

Table 1

2000 Voter Registration Data

Registration Rates for States Covered by Section 5			
State	Black Registration	White Registration	Black Rgstrn Deficit
Alabama	72.0%	74.5%	2.5%
Georgia	66.3%	59.3%	-7.0%
Louisiana	73.5%	77.5%	4.0%
Mississippi	73.7%	72.2%	-1.5%
South Carolina	68.6%	68.2%	-0.4%
Virginia	58.0%	67.6%	9.6%
Six-state average	68.7%	69.9%	1.2%

2000 Voter Turnout Data

Turnout Rates for States Covered by Section 5			
State	Black Voter Turnout	White Voter Turnout	Black Turnout Deficit
Alabama	57.2%	60.8%	3.6%
Georgia	51.6%	48.3%	-3.3%
Louisiana	63.2%	66.4%	3.2%
Mississippi	58.0%	61.2%	3.2%
South Carolina	60.7%	58.7%	-2.0%
Virginia	52.7%	60.4%	7.7%
Six-state average	57.2%	59.3%	2.1%

Registration Rates for Selected States Not Covered by Section 5			
State	Black Registration	White Registration	Black Rgstrn Deficit
Arkansas	60.0%	59.5%	-0.5%
Oklahoma	57.4%	69.5%	12.1%
Tennessee	64.9%	61.9%	-3.0%
Nationwide	67.5%	71.6%	4.1%

Turnout Rates for Selected States Not Covered by Section 5			
State	Black Voter Turnout	White Voter Turnout	Black Turnout Deficit
Arkansas	52.2%	49.0%	-3.2%
Oklahoma	44.5%	59.3%	14.8%
Tennessee	52.6%	52.3%	-0.3%
Nationwide	56.8%	61.8%	5.0%

Source: U.S. Census 2000 Data, U.S. Bureau of the Census, www.census.gov

Table 2

State	Latino Registration	White Registration	Black Registration	Latino Registration Deficit
States Covered by Section 5				
Arizona	33.4%	55.3%	46.2%	21.9%
Texas	43.2%	61.8%	69.5%	18.6%
States Not Covered by Section 5				
California	29.5%	67.2%	62.5%	37.7%
Colorado	41.5%	70.1%	64.2%	28.6%
New Mexico	49.4%	73.4%	B*	24.0%
National	34.9%	65.6%	63.6%	30.7%

State	Latino Turnout	White Turnout	Black Turnout	Latino Turnout Deficit
States Covered by Section 5				
Arizona	27.1%	48.7%	32.1%	21.6%
Texas	29.5%	48.1%	57.5%	18.6%
States Not Covered by Section 5				
California	24.5%	60.4%	52.5%	35.9%
Colorado	33.0%	59.4%	46.8%	26.4%
New Mexico	39.5%	66.1%	B*	26.6%
National	27.5%	56.4%	53.5%	28.9%

Source: U.S. Census 2000 Data, U.S. Bureau of the Census, www.census.gov

* B indicates that the base number is too small to show the derived measure

Table 3

Change in Number of Black Elected Officials from 1970 to 2000
in States Covered by Section 5 and Selected States Not Covered by Section 5

State	Black Elected Officials	Black Elected Officials	Change since 1970	Black Elected Officials	Change since 1980
States Covered by Section 5					
Alabama	70	238	240.0%	731	207.1%
Georgia	30	249	730.0%	582	133.7%
Louisiana	65	363	458.5%	701	93.1%
Mississippi	67	387	477.6%	897	131.8%
North Carolina	40	247	517.5%	498	101.6%
South Carolina	28	238	750.0%	540	126.9%
Virginia	30	91	203.3%	250	174.7%
Select States Not Covered by Section 5					
Arkansas	55	227	312.7%	502	121.1%
Oklahoma	25	77	208.0%	104	35.1%
Tennessee	31	112	261.3%	177	58.0%

Source: Various volumes of the *National Roster of Black Elected Officials* (Joint Center for Political and Economic Studies, Washington, D.C.)

* We display here data from years relevant to the Voting Rights Act (VRA) authorization. The Joint Center first published data on the number of black elected officials in 1970, the first year the act was reauthorized. 1980 marked the presidential election preceding the most recent reauthorization of the VRA in 1982. 2000 is the most recent presidential election year for which there is data on the number of black elected officials.

Table 4

State	Black Elected Officials	Total Elected Officials	Percent Black Officials	Percent Black of Voting Population
States Covered by Section 5				
Alabama	731	4,385	16.67	24.0
Georgia	582	6,529	8.91	26.6
Louisiana	701	5,051	13.88	29.7
Mississippi	897	4,754	18.87	33.1
North Carolina	498	5,820	8.56	20.0
South Carolina	540	3,943	13.70	27.2
Virginia	250	3,104	8.05	18.4
States Not Covered by Section 5				
Arkansas	502	8,408	5.97	13.9
Oklahoma	104	8,989	1.16	6.9
Tennessee	177	6,950	2.55	14.8
National	512,699	9,040	1.76	11.4

Source: U.S. Census 2000 Data, U.S. Bureau of the Census, www.census.gov and *Black Elected Officials: A Statistical Summary, 2000* by David A. Bositis, (The Joint Center for Political and Economic Studies; Washington, D.C., 2002)

Assessment of the Vestiges of Discrimination in Voting in 2006

The congressional findings in H.R. 9 and S 2703 assert that “vestiges of discrimination in voting continue to exist as demonstrated by second generation barriers constructed to prevent minority voters from fully participating in the electoral process.” (H.R. §2(2)) As evidence of discrimination, the bill cites:

- (A) the hundreds of objections interposed, requests for more information submitted followed by voting changes withdrawn from consideration by jurisdictions covered by the Voting Rights Act of 1965, and section 5 enforcement actions undertaken by the Department of Justice in covered jurisdictions since 1982 that prevented election practices, such as annexation, at-large voting, and the use of multi-member districts, from being enacted to dilute minority voting strength;
- (B) the number of requests for declaratory judgments denied by the United States District Court for the District of Columbia;
- (C) the continued filing of section 2 cases that originated in covered jurisdictions; and
- (D) the litigation pursued by the Department of Justice since 1982 to enforce sections 4(e), 4(f)(4), and 203 of such Act to ensure that all language minority citizens have full access to the political process.

We do not find the bill’s justifications for section 5 reauthorization compelling. We will analyze claims (A) and (C) in this paper. We will not deal with (B)’s claim that the number of requests for declaratory judgments denied by the United States District Court for the District of Columbia justifies reauthorization because the number of claims presented there so small as to be insignificant when compared with the number of submissions made annually to the Department of Justice.³ The claims in (D) are outside the scope of our research on section 5.

(1) Objections Interposed in Section Five Jurisdictions

The raw number of objections interposed by the Department of Justice to voting changes or procedures in the section 5 jurisdictions is an insufficient measurement to support reauthorization. In fact, the annual objections as a percentage of total submissions are so low as to warrant the exact opposite conclusion—section 5 should be allowed to expire.

³ As identified in the testimony of Bradley J. Schlozman, “Section 5 Declaratory Judgment Actions—Complete Listing of All Actions Filed in the U.S. District Court of the District of Columbia Seeking a Declaratory Judgment that Proposed Voting Change Does not Violate Section 5,” hearing before the Subcommittee on the Constitution, Committee on the Judiciary, House of Representatives, October 25, 2005.

Testimony and data presented by Acting Assistant Attorney General Bradley J. Schlozman on October 25, 2006, before the U.S. House Subcommittee on the Constitution belies this conclusion. Schlozman notes:

“For reasons of expense and timing, the vast majority of voting changes by covered jurisdictions are submitted to the Attorney General for administrative review. The Voting Section of the Civil Rights Division receives roughly 4,000-6,000 submissions annually, although each submission may contain numerous voting changes that must be reviewed. Redistricting plans are only a small portion of those submissions. For example, in Calendar Year 2003, we received a total of 4,628 submissions, 400 of which were redistricting plans. In Calendar Year 2004, we received 5,211 submissions, 242 of which involved redistricting plans. In Calendar Year 2005, we already have received 3,811 submissions (as of October 17th), 88 of which have been redistricting plans. Perhaps not surprisingly, the number of section 5 submissions sent to the Department of Justice tends to reach its apex two years after the national Census, the point at which jurisdictions have the demographic data necessary to redraw their political districts. For example, in 2002 we received 5,910 submissions, of which 1,138 were redistricting plans.”

For the period 1982-2005, of the 105,452 submissions reviewed by the Attorney General, only 753, or 0.70 percent received objections. For the period 1996-2005, of the 54,090 submissions reviewed, only 72, or 0.153 percent, drew objections. Objection rates exceeded 4 percent from 1965 to 1970 but by today are insignificant. Moreover, some of Department of Justice’s objections in recent years have been proven to be in error, either because of the Department’s “max-black” requirements, which were struck down by the Supreme Court in *Miller v. Johnson* (515 U.S. 900 (1995)), or because of its denial of preclearance to jurisdictions because it believed them to be violating Section 2 of the Voting Rights Act (*Reno v. Bossier Parish School Board* (95-1455), 520 U.S. 471 (1997)) Thus, no valid argument can be made to extend Section 5 based on the number of objections; the number of objections has reached an all-time low while black voter participation and minority elected officials numbers have soared.

Table 5

ALL SUBMISSIONS			
Year	Number	Objections	Percent objections
1982	2,848	66	2.32%
1983	3,203	52	1.62%
1984	3,975	49	1.23%
1985	3,847	37	0.96%
1986	4,807	41	0.85%
1987	4,478	29	0.65%
1988	5,155	39	0.76%
1989	3,920	30	0.77%
1990	4,809	37	0.77%
1991	4,592	75	1.63%
1992	5,307	77	1.45%
1993	4,421	69	1.56%
1994	4,661	61	1.31%
1995	3,999	19	0.48%
1996	4,729	7	0.15%
1997	4,047	8	0.20%
1998	4,021	8	0.20%
1999	4,012	5	0.12%
2000	4,638	4	0.09%
2001	4,222	7	0.17%
2002	5,910	21	0.36%
2003	4,829	8	0.17%
2004	5,211	3	0.06%
2005	3,811	1	0.03%
TOTAL	105,452	753	0.71%

Source: Bradley J. Schlozman, "Administrative Review of Voting Changes," testimony before the Subcommittee on the Constitution, Committee on the Judiciary, House of Representatives, October 25, 2005.

(2) *Section 2 Cases Originating in the Covered Jurisdictions*

Based on a recent study submitted to the U.S. House Subcommittee on the Constitution by the Voting Rights Initiative at the University of Michigan Law School, *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982*, more lawsuits brought under section 2 ending with a determination of liability have occurred in non-covered jurisdictions than in covered ones. For example, since 1990 there are more court findings of section 2 violations in New York or Pennsylvania than in South Carolina.⁴

⁴ See Richard H. Pildes: "The Future of Voting Rights Policy: From Anti-Discrimination to the Right to Vote" (forthcoming Howard Law, p.19)

The University of Michigan study asserts that the “examination of section 2 cases can provide the requisite for Congress’s exercise of its enforcement powers under the Fifteenth Amendment.” If so, the greater prevalence of section 2 liability outside the covered jurisdictions raises the question of why, if section 5 is reauthorized for currently covered jurisdictions, it should not be extended to other areas of the nation in which as many judicial findings of voting discrimination have been found.

According to the study, of the 209 lawsuits that ended with a determination of liability, 98, or 46.9 percent, originated in jurisdictions covered by section 5 of the Voting Rights Act, and 111, or 53.1 percent, were filed in non-covered jurisdictions.

Congress also has in the record an 867-page report from the American Civil Liberties Union, “The Case for Extending and Amending the Voting Rights Act.” This report examines 293 ACLU cases brought in 31 states since June, 1982. Of those 293 cases, the number dealing with constitutional discrimination problems in section 5 states, though, is quite small. 98 of the 293 cases occurred in states covered by section 5. Of the 98 cases in covered jurisdictions, six cases found unconstitutional discrimination against minority voters while another six found unconstitutional discrimination against white voters. Of the cases 195 cases in non-covered jurisdictions, four cases found unconstitutional voting practices against minority voters while two found discrimination against white voters.

An additional 22 cases found a constitutional violation, but these did not involve racial discrimination or any conduct addressed by the Voting Rights Act. As the University of Michigan report notes, the “record of section 2’s ‘results-based’ test goes beyond what the Fifteenth Amendment alone commands. As a consequence, the record of section 2 violations does not necessarily indicate the existence of constitutional violations, and *therefore does not necessarily provide the proper predicate for Congress’s exercise of its enforcement powers under the Fifteenth Amendment*” (italics added). Therefore, the case cannot be made for extending section 5 for another 25 years based upon the number of section 2 cases originating in the covered jurisdictions without applying this test to non-covered jurisdictions. The University of Michigan study notes the following non-covered jurisdictions in which there were judicial findings of intentional discrimination since 1982:

- Thurston County, Nebraska
- Berks County, Pennsylvania
- Montezuma County, Colorado
- Philadelphia, Pennsylvania
- Eastern Shore, Maryland
- Little Rock, Arkansas
- Boston, Massachusetts
- New Rochelle, New York
- Los Angeles County, California
- Chicago, Illinois
- Western Tennessee
- State of Illinois

Conclusion

In 1965, black electoral participation in South was so low that Congress added an emergency provision to the Voting Rights Act, overstepping its traditional Constitutional bounds in order to establish voting rights for minorities. That provision, section 5, was designed to be temporary—put in place until blacks could register and begin the legacy of voting. The voter registration, voter turnout, and number of elected officials data for 2000 show that the aims of section 5 have been fulfilled. The states covered by section 5 have made fantastic progress since 1965; in fact, the data show that their progress has been so significant that minority voting rights are as strong, if not stronger in section 5 states than for states not bound by such burdensome preclearance restrictions. The second-generation barriers presented in the House and Senate bills as justifications for reauthorizing the section for another 25 years are not compelling. The number of objections interposed by the Department of Justice is statistically insignificant and there are fewer section 2 violations in section 5 jurisdictions than outside.

Unlike Section 5, the most important provisions of the Voting Rights Act are permanent, such as the ban on literacy tests and grandfather clauses. Once these barriers were eliminated in the South, black voter-registration soared. Today, minorities in the states covered by section 5 are full and equal participants in the electoral process. The old roadblocks to minority voting in section 5 states are gone. Forever. It is time to let this temporary section expire.

The Bullock-Gaddie voting rights studies are available online at the AEI Project for Fair Representation website. To read the studies, visit: www.aei.org/pofr.

**TESTIMONY OF DREW S. DAYS III
ALFRED M. RANKIN PROFESSOR OF LAW
YALE LAW SCHOOL**

**BEFORE THE COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE**

**ON THE RE-AUTHORIZATION OF
THE VOTING RIGHTS ACT OF 1965**

MAY 17, 2006

Mr. Chairman and Members of the Committee, I want to thank you for inviting me to participate in these hearings concerning the re-authorization of the Voting Rights Act of 1965, one of the most important pieces of legislation in our Nation's history.

Chief Justice Warren, in his path-breaking opinion in South Carolina v. Katzenbach upholding the constitutionality of the 1965 Voting Rights Act, stated with respect to Section 5:

After enduring nearly a century of systematic resistance to the Fifteenth Amendment, Congress might well decide to shift the advantage of time and inertia from the perpetrators of the evil to its victims

I think the central issue before this Congress is, at heart, whether 40 years after the Act's passage, the time has come to shift this advantage of time and inertia back to the jurisdictions covered by Section 5. My answer is that it is not. Instead, the Voting Rights Act and Section 5, in particular, should be re-

authorized to promote further progress in achieving truly equal participation in the political process free of racial discrimination and exclusion or to prevent “backsliding” that may result in undermining what success the Act has already achieved.

I have not been able to review all of the testimony and studies presented to the House of Representatives and now, to the Senate, with respect to the re-authorization. Based upon my four years administering Section 5 and other provisions of the Act, however, I believe that they offer ample evidence of contemporaneous and continuing problems of electoral practices discriminatory in purpose and effect to support renewal. I have in mind especially the reports prepared by the National Commission on the Voting Rights Act and by the Voting Rights Project of the American Civil Liberties Union.

In contrast, others appearing before this Committee and its House counterpart, have pointed to the small numbers of objections lodged by the Attorney General in the pre-clearance process to support their contention that Section 5 is no longer needed: jurisdictions have simply stopped discriminating on their own. But relying, once again, on my experience in administering that regime I believe that those same figures can also be read to indicate that vigorous enforcement of Section 5 in the past and more recent active informational efforts by the Department with respect to its preclearance process have resulted in a high level of compliance among covered jurisdictions. During my time at the Justice Department, compliance was increased markedly to the extent that a covered jurisdiction anticipated a forceful federal response if preclearance was not sought and to the degree that they expected fair, prompt,

respectful and constructive treatment of their submissions.

It is not surprising that members of this Committee and some witnesses have also expressed concern that a reauthorized Section 5 might be open to successful challenge in the Supreme Court. For the Court has, over the last decade, found several civil rights statutes unconstitutional in the Boerne case and its progeny because they failed, in its estimation, to satisfy a “congruence and proportionality” standard. In doing so, the Court has focused on whether Congress: 1) identified the constitutional right or rights under Section 1 of the 14th Amendment that it sought to enforce; 2) found evidence of a history of “widespread and persisting deprivation of those constitutional rights”; and 3) established that there was a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.

Several points, however, need to be noted with respect to this line of cases and their potential impact on any challenges to a re-authorized Section 5. First, the Court has in recent years “pulled back” from what for a time appeared to be its unwillingness to uphold any civil rights legislation providing private damage remedies in suits brought against States. Consequently, one section of the Americans with Disabilities Act (Tennessee v. Lane) and the Family and Medical Leave Act (Nevada v. Hibbs) have now been held constitutional exercises of Congress’s Section 5 powers. In so holding, the Court has given effect to its very early acknowledgment in Boerne that “Congress must have wide latitude” in determining where the line lies “between remedial legislation and substantive redefinition.”

Second, unlike the earlier laws struck down by the Court, these latter two

decisions have involved, in one case (Hibbs) Congress's effort to remedy discrimination against women in the workplace (a gender classification), and the other (Lane), access for the disabled to the courts, a fundamental constitutional right. Given the new composition of the Supreme Court, predictions as to what course a majority will take in this respect are little more than pure speculation. But certainly these two most recent decisions make clear that legislation addressed to remedying or preventing discrimination against groups or rights entitled to heightened protection will receive a certain degree of deference. Since Section 5 is directed at eradicating racial discrimination, a suspect classification, with respect to voting, one of the most basic of rights, the Court's deference to Congress should be at its greatest.

Third, this possibility is supported further by the fact that the Court has

upheld the enactment of the Voting Rights Act and Section 5, in particular, as a model example of Congress's exercise of its prophylactic and remedial constitutional powers. For it correctly recognized the fundamental nature of the right to vote free from discrimination, Congress's explicit constitutional mandate under Section 2 of the 15th Amendment and the devastating consequences for those unable to function as first class citizens in our representative democracy (Lopez v. Monterey County).

The clear lesson from this line of "New Federalism" decisions is that congressional fact-finding and the making of a solid legislative record hold the key to any chance of legislation, such as a re-authorized Voting Rights Act, passing constitutional muster. In my estimation both the House and Senate Committees are approaching this undertaking in exactly the right fashion.

There remain several subsidiary questions with respect to re-authorization of the Voting Rights Act that I would like to address briefly. The first has to do with the proposal to amend Section 5 to address the difficulties created for effective enforcement of the Act as a result of the Court's decision in Reno v. Bossier Parish, II. It held there that the pre-clearance requirement is met to the extent that a change results in no retrogression, even though the jurisdiction's action was the result of a discriminatory intent. This decision strikes me as basically at war with the spirit of Section 5 and one that clearly places an unfair burden on those that the Act was designed to protect. Left unaddressed by amendment, Bossier Parish II will force harmed minority citizens to bring their own Section 2 litigation in order to obtain redress. Second, the new standard established by Georgia v. Ashcroft has substituted an amorphous, easily

**manipulable standard for determining a Section 5 violation in place of the
theretofore well-established and well-understood Beer non-retrogression test.
To me, it constitutes an open invitation to mischief.**

Conclusion

**Mr. Chairman and Members of the Committee, no one can deny that the
Nation has come far since 1965 in realizing the promise of the 15th Amendment
that “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.”

I think we must ask ourselves in 2006 as the Congress considers the re-authorization of the Voting Rights Act, “Why not complete the job started in 1870 and 1965? Why not ensure against “backsliding” from where we have reached in this long journey? Let’s keep the advantage of time and inertia on the side of those still hoping to enjoy fully their rights as citizens of the United States.

Thank you.

STATEMENT OF ARMAND DERFNER

Derfner, Altman & Wilborn
Charleston, South Carolina

Before the Senate Committee on the Judiciary

Hearing on Section 5 of the Voting Rights Act
May 17, 2006

Mr. Chairman and members of the Committee, thank you for the opportunity to appear and testify concerning the important legislation before you. I have had the privilege of testifying before this Committee before, and I know its members are vigilant in protecting the right to vote. It is fitting that we are here today on the anniversary of the Supreme Court's decision in *Brown v. Board of Education* (although we in South Carolina usually call it *Briggs v. Elliott*, which was the case in that group that came from our Clarendon County).

In the wake of the Civil War, our Constitution was radically changed to give the National government power to protect citizens from the States. That is why we are here today. One of the Civil War amendments, the 15th amendment, said that a State could not abridge or deny the right to vote on account of race, color or previous condition of servitude. For 90 years that amendment was violated freely by many States, and that is also why we are here today.

The Voting Rights Act was passed on August 6, 1965, against a background of the near-century of wholesale desecration of the 15th amendment. The Act contained an interlocking set of procedures and remedies, all designed to protect against denial or abridgement of the right to vote.

The original heart of the Voting Rights Act was Section 4, which suspended literacy and understanding tests, and similar devices, in certain "covered jurisdictions," mostly in the Deep South.

The suspension of the tests was for five years. During the five years, other remedies were in play, all based on the coverage formula, or "trigger" contained in Section 4 of the Act, which was codified at 42 U.S.C. § 1973b. The most important was Section 5, the preclearance provision. In 1965, Congress knew that in the past, whenever one type of discrimination had been blocked another had sprung up to take its place, sometimes within twenty-four hours. Section 5 was Congress's answer to this problem. Section 5 simply provided that in a covered jurisdiction, no change in any voting law or procedure could be enforced until the change had been precleared by the jurisdiction through either a three-judge U.S. District Court in the District of Columbia or the Attorney General. In order to gain preclearance, the covered jurisdiction would have to show that its proposed change was not discriminatory in purpose and not

discriminatory in effect – did not have the purpose or effect of denying or abridging the right to vote.. Section 5 was deliberately drawn as broadly as possible, to cover changes that could affect voting even in a minor way, because although Congress was confident that there would be widespread attempts to evade the Voting Rights Act, it could not predict exactly what forms those evasions would take

The initial focus of efforts under the Act was on registration and voting, *i.e.*, denial of the right to vote, through suspension of literacy tests. By 1970, as the initial five-year special coverage period was winding up, the literacy test suspension had resulted in registration of an estimated one million new black voters in the covered states.

On the other hand, as black citizens overcame barriers to registering and casting ballots, new barriers were being erected to abridge the newly gained right to vote, to insure that, while blacks might vote, their favored candidates couldn't win. Congress's faith in the ingenuity of those who had been relying on discriminatory literacy tests was being quickly rewarded. A 1968 report of the Civil Rights Commission perceptively reported a sharp growth in vote dilution techniques as new methods of voting discrimination. The report specifically singled out redistricting measures, shifts to at-large elections, and changes in local government boundaries.

In other words, opponents of black voting had simply shifted from denial to abridgement of the right to vote. Many people refer to the new tactics as vote dilution, and this may have obscured the fact that they were really abridgements of the right to vote – direct targets of the 15th amendment's words and meaning. The reason I emphasize this is that some people say that these vote "dilution" schemes are not really the proper focus of the Voting Rights Act, or that the Act has been taken on a detour. The word "abridge" means, "cut," or "reduce" or "contract." That is exactly what these dilution schemes do, and that is exactly what the precise words of the 15th amendment and the Voting Rights Act prohibit.

The right to be protected against abridgement of the vote was recognized by the Supreme Court in 1969, in the first interpretation of section 5. Rejecting the argument that Section 5 should be limited to measures directly affecting the right to register and to cast a ballot, the Supreme Court held that the broad reach of Section 5 covered these changes in "systems of representation" because, as the reapportionment cases recognized, "the right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot."

The trends perceived by the Civil Rights Commission in 1968 were the beginning of an epidemic of dilution or abridgement changes in the covered jurisdictions. In fact, of the 1300+ changes to which the Attorney General has objected to date, the vast majority have involved changes in representational systems, or, to put it in plainer terms, "rigged" election systems like gerrymanders; redistricting; changes to winner-take-all at-large or multimember districts; annexations superimposed upon at-large election systems; majority-runoff requirements; and anti-single-shot methods such as full-slate laws and numbered places. Since an objection is the equivalent of a court injunction, the large number of objections shows how central the role of

preclearance is in guarding the right to vote.

Furthermore, well over half of the objections have come since the last reauthorization of the Act in 1982, which makes it plain that the problem has not disappeared, and the need for preclearance continues today.

The story of the Voting Rights Act did not end in 1965; it was just beginning. Because of its effectiveness in checking the growth of vote dilution and the demonstrated need to continue its protections, Congress extended Section 5 for five years in 1970, seven more years in 1975, and 25 years in 1982. Each of these extensions was marked by vigorous debate in Congress and by extensive hearings and reports documenting the continuing abuses that justified the continued need for the preclearance remedy.

The 1982 extension was for 25 years. The 25 year interval reflected a Congressional reassessment, in light of experience, of how long it might take to overcome voting discrimination. In a Nation where slavery lasted for a quarter of a millennium, where another century went by with racial segregation in full force before the Voting Rights Act, where, in other words, the Voting Rights Act sought to change nearly 20 generations of human behavior, the problem could certainly not be solved in 5 or 10 or 17 years.

Indeed, I do not assume that the Congresses of 1965, 1970 or 1975 thought they were solving the problem of voting discrimination once and for all. Rather, they were acting judiciously and cautiously to apply an appropriate remedy for a limited time period, and calling for a review at the end of that period to see if conditions had changed sufficiently to end the statute. Each time before now, that review has led Congress to decide that the time had not yet arrived to end the statute. In fact, each time Congress has held extensive hearings and compiled a detailed record of continuing problems not only justifying extension of Section 5 and the other temporary provisions but adding new remedies to address newly recognized problems. A prime example is the way literacy tests were banned in three successive steps – from a temporary suspension in the covered jurisdictions (1965), to a temporary suspension nationwide (1970), to permanent elimination nationwide (1975). The Voting Rights Act has probably had more congressional review and oversight than any other civil rights statute – or possibly any other type of statute – in our history.

* * *

I practice law in Charleston, South Carolina, and I have studied voting and elections not only there but elsewhere in my state and in the surrounding states. I know that the need for Section 5 is still there and I would like to tell you some of what I have seen that tells me so. Although these comments reflect only my own experience, I should say that I have lived in the South for nearly 40 years, and in Charleston for about 35 years. I love my city and my state, and would like them to be, as the Army recruiting ad says, the best that they can be.

Unquestionably, there has been enormous progress since 1965, and I am very pleased with that. But we started so far down that even with great progress we have too far to go to be ready to abandon a protection that is responsible for much of the progress.

As an overview, let me refer to two major reports on South Carolina that have been presented to this Committee, one by the American Civil Liberties Union (Laughlin McDonald, Dan Levitas and others), and the other by the Leadership Conference on Civil Rights (John Ruoff and Herbert Buhl).

Both these reports present painstaking detail, case by case, of South Carolina's forced march forward. The history of our nation and of my state make it all too clear that progress does not come by itself, and these two studies show how difficult it is. My own experience, in many cases, shows how arduous it is as well.

As these reports show, South Carolina has had several dozen voting rights suits during the life of the Voting Rights Act. But the number of Section 5 objections is 120, far exceeding the number of lawsuits. That means 120 voting violations by the State and its local governments. That is an astounding number. More to the point, 73 of the section 5 objections have come since renewal of the Act in 1982. That too is an astounding number. And nine of the objections have come in just the past five years. But even these numbers are poor substitutes for the story which lies beneath the statistics. The point is that, by their very nature, voting laws and practices apply broadly to entire classes of people; thus when a Section 5 objection or a lawsuit blocks or interrupts a law which would have abridged or was abridging the right to vote, the rights of many citizens are vindicated and protected. In a very real sense, the Voting Rights Act is a Congressional promise that the nation stands by the principles enunciated in the Constitution, and the view from South Carolina since the time of the 1982 renewal suggests that now is not the time to retreat from that promise.

Here is what Ruoff & Buhl say in summarizing the past five years:

"These objections since 2000 demonstrate the continued need for Section 5 and its vigorous enforcement. Absence of Section 5 review of the General Assembly's efforts to impose a racially discriminatory election system for Charleston County, school trustees would have imposed on Charleston's black citizens the obligation to mount closely Section 2 litigation to challenge an electoral system that the district court had just found discriminatory. In the city of Charleston, African-American citizens would have foreseeably and avoidably seen a district in which black citizens could elect candidates of their choice quickly change to one in which they could not. In Sumter County, the county council could have deprived black citizens of the ability to elect a candidate of their choice in District 7, protecting a white incumbent and continuing a thirty-year pattern of opposing full voting rights for Sumter's African-American citizens. In Union County, a local state representative could have imposed on the school board a redistricting plan

that made it much less likely African-American citizens would continue to be able to elect two candidates of their choice to the Board of Trustees. In Greer, in order to protect a white incumbent and cater to white citizens' demands, African-American citizens would have been deprived of the ability to elect even one candidate of their choice to the city council. In Richland County, imposition of majority vote requirements would have put off the day that a growing black population would be able to elect a candidate of its choice to the Richland-Lexington School District 5 Board of Trustees. In North, white city officials would have continued admitting white citizens, while excluding their black neighbors from annexing and participating in town elections."

Now let me go from the wholesale to the retail – my own experience. I will address briefly five sets of cases I have personally litigated in my home state during the past two decades. – *i.e.*, since the last extension of Section 5. This is not ancient history, rather, what I will talk about happened in the time since the 1982 extension, indeed a lot of it in this very decade – the 21st century.

I should also emphasize that my state is not alone. I do not believe South Carolina legislators or officials are more likely to do things that require the protection of the Voting Rights Act than their counterparts in other Section 5 covered states. On the contrary, my experience tells me that my state is on the same wave length as other jurisdictions covered by Section 5, and that those other covered states need Section 5 just as much as my state.

The problems I will talk about are some of the same types that we encountered in earlier times – but they are still with us.

First, one of the problems that has plagued voters is manipulation of city boundaries to maintain white control. This was the trick in Tuskegee, Alabama, that produced the famous 1960 Supreme Court case of *Gomillion v. Lightfoot*. A few years later, one of the earliest Supreme Court cases under the Voting Rights Act was decided. In that 1971 case that I tried, *Perkins v. Matthews*, Section 5 was successfully used to block the city of Canton, Mississippi from carrying out an annexation that added new white residents to offset growth in black voting registration.

The problem continues. In 1987 I brought a lawsuit against the city of Orangeburg, South Carolina, for the same thing. Orangeburg was once a round town, that is, it had been formed, like many cities, by drawing a circumference from a center point. As black voting grew, however, the town officials responded by a series of annexations that turned the town border into a jagged design of the most irregular shape. Our lawsuit resulted in a decision which allowed the annexations but minimized their discriminatory effect by changing from at-large elections to elections by fairly drawn districts or wards. A similar lawsuit in the mid-1990's in Hemingway, South Carolina, also blocked that city's annexations, and the discriminatory nature of those annexations was plainly shown when the city decided that rather than annex nearby areas of black residents, it would simply undo the annexations of white people. In other words, if it could

not carry out its discriminatory design, it had no use for these annexed areas.

A second type of problem frequently encountered, the harassment of poor or black voters at the polls, bears the hallmarks of the intentional discrimination that some people mistakenly think lives only in the history books. In a 1990 election for Probate Judge of Charleston County, a black candidate faced a white candidate. There was widespread intimidation of black voters at rural polling places, especially black voters who needed assistance because they were old, infirm or not fully literate. (And, by the way, it is no shame to need help when casting a vote in our elections: if you saw some of the Constitutional referendums on our ballot, you would need a Ph.D. to read them or make heads or tails out of them.)

Despite the attempts to suppress black voting, the black candidate, Bernard Fielding, won that election. However, the State Election Commission, acting on unverified complaints from some of the same people who had tried to intimidate the black voters, set the election aside. We had to appeal to the South Carolina Supreme Court, which fortunately upheld Fielding's election. One of the other features of that campaign was the white candidate's tactic of running an ad with his black opponent's picture, to make sure that every white voter knew exactly who was white and who was black.

That was not the last time we have seen intimidation of voters. In a trial in 2002, which I will discuss in a few minutes, there was testimony that attempts to intimidate black voters continues as a frequent tactic.

Another threat to voting rights occurred when Congress passed the National Voter Registration Act in the mid-1990's ("Motor Voter law"). Our then Governor announced that South Carolina would not comply with the Act, and our then-Attorney General went to court to defend South Carolina's right to ignore the law. Again, fortunately, the court – this time a federal court – issued an injunction bringing the Motor Voter law to South Carolina.

Based upon my very recent experience I can say that the presence of pervasive racial polarization among voters has not abated. Studies by experts on all sides, including experts hired by the State, and repeated judicial decisions, have highlighted the continuing phenomenon. It is not just in elections here and there, but throughout our State. In the most recent statewide redistricting case following the 2000 Census, where the Court analyzed the plans before it under both Sections 5 and 2, a three-judge court took extensive note of the persistence of racially polarized voting, and how it affects the fundamental right to vote. Among the court's findings, it said "the history of racially polarized voting in South Carolina is long and well-documented," and the court cited the "disturbing fact" that there has been "little change in the last decade." These findings echoed earlier findings, as well as the conclusions of plaintiffs' and defendants' experts who have repeatedly confirmed the persistence of racially polarized voting in my state.

Going from the large-scale to the intensely local, even the most minor, seemingly innocuous changes can be fraught with problems that hinder voters. Last year, in Charleston

County, the registration office – which is also the location for “early absentee voting” and resolving election day registration disputes – was moved from a central location, well served by bus lines and adjacent to other government offices – including public assistance agencies – to a remote location nearly half a mile from the nearest bus service. What does that mean if you don’t have a car, especially if you are a minority voter – who disproportionately don’t own cars? What it means is another barrier to the right to vote.

Perhaps the most notable case is a very recent one that started in 2001 and ended with a Supreme Court order less than two years ago. This case involved the method of electing the County Council in Charleston County. The County Council members were elected from nine separate districts until 1969, when there was a sudden change to at-large elections for the nine members.

Unfortunately, when that change took place in 1969, it was precleared under Section 5. The reason is not entirely clear, but that was in the infancy of Section 5 and it was before the Supreme Court had highlighted the dilutive effects of at-large elections.

In any event, in 2001 the U.S. Department of Justice, along with a group of individual voters, brought a lawsuit to challenge the at-large elections as racially discriminatory. I was one of the lawyers representing the plaintiffs in that case. The case was tried for six weeks in 2002, and it resulted in a sweeping decision overturning the at-large elections on the ground that system discriminates against black voters on account of their race. The court issued a 75-page opinion analyzing in minute detail what the role of race has been and continues to be in our elections. Much of the evidence supporting the decision came from the County’s own expert witness. The decision is a virtual primer about corrosive voting discrimination in my state and my county today, in the 21st century.

Let me outline a few of the things this case tells us. First, there is severely racially polarized voting, meaning that white voters rarely vote for candidates favored by black voters, especially if those candidates are black themselves. This was based on analysis not of old elections, but elections during the past 15 years, by experts for all sides. Moreover, the evidence of polarization affects primaries and general elections, as well as non-partisan elections.

This pattern has had a predictable result. In a county with a population more than one-third black, only three of the 41 people elected to County Council since 1970 were minority, including only one in the last decade. In that last decade, all nine black candidates supported cohesively by black voters were defeated in the general elections, as well as 90% of the 21 preferred candidates of whatever race. For example, black voters did best in 1998, but even in that year, the two white candidates they supported won but the two black candidates they supported lost.

Nor were these results accidental. There was powerful evidence of people intimidating and harassing black voters at the polls during the 1980s and 1990s and even as late as the 2000

general election. There was also evidence of race baiting tactics used by political strategists.

Perhaps the most telling sign of voting discrimination in Charleston County elections was the Court's finding that racial appeals of a subtle or not-so-subtle (*i.e.*, overt) nature were used in election campaigns. The most telling of these examples were white candidates running ads or circulating fliers with photos of their black opponents – sometimes even darkened to leave no mistake – to call attention to the black candidates' race in case any white voter happened to be unaware of it.

This tactic is the surest sign of an atmosphere where voting discrimination flourishes; in locales where the tactic is used, this tactic says local politicians know race “sells,” and that is why they use it. How much more would they use race to buy and sell elections if the Voting Rights Act were not in place?

After the district court's decision, the County appealed, and the decision was resoundingly affirmed by the Fourth Circuit in an opinion by Judge J. Harvie Wilkinson, joined by Judge Paul Neimeyer and Judge Allyson Duncan. (all appointed by Republican Presidents, two by President Reagan, and one by President, George W. Bush.) Still the County did not give up, but petitioned the U.S. Supreme Court, which refused to hear the case, and it finally ended with a new system designed to provide equal rights to all voters of all races.

One important note: the County spent over \$2,000,000 of taxpayers' money in its defense of the discriminatory method of electing County Council members. Incidentally, nearly \$100,000 of this was for expert witnesses. I understand that one provision of the bill before you would include expert witness expenses as part of the attorneys' fees recoverable by prevailing parties. The huge amount spent by Charleston County on expert witnesses shows what private citizens have to be prepared to match in order to vindicate *bona fide* claims. This is why it is so important that expert witness expenses be compensable in Voting Rights litigation as is the case under many other civil rights statutes.

Another telling note that may be particularly instructive to this Committee in seeing the relationship and distinctions between Sections 5 and 2: the Charleston County School Board has an election method that is similar but not identical to the County Council. While the County Council case was going on, the South Carolina General Assembly, led by legislators from Charleston County, tried to change the school board method to adopt the most discriminatory features of the County Council. The then-Governor vetoed the first attempt, but the General Assembly tried again – even after the method had already been thrown out by the federal court. This time, the new Governor let the bill become law (although he would not sign it). Fortunately, Section 5 of the Voting Rights Act covered this voting change and when it was presented for preclearance under Section 5, preclearance was denied. If Section 5 had gone out of existence, this bill would have become law even though its precise twin had already been found to be racially discriminatory and African-American citizens would have endured years of vote dilution and expense before Section 2 could successfully undo the law.

I believe that every one of the changes involved in the instances above was purposeful. Not all of them were adjudged to be discriminatory in purpose, because once a judge on the Attorney General finds a voting change or a voting practice is discriminatory in effect or result, there is no need to go on to the inflammatory issue of discriminatory purpose. Indeed, recognition of how inflammatory that is, and hard it was to expect judges to find that the acts of state and local officials were intentionally discriminatory was, in part, what led to the course that Congress followed when modifying Section 2 in 1982.

The specific topic of today's hearing is the benefits and burdens of section 5. I believe the discussion above has clearly shown the benefits.

Let's talk about the burdens. First, of course, is the practical burden, that of doing the paperwork to file a submission with the Attorney General. This is not arduous. The task of preparing the submission is usually a fraction of the work involved in making the voting change: thus, a redistricting calls for more information, but barely a fraction of the time and work that went into considering and adopting the plan. By the same token, a polling place change is a simple submission, ordinarily taking a fraction of the time needed to find and settle on the new polling place location. I can attest to this from personal experience, from having talked many times to city attorneys or state Attorneys General who were responsible for the submissions. I have also had the experience of being retained by a city to prepare a redistricting submission, and it was not burdensome.

Indeed, the nature of the administrative process, which gives the Justice Department 60 days (and one opportunity to request more information) is probably the most streamlined administrative process known to the federal government. Unlike agencies that can sit on decisions for months or years, if the Department does not object within the 60 days, the change is cleared. That is it. Those jurisdictions that prefer can seek preclearance under the same standard before a 3-judge court in Washington D.C. in a declaratory judgment action. The same court route is available to a jurisdiction that receives an objection from the Attorney General – and the court proceeding is *de novo*.

Of course, I will not ignore the burden on our federal system, of having this unusual remedy, and having it apply only to certain states or jurisdictions. But a State, no less than any government, is an institution that is really a collection of its people. For too long, the covered states were in the invariable habit of representing only some of the people and ignoring (at best) the others. The history of 15th Amendment violations created a situation in 1965 that required the federal government to pass the Voting Rights Act in order to enforce the Constitution. The record of the continuing need now calls for keeping the remedy for a while longer. Thus, while I am fully sensitive to the demands of federalism, our federal system is not the one we created in the Articles of Confederation. Rather, it is the system that replaced the Articles: the Constitution, augmented by the Civil War amendments. Under the Constitution, the need to protect citizens' right to vote, and the historical patterns showing persistence of the problem,

require an effective remedy here, and warrant an extension of this law for what we can all hope will be the final time.

Finally, let me say something about history. In 1894, three decades after the War, Congress repealed most of the civil rights laws it had passed during Reconstruction, concluding that they were no longer needed. That hopeful belief turned out to be tragically wrong. The period that followed is called the nadir of race relations in American history. Black voters were eliminated from the rolls, by state law or by lynch rope, while the Supreme Court issued a series of decisions upholding the most transparent forms of discrimination. When Woodrow Wilson became President, he promptly segregated the entire civil service, and that 50 years after the War!

I obviously do not believe we will return to segregation or wholesale disfranchisement if Section 5 expires, but I do believe it is premature to imagine that we will not regress without this crucial protection.

Striving for full equality in all matters, especially the right to vote, is an obligation of every American. Earlier congressional efforts to address the problems that I have described here failed; this law has not. When we have such an effective protection in the form of the Voting Rights Act, we should not rush to abandon that protection prematurely simply in the hope that equality will come.

In 1981, during his testimony on the Voting Rights Act, the great historian C. Vann Woodward was asked why Congress should be concerned about history. Even today, I can remember his words almost by heart:

“It makes evident that advances and revolutions in popular rights can be reversed, that history can move backward, that enormous gains can be lost despite the enormous cost we paid for them. My history teaches me that if it can happen once, it can happen again.”

Thank you, Mr. Chairman.

Testimony of Fred D. Gray

United States Senate
Committee on the Judiciary

Hearing on
“Understanding the Benefits and Costs
of Section 5 Pre-Clearance”

Dirksen Senate Office Building Room 226

May 17, 2006
9:30 a.m.

Chairman Specter, Senator Leahy, my Senator Jeff Sessions, and other members of the Committee:

My name is Fred Gray. I am highly honored today to testify in support of reauthorizing what many have called “the most important civil rights legislation” in history.

I testify before this Committee from the perspective of a civil rights lawyer who has been in the trenches practicing for over 50 years in the Deep South, particularly in Alabama. I was fortunate to have represented Mrs. Rosa Parks and Dr. Martin Luther King, Jr. in the 1955 Montgomery bus boycott. I have represented many other heroes who sought to eliminate segregation and discrimination from every social and governmental institution.

The history of this struggle is critical to Congress’s consideration today of reauthorization. As *South Carolina v. Katzenbach* teaches, “the constitutional propriety of the Voting Rights Act of 1965 must be judged with reference to the historical experience which it reflects.”¹

¹ 383 U.S. 301, 308 (1966).

I worked with African Americans in Alabama in efforts to obtain – and then maintain – the right to vote. Some of the people I represented, such as Dr. C.G. Gomillion, the lead plaintiff in *Gomillion v. Lightfoot*,² and William P. Mitchell, were filing lawsuits as early as 1945 in an effort to obtain the right to vote for African Americans in Tuskegee, Macon County, Alabama.

The problem of African-American disenfranchisement was the subject of a hearing before the Senate Judiciary Committee's Subcommittee on Constitutional Rights in February and March of 1957. Many persons testified at that hearing. I personally submitted sworn written testimony at that hearing.

This struggle culminated in the Supreme Court's seminal opinion in *Gomillion v. Lightfoot*. In direct response to increased voter registration, the Alabama Legislature passed a law in 1957, changing Tuskegee's city limits from a square to 28 sides, excluding almost all African Americans registered to vote, but leaving the white citizens. The Supreme Court unanimously held

² 364 U.S. 339 (1960).

that the boundary change violated the Fifteenth Amendment. *Gomillion* demonstrates that the Supreme Court will infer discriminatory intent from circumstantial evidence, including evidence of severely disproportionate impact.³ Section 5, of course, encompasses both intent and effect.⁴

The Voting Rights Act, passed in 1965, was the direct result of the Selma-To-Montgomery March. The first attempt to march was aborted on *Bloody Sunday*, March 8, 1965, when now-Congressman John Lewis and others were beaten after they crossed the Edmund Pettus Bridge in Selma, Alabama. Within twenty-four hours I filed the case, *Williams v. Wallace*,⁵ to compel the State of Alabama to protect the marchers.

As a civil rights lawyer practicing both before and after enactment of the Voting Rights Act, I can, and do, attest to its

³ The Court repeated this point in *Village of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 266 (1977).

⁴ The Court's analysis in *Gomillion* is a predecessor of the "retrogression" standard of Section 5, where the baseline for comparison is the existing status of the minority community before a voting change is implemented.

⁵ 240 F. Supp. 100 (M.D. Ala. 1965).

profound impact on the full participation of African Americans in our society. On a more personal note, it was enforcement of the Voting Rights Act in redistricting cases that allowed me in 1970 to become one of the first two African Americans to serve in the Alabama Legislature since Reconstruction.

I understand the question has been asked whether there is still a need for Section 5. Let me answer that question with a resounding, “Yes.”

We all recognize the substantial improvements that have occurred because of the Voting Rights Act. African American registration in Alabama is indeed much higher than it was. I knew the time when Alabama had no Black Elected Officials; now we have approximately 870.

But these successes that are directly attributable to a civil rights law should not – and cannot – provide the very foundation for eliminating protection under that law. If the law was necessary in order to obtain these rights, certainly it is equally important, or

more important, that the law continue in effect so these great successes will continue.

Unfortunately, Alabama still suffers from severe racially polarized voting.⁶ Only two African Americans have ever been elected to statewide office: the late Oscar Adams and Ralph Cook to the Alabama Supreme Court. Currently, no African American holds statewide office. All but one of our 35 Black Elected Officials in the Statehouse were elected from majority African-American districts, and even in that one instance, the House District is 48% African-American.

Racial discrimination in voting has persisted in Alabama since the reauthorization of the Act. Even in Selma – the birthplace of the Voting Rights Act – the Department of Justice has objected to redistricting plans as purposefully preventing African Americans from electing candidates of choice to a majority of the

⁶ See, e.g., *Dillard v. Baldwin County Commission*, 222 F. Supp.2d 1283, 1290 (M.D. Ala. 2002), *aff'd*, 376 F.3d 1260 (11th Cir. 2004).

seats on the city council and county board of education.⁷ The Department objected to the Alabama Legislature's 1992 congressional redistricting plan on the ground that fragmentation of black populations was evidence of a "predisposition on the part of the state political leadership to limit black voting potential to a single district."⁸ In 1998, the Department objected to a redistricting plan for Tallapoosa County commissioners on the ground that it impaired the ability of black voters to elect a candidate of choice in order to protect a white incumbent.⁹ In 2000, the Department objected to annexations by the City of Alabaster, which would have eliminated the only majority black district, demonstrating that the boundary manipulations of *Gomillion* are not a relic of the past.¹⁰

⁷ DOJ Section 5 Objection letter from John Dunne, Nov. 12, 1992; DOJ Section 5 Objection letter from James Turner, March 15, 1993; DOJ Section 5 Objection letters from John Dunne, May 1, 1992; July 21, 1992; and Dec. 24, 1992.

⁸ DOJ Section 5 Objection letter from John Dunne, March 27, 1992.

⁹ DOJ Section 5 Objection letter from Bill Lann Lee, Feb. 6, 1998.

¹⁰ DOJ Section 5 Objection letter from Bill Lann Lee, Aug. 16, 2000.

Since 1982, federal courts have found violations of the Voting Rights Act across Alabama's electoral structures. *Dillard v. Crenshaw County* led to changes from at-large to single-member districts for dozens of county commissions, school boards and municipalities. In the initial *Dillard* decision, the court concluded: "From the late 1800's through the present, the state erected barriers to keep black persons from full and equal participation in the social, economic and political life of the state."¹¹ In Jefferson County, officials refused to place black workers in white election precincts on the ground that white voters would not listen to black poll officials. The court stated: "That public officials today would practice open and intentional discrimination of the kind now evidenced before the court is lawless and inexcusable."¹² In North Johns, Alabama, a court found that the mayor intentionally withheld candidacy forms from two African-American candidates, fully aware they were running under a new single-member district

¹¹ *Dillard v. Crenshaw Co.*, 640 F. Supp. 1347, 1360 (M.D. Ala. 1986).

¹² *Harris v. Graddick*, 601 F. Supp. 70, 74 (M.D. Ala. 1984).

plan and that their election would result in a majority black council.¹³ The consent decree entered in *Dillard v. City of Foley*,¹⁴ demonstrates the persistence of intentional discrimination in the annexation context.

Finally, Section 5 provides a powerful deterrent force in preventing discrimination. As a civil rights practitioner and one of Alabama's first African-American state legislators, I have worked with countless state office-holders and officials, city councils, county commissions, and their counsel. Based on these experiences, I strongly believe that continued Section 5 coverage in Alabama is not only necessary but imperative to prevent the backsliding that history has demonstrated will occur when it comes to full enfranchisement of African Americans. Simply put, Senators, we have come too far to affirmatively invite retreat by changing and weakening the protections of the Voting Rights Act.

¹³ *Dillard v. Town of North Johns*, 717 F. Supp. 1471, 1476 (M.D. Ala. 1989).

¹⁴ 926 F. Supp. 1053 (M.D. Ala. 1995).

Today marks the 52nd anniversary of the decision in *Brown v. Board of Education*. Even with such a groundbreaking rule of law, we are keenly aware that acceptance, compliance, and institutional change takes time, even decades. I implore the Senate not to interfere with the progress we have achieved for all our citizens when it comes to exercise of the franchise. There is simply too much at stake.

Thank you very much. I will be happy to answer questions.

Statement of Senator Patrick Leahy
Ranking Member, Senate Judiciary Committee
Hearing on the Costs and Benefits of Section Five Pre-clearance
May 17, 2006

Today marks the anniversary of the Supreme Court's landmark decision in *Brown v. Board of Education*. As we proceed with our fifth hearing before the Senate Judiciary Committee on reauthorizing the Voting Rights Act, it seems appropriate to recognize the great struggle for civil rights which led to the enactment of the Voting Rights Act in 1965. Like *Brown v. Board of Education*, which began to bring to an end America's sorry history of racial segregation, the Voting Rights Act is helping bring equal participation in voting to all Americans.

I am encouraged that we have moved forward with hearings and the introduction of our bipartisan, bicameral bill. I trust that we will keep to our plan of concluding hearings before we break for the Memorial Day recess. We have been working to report our bill before Memorial Day. Regrettably now we must look to do so by mid-June. The House Judiciary Committee has been moving forward. After almost a dozen hearings, the House Judiciary Committee last week reported our bicameral, bipartisan bill to reauthorize the Voting Rights Act by a vote of 33 to one. If we are to fulfill our commitment to reauthorizing this important measure this year, we need to stay on schedule and push forward to make progress.

Today's hearing is our fourth focusing at least in part on Section 5, the provision of the Voting Rights Act that requires covered jurisdictions to "pre-clear" changes to voting before they go into effect. By preventing discriminatory laws from going into practice, Section 5 provides one of the most effective measures to fight certain kinds of pervasive and recurring discrimination. We have heard testimony from many witnesses about examples of discrimination continuing to this day in covered jurisdictions, and about how much harder it would be in those jurisdictions for minority citizens to protect their voting rights without Section 5. We have also heard from many witnesses, including the Assistant Attorney General for Civil Rights, that Section 5 serves as a great deterrent against discriminatory efforts cropping up anew.

At this hearing, we will hear more from witnesses about the benefits of Section 5. What greater benefit is there to our democracy than to ensure that no American citizens are prevented from participating fully in it? Like the rights guaranteed by the First Amendment, the right to vote is foundational because it secures the effective exercise of all other rights. As people are able to register, vote, and elect candidates of their choice, their interests and rights get attention. The chief benefit of Section 5 is that it furthers the very legitimacy of our government, which is dependent on the access all Americans have to the political process.

I helped amend the Act in 1982 to include the new bailout provision to give covered jurisdictions without recent violations the opportunity to get out of Section 5 coverage. Even though no jurisdiction that has tried to bail out has failed, fewer than a dozen

jurisdictions have sought to remove themselves from Section 5 coverage. In fact, Section 5 is supported by many local officials in covered jurisdictions, like those on the Monterey County Board of Supervisors, who sent a letter to House Judiciary Chairman Sensenbrenner urging that it be reauthorized.

We have heard from many outstanding witnesses. Today we welcome a distinguished panel. Fred Gray is one of the Nation's pioneering civil rights lawyers, who has spent a lifetime fighting for those who were denied the rights to equal protection and equal dignity under the law. After graduating law school, he immediately went to work defending Rosa Parks and Dr. Martin Luther King, Jr. in the Montgomery Bus Boycott. Starting in the late 1950's, he brought landmark voting rights cases like *Gomillion v. Lightfoot* to the Supreme Court, paving the way for the expansion of voting rights that culminated in the Voting Rights Act of 1965. Armand Derfner has had a distinguished career as a voting rights litigator and author. Mr. Derfner began his career in 1965 working with the first federal examiners under the Voting Rights Act to register citizens to vote in Greenwood, Mississippi, and working with Congress each time Section 5 has been extended, in 1970, 1975, and 1982. Drew Days, one of the country's top constitutional lawyers, was the Solicitor General of the United States from 1993 to 1996, and has argued 23 cases before the Supreme Court of the United States. Professor Days also formerly served as the Assistant Attorney General for Civil Rights. The Committee is honored that you are joining us today and I thank you for participating in these hearings.

I do regret that we have given short shrift to extension of Section 203 and the protection of language minorities. I wish we had moved ahead with witnesses on that matter this week and completed it on time. We may wish to supplement the record on that aspect of our bill before the Senate debate.

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May 17, 2006

Senator Arlen Specter
Chairman
Committee on the Judiciary
United States Senate
SD-244 Dirksen Senate Office Building
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Senator Patrick J. Leahy
Ranking Member
Committee on the Judiciary
United States Senate
SD-152 Dirksen Senate Office Building
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Dear Chairman Specter and Ranking Member Leahy:

Thank you for your leadership and commitment to the reauthorization of the temporary provisions of the Voting Rights Act. I attended your first hearing on this issue and have been following the subsequent hearings with interest. However, I regret that some witnesses as well as Senators continue to quote a few words of my testimony in the case of the *Georgia v. Ashcroft*, take them out of context, and improperly imply that I do not favor reauthorization of Section 5 of the Voting Rights Act or that my words justify their opposition to Section 5. I take issue with the use of my name to justify opposition to the renewal of Section 5 and assure you that I am a strong supporter of that provision.

The Voting Rights Act was necessary in 1965, and, unfortunately, it is still necessary today, as the extensive Committee record in both the House and the Senate makes clear. We have come a great distance, but we still have a great distance to go before all Americans have free and equal access to the ballot box. I want to ensure that the Senate Judiciary Committee record accurately reflects my support for the reauthorization of the Voting Rights Act and my unwavering support for H.R. 9 and S. 2703.

The vote is the most powerful, nonviolent tool that our citizens have in a democratic society, and nothing but nothing should discourage, hamper or interfere with the right of every citizen to cast a vote for the person of their choice.

The history of the right to vote in America is a history of conflict, of struggling for the right to vote. Many people died trying to protect that right. I was beaten, and jailed because I stood up for it. For millions like me, the struggle for the right to vote is not mere history; it is experience.

The temporary provisions of the Voting Rights Act, including Section 5, have been vital to the success of the Voting Rights Act. We have come a long way in Georgia and around the country and my deposition statement aimed to acknowledge that progress. However, the extensive House and Senate Judiciary Committee Records on this issue tell us that the struggle is not over and that the special provisions of the Voting Rights Act are still necessary. We should not take a step backward, when there is still much to be done to ensure every vote and every voter counts. We cannot afford to slide back into our dark past. In a recent case in my state of Georgia, a federal court judge found that the voter ID bill enacted by Georgia Legislature was the equivalent of a modern day poll tax. Judge Harold Murphy wrote "in reaching this conclusion, the Court observes that it has great respect for the Georgia Legislature, the Court, however, simply has more respect for the Constitution." In light of this, and Georgia's history under Section 5 since 1982, it is clear that the Voting Rights Act must be strengthened and reauthorized.

I look forward to continuing to work with you to protect the voting rights of all Americans, by reauthorizing and strengthening the provisions of the Voting Rights Act.

Sincerely,

A handwritten signature in black ink that reads "John Lewis". The signature is written in a cursive, slightly slanted style. Below the signature, the name "John Lewis" is printed in a standard serif font, followed by "Member of Congress" in a smaller, sans-serif font.

John Lewis
Member of Congress

Testimony of Professor Nathaniel Persily

University of Pennsylvania School of Law

**Before the United States Senate Committee on the Judiciary on
“Understanding the Benefits and Costs of Section 5 Pre-Clearance”**

Submitted May 16, 2006

Thank you, Mr. Chairman and Members of the Committee, for inviting me today. I am honored to have this opportunity to testify on the reauthorization of the Voting Rights Act, the most significant and effective piece of civil rights legislation in our nation’s history.

My name is Nate Persily. I am a Professor of Law and a political scientist at the University of Pennsylvania Law School and a Visiting Professor of Law at Stanford Law School. I teach and write in the areas of voting rights, election law, constitutional law and the regulation of politics. Perhaps of most relevance to my testimony here today, however, are my experiences as a court-appointed, nonpartisan expert assisting judges in drawing remedial redistricting plans in New York, Maryland and Georgia. I have experienced the requirements of the Voting Rights Act firsthand. I understand both the substantial burdens the Act places on covered jurisdictions and the Act’s importance in protecting the historic gains in minorities’ political participation, office holding, and influence.

Since you have asked me here to discuss the costs and benefits of section 5, let me emphasize that I think the greatest benefits of this unique law occur when voting changes are least visible and the stakes for the national parties are quite low. Whereas interest groups, the media and the national parties will always pay attention to and litigate notorious changes in voting laws, such as statewide redistricting plans, the section 5 architecture proves a most useful deterrent at the local level, where elections are often nonpartisan, and voting changes would pass unnoticed but for the preclearance requirement. For changes at the state level, the potential for partisan infection of the preclearance process grows, and section 2 of the Voting Rights Act will continue to be more successful in regulating those kinds of changes.

In the coming years I believe section 5 may actually prove most important for voting changes apart from redistricting, but you have asked me here today principally to offer the perspective of one who has had to draw redistricting plans to comply with the Act and may do so again in the future. As the members of this committee know, the legal constraints on the redistricting process put linedrawers in the position of making sure that they neither disperse racial minorities into too many districts, nor overconcentrate them into too few. And while obsessing over the twin dangers of packing and cracking of minority communities, a linedrawer must also avoid drawing districts that use race as the predominant factor, and therefore likely be struck down under the Equal Protection Clause. All this must be done while abiding by the requirements of one-person, one-vote and obeying any particular state constitutional requirements.

In this vein, I would like to discuss the section of the bill that clarifies that retrogression occurs whenever a plan diminishes a racial group's "ability . . . to elect their

preferred candidates of choice.” With this language the bill attempts to overturn the holding of *Georgia v. Ashcroft*, 539 U.S. 461 (2003), which allowed jurisdictions to trade off so-called “ability to elect” or “control” districts with “influence” or “coalition” districts. The danger that *Ashcroft* seemed to invite and that this legislation intends to fix is the possibility that under the cloak of “influence districts” a jurisdiction might dilute the minority vote by splitting large minority communities among several districts in which they really have no influence at all. Although the facts in *Georgia v. Ashcroft* concerned small shifts in districts evenly split between whites and African Americans, the holding might require preclearance of plans in which, for example, a 60 percent minority district was broken into two 30 percent minority “influence districts.”¹ Perhaps it also might allow for packing of minorities as when a plan combines a 50 percent minority district with a 30 percent minority district to create an 80 percent minority district.

The legislative history concerning this bill, however, should be clear that the “ability to elect” standard prevents both types of retrogressive changes – the dispersion of a minority community among too many districts (cracking) as well as the overcentration of minorities among too few (packing). Over the proposed 25 year tenure of this bill, packing will likely pose a greater risk to minority political opportunity than will cracking, assuming racial polarization declines. To put the matter more plainly, the “*Ashcroft* fix” (or “ability to elect” standard) should be seen not only as fixing *Ashcroft* itself but also the variety of redistricting strategies that could worsen the position of minority voters.

¹ Of course, such districts in this hypothetical would likely be dilutive, and therefore violate section 2 of the Act, even if the Department of Justice would be required to preclear the plan because it would not be retrogressive under *Georgia v. Ashcroft*.

As all seem to recognize, the proposed standard does not require that the minority percentages in current districts must be frozen for the next 25 years. Rather, it requires a sensitive inquiry as to how new redistricting plans interact with a changing political environment to worsen the position of minorities to elect candidates they demonstrably prefer.

This explanation begs the question, of course, as to what constitutes a diminution in a racial group's "ability to elect" its preferred candidates. The standard is not code for "majority-minority districts" nor does it imply the maintenance of a magic number, such as 65 percent, 50 percent, or 44 percent of the population, voting age population, or citizen voting age population. In some cases, the percentage of the voting age population necessary for the minority community to elect its candidate of choice will be much greater than 50 percent, in other areas it may be substantially lower.

More importantly, the effect of redrawing lines on minorities' ability to elect will vary across space, time and groups. It will vary across space in that the required minority percentages for one jurisdiction will differ considerably from those required for another jurisdiction. The effect of dropping the minority percentages in a district in Atlanta, for example, will be different than the same drop in a district one hundred miles to the south in rural Georgia, let alone in another state. Similarly, the effect of redistricting changes on minorities' "ability to elect" their preferred candidates will evolve over time. Over the proposed 25 year tenure of this bill, we should expect declining rates of racial polarization to alter our assumptions concerning how district changes may improve or hinder groups' ability to elect their preferred candidates. Finally, the meaning of this standard will not be consistent across groups. African

Americans and Hispanics, for example, confront different types of challenges when it comes to electing their preferred candidates. In areas with high concentrations of African Americans, racial polarization in the electorate or high levels of disenfranchisement due to felony status may shape the effect of altering the minority percentages in those districts. With areas of high Hispanic concentration, in contrast, the minority group may be less politically cohesive but the high rates of voter ineligibility due to citizenship status will determine the political effect of a drop in the groups' population in the district.

The effect of redistricting on a group's "ability to elect" its preferred candidates, therefore, will depend on the political characteristics of the area in which the district is drawn. To enforce this statutory command, the Department of Justice or the U.S. District Court for the District of Columbia will need to consider the following factors, beyond the racial percentages in the districts, in their decisions whether to preclear a particular plan:

1. the extent of racial polarization in voting patterns in the district;
2. the partisanship of white voters and the probability they will vote for the minority-preferred candidate;
3. the incumbency status of the district (whether it is an open seat and if not, what is the party, race and rate of minority support for the incumbent);
4. the ability of the given minority group to control the outcome in the primary election;
5. the rates of registration, turnout, citizenship and eligibility among the various racial groups; and
6. the potential for coalitions among minority groups.

It is important that Congress recognize the nuances of the "ability-to-elect" inquiry because those looking to strike down this bill on constitutional grounds will portray it as imposing a 1960s framework on evolving political realities that will stretch to the 2030s. The legislative history should be clear that, while the ability to elect standard does not

allow as much play in the joints as did *Ashcroft*, nor does it freeze in place the current demographic distributions or allow for unnecessary overconcentration in the many district plans in covered jurisdictions.

Let me conclude, though, by emphasizing that this legislation should be viewed as a first step toward more transformative reform that addresses the principal barriers to minority political equality. While recognizing that the best should not become the enemy of the good, the reauthorization of the Voting Rights Act provides you with an opportunity to think broadly about the principal barriers to minority participation and political influence. Although your consideration of this legislation occurs in the shadow of what is politically possible and what is likely to be held constitutional by the Supreme Court, more transformative election reform must ultimately deal with the greatest barriers to the achievement of political equality for racial minorities, such as felon disenfranchisement, partisan election administration, or settling the voter identification controversy. A debate about the future of minority voting rights would be anemic if it did not include some discussion of the most important contemporary challenges.

The successful reauthorization of the Voting Rights Act ought to be a cause for introspection rather than celebration. It represents another milestone, the meaning of which should be judged by the ultimate destination of political equality among racial groups, rather than our success in running one more lap as a nation around the same track. Just as we should not allow our naïveté to shield us from the inherent political difficulties involved in more substantial election reform, nor should we mistake a reaffirmation of past achievements for victory in an ongoing and ever-changing battle over the right to vote.

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TESTIMONY OF

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AND

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U.S. COMMISSION ON CIVIL RIGHTS

BEFORE THE

COMMITTEE ON THE JUDICIARY

U.S. SENATE

Dirksen Senate Office Building Room 226

HEARING ON

“UNDERSTANDING THE BENEFITS AND COSTS OF SECTION 5 PRE-CLEARANCE”

May 17, 2006

9:30 AM

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Mr. Chairman and distinguished Committee members, thank you for the opportunity to testify this morning.

My name is Abigail Thernstrom. I am a senior fellow at the Manhattan Institute, a public policy think tank, and the vice chair of the U.S. Commission on Civil Rights. By training I am a political scientist, having received my Ph.D. from the Department of Government, Harvard University, in 1975. I have been writing on race-related issues my entire professional career. My first book, *Whose Votes Count? Affirmative Action and Minority Voting Rights*, published by Harvard University Press in 1987, won four awards, including one of the American Bar Association's two book prizes. After an absence of two decades, I have returned to the topic of voting rights with a book in progress tentatively titled *Voting Rights—and Wrongs: The Elusive Quest for Racially Fair Elections*.

I want to talk today about one of the *costs* of renewing the preclearance provision of the 1965 Voting Rights Act, which was viewed as constitutional only because of its emergency status and its very limited life. Initially, of course, it was expected to expire in 1970, along with the other temporary, emergency provisions.

There are costs I could discuss having to do with the distortion, by now, of our constitutional structure and of the statute itself. But I will leave those topics aside and focus on one issue: the pernicious impact of race-based districting on the racial fabric of American society. I am not alone, of course, in expressing concern. Indeed, my argument elaborates on a theme that runs through a number of recent Supreme Court voting rights decisions.

But before I get to the heart of my argument, a preliminary word.

I sympathize with the desire of both Democrats and Republicans to support a fourth extension of the emergency provisions. It's tough to come out against a bill that appears on the side of our better angels. Race is still the American Dilemma, and racial inequality is the great wound that remains unhealed. Nevertheless, I would like to persuade at least some members of this committee that a vote to support this bill is a vote against racial progress and racial equality.

Unlike the original Voting Rights Act, this bill is not about remedying disfranchisement. At the heart of the disagreement between opposing sides are different views of the level of racism today, and, specifically, the need to protect minority candidates for political office from white competition. For that is precisely the point of majority-black and -Hispanic districts, drawn to ensure minority officeholding roughly in proportion to the minority population. Inevitably, providing such protection from white competition (creating safe minority districts in which whites are unlikely to run) involves racial sorting—racial classifications, which have had such a long and ugly history.

We've arrived today at an interesting historical moment. By numerous measures blacks and Hispanics are becoming integrated into mainstream American life, and yet, simultaneously, our federal government is segregating them politically. As Justice Clarence Thomas has said (in part, echoing Justice Sandra Day O'Connor): "We have involved the federal courts, and indeed the Nation, in the enterprise of systematically dividing the country into electoral districts along racial lines—an enterprise of segregating the races into political homelands that amounts, in truth, to nothing short of a system of 'political apartheid.'"

In the remarks that follow, I will focus on African Americans, because their history makes them most vulnerable to the damage that any form of ongoing state-imposed or state-encouraged separation incurs.

Consider some evidence that shows increasing integration of blacks into American society. As others will testify, black voter registration and turnout today is very high, and is especially impressive in the South. That alone should raise questions about the need to renew the draconian provisions of the act. But the progress America has made in racial integration is much broader and deeper than that. In 1975 only one-fifth of all blacks said they had good friends who were white; by 2003, the figure had jumped to 88 percent over that time. And the proportion of whites with good friends who were African American soared from 9 to 82 percent. By now, among blacks and whites ages 25-to-29 the proportion who have graduated from high school is roughly the same. The concentration of blacks in heavily black neighborhoods has dropped precipitously in recent decades and less than a third of African Americans now live in census tracts that are over 80 percent black. Since 1970 the rate of black suburbanization has been much higher than that for whites.

And yet blacks who move up the economic ladder and escape overwhelmingly one-race inner city neighborhoods aren't necessarily allowed to join their new friends and neighbors in a legislative district defined by common economic and other nonracial interests. Instead, for political purposes, they're stuck in the putative "community" that they have worked hard to leave. Their old district lines, more likely than not, chase them.

That is, those engaged in drawing new maps after every decennial census use sophisticated software to make sure that majority-black districts stay safely black. And

with increasing black suburbanization that means grabbing scattered black families to create districts whose shape is a bizarre mess, dictated by racial considerations. This egregiously race-based line-drawing has been forced upon jurisdictions by a Justice Department that has generally viewed what the ACLU used to call “max-black” districts as an entitlement under the Voting Rights Act.

American law contains important messages about our basic values, and race-driven legislative maps (allegedly demanded by the Voting Rights Act) send the wrong message. Race-based districting has become equated with minority electoral opportunity. The message implicit in this racial sorting seems to be:

- Blacks are different than whites.
- And it’s okay for the state to label them as such.
- Statements that say, in effect, “blacks are...x,” or “blacks believe...y” pose no problem.

It is these messages that Justice Anthony Kennedy so strongly rejected in expressing concern that the state was assigning voters on the basis of race and thus engaging in “the offensive and demeaning assumption that voters of a particular race, because of their race, ‘think alike, share the same political interests, and will prefer the same candidates at the polls.’” (In part, quoting O’Connor.)

The point can be put slightly differently. When the state treats blacks as fungible members of a racial group, they become, in Ralph Ellison’s famous phrase, “invisible men,” whose blackness is their only observed trait. But that view—the view that individual identity is defined by race—is precisely what the civil rights movement fought

so hard against. Do we really want to sign on to the notion that group racial traits override individuality—perpetuating old and terrible habits of thought?

Blacks are not a separate people, a nation within our nation, in part because the civil rights movement refused to accept the notion of race as destiny—for political or any other purposes. The idealism of those years would never have countenanced the notion that only blacks could properly represent black interests (with its corollary, whites needing white representatives). When implemented as race-based districting, it's an assumption that amounts to a form of political exclusion—masquerading, of course, as inclusion.

Much social science evidence indicates that, at long last, blacks are moving towards becoming another American ethnic group. No thanks to the federal government. Or, I should say specifically, with no help from Congress, the courts, and the Department of Justice, all of whom have amended a once-perfect statute and turned it into a system that's much too close to political apartheid.

The overwhelming majority of Americans don't like racially safe boroughs. In 2001, a Washington Post/Kaiser poll contained the following question: "In order to elect more minorities to public office, do you think race should be a factor when boundaries for U.S. Congressional voting districts are drawn, or should it not be a factor?" Seventy percent of blacks, 83 percent of Hispanics, and 90 percent of whites said race should not figure into map-drawing.

I urge distinguished members of this Committee to be careful what they wish for. This bill may bring champagne on the day it's passed, but tears down the road. Racial classifications, however prettily they're dressed up, are—and always will be—the same

old classifications that have played such a terrible role in this great and good nation. They separate us along lines of race and ethnicity, reinforcing racial and ethnic stereotypes, and turning citizens into strangers. Haven't we, as a nation, had enough of that miserable stuff?

Thank you for the opportunity to present these views.