S. HRG. 109–822

# REAUTHORIZING THE VOTING RIGHTS ACT'S TEMPORARY PROVISIONS: POLICY PERSPECTIVES AND VIEWS FROM THE FIELD

## HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS AND PROPERTY RIGHTS

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED NINTH CONGRESS

SECOND SESSION

JUNE 21, 2006

**Serial No. J–109–88**

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE
31–269 PDF WASHINGTON : 2007

For sale by the Superintendent of Documents, U.S. Government Printing Office
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# REAUTHORIZING THE VOTING RIGHTS ACT'S TEMPORARY PROVISIONS: POLICY PERSPECTIVES AND VIEWS FROM THE FIELD

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**WEDNESDAY, JUNE 21, 2006**

U.S. SENATE,
SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS AND PROPERTY RIGHTS, COMMITTEE ON THE JUDICIARY,
*Washington, DC.*

The hearing was convened, pursuant to notice, at 2:07 p.m., in room SD–226, Dirksen Senate Office Building, Hon. Sam Brownback (Chairman of the Subcommittee), presiding.

Present: Senators Sessions, Cornyn, Coburn, Kennedy, and Feingold.

## OPENING STATEMENT OF HON. SAM BROWNBACK, A U.S. SENATOR FROM THE STATE OF KANSAS

Chairman BROWNBACK. Good afternoon. I hope this hearing will provide an opportunity for us to hear from people whose work requires them to think about and to implement the provisions of the Voting Rights Act on a regular basis. This is an historic piece of legislation, a very important piece of legislation.

It is always helpful here in the Senate to hear from the people who are affected by the laws we pass. I hope each of you will share your thoughts on the necessity and practicality of reauthorizing certain key provisions of the Voting Rights Act which are set to expire in August of 2007.

Virtually no right is more important than the right to vote. It is, quite literally, the bedroom for the representative democracy we enjoy today. We must enable American citizens to fully participate in the political process if we are truly to be a government of, by, and for the people.

Out of a strong desire to achieve this goal, a bipartisan majority in Congress passed, and President Johnson signed, the Voting Rights Act in 1965. The aim of the Act two generations ago was to fulfill the democratic promise of the Civil War amendments to the Constitution, one left unmet for a century after that terrible war had ended.

The civil rights landscape has greatly improved in this country since 1965, thanks in great part to the Voting Rights Act. The Act has resulted in a tremendous increase in the ability of minority citizens to fully and fairly participate in our political system, both as voters and as candidates.

Over the years, Congress has made adjustments to the legislation to identify and address current conditions, so it is appropriate that we do our part in the 21st century to assess and improve the Act.

The Voting Rights Act reauthorization bill currently pending before the Senate, S. 2703, recognizes the achievements of three other champions of the Civil Rights era: Fannie Lou Hamer, Rosa Parks, and Coretta Scott King; legendary names, legendary figures. I believe we have a responsibility to carry on the work of these great Americans.

To that end, I have co-sponsored this important legislation which reauthorizes three basic parts of the Act which are set to expire next year. The first provision, which will expire in 2007, is Section 5.

This section provides that certain jurisdictions that had a history of discriminatory voting practices must obtain pre-clearance from the Department of Justice before making any change in their voting procedures.

Also set to expire are Sections 203 and 4F4. Section 203 applies to jurisdictions in which a certain percentage of the voting aged population is deemed to consist of minority language speakers. It requires that such jurisdictions provide all voting notices and materials in these minority languages, as well as in English.

Finally, Sections 6 through 9, which authorizes the Department of Justice to appoint examiners and observers to monitor election activities in certain jurisdictions, are set to expire.

The importance of the Voting Rights Act and the need for Congress to exercise due diligence in reauthorizing it cannot be underestimated. We must proceed carefully to ensure the Act is properly reauthorized so that it both prevents civil rights violations and does not permanently punish jurisdictions that have rectified past discriminatory practices.

As with prior extensions of the Voting Rights Act, Congress must ensure that the Act's provisions are congruent and proportionate to the identified harms, for this is the constitutional standard the Act must meet when it is evaluated by the Supreme Court.

I hope that our witnesses today will discuss the continuing need for this legislation, identifying possible improvements, and outline the steps we can take to ensure that every American—every American—has the right to participate in the voting process.

I am delighted my colleagues are joining us today, and I turn the floor to Senator Kennedy.

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

Senator KENNEDY. Thank you very much, Senator Brownback, for chairing these hearings today. Our thanks to the Chairman of our Committee for continuing our committee's focus on the reauthorization of the Voting Rights Act.

It was important to take time to have these series of hearings to establish a strong record for reauthorizing this Act, and we have done that. I hope we can vote this bill out of Committee before the 4th of July recess.

During the hearings in recent weeks, arguments have been made for and against reauthorization. It has been argued that the trigger formula for Section 5 coverage is outdated, but the evidence presented to the Committee demonstrates that discrimination in voting persists in the jurisdictions covered by the Act, Mississippi as an example.

The Justice Department has objected to 120 voting changes in Mississippi since the Section 5 was last authorized in 1982. This is roughly double the number of objections for the period before 1982.

The Committee heard similar testimony about recent discriminatory voting changes in Alabama, South Carolina, North Carolina, and Texas.

University of North Carolina, Professor Nida Earles, testified that the Department of Justice had made a total of 682 Section 5 objections in covered jurisdictions between 1982 and 2004, as compared to only 481 objections prior to 1982. In short, covered jurisdictions continue to propose discriminatory voting changes that can only be prevented through the pre-clearance process.

Behind these statistics are the stories of the voters who were able to participate in the voting process because the Voting Rights Act protects their constitutional right to do so.

For example, in 2001, the town of Kilmichael, Mississippi canceled its elections just 3 weeks before election day. The Bush Justice Department objected to the cancellation, finding that the town failed to establish that its actions were not motivated by the discriminatory purpose from electing candidates of their choice.

The town had recently become majority African-American, and for the first time in its history several African-American candidates had a good chance of winning elected office.

Section 5 prevented this discriminatory change from being implemented, and as a result, three African-American candidates were elected to the Board of Aldermen, and an African-American was selected mayor of Kilmichael for the first time.

The fact the number of Section 5 objections is only a small percentage of total submissions should not be surprising. Jurisdictions take Section 5 into consideration when adopting voting changes, and many day-to-day changes are non-controversial. What should surprise and concern us is the fact that there continue to be objections and voting changes like the one in Kilmichael.

It has also been argued that the Section 5 coverage formula is both over-and under-inclusive. The Act addresses that problem by permitting jurisdictions where Federal oversight is no longer warranted to bail out from coverage under Section 5.

We have a letter from one of the jurisdictions that has taken advantage of the bail-out process, explaining that it did not find that process to be onerous. So far, every jurisdiction that has sought a bail-out has succeeded.

For jurisdictions that should be covered but are not, the Act contains a mechanism by which a court may order a non-covered jurisdiction found to have violated the Fourteenth and Fifteenth Amendments to obtain Section 5 pre-clearance for its voting changes. As a result, the Act's pre-clearance requirement applies only to jurisdictions for which there is need for such oversight.

Some question why Section 203 is needed if naturalized citizens must learn English to become citizens. But as we learned from the hearing on Section 203, this rhetoric is misleading and unfair. Section 203 does not just help naturalized citizens, it also helps U.S. citizens born in Puerto Rico, on Native American reservations, and in Alaskan villages. We have an obligation to help these Americans to cast a meaningful and effective vote.

We also heard testimony that English-language programs are heavily over-subscribed, forcing those who wish to improve their English to remain on waiting lists for years. Mr. Chairman, in my city of Boston it is two years now, and in cities across the country there is an equal amount of time to be able to participate.

It is rather tragic that the Appropriations Committee cut back on the English-language training programs, this when we have been trying to deal both with the immigration issues, as well as the voting rights issue. It seems to me to have failed to recognize important priorities.

These programs in the 203 are important because understanding instructions and the election process require more than a basic understanding of English. We went through a series of referenda that were on a number of different kind of ballots, and the complexity of some of these referenda, and we want people to be able to cast with informed judgments on these issues.

We cannot complain about naturalized citizens not learning English when we strip English-language programs' funding. We have conducted well-balanced hearings, different views have been presented, and the record is strong for reauthorization. It is time to move the bill forward.

I thank the Chairman.

Chairman BROWNBACK. Thank you, Senator Kennedy.

Senator Feingold?

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

Senator FEINGOLD. Thank you, Mr. Chairman. I will have to leave in a few minutes because of the debate on the floor concerning Iraq, but I really do want to thank my friend, Senator Kennedy, for agreeing to serve as the Ranking Member for this hearing. He is about the busiest member of the Senate, so I do appreciate it.

Thanks, also, to Senator Brownback, the Chairman of this subcommittee. Let me just say, very briefly, that those who work so tirelessly to ensure the Volting Rights Act's enactment and reauthorization should take pride in the great success of the Voting Rights Act. We have seen the increased participation in elections by minority voters and the enhanced ability of minority voters to elect candidates of their choice.

But I think Ted Shaw put it best when he stated in his testimony in an earlier hearing, "The Voting Rights Act was drafted to rid the country of racial discrimination, not simply to reduce racial discrimination in voting to what some view as a tolerable level."

That is why there is a continued need for the pre-clearance and minority language assistance provisions of the Act. I believe the

cases were made quite powerfully for Chairman Specter's reauthorization legislation.

The Judiciary Committee has heard detailed testimony and several reports have been entered into the record documenting continued violations and attempts to violate the Voting Rights Act in covered areas.

We know that Section 5 of the Act serves as a powerful deterrent to prevent violations in areas of the country with a history of systemic discrimination at the polls. We have heard about the impact of Section 203 and how it has empowered many voters with limited English proficiency to participate in our democratic process.

I have been very impressed by the testimony of legal experts, such as Professor Pam Carlin, who presented strong arguments for the constitutionality of the Act. I do appreciate the deliberate and thorough manner with which the Committee is proceeding and I look forward to the committee's considering the Chairman's reauthorization bill in the coming weeks.

Finally, let me thank the witnesses for being with us today. In particular, I want to welcome Professor David Canon from my alma mater, the University of Wisconsin, Madison.

Thank you, Mr. Chairman.

Chairman BROWNBACK. Thank you, Senator Feingold.

Senator Cornyn?

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

Senator CORNYN. Well, thanks, Senator Brownback, for chairing this important hearing. This is the seventh in a series of hearings in the U.S. Senate focused on reauthorization of expiring provisions of the Voting Rights Act.

I am encouraged that we continue to study this enormously important and complex issue because I know we all will agree that the Voting Rights Act has been one of the most significant pieces of legislation passed in our Nation's history to ensure full political participation of individuals who, in the past, sadly, and which is a national scar, have been disenfranchised.

But it is imperative that we, in order to increase the likelihood that the U.S. Supreme Court, when it reviews our work, can ensure that we have done everything within our power to make sure that we can meet the standards that the Supreme Court has set out before, so that the legislation will ultimately operate as Congress has intended.

We have a distinguished panel, obviously, and I will cutoff my remarks here so we can hear from them. But let me just say, in conclusion, I am delighted to see the Chairman of the U.S. Commission on Civil Rights with us today, Jerry Reynolds. In the past, the Commission has been an integral part of our analysis, and I look forward to hearing from him, as well as the other panel members.

Thank you very much.

Chairman BROWNBACK. Thank you, Senator Cornyn.

I will introduce our panel now. First, is Debo Adegbile, Associate Director of Litigation for the NAACP Legal Defense and Education Fund. He works with direct litigation over CNAACP's legal pro-

grams and is actively engaged in voting rights litigation and advocacy.

Next, we will hear from Gerald Reynolds, Chairman of the U.S. Civil Commission. Mr. Reynolds previously served as Deputy Associate Attorney General, U.S. Department of Justice, and Assistant Secretary of Education with the Office of Civil Rights. Mr. Reynolds has also served as president for the Center for New Black Leadership.

The third witness is Don Wright, General Counsel for the North Carolina Board of Elections, a position he has held since 2000. He is active in the Election Center, the Nationwide Association of Election Administrators, and has served as an instructor for the center.

We will then have Jack Park, who is here from the Office of the Attorney General in Montgomery, Alabama. Mr. Park graduated from Yale Law School in 1980 and has spent the last 11 years serving as an Assistant Attorney General and Deputy Attorney General. His practice focused on voting rights and First Amendment issues.

Our fifth witness is Professor David Canon, Professor of Political Science, University of Wisconsin. He is the author of Race, Redistricting and Representation: The Unintended Consequences of Black Majority Districts, which earned him the American Political Sciences Association's Richard F. Finno prize for the best book published on legislative politics in 1999.

Our final witness is Professor Carol Swain. She is Professor of Political Science and Law at Vanderbilt. Professor Swain earned her Ph.D. from the University of North Carolina, Chapel Hill, and received her MLS from Yale Law School.

She is the founder of the Veritas Institute, a nonprofit organization dedicated to promoting justice and reconciliation amongst people of different races, ethnicities, faith, traditions, and nations.

It is an excellent panel. We will take all of your written testimony into the record as if presented. You are welcome to summarize. I am going to run the time clock at 6 minutes, if we could, to give you an idea. If you could stay around that, that would be great. Then we could get to questions and answers, if that is workable with you. I would appreciate it if you could run it that way.

Mr. Adegbile, please.

**STATEMENT OF DEBO ADEGBILE, ASSOCIATE DIRECTOR OF LITIGATION, NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., NEW YORK, NY**

Mr. ADEGBILE. Thank you, Senator.

Today I will offer a perspective on the view from the field, based largely on our experience in Louisiana. My written testimony speaks more broadly about our experience in other places, but I think that the view from Louisiana is particularly apt at the time as the Senate considers renewal of Section 5.

I also want to touch briefly upon the operation of Section 5 as a deterrent. You have heard a great deal about it, but I think some recent contributions to the record illuminate some of those pieces in ways that are important.

Finally, I will offer some policy perspectives and speak briefly to some of the issues surrounding the coverage formula, as this Committee has discussed those issues in detail.

The view from Louisiana is very instructive. I want to focus on the experience with respect to the Louisiana House of Representatives, the State legislative House, the lower House of the State legislature, because in some sense it tells the story of the Voting Rights Act.

We recently celebrated 40 years of the existence of the Voting Rights Act, and it is fairly remarkable, but it is true when I say that every single House redistricting plan for the Louisiana House of Representatives has initially been met by an objection from the Department of Justice.

It began in 1971, and that process has continued through the last round of redistricting. Those objections have touched upon wide parts of the State. They have not only been concentrated in one part of the State, they have touched upon multiple areas of dilution and retrogression. They have taken the nature of evidence of intentional discrimination and discriminatory effects.

The important thing to think about as we look at those objections in each of the decades that followed the renewal of the Voting Rights Act, is that but for Section 5, those voting changes, those redistricting plans would have gone into effect and would have served to minimize the opportunity of African-Americans in a State with a long and well-documented history of discrimination to participate in the political process.

They would have been left to try to find lawyers to bring complex Section 2 cases, and all the while they would have suffered from discrimination that the legislative redistricting plans were either designed to implement, or had the effect of implementing.

The experience in Louisiana is not exclusively limited to the Louisiana House, but I think because you can trace the line through those objections it is important.

I will say just a word about a case I litigated, which was the last objection, which came in the form of a declaratory judgment action right here in Washington, DC. That case was remarkable, for a lot of reasons.

First, the State tried to eliminate in toto an opportunity to elect district from Orleans Parish. There was no argument that there was an offset. There was no argument that there was influence being given to African-Americans. Political motivations and other motivations, in our view, led the legislature to eliminate a district altogether.

I litigated that case on behalf of LDF, on the same side of the "V" as the Department of Justice, and the Section 5 declaratory judgment action resulted in Louisiana withdrawing that discriminatory voting change and instead implementing a plan that restored the district.

It is very significant to note that in that case there was substantial evidence of intentional discrimination, not the least of which was that the line drawers eliminated provisions of the redistricting guidelines that said that the State needs to follow the Voting Rights Act before they undertook to draft the redistricting plan.

Moving for a moment to the deterrence piece, Professor Louis Fraga of Stanford University added a piece of evidence into the record that I think we need to focus on just briefly. Much has been made of the number of objections that exist in the record. In addition, we have talked a great deal about the extent to which the trend line of objections is diminishing.

It is important to note that the Fraga study concludes that "More Information" requests—again, these are part of the Section 5 preclearance process where the Department of Justice, receiving a preclearance submission, does not have adequate information to determine the effect or intent of the submission, and they write a letter or they make a call seeking additional information to illuminate the operation of the contemplated voting change.

What Fraga found is that when you analyzed these "More Information" requests, a number of things happen: occasionally voting changes are withdrawn, at other times, they are superseded, and at other times they are simply abandoned.

But the net result, and this is the significant finding, is that the "More Information" letters result in 51 percent more voting changes being stopped than when you simply count objection letters alone.

I will not dwell on that report because it is in the record, but I think it is important to note it so that we can have a more full understanding of how Section 5 operates to deter voting discrimination, as well as block it.

Finally, I want to touch just briefly on my view of one of the important policy issues that is before this committee. Senator Kennedy mentioned that some talk has been had about the coverage formula and whether it needs modifying in some way. I would submit that neither the law, nor practical considerations, suggest that the coverage formula needs to change.

As a legal matter, there is nothing in the Supreme Court precedents that counsels change. The coverage formula has been upheld numerous times by the Supreme Court. It is a formula that has from the beginning, in some respects, been imperfect, but been fair at targeting areas of the country with dramatic evidence of discrimination.

The Supreme Court has repeatedly upheld that formula, most recently in the case of *Lopez* v. *Monterey County*, which was decided after the court's decision in *Boerne*, which seemed to limit Congressional power to enact enforcement provisions.

From the practical side, it is important to note that the statute, as it exists, has ways into coverage and ways out of coverage. Section 3(c) allows courts, where they find evidence of discrimination of a serious kind, to bring districts within the ambit of coverage.

Similarly, there is a bail-out provision—and Senator Kennedy spoke of a letter that was recently entered—that talked a little bit about one jurisdiction's experience. Taken together, neither practical considerations nor the law of the Supreme Court require changes to the coverage formula at this time.

I thank you for your time.

Chairman BROWNBACK. Thank you very much.

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

Chairman BROWNBACK. Mr. Reynolds, the Chairman of the U.S. Civil Rights Commission.

**STATEMENT OF GERALD A. REYNOLDS, CHAIRMAN, U.S. COMMISSION ON CIVIL RIGHTS, ASSISTANT GENERAL COUNSEL, KANSAS CITY POWER & LIGHT COMPANY, KANSAS CITY, MISSOURI**

Mr. REYNOLDS. All right. At the outset, I would like to discuss two housekeeping matters. It is possible that I may have to leave early, and I would just like a dispensation if that is necessary.

Also, I have revised the testimony that I have submitted. I would like my revised testimony to be entered into the record.

Chairman BROWNBACK. Without objection.

Mr. REYNOLDS. Thank you.

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

Mr. REYNOLDS. Mr. Chairman, members of the subcommittee, I am Gerald Reynolds and I have served as the Chairman of the U.S. Commission on Civil Rights since December of 2004.

The Commission is an independent, bipartisan agency established by Congress in 1957 to, among other things, investigate complaints alleging that citizens are being deprived of their right to vote by reason of their race, color, religion, sex, age, disability, national origin, or by reason of fraudulent practice.

The Commission has been called the conscience of the Nation on civil rights matters and was instrumental in providing the evidence of pervasive discrimination in voting that led to the passage of the Voting Rights Act in 1965.

I am pleased to appear before you today to discuss Section 5, one of the temporary provisions of the Act, in light of the Commission's historical and its early development and subsequent reauthorizations.

At this point, I would like to just discuss the fact that in the past, before any major piece of legislation was passed, there was a discussion as to the constitutionality of the proposed legislation. I think that that was a practice that was important. The reauthorization of Section 5 demonstrates why that tradition is extremely important.

As the Supreme Court has stated in *South Carolina* v. *Katzenback*, "The constitutional propriety of the Voting Rights Act of 1965 must be judged with reference to the historical experience it reflects."

In other words, the facts that were on the ground, the facts that persisted when the Voting Rights Act was enacted, are extremely important.

Now, the factual predicate at the time of its enactment as one of persistent defiance on the part of the South of constitutional commands and Federal legislation aimed at securing the right to vote for blacks.

A 1961 Commission report identified 100 counties across the Nation where black Americans were preventing from voting by outright discrimination, by fear of physical violence, or by economic reprisal, and pervasive and unlawful violence by police officers and others used to repress voting rights.

Such invidious practices has driven down the average registration rate for black citizens in the covered States down to 29 percent. After the demise of the institution of slavery with the end of the Civil War and the adoption of the Thirteenth Amendment, the South imposed a racial caste system.

A central element of this racial caste system was the disenfranchisement of blacks residing in the South. In defiance of the Fifteenth Amendment, numerous Federal statutes and court orders, and over the course of nearly 100 years, Southern States refused to permit appreciable numbers of blacks to vote.

Each time the Federal Government issued an order or enacted legislation to make the right to vote a reality for blacks, Southern States would circumvent the law. This aspect of the racial caste system, this open defiance of the Constitution, persisted for almost 100 years.

This led Congress to conclude that the unsuccessful remedies which had been prescribed in the past had to be replaced by sterner and more elaborate measures in order to satisfy the clear commands of the Fifteenth Amendment.

The pre-clearance requirement of Section 5 was included among those sterner measures. The court conceded that Section 5 was "an uncommon exercise of Congressional power."

As Columbia Law Professor Samuel Icharoff notes, "Section 5 is an extraordinary intervention that permits the Federal Government to overcome their normal presumption of State autonomy and respect for Federal."

To put it another way, it created a system where the Federal Government created a presumption of illegality. Any change offered up by a covered State was presumed to be unconstitutional.

That is a radical departure from what we did in the past, but it is a radical departure that was necessary in 1965. But the question before you is, is that remedy, that radical remedy, justified in the 21st century?

Despite the extreme mature of the Federal remedy in this context, the court has recognized that exceptional conditions can justify legislative measures that would not be otherwise appropriate. The question we face within addressing the reauthorization of Section 5 is whether these exceptional conditions exist today.

Beginning in October of 2005, the Commission amassed an extensive record of testimony from noted experts in the field, thousands of pages of documents from the Justice Department provided to the Commission, and relevant court decisions.

We published our findings and recommendations on the issue in both our statutory report entitled "Voting Rights Act Enforcement and Reauthorization," and in a briefing report entitled "Reauthorization of the Temporary Provisions of the Voting Rights Act." I ask that these be included in the record for this hearing.

Chairman BROWNBACK. Without objection.

Mr. REYNOLDS. Based on this record, we found the following. In those covered jurisdictions, we have seen black registration for voting rights substantially increase over the last 40 years.

Data presented to the Commission suggests that Southern blacks register and vote at rates comparable to, if not higher than, the rest of the Nation. Research also indicates that since 1984, black

registered voters have closely tracked with the voting-aged population in the original Section 5 States.

I would like to conclude by saying that what we have to ask ourselves is, looking at the discrimination that exists today, my point of view is that the notion that we will eventually reach a point where there is no discrimination, that we will never reach that point because of the human condition. For whatever reason, we—some of us, at least—will find a reason to make distinctions based on race and other invidious bases.

The bottom line is, if the Supreme Court were asked to weigh in on the constitutionality of the Voting Rights Act looking at today's facts, it is not clear to me that we have those exceptional conditions that justified this extraordinary remedy back in 1965.

Thank you.

Chairman BROWNBACK. Thank you very much, Mr. Reynolds.

Our third witness is Don Wright, General Counsel for the North Carolina Board of Elections.

Mr. Wright?

**STATEMENT OF DONALD M. WRIGHT, GENERAL COUNSEL, NORTH CAROLINA STATE BOARD OF ELECTIONS, DURHAM, NORTH CAROLINA**

Mr. WRIGHT. Thank you, Mr. Chairman and members of the subcommittee. I appreciate the invitation to appear.

My presentation is going to be from the practical aspect, from a general counsel who deals with Section 5 matters almost on a daily basis. I will not give you a lot of fancy court cases and theories. I am going to try to give you how it is to deal with the Voting Rights Act on a regular basis.

I must give a disclaimer. I am general counsel for the State Board of Elections. The State Board of Elections is a bipartisan group of five individuals, appointed by the Governor, in charge of all elections in North Carolina.

I do not state the opinion of my State Board here today. This is my personal opinion, so whatever I state cannot be presumed to be the opinion of the State Board of Elections.

When I was appointed general counsel of the State Board of Elections in September of 2000, I was a little afraid of what I would find when I started dealing with the Federal bureaucracy with the U.S. Department of Justice.

It has been the most pleasant surprise. I found out they were human, that they would actually return phone calls, they responded to e-mails, and they were realistic in dealing with situations.

I quickly developed a working relationship with Chris Herron, who was assigned to North Carolina pre-clearance matters, and worked with Chris until this last April, when he was promoted and a new person was appointed, Yvonne Rivera. She initiated a phone call to me to say, "I am your new representative at the Department of Justice. Anything you need, any expedited help, just give me a call." We exchanged e-mails.

It has been my experience from the beginning that, I have never had any difficulty getting expedited pre-clearance or any reasonable cooperation from the U.S. Department of Justice. I think the

Senate should be proud of the way that Department of Justice, and the Voting Rights Section, has worked on pre-clearance matters.

In my national meetings with other election administrators, I never heard a complaint that on the day-to-day submissions—which we have got to remember, that is the bulk of what they deal with, not the headline redistricting cases, but the day-to-day submissions—that Justice does not do an excellent job in working with the States.

The responsibilities for submission of pre-clearance is set out in North Carolina statutes. My responsibility as general counsel for the State Board of Elections is to submit all State-wide statutes and all policies and procedures of the State Board of Elections, and we make rules and administrative guidelines and send them to Department of Justice for pre-clearance.

I do quite a bit of that, and as such I have developed, on my computer, formatted letters. I will be honest with you, if push comes to shove, I could probably knock out a pre-clearance on a routine matter in a half an hour.

That is because of the Federal regulations, which set out preclearance submission requirements. They are various differences, of course, in submissions, but the heart and soul of the submission, the format, is the same so I can easily get it out.

As a matter of practice, I not only send the pre-clearance submission by mail, but I fax the preclearance submission if it needs to be expedited. For instance, if a polling place burned down 2 days before the election, I am on the phone with Department of Justice. Very often, I can get that pre-clearance there on the phone, subject to them sending a letter, of course, later on.

So I want you to understand, at least based on North Carolina's experience—I have not heard different from other States—that the way preclearance is administered by the Department of Justice is very efficient. I have no reason to believe that that would not continue, and I hope it will continue.

So the submission of pre-clearances—and I am talking about the routine clearances—has become routine, at least in North Carolina.

Now, there are other types of pre-clearances, such as annexations, dealing with municipalities. It may be a little more extensive. The Department of Justice rules talk about providing additional information for those pre-clearances. That will take more than a half hour.

But keep in mind, the annexation pre-clearance submissions and the submissions on redistricting are infrequent, much more infrequent, than the routine submissions which the Department of Justice gets, such as polling place changes, precinct changes, and special election dates.

So is the current set-up a burden upon the average State or jurisdiction in regards to submission? I would contend it is not. In preparing for a presentation last year before a group here in Washington, I said, well, I do not feel too comfortable speaking for all county election directors. I said to myself, I will just take an informal survey.

I talked to 12 county Directors of Elections in North Carolina—we have got 40; Section 5 covered counties out of the total of 100 North Carolina counties—and said to the county director. "Look, do

you think Section 5 is much of a burden upon you? Speak frankly with me."

The vast majority—I mean, I had one negative comment—but everybody else said, we like it. I said, why do you like it? They said, well, it gives us protection. It gives us, for lack of a better term, a seal of approval, that we have got Justice saying what we are doing is right. They said, if anybody complains to us, we tell them to call Washington. And they do, I understand, call Washington.

Also, too, it prevents litigation. It stops it. Some of the comments I received you might find interesting. These come from county election directors, not from me: "I would hate to operate without it," referring to Section 5; "pre-clearance requirements are 'routine' and do not occupy an exorbitant amount of time, energy or resources;" "I can always fall back on Section 5, that is protection"; and "it allows us opportunity to assure the public that minority rights are being protected and that someone is independently validating these decisions." These comments come from County Elections Directors, not from an attorney.

Then, finally, a county stated, "The history of _____ County, calls for our operations to be scrutinized, and rightly so. The first black to serve on my Board of Elections was in 1991."

So from, for lack of a better term, from the "trenches", where the people deal on a day-to-day basis with pre-clearance, at least in North Carolina, we do not consider Section 5 burden. We would encourage the renewal of Section 5.

Thank you.

Chairman BROWNBACK. Thank you very much for the very practical testimony.

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

Chairman BROWNBACK. Mr. Park, from the Office of the Attorney General in Alabama.

**STATEMENT OF JOHN J. PARK, JR., ASSISTANT ATTORNEY GENERAL, OFFICE OF THE ATTORNEY GENERAL, MONTGOMERY, ALABAMBA**

Mr. PARK. Mr. Chairman and members of the subcommittee, thank you very much for the opportunity to speak this morning.

In addressing the committee, I draw on my experience, which includes litigation about Section 5 issues, redistricting matters, voting rights, and the preparation and consultation regarding submissions that are made by the State of Alabama.

I have prepared submissions, I have litigated over their adequacy. One of the things that I learned in that process, is that Section 5 does not sleep. If we have successfully submitted something for pre-clearance, it is subject to attack down the road on the ground that we did not adequately identify the change for the Department of Justice. We learned to our dismay that pre-clearance that had been obtained, in one case, in 1984, and again in 1998, was not adequate with respect to litigation in 1999.

Our office handles State statutes and general applicability that affect voting. We are the ones who submit it for pre-clearance. The duty is that of an Assistant Attorney General, and it is an extra duty.

We try to have local jurisdictions take care of their own submissions. As Mr. Wright suggested, there is a template, but I respectfully suggest that it would be difficult to make a submission, even of a routine matter, in an hour.

I brought a couple of submissions that are short, just as demonstrative exhibits. In one instance, we made a submission that relates to two constitutional amendments at the county level, and we just asked to put them on the ballot. The substance of neither amendment related to voting, so all we needed to do was ask U.S. DOJ to put these questions on the ballot.

The second one is, likewise, small, about 25 pages, and it is a redistricting submission for the town council of the town of Lipscomb, outside Birmingham, Alabama. Actually, it is a city. It is a city of some 3,000 people.

Ordinarily, an Assistant Attorney General for the State of Alabama would not handle a matter like the pre-clearance of the city council plan for a city. Lipscomb, however, was an orphan jurisdiction with limited funds.

I went to Lipscomb, met with the town council, and suggested what they ought to do. They came to Montgomery, they looked at the computer, they prepared the plan, and I submitted it for them.

In addition, we talked about the major submissions, redistricting. In 2000, the State of Alabama successfully enacted redistricting plans for its State Senate, State House of Representatives, State Board of Education, and its Congressional delegation and submitted each of those new plans for pre-clearance, and obtained preclearance.

I brought with me the submissions that relate to the State Senate plan. It is eight volumes of material. It includes alternate plans. It includes testimony before committees that went throughout the State before the process was under way to take testimony.

It took a substantial amount of time to do this. I am the one who wrote the letter. I worked with other folks to write the letter. Of course, the first 90 percent of the letter took 50 percent of the time. But this submission was the bell cow, it is the one that drove the train.

The House submission incorporated some of these materials, otherwise the House submission would have been equally big, and the Congressional submission incorporated these materials. So, too, did the State Board of Education submission. These are exceptional, but they are representative of the amount of work.

What I would like to suggest to the committee, is that things have changed and the Committee should not view the Act as a one-way ratchet. The States have changed their behavior.

It is measured by voter participation, it is measured by the participation of African-Americans in government. Eight of the 35 members of the Alabama Senate are African-American; 27 of the 105 members of the Alabama House of Representatives are African-American.

There are African-American members of county commissions, county Boards of Education, and town municipality governing bodies throughout Alabama. There are African-Americans who have served by appointment on the State Supreme Court, but they have

not been elected State-wide. There are African-American cabinet members.

What I would suggest, is that the Committee find some way to loosen the scrutiny of Section 5 without necessarily abandoning the scope of it. The Committee should consider removing de minimis changes from the coverage of the Act.

We have to ask to move polling places. We have to ask to include constitutional amendments on regularly scheduled elections. We have to schedule special elections.

Those, properly viewed, do not have much potential for discrimination, and if somebody did not like what we did they should sue us, but we should not be put in the position of asking U.S. DOJ for permission to do this when they never object.

Second, you should consider moving the date for determining when a change occurs from 1964 to the present. If I have to defend a lawsuit and I talk to State election officials, they can tell me what happened as long as they have been in office, and that is usually 10, 15 years. After that, I have to go to the archives, and they will not necessarily provide the answer.

Third, with respect to bail-out, the Congress should make certain that all covered entities, not just jurisdictions, be entitled to bail out. The political parties of the State of Alabama are both covered entities.

The Republican party has never had an objection. The Democrats and Republicans both want African-American votes. They do not have any interest in reducing their participation. But they, because they are not political subdivisions, cannot seek bail-out. I respectfully suggest that there is a constitutional problem with that possibility.

Finally, I think that the period proposed of 25 years is simply longer than necessary. Congress should revisit this in a substantially shorter period. Thank you very much.

Chairman BROWNBACK. Thank you, Mr. Park.

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

Chairman BROWNBACK. Senator Kennedy?

Senator KENNEDY. Mr. Chairman, this is a very useful and helpful panel. I necessarily have to absent myself, and I would like to submit some written questions, if I could, and get answers for the record.

Chairman BROWNBACK. Absolutely.

Senator KENNEDY. I thank all of the panelists for their presence here today. Thank you.

Chairman BROWNBACK. Yes. Thank you, Senator Kennedy. Thank you for your participation and your long-time support for the Voting Rights Act. You have been involved in it for some period of time, you and your family. Thank you.

Professor David Canon?

**STATEMENT OF DAVID CANON, PROFESSOR, DEPARTMENT OF POLITICAL SCIENCE, UNIVERSITY OF WISCONSIN, MADISON, WISCONSIN**

Mr. CANON. Thank you, Mr. Chairman and members of the committee. Thank you for inviting me to testify this afternoon.

I will focus my comments today on something we have not heard about yet today, which is the so-called Ashcroft Fix, which would restore the standard for retrogression to what it was before the *Ashcroft* v. *Georgia* decision.

But, first, let me say a few words about the necessity of extending Section 5 of the Voting Rights Act. Much of this has been covered by witnesses already, so I will not spend much time on this.

But basically, the critics of Section 5 argue, in part, that pre-clearance is no longer needed because of the success that minority voters have had in electing candidates of their choice in covered districts.

But if you look at the actual evidence, the data, there is really not much empirical basis for optimism on the success that minority voters have had in being elected in white-majority districts.

The exceptions are exceptional because they are so rare. If you look at all of the elections and House districts from 1965 up through 2004, over 8,000 House elections, only 49 of them involved African-Americans elected in white-majority districts. That is less than six-tenths of 1 percent.

If you look at covered districts, the evidence is similar. In fact, you have a gap of over 100 years for most of the covered States, from the end of reconstruction up through the 1980's and 1990's, when no African-Americans were elected from covered States at all for that period of over 100 years.

So, clearly, the idea that we have had more success is true, but, still, it almost exclusively happens in majority/minority districts, which raises the importance then of maintaining the pre-clearance provision of Section 5, that you would not have had the creation of the black-majority districts in 1992 that led to the election of large numbers of African-Americans to the U.S. House without that pre-clearance provision, without the Justice Department telling States that they needed to create these black-majority districts. So that, I think, is very strong testimony in favor of extending the Section 5 pre-clearance provision.

Another thing that some critics have mentioned in terms of the context of Section 5, is that because of the extremely low rejection rate by the Department of Justice, this indicates that, again, Section 5 is no longer needed.

Well, we have heard from witnesses today, and saw already in the written testimony, that the deterrent effect of Section 5 itself prevents some things from happening that otherwise would have.

So if you remove Section 5 pre-clearance, that deterrent effect would no longer be there. You would have, I think, more violations that would require people who are harmed by the discriminatory practices to sue, and in many cases they would not have the resources to do so, so the practices would go into effect.

Finally, on the issue of the low rejection rate, the focus on the low rejection rate ignores the extent to which many of the objections do concern very important violations of the Voting Rights Act. So while they are relatively small in number, they are very important in terms of significance.

So with the remainder of my time, I want to focus on, again, the Ashcroft Fix. Specifically, in the Senate bill that you are consid-

ering, 2703, this would restore the standard for retrogression to what was in place before *Georgia* v. *Ashcroft*.

The proposed legislation would clarify the purpose of Section 5 of the Voting Rights Act, to protect the ability of minority citizens to elect their preferred candidates of choice rather than allowing the ability of elective districts to be traded off against influence districts the way that the Ashcroft decision would allow.

I support this clarification of Section 5. I see two main reasons that the totality of circumstances test of *Georgia* v. *Ashcroft* should be overturned.

First of all, the test is vague and unworkable. I think it is just a practical nightmare in terms of how you would actually go about measuring the relative power of African-American voters to have their voice heard in the representative process. It is a whole new ball game that the court is asking us to engage in here, and I think it would be very difficult.

Second, allowing influence districts to be traded off for ability to elect districts would erode the gains in opportunities to elect candidates of choice that have been made in Congress for the last 40 years.

Let me elaborate a little bit more on the first point. Because time is running out, I will not talk so much about the second point. But on the first point, in terms of the "vague and unworkable" standard, having something to try to measure representation in Congress that would require you to balance a certain number of influence districts versus a certain ability to elect districts requires us to do a tremendous amount of work on actual legislative behavior: now, what are members of Congress doing? What are State legislators doing for their constituents, on behalf of their constituents?

So while some people propose fairly simple roll call analysis that just looks at votes, that is actually not adequate to look at the entire representative record. When you look at the entire representative record, it takes, literally, hundreds of hours to examine not only roll call votes, but also proposed legislation. What are they doing in terms of constituency service? How are the representatives of their staffs in terms of minority representation, and so on?

So one attempt of this was my work in the remand of the *Georgia* v. *Ashcroft* case, where I did make an effort to measure influence districts the way the majority of the Supreme Court dictated us to do.

So to do that, I went and looked at all 1,500 bills that have been proposed in the Georgia State Senate, which was the legislature in question, between 1999 and 2004 in terms of their racial content and whether or not they were representing racial interests.

What I found in that case, is African-American State Senators had a far higher rate, about 40 percent, of their proposed legislation that had some racial content, while compared to about 3 percent for the white Republican Senators, and ranged from 5 to 19 percent for the white Democrats.

The thing that was the strongest bit of evidence on this question of responsiveness, was that the white State Senators, both Democrats and Republicans alike, were not responsive to increases in the percent of black voters in their districts.

In other words, if you had a white State Senator who was a Democrat in a district that is 5 percent African-American, he or she behaved no differently than in one with 40 percent African-Americans. So, they were not being responsive to the needs of African-American constituents in their districts.

I think if you would maintain the *Georgia* v. *Ashcroft* decision it would be extremely harmful to minority interests, so I strongly endorse the Ashcroft Fix, which would restore the retrogression standard to the pre-Ashcroft standard, which was focusing on the ability to elect. I think that is where that focus should be.

Thank you very much.

Chairman BROWNBACK. Thank you very much. An interesting analysis, Professor Canon.

Professor Carol Swain of Vanderbilt University. We appreciate very much your being here.

Professor Swain?

**STATEMENT OF CAROL SWAIN, PROFESSOR OF POLITICAL SCIENCE AND PROFESSOR OF LAW, VANDERBILT UNIVERSITY, NASHVILLE, TENNESSEE**

Ms. SWAIN. Thank you, Mr. Chairman and members of the subcommittee. I would like to begin by clarifying why I believe I was invited to speak, and that is because I am the author of a book entitled, Black Faces, Black Interests: The Representation of African-Americans in Congress, which was published in 1993 by Harvard University Press, reprinted in 1995 with an expanded edition, and reprinted again in 2006 by University Press of America.

Black Faces, Black Interests book won three national prizes, including the prize for best book published in the United States, the Woodrow Wilson Prize, which is the highest prize that a political scientist can win. It also won the D.B. Hardeman Prize for the best book on Congress for a biennial period, and it was co-winner of the V.O. Key Prize.

Mr. Canon and some of the other witnesses, have published works that are derivative. I would like to establish that I am not a lawyer, but I have written a book that many people consider important.

In Black Faces, Black Interests, I argue that political party is more important than the race of the representative. As long as African-Americans hold the views that they do, they are best represented by Democrats. Consequently, I have questioned the drawing of the majority-black districts and pointed out that such a strategy was likely to add to the growth of the Republican party, and that black interests were best served when there are more people in office to support a particular agenda.

I made a distinction between descriptive representative, more black faces in office, and substantive representation, more people who vote for your agenda.

I believe that substantive representation is far more important than descriptive representation and that voters are best served by having more people in office, regardless of their race, that can support the things that the care about.

I come here strongly in favor of the reauthorization of Section 5. I believe that we should be concerned about voter discrimination

whenever and wherever it occurs, and there is plenty of evidence that it occurs nationwide. I would like to see Section 5 reauthorized and strengthened so that there would be nationwide protection beyond what is offered with Section 2.

I would also like to see the bail-out process for covered jurisdictions streamlined so that those jurisdictions with established records of compliance, can more easily bail out. We could perhaps include some type of probationary period so that if jurisdictions are found in violation again they would immediately come under coverage again. Overall, I think we should reward good behavior and punish bad behavior. There are many places outside the covered jurisdictions where discrimination occurs.

Moreover, unlike Professor Canon, I believe that *Georgia* v. *Ashcroft* was a good decision. I believe it was a good decision because it was one of those rare moments where politicians moved beyond their own narrow self-interests.

Every major black elected Democrat in Georgia, except one, argued in favor of unpacking the majority-black districts. These elected officials acknowledged that the world has changed significantly since 1965, and that race is no longer a major barrier to the election of black Democrats in the south.

These black Democrats supported the enactment of influence districts and the unpacking of majority black ones. The Voting Rights Act was never intended to guarantee the election of a politician of a particular race or ethnicity.

Instead, the VRA was supposed to ensure the representation of the interests of the people, and those interests can be represented by politicians of any race. Many of the issues that politicians frame as being about race, even something as salient as felony disenfranchisement, are not really about race.

If anything, it is more about social class and educational levels. This applies to the death penalty, the people on Death Row. You do not find rich people on death row. You find people who are poor whites, poor blacks, and poor Hispanics.

A lot of the issues that Congress frame and the nation as being about race, are not about race, they are about social class. We can have better legislation that protects the interests of all voters if we stop framing everything as being about race.

Yes, the Voting Rights Act has to be reauthorized, and it has to be strengthened. I believe that 25 years is a long time. Many of us will not be around in 25 years. The nation is changing dramatically in its demographics: there are growing numbers of Hispanic voters. Hispanics are the fastest-growing group; the Asians are also growing. Nationwide, all voters need their voting rights protected.

By 2050, it has been estimated that whites may be a minority in this Nation. It is crucial for us to have national comprehensive voting rights legislation. Yes, Section 5 should be reauthorized, it should be strengthened. And *Georgia* v. *Aschcroft* should be allowed to stand. Thank you.

Chairman BROWNBACK. Thank you very much.

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

Chairman BROWNBACK. Well, I expect a spirited questioning session here. We have got quite a few opinions that have been put forward, and that is useful as we look at this piece of legislation.

Let us run 5 minutes on questions. If we need another round, we will do that.

Mr. Reynolds, I am a little uncertain on your testimony. You were saying that the situation to extend Section 5 is not there today. Now, am I understanding you to say by that then we do not need Section 5 today, or you are supporting changes to Section 5? I just want to get that clarified.

Mr. REYNOLDS. All right. In 1950, a black man goes to the Registrar's office to try to register.

Chairman BROWNBACK. My time is real short.

Mr. REYNOLDS. I am sorry. Senator Brownback. Do we have the situation today to do this?

Mr. REYNOLDS. The facts on the ground today are quite different from the facts that existed when the Voting Rights Act was passed. I cannot, with a straight face, conclude that blacks today live under the same repression that existed in the South.

As I started out in my testimony, we are talking about a racial caste system that was put into place across the South. That racial caste system——

Chairman BROWNBACK. Nobody would dispute that. But do we extend Section 5 or not?

Mr. REYNOLDS. I am not speaking for the Commission. I would say no. The only way that the Voting Rights Act is constitutional, in my view, is if we conclude that the factual predicate that justified it in the first place is still there. I do not think that that is the case.

However, this is about politics, and politics is about compromise. There are lots of things that we can do. If there is a substantial number of folks who want to reauthorize the Voting Rights Act, there are many fixes; Professor Swain mentioned one.

Similarly situated citizens should be treated the same, so if you are a black living in a jurisdiction that is not covered, it seems to me that that black, or any American, should have the same constitutional and statutory protections as someone living in a covered jurisdiction.

Chairman BROWNBACK. I think that is an excellent point.

I want to move to, what about the 25-year extension? Do you think it should be extended for 25 years? Others are suggesting a 5-year extension.

Mr. REYNOLDS. I think that a 5-year extension, or a 10-year extension would be preferable. I also believe that the trigger needs to be updated. Currently, the trigger is key to the 1964 elections. I believe that is bordering on being irrational——

Chairman BROWNBACK. Yes.

Mr. REYNOLDS. [Continuing]. To have a trigger that is grounded at a particular point in time without taking into account the sea change that has occurred in American society.

Chairman BROWNBACK. All right.

Now, I want to quickly go on to the minority/majority seats orientation. Ms. Swain, if I am understanding you correctly, you do not think that is a good idea, presently. Or correct me.

Ms. SWAIN. I will tell you what I believe. I believe that race is no longer a major barrier to the election of black elected officials, especially in traditionally Democratic districts. One reason why we do not have more black elected officials in majority-white districts is that they are discouraged from running; it is very difficult to raise funds.

If parties wanted to increase the number of minorities elected in majority-white districts, they would cough up more money for campaigns, because it is very expensive to run in such a district.

Chairman BROWNBACK. It is. But I want to get to a fine point on this. So you do not like majority/minority designation districts. Is that correct? Do you disagree with that?

Ms. SWAIN. No, it is not that.

Chairman BROWNBACK. Then you do support that?

Ms. SWAIN. No, I am not saying, no, that I do not dislike them. I am saying that it is not the only way to elect blacks to Congress.

Chairman BROWNBACK. I understand that.

Ms. SWAIN. There is too much focus on it.

Chairman BROWNBACK. I am just trying to get to a point here about whether you support this design or not.

Ms. SWAIN. I do not support them as being esential to the election of minority politicians. I think influence and coalitional districts are more important for the Nation as a whole, and more practical.

Chairman BROWNBACK. All right.

Now, quickly, because I am short on time, Professor Canon, you disagree. You think you need majority/minority seats, and that the proof is that you do not elect minorities without them. Is that correct?

Mr. CANON. Correct, with one important change in terminology. Rather than "majority/minority," "ability to elect." Ability to elect is the legal thing to focus on, and that truly is the practical thing to focus on as well.

If you have sufficient cross-over voting and sufficiently low levels of racially polarized voting, it is quite possible to elect African-Americans in districts that may only be 40, 45 percent African-American. So that is what the flexibility of the "ability to elect" standard allows you to do, is that it is a case-by-case kind of analysis.

Chairman BROWNBACK. All right.

Mr. CANON. So majority/minority is essential most of the time, but ability to elect is the key thing.

Chairman BROWNBACK. So you support majority/minority, but you want to rephrase how that is defined then so that it can be easier to elect minorities?

Mr. CANON. No. I was just saying, to urge the focus on the actual language of S. 2703, which is the ability to elect. In the standard to restore the retrogression standard of what it would be before Ashcroft, the actual language of the proposed legislation is on ability to elect, not on majority/minority. So I was just saying that that should be the legal focus here.

Chairman BROWNBACK. All right.

Mr. CANON. In practical terms, it often does take a majority/minority district, but does not require it.

Chairman BROWNBACK. All right. Thank you.

Senator Cornyn?

Senator CORNYN. Thank you very much.

Well, I am glad we are having this discussion. Unfortunately, I think we do not have enough discussions about race, its role in our society, and how we can reconcile ourselves and deal with some of the wounds of the past. So, I think this has been very, very helpful.

Just to make sure we understand, and I think this is what, Chairman Reynolds, you were alluding to, but I want to make sure everybody here understands and knows who may be reading this transcript, the Voting Rights Act is not going to expire.

Mr. REYNOLDS. That is correct.

Senator CORNYN. The Voting Rights Act, which codifies the Fifteenth Amendment to the U.S. Constitution, which guarantees no discrimination in voting rights based on race, is a permanent part of our law.

The only issue that we are talking about with regard to reauthorization has to do with Section 5, and we will describe that in a minute, and Section 203, which has to do with multilingual ballots.

Just so people understand, only nine States and some other smaller political subdivisions are covered by Section 5. As Mr. Wright, Mr. Park, and others indicated, that obligates those covered States to seek pre-clearance from the Department of Justice on any changes in their voting practices or procedures before they can go into effect.

For the rest of the country, all the rest of the United States, they do not have to pre-clear, but they are subject to Section 2 of the Voting Rights Act. They can be sued for discriminatory voting practices. That remains available whether Section 5 is reauthorized or not.

A finer point. The reason why it is so important that we get this right, is because the U.S. Supreme Court has warned us that in passing reauthorizing Section 5, there must be "congruence and proportionality to the injury sought to be prevented or remedied."

In other words, this is an extraordinary use of Federal authority and imposition upon the sovereign States. I know we do not think about this so much today, but the States are actually sovereign entities which we were bringing in as part of the Federal Government back when this Nation was created.

The Supreme Court has said, under the Fifteenth Amendment of the Constitution, that the Federal Government's power is not plenary. It just cannot do anything it wants, anywhere it wants with regard to the States. There has got to be a reason for it. The remedy has to be proportional and congruent to the injury sought to be prevented from remedy.

That leads me to this question. There have been a lot of changes, as has been noted in this country, since the passage of the Voting Rights Act. We can all stipulate, that is a good thing. Nobody wants to go back to the way things were before.

In my State, we had about 57 percent of African-American voter registration when the Voting Rights Act was passed, and in all those jurisdictions covered it was about 40 percent.

But thank goodness, today, because of changes in America, changes in the law, and because of the success of the Voting Rights

Act, we now see that African-American voting registration in covered jurisdictions, that is the nine that have to pre-clear under Section 5, exceed that of the entire Nation.

In other words, if my chart here is correct, it shows about 64 percent African-American voting registration based on the 2004 Presidential race.

In covered jurisdictions, those that had had a past history of discrimination and which are required to pre-clear, they actually have better African-American voter registration than they have had in the rest of the country.

So my question, Chairman Reynolds, for you is, part of this formula for the application of Section 5 to justify this intrusive action by the Federal Government, albeit remedial and justified in the past based on historical discrimination, what possible justification could there be for triggering Section 5 based on 1964 election returns, 1968 election returns, 1972 election returns, when America is a changed Nation and we no longer have the same sort of problems—to the same extent, I should say. We still have the same problems, no question about it—that we had back in 1964, 1968 or 1972? Should we tie it to 2000–2004 elections?

Mr. REYNOLDS. Well, I think that, at a minimum, the trigger should be updated. There has been a sea change in the culture. There has been a sea change in race relations. Again, it is difficult.

Having conversations with my children, it is difficult for them to understand that their grandparents, who lived in the South, lived under a racial caste system. This is truly history for them. They will not have to deal with the levels of oppression that existed in the South in 1965.

So is it a good idea to update this trigger? The answer is yes. I think that, as a matter of public policy, we should take a look to determine if changed circumstances warrants a new trigger, and I believe that the answer is yes.

And also, to ensure that the statute is not successfully challenged, I think that Congress needs to look at the Act on a regular basis and to tailor the remedy to the harm.

Senator CORNYN. I am sorry to interject there, because I know the clock is ticking away. But just to put the final point on it. If we do not get it right, the U.S. Supreme Court is likely to strike down that as an unjustified extension of Federal power over the States. Is that not correct? That was what Burney tells us.

Chairman BROWNBACK. A short answer here, please.

Mr. REYNOLDS. The short answer is, I am not sure what the Supreme Court is doing, but to ensure that the Supreme Court does not have to face this question, I say that we need to tailor the trigger, we need to update the statute, we need to recognize the improvements that have occurred in society.

Chairman BROWNBACK. Thank you. I must apologize the panel, I have got another engagement. I am going to ask Senator Cornyn if he would finish chairing the hearing. Can you do that?

Senator CORNYN. Mr. Chairman, I was just gathering my papers because I have another conflict, too. We can turn it over to Senator Sessions.

Chairman BROWNBACK. We will turn the hearing over, if that is all right, to Senator Sessions. You have got the rest of the time clock to ask questions.

Senator SESSIONS. All right.

Chairman BROWNBACK. I do want to say, as I exit, I think this has been an excellent panel, a lot of thoughtful comments. These are tough things to discuss a lot of times because this has been a very important piece of legislation, the Voting Rights Act. It almost becomes a sacred document, so it is tough to talk about it, but it is important to talk about it, and what does it mean in the context of 2006.

So I am hopeful that we can get the extension on this passed. It is a serious piece of legislation. We need it, but I think we need to get it right so it does withstand constitutional challenge, and it continues to improve our country.

This has been one of those foundational pieces of legislation that you look at and you say, this really changed things for the better, it made a lot of things much better. I just want to make sure we continue that in the great tradition of what this legislation has meant.

Senator Sessions, thank you very much.

Senator SESSIONS. Thank you, Mr. Chairman. I am due to be defending America on the floor pretty soon on the defense bill, so I do not have a lot of time either; I wish that I did.

Let me just say, as a Senator from Alabama, we do not dispute, and in fact fully recognize, the racial discrimination that was, by law, in existence in Alabama in the 1960's that deprived people of the right to vote systematically and in large numbers in certain areas, virtually totally eliminating people because of the color of their skin of the right to vote.

It was wrong and it could not be justified. The Voting Rights Act was a powerful piece of legislation that I believe has, in fact, done more for race relations than most anything else that has been passed.

People say that frequently, and I think that is legitimate because it has empowered people to be a part of the electoral process when they were denied the right to be part of the electoral process, a wrong that is still in the memory of many African-American citizens throughout the South. This was in their lifetimes, in our lifetimes.

So it is not a matter we ought to treat lightly, that we ought to be in any way flippant about. I would just say that I do not sense any commitment on this Congress' part to do anything other than reauthorize this Act, for a whole lot of reasons.

I get the impression from my State, that people who understand how this Act works are willing to continue to do many of the requirements that the Department of Justice and the Act puts on them, even though, in many instances, it is just really foolish. It does not really do anything other than go through a paperwork process.

But they are prepared to do that. They want to affirm that the South, these nine States, have changed, that we are in a new world, and they are not afraid to have the Department of Justice

or anybody else examine what they do. In fact, they are willing to go through that. All right.

But I think that it is appropriate for us to analyze some of the requirements of the Act and to ask ourselves whether or not we can make it work better, whether or not—I believe it was Professor Swain who said—we recognize some areas where problems no longer exist, and create a system that is more workable and focuses on the more legitimate questions that come up.

Serious questions that arise, like redistricting, have big impacts. You have got to be really careful about that. I do not sense any suggestion that we want the Voting Rights Act to be amended so as to eliminate that, but there are some areas where I think it could be improved.

Professor Swain, you indicated that you thought the Democratic party may reflect the interests of the African-American community. I do not know if you know, I quoted from you this morning on the floor of the U.S. Senate. Did you know that?

Ms. SWAIN. I am honored. No, I did not know that.

Senator SESSIONS. I did not know you would be on this panel. I did so, because I agreed with you on your opinion on the immigration bill, that low-skilled or African-American workers may be hurt more by this bill than any other groups of people.

Ms. SWAIN. Working class whites and legal immigrants are hurt also.

Senator SESSIONS. Yes.

Ms. SWAIN. It is a bill that affects all Americans.

Senator SESSIONS. Well, I agree. [Laughter.] And you and I agree. Sixty percent of the Republicans in the Senate agreed with you and me, and only four Democrats did.

Ms. SWAIN. That is because Southerners have good common sense. [Laughter.]

Senator SESSIONS. Well, the point is, I guess, nothing is certain, as in politics and life.

Jack Park, it is great to see you. You are a terrific lawyer and represented the State of Alabama well. You mentioned this baseline date. You are not talking about changing the coverage trigger date. You are talking about the baseline, that that sometimes leads to extraordinary difficulties for a State in handling the Voting Rights Act.

Could you share with us how those problems exist and whether or not we could improve that language to make it more rational without diminishing the protections that the Act provides?

Mr. PARK. A change is something measured by a reference for the State of Alabama to the standard practice or procedure that was in place on November 1, 1964.

The election officials who were working at that time are no longer around, so we need to rely on election officials to tell us what the practices are.

Senator SESSIONS. How does this come up? Why do you have to know what the practices were in 1964?

Mr. PARK. If we are applying a statute that was in effect in 1964, the statute does not cover the waterfront. So election officials figure out how they are going to work various ways to comply with the statute, and those evolve into practices.

They are never put into writing, but they are always done, they are always done the same way. The election officials always try to make them as fair as possible. If we change an unwritten practice, that is a change.

Senator SESSIONS. And that has to be pre-cleared by the Department of Justice.

Mr. PARK. That has to be pre-cleared.

In litigation in which I was involved, the Secretary of State's Office insisted that they had been following party directions to take disqualified candidates off for years, but they could talk only about 15 years back.

So we went to the archives and we found some examples where candidates had been taken off party primary ballots before November 1, 1964, but a State court judge said that was not enough, it is not the right kind of removal.

So the archival records, as good as they are, are not enough to tell us exactly what we need to know. We need to be able to draw on the knowledge base of our current election officials. That is why the baseline date should be moved forward.

Senator SESSIONS. In other words, it is all right to determine from the current officials what the standards, or maybe unwritten practices are, but it is weird and unnecessary to figure out what it was 35 years ago. It is less relevant and very difficult to prove.

Mr. PARK. Yes, sir. Almost impossible to prove.

Senator SESSIONS. Would any of you others express concerns about that? Yes?

Mr. ADEGBILE. Senator Sessions, with respect to the coverage formula, I think it is important to make the point that while registration and turn-out was, and has been, an integral aspect, the registration and turn-out was not the whole story.

It was a legislative proxy that Congress arrived at for determining certain jurisdictions that had entrenched histories of discrimination. In subsequent renewals this body has recognized, by examining the record in the coverage jurisdictions, that the problem or the evil that Congress sought to remediate, that being discrimination in voting, persisted.

So I think that it is not fair for us to put too much focus on the coverage formula and not look at it in the context of what subsequent hearings before this Congress have recognized, that the story is multifaceted and complex.

To be sure, the triggering formula is important; it is integral and it gives us the coverage that we see on the map today. But as I testified earlier, it is not static, in that there are ways into coverage and ways outside of coverage, and both have been utilized in the years since the last renewal.

Senator SESSIONS. Professor Swain, would you like to comment?

Ms. SWAIN. Yes. I think that if we were to have a uniform national voting rights law, that we would probably have to change the trigger factor to take into consideration the histories of the Nation as a whole.

I would like to point out that African-Americans are no longer the largest minority group in America, that we are also dealing with growing numbers of Hispanics, Asians. I believe the Voting

Rights Act has to be framed in a way that it protects all voters, wherever they live, regardless of their race.

Senator SESSIONS. Let me ask you a question. You are from Nashville, at Vanderbilt University.

Ms. SWAIN. Yes.

Senator SESSIONS. I would ask you to handicap the possibility of racial discrimination at Boston, New York, Chicago, Philadelphia, and Nashville.

Ms. SWAIN. I know that racial discrimination happens all over the country, and it is global. It is not confined to a particular region of the country or world. I have lived outside the South. I was a tenured professor at Princeton University. I have traveled quite a bit.

I do not believe that the rest of the Nation can point a finger at the South, a legitimate finger, as discrimination occurs in many places. A lot of it may be because of the self-interests of politicians or for partisan gain, but it is not confined to a particular region of the Nation.

Mr. REYNOLDS. Senator Sessions?

Senator SESSIONS. Yes?

Mr. REYNOLDS. If you do not mind, I would like to address that issue also.

Senator SESSIONS. Please.

Mr. REYNOLDS. I think that both you and Professor Swain raise important issues. Again, we should have uniform rules that apply to all citizens. Certain citizens should not have enhanced protections merely because of our history.

The South was guilty of this pervasive disenfranchisement, but the North did not have clean hands either. They had a different system. They did not have, for the most part, literacy tests and poll taxes, but the North was not free from discriminatory contact.

So if we are going to have this, if we assume that we can get over the constitutional issues, then I think that we need to have a conversation that starts off with the premise that we should have a rule that applies to all citizens. So, the trigger would have to be revisited under those circumstances.

Senator SESSIONS. Chairman Reynolds, I would just ask you to followup a little bit more with what you just said. Is it your feeling that there is something inherently unwise, maybe even unconstitutional, about a focus on a certain area of the country when the evidence is such that it may not justify them being treated differently any longer? You are Chairman of the Civil Rights Commission and you think about these issues, and I would appreciate your thoughts on that question.

Mr. REYNOLDS. That is the heart of the matter. In 1965, this extraordinary remedy was justified by the conduct of the South. Every Federal attempt to provide blacks with the right to vote was thwarted by the South.

Under those circumstances, this extraordinary remedy was justified. But we are now into the 21st century. There has been a sea change in racial attitudes in the country. There are many blacks who have been elected to office, both at the State and Federal levels. The country has changed.

The harm that the court was addressing was pervasive, widespread discriminatory conduct aimed at preventing blacks to vote. That is the harm. Now, the issue is, is the extent of that harm still there? Do we have the same level of discriminatory conduct?

That is not to suggest that there is an acceptable level of discriminatory conduct, but I am saying that, in order to pass constitutional muster, this institution will have to revisit and reexamine the remedy. We have to look at the harm that is currently in place and we have to look at the remedy to ensure that there is proportionality. So, that is my two cents on the issue.

Senator SESSIONS. Thank you.

Mr. ADEGBILE. Senator, if I could respond, just very briefly, to that point.

Senator SESSIONS. Briefly.

Mr. ADEGBILE. I think there is an inherent tension between the court's decisions under *Boerne* and the requirement for congruence and proportionality, with the conception that we should extend Section 5 nationwide.

For example, there are parts of the country where there are no minority citizens that need protection. The *Boerne* decisions have recognized that limitations as to time and as to geography are important considerations in weighing the constitutionality of statutes.

So I am a little puzzled why one would suggest that we save this statute by extending it to places where, clearly, it will tend to undermine, rather than support, the constitutionality of the statute. I think that is a very substantial consideration for this distinguished body.

Senator SESSIONS. Well, thank you very much. Those are very important issues. It is a matter that this Congress, I am confident, will act on and we will move forward.

Our record will remain open for 7 days, 1 week, for written questions. I would like to ask each of you, if you receive questions from the members, to respond as promptly as you can.

Thank you all for your testimony today on this very important issue. Thank you very much.

[Whereupon, at 3:30 p.m. the hearing was adjourned.]

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

QUESTIONS AND ANSWERS

LDF NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.
99 Hudson Street, Suite 1600 • New York, NY 10013 • 212.965.2200 • Fax 212.226.7592 • www.naacpldf.org

July 26, 2006

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

Dear Senator Specter:

Thank you for the opportunity to offer my testimony during the June 21, 2006 Senate Judiciary Committee Hearing regarding "Reauthorizing the Voting Rights Act's Temporary Provisions: Policy Perspectives and Views from the Field." I attach responses to your June 29, 2006 letter requesting written answers to questions posed by Senators Kennedy, Leahy, Cornyn, and Coburn. I hope that my responses will 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 additional inquiries.

Cordially,

Debo P. Adegbile
Associate Director of Litigation

Regional Offices
1444 Eye Street, N.W., 10th Floor
Washington, DC 20005
202.682.1300 Fax 202.682.1312

1055 Wilshire Boulevard, Suite 1480
Los Angeles, CA 90017
213.975.0211 Fax 213.202.5773

**Response of Debo P. Adegbile, Associate Director of Litigation, NAACP Legal Defense and Educational Fund, Inc., to Questions from Senator Edward M. Kennedy**

*1. Some argue that a comparison of voting discrimination in covered and non-covered jurisdictions must be made to support the constitutionality of a renewed Section 5.*

*Q: To the extent such a comparison is relevant, does the balance of the evidence support or not support reauthorizing the Voting Rights Act with the current trigger for Section 5 coverage?*

I do not share the view that a comparison between voting discrimination in covered and non-covered jurisdictions controls the assessment of whether the Section 4 trigger for Section 5 coverage is constitutional. There are both legal and legislative reasons that suggest that such a comparison is not controlling.

When Section 5 was reauthorized previously, the central question was not whether voting discrimination was more prevalent in covered jurisdictions than non-covered jurisdictions, but rather whether Sections 4 and 5, as currently conceived, were still needed in the decades ahead. The analysis was informed by a careful assessment of the experience within the covered jurisdictions.[1] The record before this Congress, just as in earlier renewals, indicates that voting discrimination continues in covered jurisdictions, and that the protections of Section 5 are still needed to protect minority voters.

[1] *See, e.g.*, S. REP. NO. 97-417, at 10 (1982) ("The committee's analysis of the performance of the covered jurisdictions in recent years constitutes the basis for our conclusion that Section 5 . . . remain[s] necessary and appropriate legislation . . . ."); *see also Extension of the Voting Rights Act: Hearings on H.R. 939, H.R. 2148, H.R. 3247, and H.R. 3501 Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 94th Cong. 8 (1975) (testimony of Rep. Peter W. Rodino, Chairman, H. Comm. on the Judiciary accompanied by Earl. C. Dudley, Jr., General Counsel, H. Comm. on the Judiciary) (explaining that the continuing need for the Voting Rights Act's special provisions in the longest covered jurisdictions demonstrated the necessity of renewing the provisions.); *cf.* S. REP. NO. 94-295 at 15 (emphasizing that Congress adopted Section 5 in recognition that the "great lengths" to which covered jurisdictions had previously gone to perpetuate voting discrimination indicated a proclivity for similar future behavior); *See also* Testimony of Eddie N. Williams, President, Joint Center for Political Studies, Washington D.C. *Extension of the Voting Rights Act: Hearings before the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary* (May, 1982); *See generally South Carolina v. Katzenbach,* 383 U.S. 301, 335 (U.S. 1966) (upholding the constitutionality of Section 5 because of Congress's evidentiary basis supporting the necessity of preclearance).

As a practical matter, Section 5's success and deterrent function makes a head-to-head comparison of voting discrimination between covered and uncovered jurisdictions exceedingly difficult. As Professor Theodore Arrington stated in his responses to written questions in the Senate, covered jurisdictions appear much "cleaner" than they would without Section 5 coverage because Section 5 deters them from implementing changes they know will not be precleared.[2] Additionally, any accurate assessment of Section 5's effectiveness must look beyond the mere number of DOJ objections to other categories of deterred and rejected voting changes. As I indicated in my written testimony, these include voting changes denied preclearance by the federal district court for the District of Columbia; matters settled while pending before that court (and/or other district Courts following Section 5 enforcement actions); and voting changes that were withdrawn, altered, or abandoned after the DOJ made a formal More Information Request regarding a pending change (MIR).

Moreover, the most likely metric for assessing the experience in non-covered jurisdictions is the record of voting rights litigation. This poses another difficulty because a significant number of Section 2 cases have been settled without any published opinion in covered jurisdictions as noted in reports submitted into the record by both the ACLU and the National Commission on the Voting Rights Act. This further complicates the comparisons between covered and uncovered jurisdictions, which may give false indications of parity if the substantial effect of these unreported Section 2 cases are not taken into account. As a result of the complex operation and deterrent nature of Section

[2] Theodore S. Arrington, Ph.D., *Written Responses to Members of the United States Senate Committee on the Judiciary Regarding: The Continuing Need for Section 5 Pre-Clearance,* (June 1, 2006) [hereinafter "Arrington Responses"].

5, concrete comparative analyses between covered and non-covered jurisdictions tend to yield incomplete results.

However, the fact that Section 5 has successfully deterred numerous discriminatory voting changes and corrected others should not be taken as support for its pending expiration: to the contrary, such evidence offers powerful proof that Section 5 works. Incongruously, were Congress or the Supreme Court to require a record of unchecked pervasive discriminatory conduct squaring with that which existed in 1965 in covered jurisdictions to justify Section 5's renewal, the requirement would essentially mean that Section 5 could only have a possibility of being renewed if it was largely ineffective. Congress has not required such a showing in the past, and recent case law does not suggest that it must do so now. The record contains significant evidence of voting discrimination in covered jurisdictions illustrating the continuing need for Section 5.

Second, while a direct comparison of covered versus non-covered jurisdictions under Section 5 is exceedingly difficult, the weight of the evidence through the lens of Section 2 suggests that voting discrimination continues to be most severe in covered jurisdictions. In her forthcoming article "Not Like the South? Regional Variation and Political Participation through the Lens of Section 2," Ellen Katz documents judicial findings in published Section 2 decisions, and found that more successful cases were brought and more instances of discrimination uncovered in covered jurisdictions than non-covered jurisdictions.[3] She notes, in particular, that

> courts in covered jurisdictions have both found and have been more likely to find: acts of official discrimination that impact voting rights, the use of

[3] *See* Ellen D. Katz, *Not Like the South? Regional Variation and Political Participation Through the Lens of Section 2* (forthcoming).

> devices that "enhance[]" opportunities for discrimination against minority voters, a lower level of minority voter registration and turnout, contemporary voting opportunities shaped by the continuing effects of discrimination in various socio-economic realms, racial appeals, and a lack of success by minority candidates.[4]

These findings suggest that voting discrimination continues to be most severe in covered jurisdictions, and that Section 5 as currently configured applies appropriately to the places where voters most need its protection. Additionally, Katz's findings suggest that in the absence of Section 5's reauthorization, Section 2 litigation will increase significantly in covered jurisdictions, at considerable cost to plaintiffs, jurisdictions, and the judiciary. Both of these findings weigh strongly in favor of Section 5's reauthorization and the existing coverage formula.

Finally, the argument that reauthorization of Section 5 requires a greater weight of evidence in covered jurisdictions is not supported by Supreme Court precedent. In the case *Katzenbach v. Morgan,* the Court explicitly stated that "a legislature need not 'strike at all evils at the same time,'" and that "reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind."[5] As noted by Professor Arrington, covered jurisdictions are systematically different because of their distinct political histories and long history of minority disenfranchisement. Consequently, Congress acted appropriately and within its powers when it enacted Section 5 as a prophylactic measure in these particular jurisdictions.

Several of the witnesses before this Senate have pointed out that Congress's authority to act under the enforcement provisions of the Civil War amendments may be more constrained under a fair reading of the *Boerne* cases when enacting *new* legislation

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[4] *Id.* at 4.
[5] *Katzenbach v. Morgan,* 384 U.S. 641, 657 (1966).

than when it acts to renew an existing statute such as Section 5 of the VRA. The aforementioned Katz article makes a similar point, and I share this view. The question presented in this renewal is not whether a problem of voting discrimination severe enough to warrant invocation of Congressional enforcement powers ever existed, but rather whether the threat to a fundamental right has passed. It seems that Congress's special institutional competence in fact finding is uniquely well suited to make this determination. The Supreme Court has recognized that Congress acts as a continuing body when reviewing evidence, and that previous legislative findings and experiences are properly part of the current record.[6]

The extensive record before and findings made by this Congress illustrate that significant voting discrimination continues to plague covered jurisdictions, and also suggests that discrimination in these jurisdictions is of a different character than that which exists in most non-covered jurisdictions. The balance of the evidence thus adequately supports reauthorization of Section 5 with the current "trigger" intact.

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[6] *See Fullilove v. Klutznick*, 448 U.S. 448, 502-503 (1980), noting that:

> 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.

*See also Oregon v. Mitchell*, 400 U.S. 112, 284 (1970) (Stewart, J. concurring in part, dissenting in part) (noting that "Congress was not required to make state-by-state findings concerning the . . . actual impact of literacy requirements on the Negro citizen's access to the ballot box," and that Congressional findings made in support of the Voting Rights Act's original passage "would have supported a nationwide ban on literacy tests").

*2. The proposed legislation would overrule the Georgia v. Ashcroft standard of retrogression, but some have suggested that doing so will only encourage "packing" – concentrating of voters in a few voting districts.*

*Q: Do you agree? In your answer please explain how the earlier standard treats efforts to pack minority voters into fewer districts.*

In my view the bill clarifies the Section 5 standard following *Georgia v. Ashcroft*. The "ability to elect" standard set forth in the proposed legislation does not require or encourage "packing", and may allow reductions in minority voter percentages where such reductions do not eliminate the ability to elect.[7] Several factors are used to determine whether the ability to elect exists, including: the extent of racially polarized voting; rates of turnout, registration, eligibility and citizenship status among the various racial groups; and the extent of cross-over voting. The ability to elect is assessed by analyzing maps, demographic information and election data that are particular to each jurisdiction.

The DOJ applied such a standard during its administrative assessment of the plan at issue in the *Georgia v. Ashcroft* decision. Though it objected to three of the State Senate districts, several others were precleared despite substantial drops in black voting age population (BVAP). In fact, the districts with the largest percentage drops in BVAP were not objected to. For example, Senate district 43's BVAP dropped by 25 percent; district 38's dropped by 16 percent; district 35's dropped by 15 percent; and the average drop in BVAP across all opportunity districts was 10 percent.[8] The standard applied by the DOJ prior to *Georgia v. Ashcroft* allowed for such drops in minority voting

[7] The term "packing" very often means different things to different people. I view the ability to elect standard as a useful reference point for determining if a district is "packed," which I understand to be a district containing minority voters clearly in excess of what is required to provide an effective ability to elect. It is also worth mentioning that in many situations, including some within my personal experience in redistricting litigation, residential segregation patterns, population density, and one-person one-vote considerations, lead to districts that are unavoidably "packed". Accordingly, while "packing" can be a dilutive technique, non-discriminatory reasons also can lead to the creation of districts that could be fairly described as "packed".

[8] *See Georgia v. Ashcroft,* 195 F.Supp. 25 (2002).

population where its particularized analysis determined that minority voters still retained the ability to elect candidates of choice. The language in the bill restores this standard and will allow jurisdictions to have some flexibility and latitude in redrawing district boundaries. The determination of whether minority voters have the "ability to elect" their candidate of choice rests not on whether a district is "packed," but instead on a rigorous, case-specific analysis.

*3. Professor Carol Swain testified that race was no longer a barrier to the election of black-preferred candidates.*

*Q: Why aren't more minority-preferred candidates being elected in majority-white districts in the covered jurisdictions?*

*Q: Does the persistence of extreme racial polarization in voting in the covered jurisdictions undercut Prof. Swain's view?*

In discussing the *Georgia v. Ashcroft*[9] decision and its impact on minority voting rights before the Senate Judiciary Subcommittee on the Constitution, Carol Swain testified:

> The unpacking of majority-minority districts in traditionally Democratic districts does not bar the election of qualified minority politicians who have proven again and again their abilities to garner white crossover votes...Race is no longer a barrier to the election of qualified black Democrats in historically Democratic districts.[10]

As an initial matter, Professor Swain seems willing to draw her conclusions based upon sporadic levels of Black electoral success outside the covered jurisdictions. Professor Swain's table, submitted with her written testimony (and modified from her book, Black Faces, Black Interests), does not include information regarding current members of Congress which limits the probative value of her conclusions regarding the

[9] *Georgia v. Ashcroft*, 539 U.S. 461 (2003).

[10] *Reauthorization of the Voting Rights Act: Hearing on Policy Perspectives and Views from the Field Before the Subcommittee on the Constitution, Civil Rights and Property Rights of the S. Comm. On the Judiciary*, 109th Cong. (2006) (testimony of Carol M. Swain, Professor, Vanderbilt University Law School).

current state of electoral politics. Second, all of her examples, with the exception of one from 1979, were in non-covered jurisdictions, which reveals little about the level of racially polarized voting in the covered jurisdictions.

Although there are examples of Black electoral success in majority white districts, including David Scott and Sanford Bishop of Georgia, these examples are not typical and reveal little about the systemic nature of voting discrimination and the vestiges of discrimination. Isolated examples do not demonstrate that Section 5 has outlived its usefulness.

Of the 26,670 U.S. House elections since the adoption of the 15th Amendment in 1870, only 415 (1.6%) produced black winners (92 individuals).[11] When looking exclusively at the success of African-American candidates in U.S. House races in southern, Section 5 covered jurisdictions, Swain's assertion that "[r]ace is no longer a barrier to the election of qualified black Democrats in historically Democratic districts" appears to lack not only an understanding of racially polarized voting but also an historical understanding. Fair opportunities for African Americans to elect candidates of their choice were essentially nonexistent from the end of Reconstruction up until the late 1980s and early 1990s.

Not until the first redistricting cycle after the 1982 Voting Rights Act reauthorization, when many state legislatures created ability to elect districts for the first time, did many Southern states elect their first African-American candidates to the U.S. House of Representatives. As David Canon testified to the Senate Subcommittee on the Constitution, six Southern states did not elect their first African-American to Congress

[11] *See Reauthorization of the Voting Rights Act: Hearing on Policy Perspectives and Views from the Field Before the Subcommittee on the Constitution, Civil Rights and Property Rights of the S. Comm. on the Judiciary,* 109th Cong. (2006) (testimony of David T. Canon, Professor, University of Wisconsin).

after Reconstruction until the early 1990s.[12] Two other Southern states, Mississippi and Georgia failed to elect African-American candidates to the U.S. House until the late 1980s.[13]

Similarly, Professor Richard Engstrom has found severely racially polarized voting in state and gubernatorial elections in Louisiana, and has noted that not a single African-American state legislator comes from a majority-white district.[14] Moreover, in Alabama, only one Black state legislator has been elected from a majority-white district, and that district was 48 percent Black.[15]

Equally importantly, one should not reflexively assume, as Professor Swain appears to, that the Voting Rights Act required majority-minority districts to be drawn in all circumstances, either in the 1990's redistricting round, after the *Miller* decision, or, even more importantly, that it will require this if the pending bill is enacted.[16] Swain assumes that the Section 5 process requires that jurisdictions maintain districts that meet some particular minority voting population threshold. However, the effect prong of Section 5 only prohibits impermissible backsliding of the type that would eliminate a minority community's "ability to elect" candidates of their choice. The key question, thus, is what factors determine the ability to elect?

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[12] *See* David T. Canon, Written Responses to the Subcommittee on the Constitution of the Senate Committee on the Judiciary, July 6, 2006. The six Southern states are: Alabama (1877-1993); Louisiana (1877-1991); South Carolina (1897-1993); Virginia (1891-1993); Florida (1876-1993); North Carolina (1901-1993).

[13] *See supra* at 14. Georgia (1876-1987); Mississippi (1883-1987).

[14] *Oversight Hearing on the Voting Rights Act: The Continuing Need for Section 5 Before the Subcommittee on the Constitution of H. Comm. on the Judiciary,* 109th Cong. (2005) (testimony of Richard Engstrom, Professor, The University of New Orleans).

[15] Indeed, in many instances, districts that are not majority-Black elect Blacks because of Latino voters willing form coalitions with Black voters. It should not be assumed that a district that is not majority-Black is necessarily majority-White.

[16] *Miller v. Johnson*, 515 U.S. 900 (1995); *Georgia v. Ashcroft*, 539 U.S. 641 (2003).

As I explained in my previous answer, majority-minority districts are necessary in many cases, but they are not always necessary to provide an ability to elect. It is also important to mention that while Professor Swain focuses on the sporadic white crossover voting for minority candidates, the revisions to Section 5 of the bill protect the minority community's ability to elect "preferred candidates of choice." Indeed, there are some viable majority-minority districts in which African Americans support White or Hispanic candidates. In sum, Professor Swain's arguments about the decreasing importance of majority-minority districts raise several substantial questions about the basis for her conclusions, and appear optimistic when tested in many Section 5 covered jurisdictions. Recent data has shown the success of African-American candidates is geographically limited, and too small statistically to suggest the transformation in Southern politics that Professor Swain describes.

*4. In testimony about the history of race discrimination in voting in the covered jurisdictions, some have characterized this discrimination as a part of history, and no longer existing today to a degree that warrants continued federal oversight under Section 5. These critics of Section 5 recount a past when African-American voters were denied the right to vote. However, the 15th Amendment prohibits both the denial and abridgement of the right to vote on the basis of race or color.*

*Q: Please explain the distinction between vote denial and abridgment and how vote abridgment continues to impede equal participation in the political process for minority voters.*

The primary initial focus of efforts under the Voting Rights Act was to combat the tactics of outright vote denial through tests and devices, among other things, that prevented many African Americans and other minorities from exercising their right to register and vote. These early efforts, with the aid of federal examiners, resulted in the registration of substantial numbers of African-American voters in the south, and a significant increase in minority voter registration and turnout rates. It is important to

note, however, that the necessity of federal examiners (federal employees empowered to physically add eligible voters to the rolls when local officials persisted in their refusals to do so) to accomplish this progress indicates Congress's awareness that sustained resistance, in various forms, was anticipated from the outset. Even very soon after the Act was passed, as minority voters overcame barriers to registering and casting ballots, and in many cases in direct response to this progress, new methods of voting discrimination and dilution arose or were intensified in order to impede equal participation in the political process for minority voters. These methods include dilutive tactics such as gerrymandering, shifts from single member districts to at-large elections, changes in local government municipal boundaries (also referred to as annexations), transformation of offices from elected to appointed, and alterations in the duties, compensation of officeholders.

The voting changes at issue in the seminal 1969 Section 5 case of *Allen v. State Board of Elections,* arose in precisely these circumstances.[17] Once the federal government expressed its intolerance for vote denial through the VRA, abridgements or efforts to curtail the effectiveness of votes ensued. The record before this Congress contains numerous examples of these and other types of vote abridgment, including several examples occurring in the past few years. For instance, in May of *this year,* the DOJ rejected a reduction in the number of polling places in Woodlands, Texas because

[17] 393 U.S. 590 (1969) (Court made clear that contested Mississippi law, like all other voting changes adopted in covered jurisdictions, must be submitted either to the Attorney General or to a three-judge district court in the District of Columbia, for preclearance).

the change would have a discriminatory effect on minority voters by making it more difficult for them to access the ballot box on election day.[18]

The Supreme Court has expressly held that Section 5's coverage is not limited to cases of vote denial, but also applies to changes in "systems of representation" that favor or disfavor minority voters.[19] The Court additionally recognized that "the right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot."[20] The leading voting rights text, authored by three law professors who have testified in these hearings, explains the move from vote denial to abridgement.

> Although at first the suspension of literacy tests and the appointment of federal registrars in selected jurisdictions were the most significant aspects of the 1965 Act, once voters were registered attention turned to other electoral practices and to section 5 of the Act, which required covered jurisdictions to seek prior approval – "preclearance" – of any changes in voting practices in effect on the triggering date.
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> Many Southern jurisdictions responded to the explosive growth in black voter registration with a campaign of "massive resistance" akin to their attempts to evade the mandate of *Brown v. Board of Education*, 347 U.S. 483 (1954). Consider the first post-Act vote-dilution case, *Smith v. Paris*, 257 F.Supp. 901 (M.D. Ala. 1966), *modified*, 386 F.2d 979 (5th Cir. 1967). For over thirty years, elections to the Barbour County (Alabama) Democratic Executive Committee were held on a combined at-large and beat (that is, precinct) basis. Prior to the 1965 Act, only a minuscule number of blacks were registered to vote. Once federal examiners were sent to the county, however, black registration skyrocketed, and by March 1966, four beats in Barbour County had majority-black electorates. In each of these beats, black candidates filed to run. That month, the Committee "with little or no debate, without taking any minutes or making any record of its meetings or discussions, and, so far as the record reflects, with little or no discussion among the members of the community," changed the election method, requiring at-large (county-wide) elections for all positions. *Id.* at 904. The district court enjoined the new election method, finding that its purpose and effect "greatly diminish the

[18] Nina Perales, Luis Figueroa and Criselda Rivas, *The Minority Voting Experience in Texas since 1982: Demonstrating the Importance of Reauthorizing the Voting Rights Act,* Leadership Conference on Civil Rights (June, 2006) at 15.
[19] *Allen v. State Bd. of Elections,* 393 U.S. 544, 586 (1969).
[20] *Id.* at 569.

> effectiveness of the Negroes' right to vote." *Id. See also, e.g., Sims v. Baggett*, 247 F.Supp. 96 (M.D.Ala. 1965), the remedial stage of *Reynolds v. Sims*, where the district court rejected Alabama's state House reapportionment on the grounds that "the Legislature intentionally aggregated predominantly Negro counties with predominantly white counties for the sole purpose of preventing the election of Negroes to House membership." *Id.* at 109. *See generally* Frank R. Parker, Black Votes Count: Political Empowerment in Mississippi After 1965, at 34-77 (1990) (describing Mississippi legislation intended to neutralize black registration).[21]

Recent decisions make it clear that this practice of manipulating growing minority voting strength is not a distant memory.[22] Given the circumstances of the voting changes that have been rejected under Section 5 since 1982, it seems clear that abridgment of the right to vote continues to impede equal participation for minority voters despite significant increases in minority voter registration and turnout.

Experience has shown that increased minority voter registration can be an impetus for further abridgements of the vote and dilution. Minority voter registration and turnout tell us something about vote denial, but do not directly respond to or answer the important and longstanding abridgement question. The protections of Section 5 play an important role in preventing many forms of discriminatory tactics and help to ensure that minority voting rights are neither denied nor abridged.

> *Q: Does your experience in litigating the Louisiana declaratory judgment action, which involved the State's 2001 redistricting plan for the State House, indicate that discrimination against minority voters is not a relic of the past?*

The Louisiana legislature's actions during the state legislative redistricting process in 2001, and the ensuing declaratory judgment action in *Louisiana House of Representatives v. Ashcroft*, illustrate that even at the state level, voting changes are being

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[21] SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD PILDES, THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS 571-72 (University Casebook Series Editorial Board eds., 2nd ed. 2001).

[22] *See League of United Latin American Citizens v. Perry*, 126 S. Ct. 2594 (2006).

made that not only disproportionately burden minority voters, but that also are rooted in discriminatory intent by policy makers in covered jurisdictions such as Louisiana. After failing to receive Section 5 preclearance for every single initial submission of its state legislative reapportionment plans since the Voting Rights Act went into effect four decades ago, the Louisiana legislature sought judicial Section 5 preclearance before a three-judge panel. The plan eliminated a majority black district in Orleans Parish but failed to create a comparable new opportunity for black voters anywhere else in the state.

During the proceedings, the state argued that *white voters* were entitled to "proportional representation," within Orleans Parish. The plan simply ignored the population *increase* by black voters in Orleans Parish in the preceding decade. The state sought to apply the concept of proportional representation selectively to white voters in Orleans parish. In other words, though proportionality is not required by the VRA, once the state decided to employ it, it did not ask: which allocation of legislative seats statewide would give a proportional balance to its legislature, but rather whether it could invoke a desire for proportionality limited to Orleans only, in order to defend a clearly retrogressive plan. The DOJ opposed the entry of a declaratory judgment by the federal court, on grounds that Louisiana was unable to meet its burden of showing that the plan was adopted without retrogressive purpose or effect.

The legislature's position in the case conceded that the plan was intended to benefit white voters at the expense of black voters. When the state's position is taken together with its procedural misconduct in the litigation prior to settlement,[23] this post-

[23] See *Louisiana House of Representatives, et. al. v. Ashcroft* No. 02-0062 (D.D.C. dismissed 2002) (mem. order rejecting request to approve redistricting plan, finding the state "blatantly violate[ed] important procedural rules" through its litigation tactics, and condemning the state for its "radical mid-course revision in [its legal] theory of the case").

2000 Census, statewide redistricting suggests that Section 5 review of voting changes is still needed in Louisiana.

Louisiana ultimately abandoned its selective proportionality theory after evidence emerged before trial that significant racially polarized voting exists in virtually all electoral contests in the region, that the legislature specifically altered and ignored its own redistricting guidelines, and after a court order was issued explaining that the State had engaged in a "radical mid-course revision" of its legal theory to avoid summary judgment. The case was settled on the eve of trial, after the state agreed to restore the African-American opportunity district.

Moreover, although this case is a very recent example of overt racial discrimination by the state in the voting context, other examples have followed in the several years since. Discrimination in Louisiana is not a historical artifact as it persists in the state – just as it does in other jurisdictions covered by Section 5 – and these recent examples demonstrate that such discrimination will, unfortunately, likely continue in the years ahead. In 2002, for example, the Louisiana state legislature adopted a plan allowing the St. Bernard Parish electors to reconfigure the school board from 11 single-member districts, of which one was an African-American opportunity district, to 5 single-member districts and 2 at-large seats, none of which would have allowed African-American voters the opportunity to elect candidates of their choice. When the action was brought to court under Section 2, a St. Bernard Parish state senator admitted in testimony to using racially derogatory terms and holding racist views.[24] The court struck down the plan as unlawfully diluting the black vote in the parish. More recently, the DOJ in 2005

[24] *See St. Bernard Citizens for Better Government v. St. Bernard Parish School Board* (No. 02-2209)(E.D.La. Aug 28, 2002).

blocked a redistricting plan in the Town of Delhi, Louisiana, after finding it was motivated by intent to retrogress, would have eliminated an African-American opportunity district, and was more harmful to minority voters than alternative plans. These examples demonstrate the continuing need for Section 5.

*5. You noted during your testimony that the trigger served as a "proxy" to reach jurisdictions with a history of entrenched discrimination against minority voters.*

*Q: Please explain what you meant by this point and upon what evidence you rely.*

The trigger or Section 4 coverage formula as initially crafted was based, in part, on voter registration and turnout rates, and in part on whether a jurisdiction had employed a literacy test or similar device to interfere with minority voting.[25] Indeed, though many of the discriminating jurisdictions could have been readily identified by name in 1965, the trigger was designed as a legislative proxy to reach many of the worst actors. The difficulty of healing deep racial divisions, together with the associated political considerations, counseled in favor of a formula and not a list. I characterized the original Section 4 trigger as a proxy during my oral testimony, however, to underscore that depressed registration and turnout rates were aspects or indications of the larger problem that Congress sought to address but not the entire problem in itself. The larger goal was the eradication of all discrimination in voting.[26]

In my view, those who seek to limit the purposes of the VRA in general, and Section 5 in particular, to a voter registration and turnout remedy overemphasize those aspects of the trigger in the current renewal debate. To be sure, reductions in the gap between White and African-American registration and turnout levels are markers of

[25] *See* S. Rep. No. 97-417, at 5.
[26] Indeed, the VRA was "designed to banish the blight of racial discrimination in voting." *See South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1996) (upholding the constitutionality of Section 5 of the Act).

progress (even though this progress does not extend in equal measure to Hispanic voters). However, the breadth,[27] legislative history,[28] and case law,[29] of the VRA make clear that the far-reaching purposes of the Act – the eradication of voting discrimination – could not be achieved through improved registration alone.[30] The anchoring reference to registration and turnout data in the Section 4 trigger was a way for the remedial and prophylactic protections of Section 5 to reach many places in the nation where voting discrimination had been most intense based upon a discernible manifestation of that discrimination. But as I explain in greater detail below, improvements in registration and turnout rates do not end the inquiry about whether voting discrimination persists.

During previous VRA renewals, and most recently in 1982, in addition to considering improvements in voter registration and turnout, Congress has considered whether the goal of eliminating voting discrimination more broadly had been achieved before determining whether Section 5 coverage was still necessary. In 1975, Congress found that "while most jurisdictions had complied with Section 4 for ten years by not using tests or devices, there had nonetheless been widespread violation of the Act and widespread voting discrimination in the covered jurisdictions."[31] Based upon this finding, among other things, Congress confirmed the continued need for preclearance. As explained in the corresponding record:

> Congress continued the preclearance requirement for the jurisdictions originally covered in 1965, not on the basis of some permanent stigma for

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[27] *Id.*

[28] *See e.g.* S. Rep. No. 97-417, at 6 ("[T]he right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot." (quoting *Allen v. Board of Elections,* 398 U.S. 544, 569 (1969))).

[29] *County Council of Sumter County v. U.S.,* 555 F.Supp. 694, 707 (D.D.C. 1983) ("Obviously, the preclearance requirements of the original act and its 1982 amendment had a much larger purpose than to increase voter registration . . . .").

[30] *See e.g.* Written Response to Question 4 *supra.*

[31] *See* S. Rep. No. 97-417, at 8.

> events which had occurred before 1965, but rather on the basis of a careful review of the contemporaneous record of ongoing voting rights discrimination in 1970 and 1975 respectively.[32]

Likewise in 1982, Congress renewed Section 5 of the VRA after determining that performance in the covered jurisdictions was still not sufficient to afford minority voters their full voting franchise. At this time, Congress observed that "although we have come a long way since 1965, the Nation's task in securing voting rights is not finished" and that "continued progress toward equal opportunity in the electoral process will be halted if we abandon the Act's crucial safeguards now."[33] Congress declined to change the coverage formula during the 1982 renewal, recognizing that discrimination against racial and language minorities persisted in covered jurisdictions, and that, in many jurisdictions, overt measures of vote denial had simply been replaced with "more sophisticated devices that dilute minority voting strength."[34] This legislative history makes clear that Section 5 coverage does not rely upon the trigger alone but also upon an assessment of the circumstances in the jurisdictions identified for coverage.

As Congress understood when renewing the VRA in 1970, 1975 and 1982, improvement in voter registration and turnout are necessary, but not sufficient measure of increased minority voting guarantees. Just as in 1982, the record before this Congress exhibits widespread continued voting discrimination in covered jurisdictions which Section 5 is uniquely suited to remedy. As the Leadership Conference on Civil Rights's recent reports on voting rights in Louisiana and Texas, for example, have shown, and as my own experience litigating voting rights cases in Louisiana has demonstrated, various methods of voting discrimination persist in covered jurisdictions. These facts permit the

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[32] *Id.* at 8-9.
[33] *Id.* at 10.
[34] *Id.; See also* Written Response to Question 4.

inference that the basic coverage formula supported in 1965, 1970, 1975 and 1982, now informed by careful evaluation of the existence and threat of voting discrimination in covered jurisdictions, continues to be justified.[35] Voting abridgments such as dilution, the most common present-day form of voting discrimination, cannot be measured with reference to registration and turnout rates alone: the VRA generally, and Section 5 in particular, focus appropriately on both vote denials and abridgments.

*6. Some have suggested that because African-American voting registration has increased significantly in the covered jurisdictions since enactment of the Act, Section 5 is no longer needed.*

*Q: What is your view of the relationship between African-American voter registration and the continued need for Section 5?*

I believe I have substantially answered this question in my responses to questions 4 and 5. In addition, as expressed by Professor Alexander Keyssar in his written testimony to this Committee, this country's progress in the expansion of the voting franchise has been "piecemeal and fitful, not steady and gradual."[36] Over time, the right to vote has been narrowed and expanded, gains have been made and lost, and populations that once possessed the right to vote have been subsequently disenfranchised. In this context, the preclearance provision of Section 5 works as a critical mechanism for preventing another round of rollbacks and reversals of the gains achieved by African Americans and other minority groups.[37] As illustrated by the record and my previous responses, the need for the remedial and prophylactic Section 5 measure persists despite improvements in voter registration.

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[35] In 1999 the Supreme Court firmly upheld the constitutionality of Section 5 and the existing trigger formulation, citing in its opinion that these jurisdictions were "properly designated for preclearance." *Lopez v. Monterrey County, 525 U.S. at 282-283 (citing City of Boerne, 521 U.S. at 518).*

[36] Alexander Keyssar, *Written Testimony Submitted to the Senate Committee on the Judiciary,* (June 12, 2006).

[37] *Id.*

*7. Some argue that Section 2 of the Voting Rights Act, which is a permanent provision and applies nationwide, would be an adequate remedy for voting discrimination if Section 5 is not reauthorized.*

*Q: Do you agree or not agree? Please explain.*

No, I do not agree that Section 2 would be an adequate remedy for voting discrimination if Section 5 were not reauthorized. While Section 2 provides an important ongoing remedy for voting discrimination in many circumstances, it is less a less effective tool for responding to some of the episodic forms of discrimination common to jurisdictions currently covered by Section 5. Section 5 is a more effective provision for responding to seemingly small voting changes that can have clearly dilutive effects on minority voting power. Examples of such dilutive changes can include polling place changes, changes in the length of voting periods, or last-minute election date changes.

Due to the complex nature of Section 2 litigation, it can be difficult and costly to challenge VRA violations, such as those described above, under Section 2. Section 5, on the other hand, is specifically designed to deal with these all voting changes expeditiously. Additionally, without Section 5 there would likely be an increase in Section 2 cases throughout covered jurisdictions. As I noted in my response to Question 1, even with Section 5 in place there have been more successful Section 2 cases brought in covered jurisdictions than non-covered jurisdictions. Without Section 5 preclearance, this disparity would likely grow much larger, at significant cost to litigants, covered jurisdictions, and the judicial system. Finally, whereas Section 5 works to deter voting discrimination *before* it has taken effect, Section 2, in large part, typically addresses discrimination after the fact. As a result, minority voters can still be denied their full voting rights while litigation is pending, contrary to the legislative intent under the VRA.

**Response of Debo P. Adegbile, Associate Director of Litigation of the NAACP Legal Defense and Educational Fund, Inc., to Questions from Senator Patrick Leahy**

1. *Some witnesses have proposed that Section 5 coverage be extended nationwide. You testified that you oppose that proposal because it would not be congruent and proportional to the harm being remedied. Why?*

Nationwide extension of Section 5 preclearance would present serious legal and practical dangers. The approach has been suggested and rejected during previous renewal debates as a form of poison pill. For example, as Congressman Henry Hyde stated in 1982 in response to the nationwide argument, those who seek nationwide extension of Section 5 risk "strengthen[ing] it to death".[1] Below I describe in greater detail the constitutional and practical problems with proposals for nationwide extension that I described more briefly during the hearing.[2]

Under the *Boerne* line of cases, Congress may act after careful assessment and documentation of a constitutional problem and threat provided that its legislative response is "congruent and proportional" to the violation it seeks to remedy. The remedy can be both remedial and prophylactic in nature, thus, in crafting the legislative response, Congress enjoys latitude to employ its enforcement powers under the Fourteenth and Fifteenth Amendments. In several recent cases, the Supreme Court referenced or explicitly upheld Congress's enactment of the VRA, including Section 5, as an example of carefully and appropriately crafted remedial and prophylactic legislation. Central to these findings was the unique history of voting discrimination in covered jurisdictions.

The existing record does not support nationwide extension of Section 5 to many jurisdictions that, to date, have no substantial pattern of voting discrimination. Consequently,

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[1] *Extension of the Voting Rights Act: Hearings Before the Subcomm. On Civil and Constitutional Rights of the H. Comm. on the Judiciary,* 94th Cong, 28 (1981) (testimony of Lane Kirkland, President, AFL-CIO.

[2] *Id.* As Congressman Hyde stated,: "It would be administratively impossible to administer, but most importantly, it would be unconstituitional."

were a statute mandating nationwide coverage subject to a constitutional challenge, the Court would likely strike it down because its reach would not be "congruent and proportional" to the record of voting discrimination that Congress now has before it. In contrast, Section 5 as currently constructed is appropriately focused on the history of discrimination that gave rise to the coverage formula, augmented by more recent examples of discrimination in covered areas. It likewise includes adequate measures through its bail-in and bail-out provisions to respond to new instances of discrimination in uncovered jurisdictions, or to release jurisdictions from coverage where Section 5's protections are no longer needed.

Practically speaking, extending Section 5 nationwide would also prove to be an administrative quagmire. The DOJ is not presently equipped with the resources or personnel that would be needed to extend its existing preclearance responsibilities nationally. Additionally, expansion of coverage would prevent the DOJ from focusing its preclearance responsibilities on the jurisdictions where voting discrimination has historically been, and continues to be, a serious problem.

Proposals to extend the Act in this fashion appear, once again, to be designed to end its application both legally and practically. Instead, Section 5 should continue to cover selected jurisdictions, because this arrangement satisfies the *Boerne* requirements and has proven successful in combating voting discrimination where its effects are most severe.

2. *Some have pointed to increases in black voter registration and turnout as evidence that Section 5 is no longer needed. Do you agree with that conclusion? Why or why not?*

No, I do not agree with that conclusion. As I noted in my responses to Senator Kennedy, the VRA was enacted to combat both vote denial *and* abridgment, and voting abridgment (in the form of vote dilution) remains a widespread and persistent problem in covered jurisdictions. The

fact that more African-American voters are registered and turnout today than when the VRA was passed attests to the VRA's success on this critical issue, however, it does not prove that voting discrimination against African Americans or other minorities has ended. Rather, the congressional record is replete with examples of continuing voting discrimination against racial minorities in the covered jurisdictions, and this discrimination works to limit or reduce the effectiveness of their votes.

As minority voters have overcome barriers to registering and casting ballots, new methods of voting discrimination and abridgment have arisen to impede equal participation in the political process for minority voters. These methods include dilutive tactics such as redistricting, shifts from single-district to at-large elections, and changes in local government/ municipal boundaries (also referred to as annexations). The record before this Congress contains numerous examples of these and other types of abridgments, including several examples occurring in the past few years. The Supreme Court's ruling in the Texas redistricting case, *LULAC V. Perry,*[3] is but one recent example. Likewise, in May of *this year,* the DOJ objected to a voting change that would have reduced the number of polling places in Woodlands, Texas and thereby, restricted minority voters' access to the ballot box.[4]

Additionally, the Supreme Court has expressly held that Section 5's coverage is not limited to cases of vote denial, but also applies to changes in "systems of representation".[5] The Court further recognized that "the right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot."[6] As stated by Attorney Armand Derfner

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[3] *League of United Latin American Citizens v. Perry*, 126 S.Ct. 2594. (2006).
[4] Nina Perales, Luis Figueroa and Criselda Rivas, *The Minority Voting Experience in Texas since 1982: Demonstrating the Importance of Reauthorizing the Voting Rights Act,* Leadership Conference on Civil Rights (June, 2006) at 15.
[5] *Allen v. State Bd. of Elections,* 393 U.S. 544, 586 (1969).
[6] *Id.* at 569.

in his previous testimony before this Congress, "the trends perceived by the Civil Rights Commission of 1968 were the beginning of an epidemic of dilution methods in covered jurisdictions."[7] In fact, as Derfner noted, of the over 13,000 changes that the DOJ has rejected to date, the vast majority have involved changes in representational systems that would result in minority vote dilution.[8] Given these statistics, it seems clear that Section 5 remains very much needed, despite significant gains in voter registration and turnout. The protections provided by Section 5 preclearance play an important role in detecting and remedying dilutive and discriminatory tactics, and ensuring that minority voting rights are neither denied nor abridged.

3. *John Park testified that he believes that "de minimis changes that have proven to have no potential for discrimination: such as "the location of polling places, the setting of special elections, and the inclusion of referenda on constitutional amendments" should be removed from Section 5 coverage. Do you agree? Why or why not?*

Although certain voting changes, including the ones to which you refer, may appear to be of minor importance to some, I disagree with Mr. Park that such changes are "*de minimis*" as a matter of course. Indeed, any type of voting change can potentially be discriminatory given the specific local context in which it is made. Moreover, even the smallest changes have the potential to impact a great number of people depending on the type of change at issue. Voting procedures are often very complex and present multiple opportunities for seemingly small changes to have broad impacts. The opportunities for discrimination at various levels of the electoral process were part of the reason that Section 5 was enacted in 1965.

[7] *To Examine the Impact and Effectiveness of the Voting Rights Act: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 109th Cong. (2005) (Statement of Armand Derfner, Attorney, Derfner, Altman & Wilborn).
[8] *Id.*

According to Black's Law Dictionary, a "*de minimis*" change is "trifling" or "minimal" and is "so insignificant that a court may overlook it in deciding an issue or case."[9] Enforcement of the Voting Rights Act has repeatedly demonstrated, however, that voting changes such as polling place or election date changes that appear benign can, in fact, diminish minority voting strength, in violation of the VRA.

For example, a polling place change may be unlawfully discriminatory if the geographic location of the new polling place makes it more difficult for minority voters to travel to or access the site. In addition, jurisdictions may also seek to move polling places to areas or communities that have historically been hostile to minority voters. The Department of Justice has blocked polling place changes such as these through the Section 5 preclearance process.

In Virginia, the Dinwiddie County Board of Supervisors in 1999 was forced to move a polling place for one precinct after the existing location burned down. Initially, the privately-owned Cut Bank Hunt Club, which had a large African-American membership, was designated the new polling place. Subsequently, 105 citizens petitioned the county to move the polling place to a Methodist church three miles away, which petitioners described as a "more central location," but the church removed itself from consideration as a possible polling place. Ultimately, the Board of Supervisors selected a Presbyterian church at the far eastern end of the precinct as the new polling place. Since the majority of African-American residents lived in the western portion of the precinct, the DOJ objected to the proposed move, finding that the selection of the Presbyterian church would have placed minority voters in a worse position.[10]

Similarly, in 1992, the DOJ objected to a proposed polling place change by the City of Wrightsville, Georgia from a county courthouse to a racially segregated American Legion hall

[9] BLACK'S LAW DICTIONARY 443 (7th ed. 1999).
[10] Letter from Bill Lann Lee, Acting Assistant Attorney General, Civil Rights Div., U.S. Dep't of Justice, to Benjamin W. Emerson, Sands, Anderson, Marks & Miller (Section 5 objection letter) (Oct. 27, 1999).

that had a reputation of refusing membership to African Americans. Finding the American Legion to be "considered hostile and intimidating to potential black voters[,]" the DOJ objected to the change.[11]

Earlier, in 1987, the Bibb County, Georgia school board moved a bond measure from March 8, 1988, the Super Tuesday primary election in which many African-American voters were expected to turn out because of the candidacy of Rev. Jesse Jackson, to Tuesday, May 31, 1988, the day after the Memorial Day holiday. The change, not submitted to the DOJ until March 28, 1988, *after* the original election date, did not receive preclearance from the DOJ. The DOJ responded with a letter seeking more information about the change and specifically asking for a "detailed explanation of the reason for choosing May 31, 1988, as the bond election date."[12] The board attempted to hold the election before it responded to the DOJ, causing Justice Anthony Kennedy, acting as Circuit Justice, to grant a stay enjoining the election just before polls opened.[13]

These are just several examples of seemingly "*de minimis*" polling place and election date changes that, if implemented, would have made access to the polls more difficult for minority voters. These changes were properly blocked through the Section 5 preclearance process. The examples illustrate the multiple ways in which seemingly insignificant changes can have severe consequences on minority voting strength. Section 5 blocks these changes prior to their implementation, rather than forcing minority voters facing discriminatory practices to file Section 2 lawsuits after the changes have already occurred, which, in many circumstances, would not happen due to limited resources.

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[11] Letter from John R. Dunne, Assistant Attorney General, Dep't of Justice, Civil Rights Div., to Charlotte Beal (Section 5 objection letter) (Oct. 28, 1992).
[12] *Lucas v. Townsend*, 486 U.S. 1301, 1303 (1988).
[13] *Id.* at 1304.

4. *You testified that the trigger dates for Section 5 coverage do not need to be "updated." Explain why the current triggering formula should be maintained and how it meets the "congruent and proportional" test under City of Boerne v. Flores.*

I believe I responded to the latter part of this question in my response to Question 1 above. As I noted there, Section 5's coverage formula satisfies the "congruent and proportional" test under *Boerne* because it is narrowly tailored to remedy the particular constitutional violation at issue: voting discrimination in jurisdictions with a proven history of denying and abridging minority voting rights, augmented by new findings of discrimination within the covered jurisdictions. Additionally, as I stated in my written testimony, the existing "bail-in" and "bail-out" provisions of Section 5 operate in tandem with the coverage formula to ensure that the scope of Section 5 is appropriately contracted or expanded.

My view is that the trigger dates do not need to be "updated" because voting discrimination, unfortunately, persists in the covered jurisdictions, and the dates are only one aspect of a much larger legislative picture. In establishing the initial coverage formula, Congress considered not only presidential turnout data, but also which jurisdictions "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." The breadth of this initial inquiry illustrates that the VRA's enactors were concerned not only with voter registration and turnout, but more importantly with the ability of voters to meaningfully exercise their franchise. While voter registration and turnout has increased measurably in covered jurisdictions since the VRA was enacted, this does not support the argument that jurisdictions that discriminated against minority voters for over 100 years should be allowed to opt out in the face of ongoing discrimination. To the contrary, the years 1964, 1968 and 1972 remain relevant to recognizing the long history and ongoing nature of voting discrimination in these jurisdictions, and the current record is, unfortunately, replete with

present-day examples in the covered jurisdictions. Using only a current date to determine which jurisdictions should be covered would ignore the history and evidence of voting discrimination in currently covered jurisdictions.

When Congress considered this issue in 1982, it determined that the formula did not need to be updated because, as now, many forms of discrimination persisted in covered jurisdictions. As noted in the responses of my colleague, Theodore Shaw, this assessment was vindicated when the Supreme Court rejected a constitutional challenge to Section 5 as recently as 1999. In *Lopez v. Monterey County,* the court held that Congress possessed the authority to identify and protect against persisting discrimination in covered jurisdictions. Congress undoubtedly possesses this same authority today.[14]

5. *Describe some of the best evidence of recent discrimination supporting reauthorization of Section 5.*

Over the past decade, Section 5 has effectively blocked proposed voting changes that would have otherwise retrogressed the voting strength of African Americans, Latinos, American Indians, and Asian Americans. As recently as this year, Section 5 has been used to block discriminatory practices including: (1) reapportionment plans that sought to eliminate viable majority-minority voting districts; (2) at-large voting plans instituted only after African-American candidates were successful in single-member districts; (3) targeting minority candidates through changes to district boundaries, requirements for office, and other practices; and (4) state and local jurisdictions' refusal to submit changes for Section 5 preclearance in defiance of the Voting Rights Act.

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

The following recent examples, from covered jurisdictions illustrate that voting discrimination continues, usually in jurisdictions with histories of discrimination that extend much further into the past.

Florida. In 2002, the DOJ interposed an objection to the proposed Florida House of Representatives redistricting plan, stating that the plan would make it "impossible" for Hispanic voters in Collier County, Florida to elect candidates of choice. Because of the DOJ's Section 5 objection, the Hispanic majority-minority district in Collier County was preserved.

Georgia. Just this year, in anticipation of the upcoming 2006 county school board election, election officials in Macon County, Georgia, modified district boundaries such that the African American county school board chairman and his family were removed outside of the boundaries of majority black District 5 to majority white District 4. Based on significant racial bloc voting in Macon County, it would have been unlikely that Henry Cook, the board chair, would have been reelected from the majority white district. Although the change was significant, as it would deprive black voters of an incumbent black candidate who had received strong support in the past, the county refused to submit the change for Section 5 preclearance until ordered to do so by a federal court in June 2006. The court's order, which enjoined the change for failing to comply with Section 5, held that "preclearance of the change is required."[15]

Louisiana. In 2001, the state legislature attempted to eliminate a majority African-American state legislative district in Orleans Parish with the express intention of providing selective "proportional representation" to *white* voters, despite significant growth of the parish's African-American population over the previous decade. Notwithstanding the clear retrogressive effect of the proposed change, the state legislature sought judicial preclearance for the plan. Under Attorney General John Ashcroft, the DOJ opposed the plan believing that the state could

[15] *Jenkins v. Ray*, Civ. No. 4:06-CV-43 (CDL) (M.D.Ga.) (June 5, 2006).

not meet its burden of showing the plan was adopted without retrogressive purpose or effect. The state ultimately abandoned its selective proportional representation theory after evidence emerged before trial that significant racially polarized voting existed in virtually all electoral contests, that the legislature specifically ignored its own redistricting guidelines, and that the plan, if adopted, would have diminished minority voting strength. The case was settled on the eve of trial, restoring the Orleans opportunity district.

Mississippi. On two occasions in the last two years, two minority office-holders in Mississippi were targeted by discriminatory actions. Most recently, in 2005, the City of McComb attempted to remove a black member of the city's Board of Selectmen by changing the requirements for holding that office. A federal court enjoined the state from removing him from office, because the city failed to seek preclearance even though it clearly altered an existing practice. A year earlier, in 2004, an African-American incumbent Supreme Court justice in Mississippi was opposed by a white candidate who employed a race-based appeal to white voters that was virtually identical to one that made its way into a Supreme Court opinion nearly 20 years ago. The white opponent, Samac Richardson, used the slogan "One of Us" on his flyers, the same phrase previously found to constitute a racial appeal by a federal district court in *Jordan v. Winter*.[16]

South Carolina. In 2004, the DOJ objected to the State's proposed change to the Charleston County school board's method of election. The State proposed moving from a non-partisan to a partisan system. The DOJ concluded that the change would "make it extremely difficult for minority-preferred candidates to win" seats on the school board, compared to the existing system which provided minority-preferred candidates a chance of success. In its objection to the plan, the DOJ noted the vast majority of minority elected officials, including

[16] 604 F. Supp. 807 (N.D. Miss. 1984).

every African American legislator from Charleston County, opposed the change. The DOJ also noted that there were non-retrogressive alternatives available that the state legislature failed to consider.

In 2003, the DOJ interposed an objection to a proposed municipal annexation in the Town of North, South Carolina, because the town had "been racially selective in its response to both formal and informal annexation requests."[17] The DOJ found that white petitioners "have no difficulty in annexing their property to the town" while the requests of black residents were largely ignored by town officials. The DOJ concluded that race was "an overriding factor in how the town responds to annexation requests."[18]

South Dakota. In 2001, the South Dakota state legislature adopted a redistricting plan that diluted American Indian voting power by over-concentrating, or "packing," American Indian voters into one unusually large new district. Under the plan, the boundaries of District 27, which included Shannon and Todd counties, were altered so that American Indians comprised 90 percent of the district, which would become one of the most overpopulated districts in the state. Without the unnecessary packing, American Indians could have been majorities in both District 27 and the adjacent District 26. The State refused to submit the redistricting plan for preclearance until a federal district court ordered it to do so. Although the DOJ found that the packing of American Indian voters into one district was not retrogressive and precleared the change, the federal judge considering the related Section 2 claim held otherwise. The court invalidated the redistricting plan and found "substantial evidence that South Dakota officially excluded Indians from voting and holding office."

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[17] Letter from R. Alexander Acosta, Assistant Attorney General, Civil Rights Div., U.S. Dep't of Justice, to H. Bruce Buckheister, Mayor, North, SC (Sept. 16, 2003).
[18] *Id.*

Texas. In 2001 and 2002, the DOJ blocked two separate efforts by a city government and a consolidated three-county school district to institute at-large voting schemes that would have retrogressed minority voting strength in the State of Texas.

In 2002, officials in a majority-minority jurisdiction in Texas were blocked from implementing a new election system that would have harmed black and Latino voters' ability to elect candidates of their choice. In Freeport, Texas, which was 47.3 percent Latino and 12.3 percent African American at the time, officials proposed reverting from its single-member city council district system to an at-large system, which it had previously abandoned in 1992 as part of a voting rights settlement agreement. Under the single-member system, the DOJ found that "minority voters . . . demonstrated the ability to elect candidates of choice in at least two districts," whereas the at-large system would "have a retrogressive effect on the ability of minority voters to elect a candidate of their choice" given the extremely racially polarized in the city. The DOJ objected to the change during the Section 5 preclearance process.

Similarly, in 2001, the Haskell Consolidated School District in Haskell, Knox, and Throckmorton Counties, abandoned its plan to revert from single-member districts to at-large elections after the DOJ expressed concerns regarding the proposed change.

Of course, the Supreme Court's very recent ruling in *LULAC v. Perry*, is a timely statewide reminder that one of the most populous states, with one of the highest minority populations, is capable of violating the rights of very large numbers of minority citizens in the context of redistricting.

Virginia. On two occasions in the past five years, officials in Northampton County, Virginia have proposed redistricting plans that would have diminished African-American voting strength. In 2001, Northampton County, Virginia proposed collapsing its six existing Board of

Supervisors voting districts into three larger districts, eliminating three majority-minority districts in which African American voters regularly elected candidates of their choice and leaving only one majority-minority district intact. The DOJ objected to the plan finding evidence of retrogressive effect. In 2003, the county proposed a new six-district plan, which the DOJ also opposed for having the same retrogressive effects as the earlier three-district plan. Although the DOJ identified a non-retrogressive, alternative six-district plan, the County has not implemented the non-discriminatory plan.

**Response of Debo P. Adegbile, Associate Director of Litigation, NAACP Legal Defense and Educational Fund, Inc. to Questions from Senator 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.*

The question implies that a comparison between covered and non-covered jurisdictions controls the Section 5 renewal inquiry. This is a view that I do not share, however, for reasons that I have set out more fully in my response to Senator Kennedy's first written question.

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?*

No, I would not support this change, because the record currently before Congress does not provide any support for dropping the earlier election years from the coverage formula for reasons that I set out more fully in response to Senator Kennedy's questions 1, 4-6 .

    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 believe that the responses referred to in response to the question above provide my answer to this query.

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

Please refer to my previous responses.

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?*

I have not personally performed the calculations, so I do not know the precise ratio of objections issued to submissions made. Assuming, arguendo, that the above figures are accurate, I do not believe that the low ratio of formal objections supports the conclusion that Section 5 has outlived its usefulness. Obviously, a high percentage of formal objections to submitted electoral changes by the DOJ would necessarily be problematic, as it would indicate that Section 5 has largely been an ineffective tool to battle voting discrimination. A low percentage of objections, however, may understate the role that Section 5 plays in barring the implementation of discriminatory voting changes that would otherwise adversely impact minority communities. A single discriminatory district boundary change, for example, may only yield one DOJ objection, but would, if not blocked during preclearance, impact the rights of thousands of minority citizens in the affected community or state. This danger is particularly acute when a voting change involves an entire state or large urban area.[1] Thus, the relevant inquiry is not the raw percentage of objections, but the potential impact that those changes, and those that have been deterred because of Section 5, would otherwise have on minority voters. This inquiry should include, at minimum, consideration of which group or groups are affected and the number of citizens for

[1] *League of United Latin American Citizens, et al. v. Perry*, 126 S. Ct. 2594, 2622 (2006) (finding the Texas legislature's systematic carving of 100,000 Latino voters out of a majority-minority Latino voting district violated §2 of the VRA and bore " the mark of intentional discrimination").

whom the right to vote has been restricted or diluted. As a critical remedial and prophylactic tool for blocking changes affecting large numbers of individuals *before* discrimination occurs, Section 5 remains invaluable in light of the existing Congressional record.

Additionally, formal objections are not the sole indicator of the impact of Section 5 on preventing discriminatory voting changes. The deterrent effects of Section 5 serve to prevent covered jurisdictions from proposing changes that would be blocked if submitted for preclearance. Many proposed changes are dropped by covered jurisdictions after the DOJ issues an informal More Information Request letter, but before a formal objection is issued. Thus, the actual percentage of voting changes blocked by Section 5 is appropriately assessed by looking at a wide range of factors that are not reflected in objection statistics alone.

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?*

The trend in Section 5 renewals has been to increase, not decrease, the term length of the legislation. After the passage of the VRA in 1965, subsequent renewals were five years apart in 1970 and 1975, seven years apart in 1982, and then 25 years from 1982 to 2007. The increasing length of the terms was due to Congress's recognition that voting discrimination was found to be more persistent and difficult to eradicate than originally thought. In the aggregate, change is gradual and not unidirectional.[2] In other words, as has been true throughout American history, and since the most recent reauthorization in 1982, we have experienced some progress accompanied by renewed or adaptive discrimination, as the record reflects.

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[2] *See, e.g* Alexander Keyssar , *Written Testimony Submitted to the Senate Committee on the Judiciary,* (June 12, 2006) (concluding that while "[o]ver the long run, the history of the right to vote in the United States is a history of increasing inclusion, . . . frequently, in one state or another, the change has been in the opposite direction" and recommending that the uneven history of voting rights improvements should be taken into account in reauthorizing the Voting Rights Act).

Another 25-year renewal, which is clearly a policy judgment informed by the record since 1965, may be warranted for one additional important reason. The highest number of voting changes made in covered jurisdictions and corresponding objection activity follows the decennial legislative redistricting cycles that occurs upon the release of new Census figures at the start of each decade. A 25-year reauthorization period would extend Section 5 protections for minority voters through three future redistricting cycles in 2010, 2020, and 2030. This would be an adequate and appropriate period of time in which to measure progress. A 10-year term, which would extend through only the next redistricting cycle, would be too short to measure concrete change. A 50-year term, in contrast, would be too long, as periodic review of the legislation by Congress is important for both legal and practical reasons.

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 do not believe that the ability to elect clarification of the retrogressive effects standard as embodied in S 2703 and H.R. 9 poses any serious constitutional question. Among other reasons, I hold this view because the bill merely restores a long accepted construction of the statute, and clarifies Congressional intent consistent with a rule that the Supreme Court applied with little difficulty just this term in the Texas redistricting cases – albeit in the Section 2 context.

As I stated in my Senate testimony, the proposed bill restores the original ability to elect test for measuring minority voting strength. In *Georgia v. Ashcroft*, the Supreme Court abandoned this straightforward non-retrogression test in favor of a confusing, amorphous, and

difficult to administer "influence" standard.[3] This new standard permits electoral changes where the DOJ can identify that proposed plans trade "ability to elect" districts for those in which minority voters wield "influence."[4] Although there may be situations where minority "influence" is measurable and important, in reality discerning such instances seems not only unrealistic, but administratively unworkable. For instance, in the absence of any clear metric for "influence," which was not provided by the Court in *Georgia v. Ashcroft*, it would be difficult to evaluate the tradeoffs that this new standard injects into the Section 5 analysis. Additionally, an influence trade-off theory could be used to cloak purposefully retrogressive or discriminatory acts from meaningful Section 5 review. The "ability to elect" standard restored by the current bill withstood the test of time prior to the *Georgia v. Ashcroft* decision. It has also proven workable both judicially and administratively as a means of protecting minority communities' ability to elect candidates of their choice.

Determinations about whether a district provides the minority community with the ability to elect have been, and must continue to be made on a case-by-case basis. Indeed, prior to *Georgia v. Ashcroft*, the Department of Justice utilized case-by-case analysis to determine whether a voting change impacted the minority community's ability to elect. Specifically, DOJ performed an intensely jurisdiction-specific review of election results, demographic data, maps and other information in order to compare the minority's community ability to elect under benchmark and proposed plans. Other information considered by DOJ, outlined in the Procedures for the Administration of Section 5 of the Voting Rights Act," 28 C.F.R., Part 51, include the extent to which a reasonable and legitimate justification for the change exists; the extent to which the jurisdiction followed objective guidelines and fair and conventional

[3] *Georgia v. Ashcroft*, 539 U.S. 461 (2003).
[4] *Id.* at 482 (defining 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.").

procedures in adopting the change; the extent to which the jurisdiction afforded members of racial and language minority groups an opportunity to participate in the decision to make the change; and the extent to which the jurisdiction took the concerns of members of racial and language minority groups into account in making the change. This analysis provides a reasonable test to determine whether districts provide minority voters the ability to elect and it is these districts that should be protected under the plan.

**Response of Debo P. Adegbile, Associate Director of Litigation of the NAACP Legal Defense and Educational Fund, Inc., to Questions from Senator Tom Coburn**

1. *Some of the cases you cite as evidence of discrimination are actually Section 2 violations (US v. Charleston County and Moultrie v County Council). As you know Section 2 is permanent. Are the other cases you cite on page 8 of your testimony Section 2 cases or Section 5?*

Most of the cases cited on page 8 of my testimony are Section 2 cases that were brought after a voting change had been precleared under Section 5, but subsequently found to have a discriminatory effect on minority voting strength. Consequently, voters were required to challenge these VRA violations under Section 2. Indeed, Congress long ago recognized that Sections 2 and 5 are complimentary tools for combating the same evil – discrimination in voting. From a policy standpoint, it is my view that discrimination is discrimination, and evidence relevant to whether Congress should renew Section 5 can be found in reported evidence of discrimination (statutory or constitutional), unreported cases, descriptions of voting behavior by officials, administrative findings in the preclearance context, polarized voting patterns, racial campaign appeals, and actions taken in response to DOJ requests for more information, among other things. Moreover, the fact that so many Section 2 cases have been brought successfully in covered jurisdictions further attests to the continuing need for the Section 5 preclearance requirement in that actual harms and the threat of future harms exist. Finally, I believe that all of the Justice Department's Section 5 objection letters, and a detailed empirical analysis examining the provision's deterrence effects prepared by Professors Luis Fraga and Maria Lizet Ocampo, about which I testified, are part of the Congressional record in the event that you find a more narrow focus exclusively on Section 5 illuminating.

2. *In your testimony you state that it is not a good idea to expand the DOJ pre-clearance requirement to the whole nation. The proposal I have heard is to update the trigger to cover all states that need to be covered based on current data.*

    a. *For Example: over the past 15 years, Alabama has not had a single court find it guilty of violating the Constitution or violating the very broad protections afforded by Section 2 of the Voting Rights Act. The same cannot be said of Massachusetts; Chicago, Illinois; Wisconsin; Hawaii; Ohio; Hempstead, New York; Los Angeles County, California; Arkansas; Colorado; Dade County, Florida; Maryland; Missouri; Montana; or Nebraska – none of which are covered under the Voting Rights Act.*
    b. *Given that these non-covered jurisdictions have an equally bad, or worse, record, would you support extending the Voting Rights Act's temporary provisions to them as well?*

I am not in favor of updating the coverage formula nationwide because such a change would both weaken Section 5's administrability from a practical standpoint and make the provision vulnerable to constitutional challenge from a legal standpoint. Accordingly, those who support nationwide extension either lack a full understanding of the governing law and operation of Section 5 or understand both very well and seek to end Section 5's application as a legal and practical matter.

It also bears mention that several of the examples of jurisdictions identified in 2a above are covered by Section 203 of the VRA: Massachusetts has six covered cities; Cook County (Chicago), Illinois is covered; Hawaii is covered; the Town of Hempstead (Nassau County), New York is covered; Los Angeles is covered; ten counties in Colorado are covered; Dade County, Florida is covered; Montgomery County, Maryland is covered; two counties in Montana are covered; and two counties in Nebraska are covered. This 203 coverage, taken together with the point the question raises regarding the violations that occurred in those jurisdictions, highlight that voting discrimination often is present in Section 203 jurisdictions because of their large language minority populations. Furthermore, several of these jurisdictions (Hempstead, Los

Angeles, and Dade County) already benefit from 4(f)(4) coverage in other parts of the state; and jurisdictions within two, Arkansas, and Illinois have had court ordered preclearance under the bail-in or 3(c) provision of the VRA. This further illustrates one of the points that I made during my oral testimony that the coverage formula is not static, as some would suggest.

I do not embrace the premise, however, that because certain non-covered jurisdictions have been found to violate a constitutional or statutory prohibition in the past 15 years they have "an equally bad or worse" record of discrimination as covered jurisdictions. While most would agree that every voting violation is serious, there is a significant difference between jurisdictions with a recent voting rights violation and those with a long history of persistent and adaptive discrimination that can be traced to the present day. The record before Congress contains ample documentation of widespread and sustained voting discrimination in covered jurisdictions, including state by state reports focused on violations that have occurred since 1982 alone.

Again, Sections 3(c) and 4(a) of the Act, also known as the "bail-in" and "bail-out" mechanisms, make the revisions of the coverage formula that you identify unnecessary, and in my view, legally unwise in light of the record that Congress has assembled. These provisions work to ensure that coverage under Section 5 is appropriately expanded or contracted. Under Section 4(a), currently covered jurisdictions that can establish a clean record in the electoral process for a sustained period of time can seek to end Section 5 coverage. Likewise, under Section 3(c) a court can order a jurisdiction that is not currently covered to submit its voting changes for preclearance in the future if circumstances warrant this oversight. Together these features of the VRA ensure that Section 5 coverage remains appropriately tied to jurisdictions with a serious and continuing record of discriminating against minority voters.

3. *Can you give examples, from the past ten years, of states committing unconstitutional voting discrimination?*

Over the past decade, Section 5 has effectively blocked proposed voting changes that had the purpose or effect of diminishing the voting power of African Americans, Latinos, American Indians, and Asian Americans. As recently as this year, Section 5 has been used to block discriminatory practices including: (1) reapportionment plans that would eliminate majority-minority voting districts; (2) at-large voting plans instituted after African-American candidates were successful, or on the brink of success, in single-member districts; (3) targeting minority candidates through changes to district boundaries, requirements for office, and other practices; and (4) state and local jurisdictions' refusal to submit changes for Section 5 preclearance in defiance of the Act's requirements.

Significantly, largely because of the remedial and prophylactic protections of the VRA, there has been a decline in the number of judicial findings of constitutional voting violations. It bears emphasis that the decrease is, in part, explained by the ability of a strongly enforced, and widely recognized statutory regime to stop voting discrimination -- through litigation or administrative avenues -- prior to a judicial finding of a constitutional violation. Under the doctrine of constitutional avoidance, courts adjudicate the statutory issues first, and, as the term suggests, avoid reaching constitutional questions. Nevertheless, within the last month, two of the covered states that have figured very prominently in the renewal debates, Georgia and Texas, have had rulings of constitutional violations, in both state and federal court, that "bear the mark of intentional discrimination" in the estimation of the Supreme Court.[1]

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[1] *League of United Latin American Citizens v. Perry,* 126 S. Ct. 2594, 2622 (2006) (finding the Texas legislature's changes to a majority-minority Latino voting district violated §2 of the VRA and signaled a potential constitutional violation);); *Common Cause/Georgia v. Billups,* No. 4:05-CV-0201-HLM (N.D. Ga., 2006) (order granting preliminary injunction on the grounds that "the 2006 Photo ID Act[] . . . unduly burdens the [fundamental] right . . . to vote . . . ."); *Lake v. Perdue,* No. 2006CV119207 (Ga. Sup. Ct. 2006) (order granting temporary restraining order

In addition, a surprisingly significant number of the Justice Department's objection letters point to evidence of intentional discrimination; and the examples that I set out in response to Senator Leahy's written question 5 also bear on your inquiry.

4. *In your testimony, you state that English-only voting materials bar non-English speaking citizens from voting. However, 42 U.S.C. §1973aa-6, Section 207 of the VRA, allows citizens who have an "inability to read or write" to be "given assistance by a person of the voter's choice" excluding the voter's employer or an agent of the voter's union. Senator Feinstein stated at the last hearing that she utilized this law to help her mother vote. This is the law that protects the right to vote of all naturalized Europeans (Russians, Germans, Irish, etc.) and all voters who speak the languages covered by Section 203 but do not qualify for language assistance in their county due to the low number of people with the same language needs, as determined by the Census. Are you aware of this law?*

As an initial matter, it appears that the question mistakenly refers to a section of the VRA other than that which was intended. Section 207 of the Act requires that the Census Bureau compile registration and turnout statistics. Presumably, the query intended to refer to Section 208 of the Act, which provides for voter assistance.

Moreover, the question also is based upon a potentially misleading premise that Section 208 "protects the right to vote of all naturalized Europeans (Russians, Germans, Irish, etc.), and all voters who speak the languages covered by Section 203 but do not qualify for language assistance in their county due to the low number of people with the same language needs...." The legislative history of Section 208, which was added to the VRA in 1982, makes it clear that the provision does not address language barriers to voting. Instead, Congress added Section 208 to effectuate its legislative intent in banning literacy tests through Section 201 of the Act,[2] after

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enjoining enforcement of 2006 Photo ID Act on grounds that the "statute unduly burdens the fundamental right to vote"); These Georgia cases were in response to a new photo identification measure after a ruling just last year that Georgia's law requiring voters to present photo identification represents a modern "poll tax" and thus violates the 24th and 14th Amendments. *See Common Cause/Georgia v. Billups,* 406 F.Supp.2d 1326, 1370 (N.D. Ga., 2005).

[2] 42 U.S.C. § 1973aa.

determining that existing law did not adequately protect voters who needed assistance.[3] Specifically, Congress made the following findings in enacting Section 208:

> Certain discrete groups of citizens are unable to exercise their rights to vote without obtaining assistance in voting including aid within the voting booth. These groups include the blind, the disabled, and those who either do not have a written language or who are unable to read or write sufficiently well to understand the election material and the ballot. Because of their need for assistance, members of these groups are more susceptible than the ordinary voter to having their vote unduly influenced or manipulated. As a result, members of such groups run the risk that they will be discriminated against at the polls and their right to vote in state and federal elections will not be protected.[4]

The plain language of Section 208 confirms that it is not targeted for language assistance. Instead, it provides, "Any voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by a person of the voter's choice, other than the voter's employer or agent of that employer or officer or agent of the voter's union."[5]

Section 208 compliments, but does not replace, the need for the language assistance provisions in Section 203 of the VRA. Section 203 addresses a different sort of harm. It enhances the policy of "removing obstructions at the polls for illiterate citizens" and is "specifically directed to the problems of 'language minority groups.'"[6] Congress found that the high illiteracy rates experienced by language minorities were "not the result of choice or mere happenstance," but instead resulted from "the failure of state and local officials to afford equal educational opportunities."[7] The obstacle that illiteracy posed for language minority citizens

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[3] *See* S. REP. NO. 97-417 at 63-64, *reprinted in* 1982 U.S.C.C.A.N. 242 (noting that the amendment "does not create a new right ... to receive assistance; rather it implements an existing right by prescribing minimal requirements as to the manner in which voters may choose to receive assistance").

[4] S. REP. NO. 97-417 at 62, *reprinted in* 1982 U.S.C.C.A.N. 240 (emphasis added).

[5] 42 U.S.C. § 1973aa-6 (emphasis added).

[6] S. REP. NO. 94-295 at 37, *reprinted in* 1975 U.S.C.C.A.N. 804.

[7] S. REP. NO. 94-295 at 28, *reprinted in* 1975 U.S.C.C.A.N. 794; *see also* 42 U.S.C. § 1973aa-1a(a) ("The Congress finds that, through the use of various practices and procedures, citizens of language minorities have been effectively excluded from participation in the electoral process. Among other factors, the denial of the right to vote of such minority citizens is ordinarily directly related to the unequal educational opportunities afforded them,

attempting to vote has been exacerbated even further by the lack of adequate bilingual language assistance at the polls. The Senate has previously found that state and local jurisdictions had been "disturbingly unresponsive" to illiteracy among language minorities:

> Some, such as Connecticut, do provide bilingual officials or materials in areas with 5 percent or more Spanish-speaking citizens; others, with a much higher concentration of language minorities, provide no assistance whatsoever. Seventeen states do allow for the possibility of bilingual assistance "through the aid of a judge or friend," but ... this assistance is often inadequate. Another seventeen states lack any provision for voter assistance whatsoever to language minorities, and of these seventeen, eleven come under Title III, which is based on a concentration of 5 percent or more of language minority citizens.[8]

Section 203 adopts a practical approach to the illiteracy problem that is unique from Section 208. "[T]he purpose of suspending English-only and requiring bilingual elections is not to correct the deficiencies of prior educational inequality. It is to permit persons disabled by such disparities to vote now."[9] There is no question that language minority voters benefit from the protections of Section 208. At the same time, Section 208 is an inadequate substitute for the unique manner in which Section 203 provides language minority citizens with equal access to the elections process.

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resulting in high illiteracy and low voting participation. The Congress declares that, in order to enforce the guarantees of the fourteenth and fifteenth amendments to the United States Constitution, it is necessary to eliminate such discrimination by prohibiting these practices, and by prescribing other remedial devices.").

[8] S. REP. NO. 94-295 at 39, *reprinted in* 1975 U.S.C.C.A.N. 805-06 (emphasis added).

[9] S. REP. NO. 94-295 at 34, *reprinted in* 1975 U.S.C.C.A.N. 800; *see also id.* at 34, 1975 U.S.C.C.A.N. 801 (observing that Title II of the 1975 amendments "is a temporary measure to allow such citizens to register and vote immediately; it does not require language minorities to abide some unknown, distant time when local education agencies may have provided sufficient instruction to enable them to participate meaningfully in an English-only election.").

*a. Limited English Proficient people who live in jurisdictions not covered by the Section 203 coverage formula (the 5% or 10,000 person threshold) are covered by the law cited above. Are you aware of any actual problems that have occurred because of this?*

Yes. Many language minority voters have no family members sufficiently fluent in English to provide them with voting assistance. According to the 2000 Census, 4.4 million households encompassing 11.9 million people are "linguistically isolated" from the rest of the population, which means that all members of the household fourteen years and older are limited-English proficient. Among the language groups covered by Section 203, the following are linguistically isolated: 29.2 percent of the 2.8 million Asian American and Pacific Island language-speaking households; 23.9 percent of the 10.7 million Spanish-speaking households; and 5.0 percent of all Alaskan Native and American Indian persons.[10]

Moreover, a comprehensive nationwide study of 810 jurisdictions in the 31 states covered by Section 203 shows that language minority voters will be disenfranchised without the language assistance provisions. The election officials admitted in the study that they do not permit voter assistance. Only 10.3 percent of responding election officials in 31 states covered by Section 203 of the Voting Rights Act reported voter assistance practices that are at least as protective as Section 208; of this percentage, just 1.9 percent correctly stated the federal standard, with an additional 8.4 percent identifying voter assistance practices more protective than Section 208.[11] Over half of all responding jurisdictions would not allow the sort of voter assistance that Senator Feinstein described having provided to her mother during the Section 203 hearing because they do not permit voters to receive assistance from a minor (under the age of eighteen) child, even if

[10] BUREAU OF THE CENSUS, ECONOMICS & STATISTICS ADMIN., U.S. DEP'T OF COMMERCE, LANGUAGE USE AND ENGLISH-SPEAKING ABILITY: 2000, at p. 10 (OCT. 2003); 2000 Census, Summary Tape File 3 (STF-3), Tables QT-P17 and P20.

[11] DR. JAMES THOMAS TUCKER & RODOLFO ESPINO ET AL., MINORITY LANGUAGE ASSISTANCE PRACTICES IN PUBLIC ELECTIONS 80-82 (Mar. 2006).

that child is fully capable of providing effective assistance (whether language or otherwise) to their parent.[12] Similarly, only 11 percent of responding jurisdictions permit voters to receive assistance from a campaign worker, even if that campaign worker is the voter's assister of choice.[13] Perhaps most relevant for language minority voters, approximately 30 percent of responding jurisdictions indicated that bilingual poll workers are not permitted to provide assistance to voters in the voting booth and about one-half of responding jurisdictions do not allow a voter to receive assistance in the voting booth from a translator.[14]

The candid admissions by election officials that they do not permit language assistance to LEP voting age citizens is confirmed by the legislative history of Section 203. Prior to the enactment of Section 203, language minority voters were routinely denied assistance if they were illiterate in English. For example, in Texas, election officials construed state voter assistance laws narrowly to exclude all forms of language assistance, resulting in the disenfranchisement of over 300,000 illiterate Mexican American citizens.[15] Similarly, vote denial occurs when only Section 208 is available to language minority voters. In 2002, the Department of Justice sued Osceola County for discriminating against Hispanic voters through hostile treatment at the polls, failure to recruit bilingual poll workers, and prohibiting Hispanic voters from bringing bring assistors of their choice into the polling places.[16] On July 22, 2002, Osceola County entered into a consent decree to remedy these violations. Just four days later, Osceola County became

[12] Id. at 81.
[13] Id.
[14] Id. at 82.
[15] *Garza v. Smith*, 320 F. Supp. 121 (W.D. Tex. 1970); 94 Cong. Rec. 800, 875 (1975).
[16] *United States v. Osceola County*, Civil Action No. 6:02-CV-738-ORL-22JGG (M.D. Fla. 2002).

covered for Spanish under Section 203 following the new Census determinations.[17] The problems have not reoccurred since Osceola County became covered by Section 203.

In 2003, the Department of Justice successfully sued Berks County, Pennsylvania for denying assistance to language minority voters.[20] The federal court noted the deleterious effect the denial of assistance has on language minorities: "When Defendants deny Spanish-speaking voters in Reading the right to bring their assistor of choice into the voting booth, voters feel uncomfortable with the process, do not understand the ballot, do not know how to operate the voting machine, and cannot cast a meaningful ballot, in violation of Section 208."[21]

Empirical data shows that voter assistance under Section 208 is an insufficient substitute for Section 203. Acting Assistant Attorney General Bradley Schlozman testified before the House Judiciary Committee on the Constitution that as a result of Section 203 litigation brought by the Civil Rights Division of the Department of Justice against Yakima County, Washington, "Hispanic voter registration is up over 24 percent since the Division's Section 203 lawsuit. In San Diego County, California, Spanish and Filipino registration rates are up over 21 percent, and Vietnamese registration is up over 37 percent since the Division's enforcement action."[22] Mr. Schlozman also testified, "A Section 203 lawsuit in Passaic, New Jersey, was so successful for Hispanic voters that a Section 2 challenge to the at-large election system was subsequently withdrawn. A Memorandum of Agreement in Harris County, Texas helped double Vietnamese turnout, and the first Vietnamese candidate in history was elected to the Texas legislature –

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[17] *See* Voting Rights Act Amendments of 1992, Determinations Under Section 203, 67 Fed. Reg. 48,871 (July 26, 2002) (to be codified at 28 C.F.R. pt. 55).
[18] *United States v. Osceola County*, Civil Action No. 6:02-CV-738-ORL-22JGG (M.D. Fla. 2002).
[19] *See* Voting Rights Act Amendments of 1992, Determinations Under Section 203, 67 Fed. Reg. 48,871 (July 26, 2002) (to be codified at 28 C.F.R. pt. 55).
[20] *United States v. Berks County*, 277 F. Supp.2d 570 (E.D. Pa. 2003).
[21] 277 F. Supp.2d at 580.
[22] *Oversight Hearing on the Voting Rights Act: Section 203—Bilingual Election Requirements (Part I) Before the Subcommittee on the Constitution of H. Comm. on the Judiciary*, 109th Cong. (2005) (statement of Bradley J. Schlozman, Acting Assistant Attorney General).

defeating the incumbent chair of the Appropriations Committee by 16 votes out of over 40,000 cast."[23] If Section 208 sufficiently addressed the problem, then you simply would not see participation by language minority voters skyrocket after successful Section 203 litigation is brought.

*b. Why is 42 U.S.C. §1973aa-6 sufficient to protect some language groups, but not others?*

For the reasons I have explained above, although Section 208 complements the language assistance provisions, it does not specifically "protect" any "language groups" on the basis of their limited English proficiency. Additional language groups were not included under Section 203 because there has been no evidence introduced showing that they experienced similar difficulties in voting arising from educational disparities and voting discrimination.[24]

*5. Do you think it is a good idea/ good policy for the government to take race into account when creating voting districts? Please explain.*

This country has a longstanding tradition of taking race into account when drawing voting districts (*see Gomillion v. Lightfoot*).[25] Without doubt, the NAACP LDF, Inc., an institution that is itself dedicated to eradicating racial discrimination in the United States, is committed to the guarantee of the 15th Amendment -- that all citizens should be able to exercise their fundamental right to vote, which the Supreme Court has called "preservative of all other rights," without regard to race. However, for most of our nation's existence, including 95 years preceding the enactment of the Voting Rights Act, the words of the Fifteenth Amendment were essentially a dead letter in many parts of the United States. The Voting Right Act, as a race-

[23] Id.
[24] *See* S. REP. NO. 94-295 at 31, *reprinted in* 1975 U.S.C.C.A.N. 797.
[25] 364 U.S. 339 (1960).

conscious remedial and prophylactic measure represents an appropriate exercise of expressly granted constitutional authority to protect the right to vote for all citizens.

Several factors affect the drawing voting districts, including geographic contiguity, communities of interest, incumbency protections, partisan and one person one vote considerations, and, at times race. Because of the well-documented patterns of residential segregation in this country, which predate the VRA and are rooted in our history of racial discrimination, it is not surprising that race is considered as one of these factors.[26] Additionally, the national preference for single-member districts means that geography and demographic information are inherently a part of the districting process. When modern mapmakers sit down at the computer to draw districts, they will necessarily have before them information about the racial characteristics of the voting districts they set out to draw. This information can be, and has frequently been, used to disadvantage minority groups, as the Supreme Court recognized in a decision just last month.[27]

In sum, the question we now face is not whether race should be take into account, but whether the VRA's protections are necessary to ensure that race is not taken into account *only* to disadvantage minorities, but also to ensure that they can participate in the electoral process on equal terms.

6. *Should race be a deciding factor in any policy decision we make, or should Congress write laws that treat all Americans equally regardless of the color of their skin? Please explain.*

I believe that my answer to question 5, above, provides the basis for my answer to this question as well. Just as in the voting arena, in too many other areas our nation's history of

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[26] *See* Drew Day's written response to Steward Taylor's article "More Racial Gerrymandering," submitted in response to Senator Hatch's inquiry.
[27] *See League of United Latin American Citizens v. Perry,* 126 S. Ct. 2594, 2622 (2006)

racial discrimination has led to race being taken into account very often to disadvantage minority groups and citizens.[28] Thus, policy decisions like that which Congress is faced with when weighing renewal of the VRA often must account for this reality. At this stage in our societal efforts to heal the wounds of a long period of entrenched racial discrimination, the choice is very often not between "racial considerations" and "no-racial considerations," but rather whether race can be taken into account only to disadvantage and not to protect.

It is also important to note the Supreme Court has identified some limitations on the consideration of race in redistricting that remain consistent with vigorous VRA enforcement. These limitations are discussed in the cases *Shaw v. Reno*[29] and *Miller v. Johnson*[30], among others, and can be compared and reconciled with the Court's recent decision in *LULAC v. Perry.*[31]

[28] For a more detailed history of the use of race under the law to disadvantage African Americans, *see* A. LEON HIGGINBOTHAM, JR.. IN THE MATTER OF COLOR: RACE & THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD (1978); A. LEON HIGGINBOTHAM, JR., SHADES OF FREEDOM: RACIAL POLITICS AND PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS (1996).
[29] 509 U.S. 630 (1993).
[30] 531 U.S. 1090 (2001).
[31] *League of United Latin American Citizens v. Perry,* 126 S. Ct. 2594, 2622 (2006).

**Supplemental Testimony of**
**Professor David T. Canon**
**Department of Political Science**
**University of Wisconsin, Madison**

**Submitted to the Senate Judiciary Committee**
**Subcommittee on the Constitution, Civil Rights, and Property Rights**
**in Response to Written Questions from**
**Senators Tom Coburn, John Cornyn, Edward Kennedy, and Patrick Leahy**

# Voting Rights Act:
# Policy Perspectives and Views from the Field

**July 6, 2006**

## 1. Introduction

This testimony supplements my written testimony that I submitted to the Senate Judiciary Committee on June 20, 2006, and my oral testimony on June 21, 2006. I received written questions from Senators Coburn, Cornyn, Kennedy, and Leahy. I have responded to all the questions in my areas of expertise.[1] I organized my responses by topic, indicating under each section the specific written questions. The four general topics I address in this supplemental testimony are: the importance of ability-to-elect districts (and the distinction between ability-to-elect districts and majority-minority districts), the impact of overturning *Georgia v. Ashcroft*, extending Section 5 preclearance, and whether creating ability-to-elect districts encourages the

[1] I am not an expert on the issue of bailout, so I declined to answer Senator Coburn's first question concerning this topic. I also declined to answer Senator Cornyn's questions about Section 5 triggers for that reason.

"balkanization" of the races. I will discuss each in turn.

**2. Ability-to-elect districts**

Several of the submitted questions concerned the definition of ability-to-elect districts (as distinct from majority-minority districts), when they are necessary, and whether they are more or less common in covered and non-covered jurisdictions. Senators Kennedy and Leahy raised some of the important issues concerning definitions of the terms: "Some have claimed the Voting Rights Act mandates majority-minority districts. In your testimony, you stated that the Voting Rights Act, as proposed for reauthorization, protects the ability of minority voters to elect their preferred candidates, which would not necessarily require a majority-minority district. Please explain the distinction and how the ability-to-elect standard is applied in practice." Senator Leahy said, "The Voting Rights Act provides that minority voters have equal opportunities to elect their candidates of choice. You testified that the language in S. 2703 requires the creation of ability-to-elect districts which can be achieved, depending on local circumstances, by the use of majority-minority districts. You also testified that depending on local circumstances, ability-to-elect districts do not always have to be majority-minority districts. How does the ability-to-elect standard proposed in S. 2703 provide flexibility in determining whether a majority-minority district is needed? Under the ability-to elect standard, when is a majority-minority district necessary to provide minority voters in that district with an equal opportunity to elect their candidates of choice? When is it not necessary?"

Before answering these questions, I must clarify one point. Sen. Leahy's question says that I "testified that the language in S. 2703 requires the creation of ability-to-elect districts which can be achieved, depending on local circumstances, by the use of majority-minority districts." Actually, S. 2703 would require the *protection* of ability-to-elect districts rather than their *creation*. The creation of ability-to-elect districts is covered by Section 2 of the Voting Rights Act and the "three *Gingles* prongs" (geographically compact, politically cohesive racial minorities who are denied the opportunity to elect candidates of their choice by racially polarized voting by whites). This provision of the Voting Rights Act applies to the entire country (with the limitations of the *Shaw* line of cases). The relevant provision of S. 2703 that is being discussed here concerns the protection of ability-to-elect districts under the retrogression standard of

Section 5 of the VRA (which only applies to the covered states). That retrogression standard was changed by *Georgia v. Ashcroft*, but the old standard would be restored by this legislation.

To return to the initial question, ability-to-elect districts are typically comprised of a majority of the relevant minority voters but this certainly is not required. The specific level of minority population required for a "performing" district (that is, a district in which minority voters have an equal opportunity to elect candidates of their choice) should be examined by map-drawers and the courts every ten years on a case-by-case basis, depending on the levels of racially polarized voting, voter turnout, incumbency status and other considerations. In districts in which there is substantial crossover voting in biracial or multi-racial blocs, it is possible for ability-to-elect districts to have less than 50% minority voters.

Professor Nate Persily provided a good summary of the various considerations that come into play when deciding what level of minority population would be required to produce an ability-to-elect districts in his testimony before this committee on May 17, 2006, "Understanding the Benefits and Costs of Section 5 Pre-Clearance":

"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."

There is no simple rule that is required to determine the level of minority population necessary, but rather a detailed case-by-case analysis based on the above factors. What is clear from this discussion is that the proposed legislation would be flexible in terms determining whether a majority-minority district is needed. There is no requirement in the proposed legislation for majority-minority districts; instead, the legislation protects existing ability-to-elect districts.

Senator Kennedy followed up with the questions, "There has been a great deal of progress since enactment of the Voting Rights Act in 1965. Minority voter registration has increased, and there are a significant number of minority elected officials. Given this progress, why is it necessary to create and maintain majority-minority districts in order for minority voters to have an equal opportunity to participate in the electoral process? Would you expect a significant decline in the election of minority-preferred candidates if Section 5 is not reauthorized?"

Despite the substantial progress that has been made in the election of minority politicians, majority-minority districts are typically still needed to give minority voters an equal opportunity to participate in the political process by being able to elect candidates of their choice. Thus, while there is an important distinction between ability-to-elect districts and majority-minority districts, historically a majority of minority voters is required to produce an ability-to-elect district.

This claim is based on my analysis of the success that African Americans have had in winning office in majority-white districts. Only 49 of 8,047 elections in white-majority U.S. House districts have provided black winners since 1966, and most of those were in unusually liberal districts or with some other idiosyncratic context that prevents generalizing to other districts. While the Voting Rights Act and its amendments, in my opinion, only provide an equal opportunity for black voters to elect candidates of choice rather than guaranteeing that outcome, 49 of 8,047 elections is not much of an equal opportunity. The proposed legislation is flexible because it allows the number of majority-minority districts to be reduced as the number of ability-to-elect districts in white-majority districts increases in the covered jurisdiction (as racially polarized voting diminishes and biracial coalitions increase).

Senator Cornyn submitted a more specific question on this topic concerning covered jurisdictions: "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 was nearly impossible for blacks to be elected to Congress from the South before the pre-clearance process required the creation of black-majority districts in the South that provided

black voters with equal opportunities to elect their chosen candidates: blacks were not elected in majority-white districts in the South and state legislatures did not draw black-majority districts until they were compelled to do so by the law and the pre-clearance process. The years in which no African Americans were elected to Congress for the seven covered states are: Alabama (1877-1993), Georgia (1876-1987), Louisiana (1877-1991), Mississippi (1883-1987), South Carolina (1897-1993), Texas (first African American elected in 1973), Virginia (1891-1993; 11 political subdivisions have subsequently "bailed out" from Section 5 coverage, so the entire state of Virginia is no longer covered). Other southern states that are partially covered by Section 5 have a similar record (Florida had a gap from 1876-1993 and North Carolina from 1901-1993). Blacks had started to regularly win election many decades earlier in non-covered states.

**3. Overturning *Georgia v. Ashcroft***

Several questions concerned the relationship between ability-to-elect districts and "influence districts" in the Supreme Court's new "totality of circumstances test under *Georgia v. Ashcroft*. Senator Kennedy asked, "The proposed reauthorization bill would overrule the Supreme Court's decision in *Georgia v. Ashcroft*, which permits jurisdictions to create a greater number of so-called "influence districts" to offset reductions in "ability-to-elect" districts. How might the *Ashcroft* standard undermine the progress that minority voters have made in the covered jurisdictions?" Senator Leahy said, "In your testimony, you articulated two principle criticisms of the Supreme Court's "totality of the circumstances" standard articulated in *Georgia v. Ashcroft*. First, you testified that the standard is vague and unworkable. Second, you testified that 'allowing influence districts to be traded off for ability-to-elect districts would erode the gains in the opportunities to elect candidates of choice that have been made in the Congress in the past forty years.' Please describe the difficulties posed by the fact that *Georgia v. Ashcroft*'s standard is vague and unworkable. In what ways could the gains in opportunities for minority voters to elect candidates of their choice be eroded under the *Georgia v. Ashcroft* standard?"

There is broad agreement among voting rights lawyers and experts that the "totality of the circumstances" standard articulated in *Georgia v. Ashcroft* is vague and unworkable. Even Professor David Epstein, who submitted a letter to the Judiciary Committee stating his support

for the *Georgia v. Ashcroft* standard in general states that "I do agree that the standards set forth in *Georgia v. Ashcroft* for measuring substantive representation are vague, and that work still needs to be done on the question of how to implement the Court's ruling in a fair, workable way." (Letter to the Committee from Prof. Epstein, dated June 21, 2006).

In my written testimony, I note that while the general principles of this new totality of circumstances analysis for retrogression are clear, the specific application of the principles is not. The dissent in *Georgia v. Ashcroft* lays out the challenges posed by this broadened analysis:

> Indeed, to see the trouble ahead, one need only ask how on the Court's new understanding, state legislators or federal preclearance reviewers under §5 are supposed to identify or measure the degree of influence necessary to avoid the retrogression the Court nominally retains as the §5 touchstone. Is the test purely *ad hominem,* looking merely to the apparent sentiments of incumbents who might run in the new districts? Would it be enough for a State to show that an incumbent had previously promised to consider minority interests before voting on legislative measures? Whatever one looks to, however, how does one put a value on influence that falls short of decisive influence through coalition? Nondecisive influence is worth less than majority-minority control, but how much less? Would two influence districts offset the loss of one majority-minority district? Would it take three? Or four? The Court gives no guidance for measuring influence that falls short of the voting strength of a coalition member, let alone a majority of minority voters. Nor do I see how the Court could possibly give any such guidance. The Court's "influence" is simply not functional in the political and judicial worlds.

The dissent raises many important points. These concerns and additional points I raised in my written testimony about how difficult and unworkable the new standard would be to actually implement are summarized here:

- There is no generally agreed upon definition of "influence."
- Measuring influence is extremely difficult and time consuming if it is done right (that is, focusing on a broader range of measures than simple roll call voting).
- Even with an agreed upon definition of influence and adequate measures, it still is not clear how the redistricting process should trade off influence districts for ability-to-elect districts (as noted in the *Georgia v. Ashcroft* dissent).

- Under the new "totality of circumstances" test for retrogression, minority voters who are placed into an "influence district" with a non-responsive politician would have no recourse or remedy to make up for their loss in voting power.
- If the "totality of circumstances" test for retrogression is allowed to stand, it would ensure that courts would have to make the political judgment of how much "influence" is enough. It is extraordinarily undemocratic for the least representative branch, the judiciary, to make such fundamental political decisions that will directly affect the ability of minority voters to participate in the political process.

Another important point about the *Georgia v. Ashcroft* decision was raised in the letter from Professor Epstein and in Professor Carol Swain's oral testimony: both characterize the *Georgia v. Ashcroft* decision as allowing state legislatures to trade off descriptive representation for substantive representation. Prof. Epstein notes in his letter that "there are times when they [descriptive and substantive representation] go hand-in-hand," but Prof. Swain discussed the two as distinct in her oral testimony. Both Epstein and Swain believe that it is a mistake to focus on descriptive representation to the exclusion of substantive representation (as would be required, they argue, by the "*Ashcroft* fix" in S. 2703). While it is true that the *Georgia v. Ashcroft* decision focuses on that tradeoff, this is a false distinction. As I outline in my written testimony, descriptive representation *nearly always* has a substantive component (the most common exception is when a minority representative is not the minority candidate of choice, such as Gary Franks of Connecticut): having racial minorities in office has been and still is necessary for the representation of racial interests. While it is conceivable that trading ability-to-elect districts for influence and coalition districts could lead to overall greater representation of minority interests

(that is, using the Court's language, trading descriptive for substantive representation), these circumstances are extremely rare (specifically, the case would have to involve trading a few ability-to-elect districts for more influence districts that would preserve Democratic control of the legislature, as was the hope in the Georgia State Senate). Therefore, given the practical difficulties of implementing the new standard and the value of the previous standard, I support the provision in S. 2703 that would restore the previous focus on ability-to-elect districts in defining retrogression under Section 5 of the Voting Rights Act.

My final argument on this point was that allowing influence districts to be traded off for ability-to-elect districts would erode the gains in the opportunities to elect candidates of choice that have been made in the Congress in the past forty years. If ability-to-elect districts are not protected, fewer minority politicians will be elected to office **by design**. Influence districts are those in which minority politicians are not elected, but minority voters are supposed to have some influence over the white politicians who win. Indeed, that is the central premise of the *Georgia v. Ashcroft* decision: as Prof. Swain puts it, "black faces" are not needed to "represent black interests." Instead, this can be done by sympathetic whites in influence districts. As my written testimony and book on this topic demonstrate, this is simply not true. Many white members of Congress who have significant percentages of black constituents do not sponsor bills that are interests to their minority constituents, they do not advocate this legislation in committees, and do not make speeches on the floor on these issues. African American members of the House (and of the Georgia state senate that I examined in the *Georgia v. Ashcroft* remand) do a much better job of addressing both the interests of their minority constituents and the district as a whole.

**4. Extending Section 5 Preclearance**

Senator Cornyn submitted the following question: "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?"

As a preliminary matter, I disagree with the question's premise that the Section 5 objections, including many that stopped statewide implementation of broad discriminatory measures, are mere "anecdotes." The question suggests that even the most egregious examples of voting discrimination that have been prevented, as detailed at length in the Senate record, should be dismissed out of hand. Although, I categorically reject the question's erroneous premise, I will provide a brief response of why the number of objections do not tell the whole story.

In my written testimony I noted that critics of the pre-clearance provision also point to the extremely low rate of rejection by the Department of Justice as evidence that pre-clearance is no longer needed because objectionable plans are claimed to be relatively rare. I rejected this view for three reasons: Section 5 deters discriminatory practices, significant discriminatory practices *have* been prevented by preclearance, and the recent decline in the number of objections may be attributed, in part, to the *Bossier II* case (which would be overturned in the proposed legislation)

and the normal cyclical patterns of objections that coincides with the apportionment/redistricting cycle. Allow me to elaborate on each.

First, the focus on the number of actual objections ignores an important mechanism that helps generate this low rate of rejection: because of the pre-clearance process, covered states are less likely to *submit* electoral arrangements and institutions that violate the Voting Rights Act. There is no doubt that the deterrent effect is real as documented by a recent study by Professor Luis Fraga of the impact of more information requests by the Justice Department on discriminatory voting changes.[2] While the analogy is imperfect, nobody advocates pulling all traffic cops off the streets because voluntary compliance with traffic laws is relatively high. If police officers no longer monitored speed limits or ticketed drivers for running stop signs and traffic lights, it is fairly clear that violations of the law would increase. Similarly, if pre-clearance was abandoned, it is very likely that more local governments and even some states would be more likely to implement laws that harmed minority voting rights. Critics of Section 5 respond by saying the harmed voters would still be able to sue under Section 2 of the Voting Rights Act. Pre-clearance is a more effective tool than relying on litigation to enforce the law because many potential plaintiffs would not have the resources necessary to initiate law suits and discriminatory voting changes would be allowed to go into effect, probably for several years

[2]Luis Ricardo Fraga, "More Information Requests and the Deterrent Effect of Section 5 of the Voting Rights Act," unpublished paper, delivered at the symposium Protecting Democracy: Using Research to Inform the Voting Rights Reauthorization Debate, The Chief Justice Earl Warren Institute on Race, Ethnicity and Diversity, University of California, Berkeley, School of Law (Boalt Hall), and the Institute of

while the litigation was pending.

Second, pointing to the relatively low rate of rejection also ignores the fact that the voting changes that *were* rejected between 1996 and 2005 represent the full range of tactics that have been used in the South to abridge voting rights including moving and reducing the number of polling places, changing from district-based to at-large elections, annexations and redistricting that dilute minority voting power (including three state-wide redistricting plans: Georgia, South Carolina, and Texas), and an administrative plan for implementation of the National Voter Registration Act of 1993. These are not trivial violations that can be ignored, but important changes in electoral practices that would have hurt minority voting rights if the pre-clearance process had not been in place (see http://www.usdoj.gov/crt/voting/sec_5/obj_activ.htm for a complete list of Section 5 rejections).

Indeed, as recently as May 5, 2006, the Department of Justice issued an objection to the reduction of polling places and early voting locations for the North Harris Montgomery Community College District in Texas. According to Assistant Attorney General Wan J. Kim's objection letter, the District reduced the number of polling places from 84 to 12, serving over 540,000 registered voters in a 1,000 square mile area. Kim concluded that "The assignment of voters to these 12 sites is remarkably uneven: the site with the smallest proportion of minority voters will serve 6,500, while the most heavily minority site (79.2% black and Hispanic) will serve over 67,000 voters." This objection highlights the continuing need for Section 5 coverage.

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Governmental Studies, University of California, Berkeley, Washington, DC, February 9, 2006.

Third, there are additional reasons why the number of objections have declined. The Supreme Court's decision in *Reno v. Bossier Parish II* (520 US 471, 1997) prevents the Department of Justice from objecting to intentionally discriminatory voting changes merely because they do not have a retrogressive effect. *Bossier II* has had a tremendous negative impact on the ability of the Department of Justice to object to discriminatory voting changes.[3] Finally, the recent decline in Section 5 objections is consistent with the pattern of fewer submissions being made in mid-decade after the substantial volume of submissions are made earlier in the decade during the decennial redistricting cycle.

This discussion is also relevant for a question from Senator Coburn. While his question was not specifically concerned with Section 5, but rather voting discrimination more generally, the evidence of discriminatory practices that were denied pre-cleared by the Justice Department address this point. Specifically, Senator Coburn asked, "Can you give examples, from the past ten years, of states committing unconstitutional voting discrimination?" In addition to the example of moving polling places in North Harris Montgomery Community College District, Texas, the Justice Department web site lists all of the objections it has filed against covered jurisdictions (all of the objections in the past ten years are listed in the appendix). However, this list should not be viewed as a complete catalogue of discriminatory practices in covered jurisdictions. As Donald Wright testified before this committee on June 21, 2006, there are many instances in which the Justice Department stops a discriminatory practice through informal communication and inquiries. Therefore, the list of actual objections should be seen as a very

[3]Peyton McCrary, "How the Voting Rights Act Works: Implementation of a Civil Rights Policy: 1965-2005, *South Carolina Law Review* 57:4 (Summer, 2006): 785-825.

conservative estimate of the number of discriminatory acts that were prevented by the preclearance process.

**5. The Voting Rights Act and "balkanization"**

One of the most common misconceptions concerning the Voting Rights Act is that Section 5 has somehow helped promote the "balkanization" of the races or otherwise results in "political apartheid" (to use Justice Sandra Day O'Connor's words). Senators Kennedy and Leahy both submitted questions on this topic. Senator Kennedy said, "Abigail Thernstrom testified before this Committee that the Voting Rights Act promotes racial apartheid and balkanization. Do you agree or disagree? Please explain." Senator Leahy notes, "Some have argued that the Voting Rights Act's preclearance provisions nurture division and extremism by reducing incentives for candidates to make appeals to anyone other than their racial or ethnic voting base. Based on your empirical research on the behavior of representatives from districts covered by Section 5 of the Voting Rights Act, do you agree with these characterizations? In what ways has Section 5 facilitated the representation of all interests, made districts more integrated, and opened dialogues between minority and non-minority officials and voters?

In addition to Abigail Thernstrom, the Judiciary Committee heard testimony from Professor Swain and recently received a letter from Donald Horowitz of Duke University that makes a similar argument. Justice O'Connor outlines this view in the majority opinion in *Shaw v. Reno,* stating that "[w]hen a district obviously is created solely to effectuate the perceived common interests of one racial group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole" (1993, 2827).

However, this assumption turns out to be false, as I demonstrate in my book *Race, Redistricting, and Representation: The Unintended Consequences of Black-Majority Districts* (University of Chicago Press, 1999). In fact, it was the *Shaw v. Reno* decision in June, 1993, that made me decide to write this book. That Supreme Court decision and the outpouring of commentary on the "political apartheid" districts simply did not square with what I had observed in North Carolina when I was working on another project concerning candidate recruitment and the decision to run for Congress.[4] It appeared to me that an important part of the story was missing: many black candidates were reaching out to white voters and winning on that basis. These new districts seemed to promote a politics of commonality rather than a politics of difference.

I will elaborate on this argument and explain the evidence that I found. First, I will define a few terms: "the politics of commonality" and "the politics of difference." In the context of racial representation, the politics of commonality would be rooted in a biracial politics and argue that blacks can represent whites and whites can represent blacks. A politics of difference would maintain that only a member of a given race can truly represent the interests of that racial group. Many political observers, including proponents and opponents of the strategy, saw the creation of majority-minority districts as an embodiment of the politics of difference [Walters 1992; *Shaw v. Reno*, 1993, Thernstrom 1987].

My book contradicts that view. My research shows that many of the African American politicians who were elected in the new districts embody the politics of commonality, rather than

[4]"A Formula for Uncertainty: Creating a Black-Majority District in North Carolina." In *Who Runs for Congress: Ambition, Context, and Candidate Emergence*. Edited by Thomas A. Kazee. Washington, D.C.: CQ Press, 1994, 23-44 (with Matthew M. Schousen and Patrick J. Sellers).

the politics of difference. Furthermore, even those who *campaign* by appealing only to black voters do, in fact, spend a substantial proportion of their time in Congress representing the interests of white and black voters alike.

My work suggests that new minority districts may give African Americans a greater voice in the political process while simultaneously helping promote a politics of commonality rather than creating "political apartheid." My study of the behavior of House members was based on sponsorship and cosponsorship of legislation, speeches on the floor, roll call voting, committee assignments, leadership positions, constituency newsletters, district office location, and coverage of the member's activities in the local press how legislators represent racial interests. I found that African American members of Congress spent more of their time representing the interests of all of their constituents, while white members of Congress who had at least 25% of their constituents who were African American were not as balanced in their legislative behavior and tended to ignore racial issues. Section 5 of the Voting Rights Act promotes a politics of commonality in racial representation in Congress by helping African Americans voters elect their preferred candidates such as Sanford Bishop, James Clyburn, and Mel Watt. Without the preclearance process, many of these African Americans who practice a politics that balances racial interests would not have been elected.

This is a story of unintended consequences: the Madisonian-style institutional engineering that attempted to implement a politics of difference was trumped by individuals operating as sovereign actors (the candidates and potential candidates) within the broader Madisonian system that is based on the politics of commonality. The "commonality" roots of our republic are evident in the Federalists' desire to overcome sectionalism and get citizens to start

thinking like "Americans" rather than "Virginians" or "New Yorkers." While making concessions to the Anti-Federalists, the institutional engineering implemented by the Federalists to encourage a politics of commonality was nothing short of revolutionary (of course, with the important caveat that "commonness" primarily applied to white, land-holding Protestant men). In contrast, the attempt to elect black leaders through the creation of black majority districts is criticized as promoting a politics of difference. I argue that because of these unintended consequences, creating ability-to-elect districts should be embraced in a political system that continues to be divided by racial differences.

**6. Conclusion (with a brief discussion of proposed Amendments)**

I urge this committee and the Senate to adopt S. 2703 without amendment. By implication, this addresses the second question from Senator Coburn, "If you were able to offer an amendment to this bill, would you? If so, how would you amend this bill?" Allow me to briefly discuss the merit of various proposed amendments.

I urge the Senate to reject any amendment. The proposed amendments I have seen would either make the preclearance process irrelevant (as with the Norwood Amendment on the Section 5 trigger), unconstitutional (as with the proposed amendments that would extend Section 5 coverage to the entire United States), or would substantially weaken or eliminate the language assistance for citizens with limited English proficiency and Section 5 through unnecessary modifications to the existing trigger and bailout provisions.

Some of these amendments sound fair and just on their face: if Section 5 is good for the South, why not apply it to the entire country? The answer is simple: because national coverage

would not meet the standard established in *Boerne v. Flores* (521 U.S. 507, 1997) that state sovereign immunity requires that federal laws be "congruent and proportional" to the constitutional violations they purport to redress. Therefore this provision of the Voting Rights Act would almost certainly be ruled unconstitutional if the proposed legislation is amended. Similarly, some have suggested that the trigger mechanism needs to use a formula based on more recent election data. However, if this is done, the only state that would be covered by the law is Hawaii.

Similarly, Rep. Westmoreland's "proactive bailout" provision for Section 5 would require the Department of Justice to shift its focus from identifying and stopping voting discrimination in covered jurisdictions to looking for those jurisdictions that might satisfy the bailout requirements. Such a proposal turns the existing bailout provision, which is the product of substantial deliberation and has proven very effective in removing qualifying jurisdictions from coverage, on its head. Make no mistake, amending these parts of the law would render these significant provisions meaningless or unconstitutional.

Finally, Senator Cornyn asked, "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?" Again, I reject the premise of the question that there is no clear "differentiation between covered jurisdictions and non-covered jurisdictions." My written testimony argues that there is a clear difference between covered and non-covered states in terms of discrimination. For that reason, I support re-authorization and extension of the Voting Rights Act for 25 years. This means that the next three apportionment cycles would be covered, which is when much of the most important preclearance

activity occurs.

This historic legislation should not be allowed to expire. The right to vote for all citizens is critical for a healthy democracy. Passing the proposed legislation without amendment is the best way to protect that fundamental right for the next 25 years.

**Appendix: Section 5 Objections, 1996-2006**
**As listed on the Department of Justice web site**[5]

**Alabama:**
Tallapoosa County (97-1021), Redistricting plan, 2-6-98
Alabaster (Shelby Cty.) (2000-2230),Annexations (Ordinance Nos. 94-338 and 96-410) 8-16-2000

**Arizona:**
State (2002-0276), 2001 legislative redistricting plan, 5-20-02
Coconino Association for Vocations, Industry, and Technology (Coconino Cty.) (2002-3844), Method of election, 2-4-03

**California**
Chualar Union Elementary School District (Monterey Cty.) (2000-2967),Method of electing school trustees from districts to at large, 3-29-02

**Florida:**
State (98-1919), Additional requirements for the absentee voting certificate and absentee ballot and the criminal penalty provided for in Section 26 (proposed Section 104.047 (3) of the Florida Election Code), 8-14-98
State (2002-2637), 2002 redistricting plan for the Florida House of Representatives, 7-1-02

**Georgia:**
State (95-3656) 1995 Georgia State House and Senate redistricting plans, 3-15-96, Withdrawn 10-15-96
Webster County School District (98-1663), Redistricting plan, 1-11-00
Tignall (Wilkes Cty.) (99-2122), Proposed addition of numbered posts, staggered terms and a majority vote requirement to the method of electing councilmembers, 3-17-00
Ashburn (Turner Cty.) (94-4606), Adoption of numbered posts and majority-vote requirement, 10-1-01
Putnam County (2002-2987), 2001 redistricting plan, 8-9-02
Putnam County School District (2002-2988) (2002-2987), 2001 redistricting plan, 8-9-02
Albany (Dougherty Cty.) (2001-1955), 2001 redistricting plan, 9-23-02
Marion County School District (2002-2643), 2002 redistricting plan, 10-15-02

**Louisiana:**
State (96-2589), 1996 Louisiana Congressional redistricting plan (Act No. 96 (1st Ex. Sess. (1996)), 8-12-96

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[5] http://www.usdoj.gov/crt/voting/sec_5/obj_activ.htm (last updated May 8, 2006).

Shreveport City Court (Bossier and Caddo Parishes) (96-3506), Two annexations (Ordinance Nos. 205 and 206 (1995)), 10-24-96, Withdrawn 8-25-97, upon change in method of election

Shreveport City Court (Bossier and Caddo Parishes) (96-4344), Annexation (Ordinance No. 207 (1995), 4-11-97 Withdrawn 8-25-97, upon change in method of election

Shreveport City court (Bossier and Caddo Parishes) (97-1091), Three annexations (Ordinance Nos. 188, 189 and 192 (1996)), 6-9-97, Withdrawn 8-25-97, upon change in method of election

St. Martinville (St. Martin Parish) (97-0879), 1997 redistricting plan (councilmanic), 10-6-97

State (97-2264) Act No. 1420 (1997), designation of time period during which voting precinct boundaries cannot be changed, 1-13-98

Washington Parish (98-1475), Redistricting plan, 4-27-99

Minden (Webster Parish) (2002-1011), 2001 council redistricting plan, 7-2-02

Pointe Coupee Parish School District (Pointe Coupee Parish) (2002-2717), 2002 redistricting plan, 10-4-02

DeSoto Parish School District (DeSoto Parish) (2002-2926), 2002 redistricting plan, 12-31-02

Richland Parish School District (2002-3400), 2002 redistricting plan, 5-13-02

Tangipahoa Parish (2002-3135), 2003 redistricting plan, 10-6-03

Plaquemine (Iberville Parish) (2003-1711), 2003 redistricting plan, 12-12-03

Ville Platte (Evangeline Parish) (2003-4549), 2003 redistricting plan, 6-4-04

Delhi (Richland Parish) (2003-3795), 2003 redistricting plan, 4-25-05

**Mississippi:**

Grenada (Grenada Cty.) (96-3225), Special referendum election, 3-3-97

State (95-0418), Administrative plan for implementation of National Voter Registration Act of 1993 (NVRA), 9-22-97

Grenada (Grenada Cty.)(96-2219; 98-1598), Annexation; cancellation of the election; redistricting plan 8-17-98, Withdrawn 6-28-05

McComb (Pike Cty.) (97-3795), Designation of the American Legion Hut as a polling place, 6-28-99,Withdrawn 9-20-99, upon redrawing the boundaries of the voting precinct the polling place would serve and establishing a new polling place for the affected minority voters.

Kilmichael (Montgomery Cty.) (2001-2130), Cancellation of the June 5, 2001, general election, 12-11-01

**New York:**

New York City Community School District 12 (Bronx Cty.) (96-3759), Temporary replacement of all nine board members with three appointed trustees and the permanent replacement of all nine board members with five appointed trustees, 11-15-96

New York (Bronx, Kings and New York Ctys.) (98-3193), Change in method of election from single transferable vote to limited voting with four votes per voter, 2-4-99

**North Carolina:**

State (95-2922), Chapter 355 (1995)--prohibits state legislative and Congressional district boundaries from crossing voting precinct lines unless the districts are found in violation of Section 5 of the Voting Rights Act, 2-13-96

Camp Butner Reservation (Granville Cty.) (96-3224), At-large method of election and staggered terms, 2-3-97

Harnett County School District (2001-3769), 2001 redistricting plan (board of education), 7-23-02

Harnett County (2001-3768), 2001 redistricting plan (board of commissioners), 7-23-02

**South Carolina:**

Gaffney Board of Public Works (Cherokee Cty.) (95-2790), Readoption of the at-large method of election, 3-5-96

State (97-0529), 1997 redistricting plan (Senate), 4-1-97

Horry County (97-3787), 1997 redistricting plan (county council), 5-20-98

Charleston (Berkeley and Charleston Ctys.) (2001-1578), 2001 redistricting plan, 10-12-01

Greer (Greenville and Spartanburg Ctys.), (2001-1777) 2001 redistricting plan, 11-2-01

Sumter County (2001-3865), 2001 redistricting plan, 6-27-02

Union County School District (Union Cty.) (2002-2379), 2002 redistricting plan, 9-3-02

Clinton (Laurens Cty.) (2002-1512) (2002-2706), Annexations designation to Ward 1, 12-9-02

Cherokee County School District No. 1 (Cherokee Cty.) (2002-3457), Reduction in the size of the school board, 6-16-03

North (Orangeburg Cty.)(2002-5306), Annexations, 9-16-03

Charleston County School District (2003-2066), Method of electing the board of trustees School Board members from nonpartisan to partisan elections, 2-26-04

Richland-Lexington School District No. 5 (2002-3766) Act Number 326, (2002), Providing for a majority-vote requirement and numbered posts, 6-25-2004

**Texas:**

State (95-2017), Chapter 797 (1995)--authorizes agency employees to make determinations of an individual's eligibility to register based on citizenship information contained in the agency's file, 1-16-96

Webster (Harris Cty.) (96-1006), Annexation (Ordinance No. 95-33) 3-17-97, Withdrawn 4-7-98

State (98-1365), Procedure for filling prospective judicial vacancies, 9-29-98, Withdrawn 10-21-98

Galveston (Galveston Cty.)(98-2149), Method of election to four single-member districts and two at-large seats, the adoption of numbered posts for the at-large seats, the adoption of a majority vote requirement for the election of city officers, and the proposed redistricting criteria, 12-14-98, Withdrawn 02-04-02

Lamesa (Dawson Cty.) (99-0270), Deannexation by referendum of the property annexed under Ordinance No. 0-06-98, 7-16-99

Sealy Independent School District (Austin Cty.) (99-3823), Numbered posts, 6-5-00

Haskell Consolidated Independent School District (Haskell, Knox, and Throckmorton Ctys.) (2000-4426), Cumulative voting with staggered terms, 9-24-01

State (2001-2430), Redistricting plan (House), 11-16-01
Waller County (2001-3951), 2001 redistricting plans for the commissioners court, justice of the peace and constable districts, 6-21-02
Freeport (Brazoria Cty) (2002-1725), Method of electing city council members, 8-12-02
North Harris Montgomery Community College District (2006-2240), Reduction in polling places and early voting locations, 5-5-06

**Virginia:**
Dinwiddie County (99-2229), Polling place, 10-27-99
Northampton County (2001-1495), Method of electing the board of supervisors from six single-member districts to three double-member districts and the 2001 redistricting plan for the board of supervisors, 9-28-01
Pittsylvania County (2001-2026) (2001-2501), 2001 redistricting plan for the board of supervisors and school board, 4-29-02
Cumberland County (2001-2374), 2001 Redistricting plan for the board of supervisors, 7-9-02
Northampton County (2002-5693), 2002 redistricting plan for the board of supervisors, 5-19-03
Northampton County (2003-3010), Redistricting plan, 10-21-03

July 12, 2006

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

Dear Chairman Specter:

Thank you for the opportunity to testify at the United States Senate Judiciary Committee hearing, "Reauthorizing the Voting Rights Act's Temporary Provisions: Policy Perspectives and Views from the Field" on June 21, 2006. I greatly appreciated the chance to provide the Committee with important information to help guide its reauthorization of the temporary provisions of the Voting Rights Act.

This letter responds to the questions of Committee members Coburn and Cornyn submitted to me on June 29, 2006. The responses are made on my own behalf and do not necessarily reflect the views of all members of the Commission.

**Responses to Senator Tom Coburn, M.D.**

*1. In your testimony you cite the reduction in the gap between black and white voter registration rate and turnout—in fact, we have heard the amazing statistics presented by Professor Gaddie, substantiating your testimony. The change in registration and turnout of black voters in the south is both encouraging and should convince Congress that the bill may need to be updated based on the current factual data. Do you think it would be wise for Congress to update the data used to trigger coverage? Why or why not and what are the potential benefits and costs?*

Ninety-five years after the ratification of the Fifteenth Amendment, many southern states continued to defy its requirements. As demonstrated by their embrace of the Southern Manifesto and the Massive Resistance Movement, these states declared to the world that they would not comply with any federal statute, court order or constitutional amendment that would reallocate the political power between white and black southerners. In their battle to maintain the status quo, these states evaded each federal attempt to prevent the states from denying the vote to black Americans. It is this sordid history, this factual predicate that permitted Congress to fashion Section 5 of the Voting Rights Act. Section 5 is an

extraordinary remedy for the refusal of many southern states to obey the Constitution. The trigger coverage was intended to be a proxy for discriminatory conduct. In the event Congress reauthorizes Section 5 of the Voting Rights Act, Congress should base the trigger coverage on current data. The U.S. Commission on Civil Rights recently emphasized the importance of using current data, rather than outdated information. Specifically, the Commission recommended that, in the context of using disparity studies as evidence of discrimination in contracting, the federal government should discard data that is more than five years old. Likewise, in the context of the temporary provisions of the Voting Rights Act, and to shore up potential constitutional infirmities, Congress should use current data to justify the preclearance requirement. Analysis of current data would enable the government to assess the scope and intensity of discriminatory conduct in covered jurisdictions. This will allow the government to determine if it continues to have a sufficient factual predicate to reauthorize Section 5.

*2. Do you think it is a good idea/good policy for the government to take race into account when creating voting districts?*

No. In the 21st century the government should not be in the business of distributing benefits and burdens on the basis of race. It is far better for our democracy if political candidates had greater incentives to court the support of all voters, regardless of their race. As pointed out by Chief Justice Roberts in a recently decided Texas redistricting case—"It is a sordid business, this divvying us up by race." *See League of United Latin American Citizens v. Perry*, 2006 U.S. LEXIS 5178, *195 (2006) (Roberts, C.J., dissenting). Finally, Congress should heed the warnings against factions contained in Federalist Paper Nos. 9 and 10. In the public square, we stand as Americans.

*3. Should race be a deciding factor in any policy decision we make, or should Congress write laws that treat all Americans equally regardless of the color of their skin?*

Congress should refrain from enacting any law that contains a racial classification. In our individual capacities some of us choose to make distinctions amongst our fellow Americans based on race. This is unfortunate. The government should be an exemplar. The government should conduct its business so that no American has cause to believe that the government favors some Americans because of their race. The government, however, should not ignore the fundamental role it played in supporting a racial caste system that has only recently been dismantled. Many Americans, both black and white, are still reeling from the effects of America's recently dismantled racial caste system. The government should support public policies whose purpose is to equip the downtrodden with the tools needed to compete in society. Many of these Americans are struggling, in part, because of the destructive dynamics created by our history of oppression.

*4. You suggest in your statement as well as in the Commission report that Congress should have a record of purposeful voting discrimination and vote dilution in order to renew Section*

*5. As your Commission, founded and authorized by Congress, studied the objections by DoJ and the current facts, have you found a pattern of voting discrimination in the covered jurisdictions?*

In its recent reports, the Commission has not evaluated specific claims of intentional voting discrimination. Rather, the Commission's report looked to the overall numbers and scope of Department of Justice objections as a robust proxy for actual or potential discriminatory conduct. While some would argue that this proxy underrepresents discriminatory voting practices, others would argue that objections overstate such practices, as the Justice Department has raised many objections of questionable validity over time. The Justice Department's record in the courts tends to bolster the latter point of view.

*5. The Commission you chair provides important data and reports covering many different topics. Your reports on the VRA have been helpful. However, was the Commission planning to conduct additional fact finding sessions or write additional reports that may have been cut short because Congress has taken up the issue of re-authorizing this Act, early?*

The Commission's original project proposal for its statutory enforcement report on reauthorization of the temporary provisions of the Voting Rights Act had called for the agency's Office of Civil Rights Evaluation to examine the function and impact of section 203 of the Act from a sociological and demographic viewpoint, incorporating the data and findings received from the Department of Justice. This additional research would have examined how section 203 has functioned in those areas of the country that have experienced an influx of immigrants and recently naturalized citizens. The Commission voted in December 2005 to eliminate this portion of the project in order to ensure a timely submission of findings and recommendations to Congress. At that time, however, the Commission had already completed substantial research on the preclearance requirement on Section 5.

*6. In your opinion, do current conditions in covered jurisdictions justify the continued extraordinary intervention required by Section 5?*

The factual predicate existing in 1965 no longer exists. There is little, if any, evidence that supports the proposition that the political machinery in Southern states would purposefully and continually evade the dictates of the Fifteenth Amendment. While Congress's record for reauthorization contains anecdotal evidence of alleged voting rights discrimination, I believe the record does not demonstrate the pervasive, intentional, virulent, and often-violent discrimination that existed at the time of the Voting Rights Act's enactment. In covered jurisdictions, for example, we have seen black registration voting rates substantially increase in recent decades. Data presented to the Commission suggest that Southern blacks register and vote at rates comparable to, if not higher than, the rest of the Nation. Research also indicates that since 1984 black registered voters have closely tracked the voting age population in the original Section 5 states. For most of the period studied, black registration rates lagged behind those for whites, but for the last four elections for which data are available, black registration in five of the six original Section 5 states exceeded that of black

registration in non-southern states. Most notably, in two Section 5 states, black turnout has been consistently above the national average. At the same time, we have witnessed remarkable strides in the number of blacks and other minorities holding elected office. According to the important and timely research conducted by Ronald K. Gaddie, Professor of Political Science at the University of Oklahoma, in earlier times, only one black state legislator held office in all of the seven states originally covered by Section 5—combined. Today, by Dr. Gaddie's estimation, a black person in the South is more likely to have a black representative than anywhere else in the country.

*7. Can you give us solid reasons for extending the Bill another 25 years?*

As currently written, I am afraid that Section 5 may be constitutionally infirm. Assuming that Congress strengthens Section 5 by, for example, updating the trigger coverage, I would recommend that Congress reauthorize Section 5 for five instead of twenty-five years. This would ensure that Congress can expand or reduce the scope of the section based on the most up-to-date data.

*8. In the report of the Commission a number of questions are posed to Congress, including the following: (1) Should Section 5 be extended? (2) If Section 5 is extended, how long should that extension be? (3) If Section 5 is extended, should Congress reverse recent Supreme Court decisions interpreting Section 5 that have limited the scope of the preclearance standard? (4) If Section 5 is extended, should it continue to cover all voting changes, or should Section 5 be amended to focus only on changes that the Justice Department has most frequently found discriminatory and any others that present significant concerns? (5) If Section 5 is extended, should Congress alter the procedure by which covered jurisdictions may seek to bail out from coverage and/or amend the formula for determining geographic coverage, such as updating the trigger to reflect registration and turnout figures in the 2004 election?*

*a. Do you believe that Congress, during our hearings, has been presented with adequate factual information to answer these questions? Acknowledging that no-one has presented an analysis or summation of DoJ's objections.*

I do not believe that the record amassed so far can answer any of the questions the Commission posed. As far as I can determine, the record contains primarily anecdotal evidence of intentional racial discrimination in voting, rather than systematic, widespread evidence of discrimination. Much of the record is comprised of evidence of voting practices that may have a disproportionate racial effect, at best. Additionally, there is little in the record that compares covered jurisdiction to non-covered jurisdiction in a way that could support that radically different treatment afforded to these two categories.

*b. Has your Commission found adequate information to answer these questions?*

The Commission made no factual findings specifically addressing the questions raised above. However, in its briefing report on the reauthorization of the temporary provisions of the Voting Rights Act, the Commission recommended that Congress should: (1) carefully define the scope of voting rights discrimination, focusing on intentional discrimination prohibited by the Fourteenth and Fifteenth Amendments; (2) carefully develop a record of purposeful voting discrimination, including denial of ballot access and vote dilution; (3) should concentrate on developing records of evidence that are comparable for both covered and noncovered jurisdictions so that laws governing each may be appropriately directed; (4) to the extent possible, rely upon theories of discrimination that are likely to achieve broad consensus and survive judicial scrutiny, rather than upon controversial arguments that may be vulnerable to legal challenge; and (5) to the extent that Congress finds constitutionally sufficient evidence of voter discrimination, ensure that any reauthorized preclearance procedures are proportional to the evidentiary record of voter discrimination. In order to ensure proportionality, the Commission recommended that Congress might do well to consider amendments regarding the formula for determining covered jurisdictions, the stringency of the bailout standard, the extent of state and local procedures subject to preclearance, and the length of the extension term.

*c. Roughly, how would the majority of the members of your Commission answer these questions?*

Based on the vote that approved the briefing report on reauthorization of the Voting Rights Act's temporary provisions, I imagine that a majority of the Commission would embrace the recommendations to Congress cited above in response to question 8b.

*9. The Department of Justice reported that last year, there was only 1 objection out of 4734 pre-clearance submissions and the report from your Commission on the VRA has a chart detailing the decline in DoJ objections. Can you elaborate for the Committee record about the decline in DoJ objections since the 1990s and how this is relevant to the reauthorization?*

The Commission found a decline in objections regardless of types of submitted changes and the geographic distribution of submitted changes. For the period 1982 to 2004, we reviewed objection rates by types of proposed voting changes and found that the Justice Department made few objections relative to submitted changes regardless of change type. For example, changes which concerned precincts/polling place/absentee vote, annexations/boundary changes, and voter registration, comprised almost 76 percent of all submitted changes, but showed a collective objection rate of only 1.5 percent. Analysis by state showed objection rates disproportionate to the number of changes submitted for many jurisdictions. For example, Texas ranked first among the states that submitted proposals, contributing 41.6 percent, yet the numbers of objections it received comprised a small proportion of all the objections the Justice Department interposed. In contrast, South Carolina submitted a smaller number of changes, only 6.1 percent, but its objections comprised 35.9 percent of all

objections. Furthermore, objection rates to submitted changes from an overwhelming majority of states are negligibly low, less than 1 percent.

**Responses to Senator 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 of covered jurisdictions? Please be specific with respect to covered jurisdictions vs. non-covered jurisdictions.*

The Commission has not directly addressed the issue in recent reports, but we are aware of the findings of Professors Ronald Gaddie and Charles Bullock with respect to minority participation in the electoral process in both covered and non-covered jurisdictions. Overall, these studies have found no quantifiable difference in the voting rights exercised by minorities in covered jurisdictions than in the non-covered jurisdictions. We are aware of no principled distinction between covered and non-covered jurisdictions in this context today.

*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?*

If Congress should choose to reauthorize Section 5, I would support updating the coverage formula to refer to the Presidential elections of 2000 and 2004 instead of 1964, 1968, and 1972. The Act's preclearance requirement is an extraordinary remedy that presumes that state action within the sphere of voting rights is unconstitutional. Congress can justify this presumption only if it demonstrates that the presumption is supported by an extraordinary factual predicate—namely, a record of persistent, widespread and intentional discrimination in the covered jurisdictions. Since 1965, I believe that the nation has experienced dramatic, social, economic, and political changes that have increased opportunities for all Americans.

*b. Would you support adding the Presidential election of 2000 or 2004 as well as political subdivisions that have been subject to Sec. 2 litigation to this formula in order to pick up jurisdictions that have begun discriminating since the 1970s? Why or why not?*

Assuming that Congress chooses to reauthorize Section 5, I would support adding the Presidential elections of 2000 and 2004 to the coverage formula for the reasons above. I would support adding to the formula only those political subdivisions subjected to Section 2 litigation on the grounds of purposeful voter discrimination consistent with the scope of the Fourteenth and Fifteenth Amendments. A record of intentional voter discrimination would allow Congress to target the stern remedy of preclearance where it is most needed. Such a record would also allow a continued preclearance requirement to survive judicial scrutiny.

*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?*

I would support removing the year 1964 from the coverage formula of the Voting Rights Act. Since that time the nation has undergone a sea change in racial attitudes. These societal changes and vigorous enforcement of civil rights laws have significantly expanded opportunities for minorities, not only in electoral politics but in other areas as well. By including data from 1964 in the coverage formula, Congress relies on outdated facts that are no longer accurate.

*4. While I am still reviewing the record, it seems to me that arguments thus fact 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 Commission has evaluated Department of Justice objection rates in some detail. Over the last decade, the objection rate has become virtually insignificant. This, clearly, documents the progress that we have made since 1965. It is hard to imagine any argument that exclusively relies on this objection rate to justify further extensions of the preclearance provision.

*5. In light of the lack of clear differentiation between covered 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?*

Provided the coverage formula is updated, I believe a five-year extension of Section 5 would be appropriate. This extraordinary remedy was clearly justified in 1965. However, since 1965, the nation, including the South, has experienced dramatic, social, economic, and political changes that have increased opportunities for black Americans. Congress should examine evidence of recent discriminatory conduct then determine whether its scope and intensity justifies reauthorizing Section 5 in its current form. I do not believe the current data supports reauthorization of Section 5 in its current form.

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?*

I do not believe that so-called "influence" districts should be protected under any reauthorized Voting Rights Act. As Justice Kennedy stated in the recently decided Texas redistricting case, if the Act were "interpreted to protect this kind of influence, it would unnecessarily infuse race into virtually every redistricting, raising serious constitutional questions." *See League of United Latin American Citizens v. Perry*, 2006 U.S. LEXIS 5178, *86 (2006). In my opinion, distributing benefits and burdens on the basis of race is unfair and discriminatory.

We appreciate your interest in the Commission's work on this issue and look forward to working with you in the future.

Very truly yours,

GERALD A. REYNOLDS
Chairman

cc: The Honorable Tom Coburn, M.D.
The Honorable John Cornyn

July 9, 2006

## Professor Carol M. Swain's Responses to Senators' Follow-up Questions
## VRA Hearing June 21, 2006

**Senator Tom Coburn**

**Please explain in your own words what a majority-minority district is, how it relates to the VRA, and how you view the impact of majority-minority districts on the African-American population.**

1. A majority-minority district is a compact, geographical political unit where one or more minority racial or ethnic groups constitute a majority of the voting-age population. These districts are usually drawn to guarantee the election of a politician from a particular racial or ethnic background. In past decades, majority-minority districts were instrumental in the growth of black elected officials across the nation. Now, however, an increasing number of blacks have demonstrated their ability to get elected in majority-white legislative districts, as well as state-wide elections. The Voting Rights Act was passed to protect minority voters from discrimination at the polls and to help them get adequate political representation. It was never designed to insulate incumbents from electoral competition or to guarantee voters a representative who shares their skin color.

**If you were able to offer an amendment to this bill, would you? If so, how would you amend the bill?**

2. I would amend the bill. The Swain Amendment would be similar to the amendment offered by Representative Charlie Norwood (R-GA-9). I would link the original Voting Rights "trigger" to the three most recent presidential elections (1996, 2000, and 2004) and would extend preclearance requirements to all jurisdictions across the nation where voting rights violations continue to occur. The oversight coverage of Section 5 would coincide with the three election cycles, thereby ensuring a minimum of 12 years of coverage. I would allow for a much easier bailout for any covered jurisdictions where minorities have high rates of voter participation and no documented evidence of recent voter discrimination. Any such jurisdictions would be automatically dropped from Section 5 preclearance coverage. Lastly, I would clarify whether the Department of Justice should be allowed to clear plans created with discriminatory intent and would strive for wording that would protect minorities from the kinds of action that the Supreme Court allowed to stand in *Reno v. Bossier Parish School Board II*, 528 U.S. 320 (1999).

**Do you think it is a good idea/good policy for the government to take race into account when creating voting districts? Please explain.**

3. A wise government would not elevate race and ethnicity above other demographic characteristics to create majority-minority legislative districts, which segregate voters and potentially diminish their political influence. The packing of minority voters into majority-minority districts often comes with a direct tradeoff between descriptive (i.e. black and brown faces) and substantive representation (more people to vote for your agenda). In my opinion, minority voters are best served when there are more members of their preferred party in office to support their policy agendas. Majority-minority districts can insulate minority elected officials from electoral competition without necessarily increasing the substantive representation of their constituents.

**Should race be a deciding factor in any policy decision we make, or should Congress write laws that treat all Americans equally regardless of their skin color?**

4. The Congress should write laws that protect all Americans from racial or gender discrimination. Legislators should be mindful of the fact that many of the issues we racialize are really about social class. It would be much easier for legislators to work together for common goals if we recognized and acted on the fact that we are all Americans, and we will stand or fall together depending on the choices we make. To the extent possible, we should define problems and seek remedies for issues without regard to the race of the recipients. Again, keeping in mind that issues such as felony disenfranchisement do not have to be framed as racial.

**Should the trigger formula be updated so that jurisdictions recently guilty of discrimination are covered by Section 5?**

5. The trigger formula of Section 5 should be updated to correspond to the last three presidential elections, and it should be applied nationally to jurisdictions where document violations have occurred or continue to occur.

**Senator John Cornyn**

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

It depends on how the bill is amended. I would recommend extension of Section 5 for another 25 years only if we amend the bill to change the coverage formula and make bailout easier for covered jurisdictions. If significant changes are not made in the existing law, then it makes sense to renew for a shorter period of time, for example, 5 or 10 years.

**Assuming the new language of re-authorization is adopted, would it be your view that even districts that are "influence" districts, with relatively low**

**numbers of minorities, should be protected under the plan? Why or why not?**

The amended Section 5 should offer protections to *all* voters in jurisdictions that fail an updated trigger formula.

## Follow-up questions submitted for Senator Tom Coburn, M.D.
## VRA Hearing June 21, 2006

**Response of Don Wright, General Counsel of the North Carolina State Board of Elections**

All of my responses are subject to the same caveat as in my written testimony. The opinions I have expressed are my own in my individual capacity, and do not necessarily reflect those of the North Carolina Board of Elections.

Don Wright:

1. What do you think is the reason that so few jurisdictions have tried to bail out from coverage?

I do not think there is any single reason why jurisdictions that may be eligible for bailout have not done so. Some jurisdictions may not be aware of the bailout provision. Others may not want to bailout for some of the reasons I provided in my written testimony. Most of the North Carolina covered jurisdictions do not see Section 5 preclearance as a burden, it has become a routine administrative matter taking little time or expense to comply with. The lack of covered jurisdictions in all covered areas filing for bailouts speaks more strongly than any other fact or rhetoric that Section 5 is reasonably easy to comply with. Obviously, many jurisdictions are not and should not be eligible for bailout based upon their track records in the last ten years.

Do you have any suggestions for ways in which the bailout provision could be modified to encourage jurisdictions that no longer suffer from racial polarization or that are majority African American to bail out?

Persons assume that covered jurisdictions receive no benefits from Section 5 and that all covered jurisdictions would desire to bail out if it was "easier." Most North Carolina jurisdictions like the protection of having USDOJ preclearance as to voting changes, it acts like a shield against claims of racial discrimination. Getting a prompt federal decision that a state, county, or municipality can use guidance and approval of their actions is a rarity in our federal system of government and should be viewed in a positive light.

I also do not believe that the bailout provision should be modified because the existing provision strikes the right balance to provide covered jurisdictions with the incentive to eliminate voting discrimination and offer equal voting opportunities.

Finally, it is my understanding that the question posed does not accurately state what the existing law is and how it should remain. Section 4(a) of the Voting Rights Act

outlines all of the criteria for bailout and reflects the considerable deliberation of Congress and the record it created in 1982. Those criteria recognize that unequal voting opportunities are not just limited to the effects of racial polarization and do not just apply to jurisdictions with African American populations. Indeed, North Carolina has a county covered for American Indians. Several other states are covered in whole or in part for American Indians or Latinos. The evidence supports keeping the existing bailout structure in place. After all, it is very reasonable to expect jurisdictions to have a clean bill of health free of voting discrimination for ten years before they should be eligible to bailout.

2. If you were able to offer an amendment to this bill, would you? If so, how would you amend this bill?

I would not offer an amendment to the bill.

3. Do you think it is a good idea/ good policy for the government to take race into account when creating voting districts? Please explain.

The government has always taken race into account when creating voting districts. For far too long, it did so in a negative manner, denying equal voting opportunities on account of race. The sad legacy of the South is that prior to the 1990 round of redistricting, several states, including my own, had not elected any black Members to Congress since the end of Reconstruction. This result did not happen by chance, especially considering the large number of blacks who in some states comprised over one-third of the eligible voting population. States are always aware of where minority voters live, and used that knowledge to divide compact groups of voters between districts in which only white candidates could be elected.

I agree with the Supreme Court that race can be considered in redistricting, as long as it does not predominate over other factors. It is good public policy. It has resulted in more representative bodies legislative bodies, including Congress. It has made our government more legitimate and accountable to all voters, regardless of their race.

Also, please see my response to Senator Cornyn's fifth question, which is also responsive to this question.

4. Should race be a deciding factor in any policy decision we make, or should Congress write laws that treat all Americans equally regardless of the color of their skin? Please explain.

In some areas, including voting and elections, race should still be considered. There still exists social and intangible discrimination based upon race even after 40 years after corrective legislation, less time than that in certain states that aggressively fought the legislation into the 1970's. The formal and informal racial inequality in this country started over three hundred years ago, why would we think the remnants of it would fade quickly after only 40 years?

Also, please see my response to the third question, which is also responsive to this question.

**Senator John Cornyn**
**Questions for Witnesses for ALL Voting Rights Act Hearings**
**May – June 2006**

**Response of Don Wright, General Counsel for the North Carolina State Board of Elections.**

All of my responses are subject to the same caveat as in my written testimony. The opinions I have expressed are my own in my individual capacity, and do not necessarily reflect those of the North Carolina Board of Elections.

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. As General Counsel of the North Carolina State Board of Elections, I was asked to testify as to the practical aspects of dealing with Section 5 preclearance. Not being a political scientist or having other experience that would allow me fairly answer this question, I would respectfully decline to answer this question.

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?

    No. The effect of these trigger changes would be to have no covered jurisdictions, thus in effect indirectly killing Section 5. Although legal racial discrimination/segregation is no longer in our laws and statutes, both covert and overt social and personal racial discrimination exists to the extent that effective Section 5 coverage should continue.

    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?

    No. The effect of these trigger changes would be to have no covered jurisdictions, thus in effect indirectly killing Section 5. Although legal racial discrimination/segregation is no longer in our laws and statutes, both covert and overt social and personal racial discrimination exists to the extent that effective Section 5 coverage should continue.

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 disagree with the underlying premise of the question, which does not accurately describe the *Boerne* test or the record supporting reauthorization of the Voting Rights Act. *Boerne* specifically cited the Voting Rights Act as the gold standard for a federal law meeting the congruent and proportional test, which the Supreme Court confirmed again post-*Boerne* in *Lopez v. Monterey County*. In addition, an extensive record of post-1982 discrimination in the covered jurisdictions has been developed for Congress. At the same time, Congress cannot and should not ignore pre-1982 voting discrimination, which provides a context for the discrimination that remains. In many jurisdictions, post-1982 objections and successful voting cases address discrimination against minority voters that even preceded the Voting Rights Act of 1965.

   The effect of these trigger changes would be to have no covered jurisdictions, thus in effect indirectly killing Section 5. Although legal racial discrimination/segregation is no longer in our laws and statutes, both covert and overt social and personal racial discrimination exists to the extent that effective Section 5 coverage should continue.

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?

   I disagree with the underlying premise of the question. The evidence in the record is not limited to mere "anecdotes," but instead encompasses a substantial body of ongoing discrimination in the covered jurisdictions.

   It is the presence of Section 5 that is causing the greater compliance with the Voting Rights Act. This low objection rate should be seen a positive, not a negative. Removing Section 5 could undo the current level of success. One only has to look at the number of discriminatory voting changes that were withdrawn after the USDOJ called the jurisdiction or sent the jurisdiction a More Information Request to see the importance of continuing Section 5.

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?

I disagree with the underlying premise of the question, which assumes that there is no difference between covered and non-covered jurisdictions. More than a century of Jim Crow and overt discrimination against blacks and Latinos in the South and Southwestern states shows that there is a substantial difference. The record also reflects that although there is less overt discrimination today, there is a continuing need for Sections 5 and 203 of the Voting Rights Act.

I do not support any of the proposed alternatives suggested in the question. I was born in 1950, a baby boomer. Until I was 14, I lived in North Carolina, which was legally, socially, and emotionally segregated. I worked for my father both on a poultry farm and in a restaurant where I was placed under the direction of older black men to learn work habits, yet received from the same older black men a deference I knew was based upon the fact I was white. I was a student in Goldsboro (N.C.) High School when the first black students entered. I was a student at UNC-CH when the first black played for their basketball team. I am saying this because, there are still many persons of the previous generations to the baby boomers who still live in the world of social and emotional racial segregation and discrimination. I sense that regularly in dealing with persons in my position as General Counsel to the North Carolina State Board of Elections. Because I grew up in a time where legal racial discrimination existed and then was outlawed, I feel I can recognize more easily the covert social and emotional discrimination that still exists. It is too early in the history of our country's civil rights reformation to eliminate the affirmative consideration of race in creating voting districts. Literally, in many cases, discrimination will have to die out.

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 disagree with the underlying premise of the question. The *Georgia v. Ashcroft* fix is constitutional because it was a statutory interpretation case in which the Supreme Court got that interpretation wrong. Congress is simply clarifying its intent, just as it has for prior amendments to the VRA such as the 1982 amendment to Section 2. The fix raises no constitutional concerns.

   It is not possible to answer the question as posed. Under the bill's proposed change, the focus will return to what it was for a quarter century before the Supreme Court's misreading of Section 5: namely, an intensely localized assessment of whether minority voters have an equal opportunity to participate. The question assumes a categorical rule of decision that is inconsistent with how the Voting Rights Act has been interpreted and applied.

**Written Questions from Senator Edward M. Kennedy**

**June 21, 2006 Hearing,**

**"Reauthorizing the Voting Rights Act's Temporary Provisions:**

**Policy Perspectives and Views from the Field"**

**Response of Don Wright, General Counsel of the North Carolina State Board of Elections**

All of my responses are subject to the same caveat as in my written testimony. The opinions I have expressed are my own in my individual capacity, and do not necessarily reflect those of the North Carolina Board of Elections.

1. Q: Do you believe that Section 5 reduces litigation that might otherwise be brought under Section 2 of the Act?

   Yes, it acts to prevent situations that would become a basis for later Section 2 litigation. Under Section 2, a discriminatory voting change is often implemented and used for several years before it is stopped; Section 5 stops the discriminatory voting change before it goes into effect. In addition, Section 5 is much more cost effective than Section 2, as I have discussed in my response to the next question. The prohibitive cost on both the plaintiff and the jurisdiction of Section 2 litigation undoubtedly causes many discriminatory voting changes to go unchecked, which does not happen if those changes are submitted for Section 5 preclearance.

2. Q: Would Section 2 litigation be more or less burdensome for the State Board of Elections and other governmental entities in North Carolina than complying with Section 5?

   Except for the occasional statewide redistricting and major municipal annexation submissions, Section 5 submissions are not burdensome in regards to costs, time, and labor. Section 2 litigation would far outweigh any Section 5 submissions in regards to being a burden.

Higher monetary costs for Section 2 include attorneys' fees that can be millions of dollars, as the Charleston County, South Carolina litigation showed us. In addition, plaintiffs have to incur expert witness fees for statisticians, historians, and demographers that often are more than one hundred thousand dollars. Section 2 cases also include witness fees, travel costs, copying expenses and non-taxable costs that frequently cannot be fully recovered. In my experience, prevailing plaintiffs typically do not recover all of their costs in voting cases, and even the addition of expert witness fees to recoverable costs under the bill will not change this result. Even to the extent that plaintiffs do recover their costs in successful litigation, it is at the expense of the defendants, which are jurisdictions that have had to bear their own considerable expenses as well. Those jurisdictions would have been better served by the more cost-effective submission of voting changes under Section 5.

The costs of Section 2 litigation are not limited to money. Section 2 cases are complex and can take several years to fully litigate at the trial level, exclusive of any appeals. In the meantime, the discriminatory voting change is put into effect, which would not happen under Section 5. Unfortunately, even after a successful Section 2 case is brought to stop a discriminatory voting change, the damage is often already done: elections may have been held under an unlawful plan, providing candidates elected under that plan an advantage in terms of incumbency and fundraising under any remedial plan that might be adopted.

3. Critics of reauthorization have pointed to the declining percentage of Section 5 objections. Supporters of reauthorization cite Section 5's deterrent effect.

Q: In your experience, has Section 5 served to deter discriminatory voting changes? Can you cite specific examples?

Yes. There have been changes made in proposed annexations that would otherwise

have reduced minority voting strength or excluded annexations of minorities as a result of Section 5 review or a threat of it. The same has applied to county and municipal level redistricting that would have reduced the voting strength of minorities. The net effect of Section 5's deterrence is apparent. North Carolina's legislative body is much more representative at federal, state, and local levels as a direct result of Section 5 preclearance.

4. Some have argued that so-called *de minimis* changes, like the relocation of a polling place, should be exempt from Section 5.

Q: From your experience, can apparently *de minimis* changes harm minority voters? Please provide examples.

Yes. A few of the witnesses on my panel suggested that a polling place move is insignificant. I respectfully disagree. A polling place change often has the greatest direct impact on minority participation. Minority populations sometimes do not have available to them personal transportation that makes a polling place move insignificant. Moving a polling location can adversely affect the ease of some minorities getting to the polls and thus hurting their turnout. Also, moving a polling place to a non-public location can intimidate minorities. Making a private community center a voting location can reduce minority turnout, where that community center does not normally allow minorities, or express anti-minority sentiment such as flying a confederate flag, or is controlled by individuals that are known by their anti-minority views. The same would apply to the use of private homes and businesses as polling locations. Therefore, polling place changes are not "*de minimis*" voting changes at all, particularly where the conditions I have described above are present.

Q: Are fewer resources required when submitting voting changes under Section 5 that are in fact *de minimis*?

Absolutely, I can prepare a submission for a so-called *de minimis* change in less than half an hour. The burden of these submissions is minimal compared to the significant benefits that voters receive. It is my understanding that several examples of objections to polling place changes have been included in the record. Everyone benefits when we make sure that election laws, practices, and procedures are being applied even-handedly.

Q: In your experience, how does the Department of Justice approach truly *de minimis* changes? Does the Department require as much information as it does for other voting changes? Does it preclear such changes in less than the 60 days granted in the statute to review Section 5 submissions?

To their credit, the USDOJ looks carefully at all changes, even the so-called *de minimis* ones. Based upon their experience they can quickly determine if a submission bears further intense review. So, the reality is that there is less of a need of review and materials as to such a change. But the USDOJ does not shrink from giving every submitted change a careful first look. Once the USDOJ looks at the submission carefully and sees that it has no impact on minority voters, there is generally no need for further information. It often provides expedited preclearance of these voting changes as needed or requested.

**Hearing on "Reauthorizing the Voting Rights Act's Temporary Provisions: Policy Perspectives and Views from the Field"**
**Questions for Don Wright**
**Submitted by Senator Patrick Leahy**
**June 23, 2006**

**Response of Don Wright, General Counsel of the North Carolina State Board of Elections.**

All of my responses are subject to the same caveat as in my written testimony. The opinions I have expressed are my own in my individual capacity, and do not necessarily reflect those of the North Carolina Board of Elections.

1. You testified that there are several benefits for jurisdictions of being under Section 5 coverage, such as for the 40 covered counties in North Carolina.

   A. What are some of the benefits of Section 5 coverage?

- Section 5 can vindicate governmental units from allegations of discrimination or adverse racial effects. It provides a "seal of approval" that a voting change is not discriminatory because the USDOJ has precleared the change.

- Section 5 prevents actions that would have a discriminatory impact from going into effect, ensuring that all voters have equal opportunities to participate free of discrimination. Section 5 is much more cost effective and efficient than litigation regarding voting changes, which is expensive to both the submitting jurisdiction and the plaintiffs. In the meantime, the plaintiffs – and, in fact, all voters – suffer the discriminatory impact of the voting change during the several years it can take to bring a successful court challenge. Preventing this sort of expense, delay, and discriminatory implementation was the main reason Section 5 was enacted to begin with.

- Section 5 allows the opportunity to assure the public that minority rights are being protected and that someone is independently validating those decisions. A very important matter when dealing with racial issues with its strong emotional overlays.

- Section 5 facilitates planning and administration of special elections. Preparation of special elections must be done well in advance. The longer an election is set prior to its running, the easier it is for the election administrator. Elections that need preclearance can be shielded from "last minute" adjustment, such as adding a bond issue that may burden the election administrator.

B. How does Section 5 coverage make your job as General Counsel to the State Board of Elections easier?

Section 5 precludes situations that adversely affect the voting rights of minorities from coming into existence, thus reducing the number of future issues I would have to deal with. The preclearance procedure gives me a prompt direct answer as to covered situations and allows me to rely upon them without fear from being sued by the USDOJ or to use that preclearance opinion as a legal shield to protect the action from challenge from others than the USDOJ. It also forces the local jurisdictions and I to focus early in the process of determining voting/election actions upon the possible effect of the action upon minorities.

**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.

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

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

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

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

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

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

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

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

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

**Reauthorizing the Voting Rights Act's Temporary Provisions: Policy Perspectives and Views from the Field**
Hearing Before the Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights, and Property Rights
Wednesday, June 21, 2006
2:00 p.m. SD-226
**Written Questions by Senator Jeff Sessions**

**Questions for John J. Park, Jr.:**

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

In your opinion, should Congress attempt to overturn the Supreme Court's interpretation of section 5 of the Voting Rights Act in *Reno* v. *Bossier Parish School Board*, 520 U.S. 471 (1997) (*Bossier Parish I*), through an amendment to section 5?

In your opinion, should Congress attempt to overturn the Supreme Court's interpretation of section 5 of the Voting Rights Act in *Reno* v. *Bossier Parish School Board*, 528 U.S. 320 (2000) (*Bossier Parish II*), through an amendment to section 5?

In your opinion, should Congress attempt to overturn the Supreme Court's interpretation of section 5 of the Voting Rights Act in *Georgia* v. *Ashcroft*, 539 U.S. 461 (2003), through an amendment to section 5?

In your testimony, you suggested that, if Congress reauthorizes the Voting Rights Act, it should do so "for less than 25 years." In your opinion, would a shorter extension period help in defending the Act against a constitutional challenge under the "congruence and proportionality" standard of *City of Boerne* v. *Flores*?

During your oral testimony, you showed the Subcommittee a preclearance submission submitted by the State of Alabama to the Attorney General of the United States for the 2001 redistricting of the Alabama State Senate. How many volumes and pages did the submission you showed the Subcommittee contain?

**Follow-up questions submitted for Senator Tom Coburn, M.D.**
**VRA Hearing June 21, 2006**

Jack Park:

1. Can you give me further information and explanation about why political parties and their need the option to bail-out?

2. What do you think of the Court's decision in *Georgia v Ashcroft*?

3. What do you think of the Court's decision in *Reno* v. *Bossier Parish School Board* (*Bossier Parish I*)?

4. What do you think of the Court's decision in *Reno* v. *Bossier Parish School Board* (*Bossier Parish II*)?

5. Under Alabama law, what assistance can a voter who has limited reading ability or limited English proficiency receive when casting their vote?

6. What do you think is the reason that so few jurisdictions have tried to bail out from coverage? Do you have any suggestions for ways in which the bailout provision could be modified to encourage jurisdictions that no longer suffer from racial polarization or that are majority African American to bail out?

7. If you were able to offer an amendment to this bill, would you? If so, how would you amend this bill?

8. Do you think it is a good idea/ good policy for the government to take race into account when creating voting districts? Please explain.

9. Should race be a deciding factor in any policy decision we make, or should Congress write laws that treat all Americans equally regardless of the color of their skin? Please explain.

# SUBMISSIONS FOR THE RECORD

**Testimony of Debo P. Adegbile**
**Associate Director of Litigation of the NAACP Legal Defense and Educational Fund, Inc.**

**Reauthorization of the Voting Rights Act: Policy Perspectives and Views from the Field**

**United State Senate Judiciary Committee**

**June 21, 2006**

## Introduction

As Associate Director of Litigation of the NAACP Legal Defense and Educational Fund, Inc. (LDF), I welcome the opportunity to testify before the Senate Judiciary Committee regarding the regarding the renewal of and continuing need for the expiring provisions of the Voting Rights Act (VRA). Today, my testimony is divided into two parts. Initially, I offer observations about LDF's practical experience with enforcement of the expiring provisions of the Act. My observations are informed by LDF's long experience with and work on these issues in the field. In light of that experience, I offer an analysis of some of the central policy issues that are presented in the current renewal debate. Renewal of the expiring provisions of the VRA is of critical importance to LDF as our work has long been, and continues to be, focused on ensuring that African Americans and other minority groups have equal and unfettered access to the political process.

I.

## VRA Enforcement: A View from the Field -- Evidence of Continuing and Persistent Voting Discrimination

### *Louisiana*

The recent history of Voting Rights Act enforcement in Louisiana provides strong evidence of the success of the VRA in preventing ongoing and pervasive state and local attempts to discriminate against minority voters, as well as the continuing need for the Section 5 preclearance requirement. Louisiana has the fifth largest African-American population in the United States, and the second highest percentage of African-American population of any state following Mississippi. Significant racially polarized voting and voting changes adopted with retrogressive purpose and/or effect continue to be commonplace in Louisiana.

LDF's substantial experience enforcing voting rights protections in Louisiana since the 1982 reauthorization indicates that, although the VRA has facilitated some progress toward the goal of equality in voting, discrimination against African-American voters has not been eradicated. The continuing need for Section 5 preclearance in the future is highlighted by the fact that some jurisdictions – including the State of Louisiana itself – have been repeat offenders that have drawn multiple objections during this time period.

Here, I describe some of the forms of discrimination that the preclearance provision has blocked through the present day, and then discuss the experience in Orleans Parish and other jurisdictions within the state in which Section 5 has effectively protected minority voting rights from repeated threats.[1]

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[1] A report that more fully details the voting experience in Louisiana since 1982 is part of the Congressional record. *See* DEBO P. ADEGBILE, VOTING RIGHTS IN LOUISIANA 1982-2006.

Multiple Forms of Persistent Discrimination

The success of Section 5 is measured, in part, by the number of objections to proposed voting changes issued by the Department of Justice ("DOJ"). Indeed, Section 5 has been used more frequently in the years since 1982 than beforehand as the Department of Justice has interposed 96 objections to proposed voting changes in Louisiana since the last renewal.[2] Put another way, nearly two-thirds of the DOJ objections interposed against Louisiana have been made since the last Congressional reauthorization of Section 5.

Formal objections, however, do not include other indicia of Section 5's effectiveness – including its deterrent effect on those jurisdictions that may be considering potentially discriminatory changes. In particular, DOJ's "more information requests" (MIRs) often lead jurisdictions to withdraw or supercede potentially retrogressive voting changes.[3] Overall, jurisdictions within Louisiana have withdrawn 45 changes after receiving an MIR since the last renewal.[4] Both objection statistics and MIRs, among other things, help illustrate the full deterrent effect of Section 5.

Repeat Offenders

The continued need for Section 5 preclearance is illustrated, in part, by the fact that several jurisdictions within Louisiana have received multiple objections to proposed voting changes since the 1982 renewal. Indeed, one of the worst repeat offenders is the State of

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[2] Compare to period from 1968 to 1982 during which DOJ objected to 50 attempts by state and local authorities to implement voting changes that would have retrogressed African-American voting strength, or 3.5 objections on average per year.

[3] Luis Fraga and Maria Lizet Ocampo note that because More Information Request (MIR) letters "are issued at far higher rates than letters of objection . . . they have the potential to impact a wider range and larger number of electoral changes" and have "prevented implementation of 1,162 additional voting changes from 1982 to 2005[.]" Luis Ricardo Fraga & Maria Lizet Ocampo, More Information Requests and the Deterrent Effect of Section 5 of the Voting Rights Act 10-11 (June 7, 2006).

[4] *Id.* at 14 (Table 3: Changes, Objections, and MIR Outcomes, 1982-2005).

Louisiana itself. The DOJ has interposed an objection to every initial reapportionment plan adopted for the State House of Representatives since the VRA was passed in 1965. The record underlying these objections, described more fully below, provides substantial evidence of both retrogressive effect and purpose underlying the adoption of the plans.

Objections to Louisiana State Legislative Reapportionment Plans, 1971-2001

In 1971, the DOJ objected to the state's first legislative reapportionment plan after the VRA went into effect, noting the "apparent racially discriminatory effects in both houses of the legislature in widely disparate parts of the state" including "an extraordinarily shaped 19-sided figure . . . [that] suggests a design to consolidate in one district as many black residents as possible."[5] The DOJ also interposed an objection to the post-1980 decennial redistricting plan finding that the plan had the "net effect of *reducing* the number of House districts with black majorities."[6] Similarly, in 1991, the Louisiana legislature once again proposed a plan that retrogressed African-American voting strength. DOJ objected to the proposed configuration of district boundaries in seven areas across the state finding that "the state has not consistently applied its own criteria" and the inconsistent application "in each instance" negatively impacted black voters' ability to elect a candidate of their choice.[7]

In 2001, the state filed a declaratory judgment action in *Louisiana House of Representatives v. Ashcroft* (Civ. No. 02-62 D.D.C.) seeking judicial preclearance process of its state house redistricting plan. In that case, the legislature argued that its proposed elimination of

[5] Letter from David L. Norman, Assistant Attorney General, Civil Rights Div., U.S. Dep't of Justice, to Jack P.F. Gramillion, Attorney General, State of Louisiana (Section 5 Objection Letter) (Aug. 20, 1971), at 6.
[6] Letter from Wm. Bradford Reynolds, Assistant Attorney General, Civil Rights Div., U.S. Dep't of Justice, to Charles Emile Bruneau, Jr., Member, Louisiana House of Representatives and David R. Poynter, Clerk, Louisiana House of Representatives (Section 5 Objection Letter) (June 1, 1982), at 2. (*Emphasis added.*)
[7] Letter from Deval L. Patrick, Assistant Attorney General, Civil Rights Div., U.S. Dep't of Justice, to Jimmy N. Dimos, Speaker, Louisiana House of Representatives (Section 5 Objection Letter) (July 15, 1991).

a viable majority African-American district in Orleans Parish was justified by arguing that white voters in this part of the state were entitled to "proportional representation," an unrecognized Section 5 defense, while ignoring long-standing Section 5 principles and disregarding significant growth of the African-American population in the Parish. The fate of Louisiana's 2001 redistricting plan was the same as that of its predecessors. The 2001 redistricting plan for the Louisiana House of Representatives is a telling statewide example that emerged during the last decennial redistricting cycle in that the evidence suggested that the pre-settlement plan was enacted with both retrogressive purpose and effect.

The Louisiana legislature's repeated attempts to violate the VRA over the course of four decades, which were arguably more blatant in 2001 than before, shows the importance and effectiveness of Section 5 in protecting African-American voters. The experience with Section 5 in Louisiana illustrates that without preclearance, we risk actual implementation of plans adopted with retrogressive effect and/or discriminatory purpose.

Other Repeat Offenders

Numerous jurisdictions in Louisiana have repeatedly proposed retrogressive voting changes that were blocked by the DOJ during the Section 5 preclearance process. Between 1982 and 2003, 11 parishes were "repeat offenders" as they submitted multiple numbers of voting changes that drew objections.[8] An example of a particularly resistant jurisdiction is Pointe Coupee Parish, in which DOJ interposed objections to the school board and police jury district redistricting plans three decades in a row. Most recently, DOJ interposed an objection to a 2002

[8] DEBO P. ADEGBILE, VOTING RIGHTS IN LOUISIANA 1982-2006: A REPORT OF RENEWTHEVRA.ORG 27 (Mar. 2006).

plan that would have eliminated a majority-black district.[9] The persistence of these repeat offenders along with the state's long history of Section 5 objections and changes withdrawn in response to MIRs together illustrate the grave potential for retrogression to emerge in the political process in the absence of the Section 5 safeguard.

***Mississippi and South Carolina***

Much like Louisiana, the recent experience in the States of South Carolina and Mississippi also provides strong evidence of the continuing need for the broad application of Section 5. Although the record contains numerous examples of persistent voting discrimination, as reflected in various reports, and extensive witness testimony that has been submitted and offered, I highlight a few examples here. Indeed, in both of these covered states, DOJ has interposed a series of recent objections that reach a wide range of voting changes, many of which illustrate both retrogressive effect and purpose. For example, in 2001, the Town of Kilmichael, Mississippi, cancelled its general election for alderman and mayor, after the all-White Board of Aldermen realized that, given 2000 census data, African Americans comprised a majority of both the town's total population and registered voters. The cancellation prompted a 2001 objection from the DOJ on the grounds that the voting change prevented African Americans from electing candidates of their choice (since several African Americans had already qualified for the town's elections).[10] This continued voting discrimination has been accompanied by the reality of racially polarized voting, which has been documented through a long litany of Mississippi court

[9] Letter from Wm. Bradford Reynolds, Assistant Attorney General, Civil Rights Div., U.S. Dep't of Justice, to E. Kenneth Selle, President, Tri-S Associates, Inc. (Aug. 22, 1983); Letter from John R. Dunne, Assistant Attorney General, Civil Rights Div., U.S. Dep't of Justice, to Clement Guidroz, President, Pointe Coupee Parish Police Jury (Feb. 7, 1992); Letter from Ralph F. Boyd, Jr., Assistant Attorney General, Civil Rights Div., U.S. Dep't of Justice, to Gregory B. Grimes, Superintendent, Pointe Coupee Parish School District (Oct. 4, 2002).

[10] Letter from Ralph Boyd, Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, to J. Lane Greenlee, Esq., December 11, 2001.

decisions. In *Jordan v. Winter*, a congressional redistricting case, the three-judge district court stated "[f]rom all the evidence, we conclude that blacks consistently lose elections in Mississippi because the majority of voters choose their preferred candidates on the basis of race."[11] In *Martin v. Allain*[12], which involved a statewide challenge to the election of state trial court judges from multi-member districts, the federal district court noted that "racial polarization exists throughout the State of Mississippi . . . and that blacks overwhelmingly tend to vote for blacks and whites almost unanimously vote for whites in most black versus white elections."[13] This same pattern has been confirmed in a number of decisions throughout the state dealing with local redistricting.[14]

Likewise, in 2003, the DOJ interposed an objection to a proposed annexation in the Town of North, South Carolina. The DOJ determined that the town had "been racially selective in its response to both formal and informal annexation requests" and found that "white petitioners have no difficulty in annexing their property to the town" while "town officials provide little, if any, information or assistance to black petitioners and often fail to respond to their requests, whether formal or informal, with the result that the annexation efforts of black persons fail."[15] In the view of the DOJ the town's deliberate non-responsiveness to African Americans revealed that race was "an overriding factor in how the town responds to annexation requests."[16] More recently, in 2004, the DOJ interposed an objection to the state's proposed change to Charleston County School Board's method of election because the change from non-partisan to partisan

[11] 604 F. Supp. 807, 812-813 (N.D. Miss. 1984) (three-judge court), aff'd 469 U.S. 1002 (1984).
[12] 658 F. Supp. 1183 (S.D. Miss. 1987).
[13] *Id.* at 1194.
[14] *See, generally, Houston v. Lafayette County*, 20 F.Supp.2d 996 (N.D. Miss. 1998); *Teague v. Attala County*, 92 F.3d 283 (5th Cir. 1996), *cert. denied*, 522 U.S. 807 (1997); *Clark v. Calhoun County*, 88 F.3d 1393 (5th Cir. 1996); *Ewing v. Monroe County*, 740 F. Supp. 417 (N.D. Miss. 1990); *Gunn v. Chickasaw County*, 705 F. Supp. 315 (N.D. Miss. 1989); *Jordan v. City of Greenwood*, 599 F. Supp. 397 (N.D. Miss. 1984).
[15] Letter from R. Alexander Acosta, Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, to H. Bruce Buckheister, Mayor, North, SC (September 16, 2003)
[16] *Id.*

elections would "make it extremely difficult for minority-preferred candidates to win."[17] While the non-partisan election system was credited by a federal judge in *United States v. Charleston County* (D.S.C. 2003) for its creation of opportunities for single-shot voting and plurality victory by minority-preferred candidates, the proposed system imposed a *de facto* majority requirement, which, when combined with an at-large system, would likely result in the defeat of minority voters' candidates of choice. The DOJ also noted that this plan was proposed in the face of opposition from a majority of minority elected officials opposed and despite the availability of non-retrogressive alternative plans that had been made available.

Indeed, this evidence illustrates the persisting nature of voting discrimination in the covered jurisdictions and the ability of the Section 5 preclerance process to ferret out voting discrimination that often manifests itself in multiple forms. This evidence must also be viewed in the context of high levels of racial polarization[18] and other barriers that persist within the political process. For example, federal observers have been deployed to monitor elections in Mississippi no less than 250 times covering 48 of the state's 82 counties since the 1982 renewal. A number of these counties were covered on multiple occasions illustrating the intransigence and resistance of local officials in these areas. Moreover, courts have highlighted the steep levels of racially polarized voting in these covered jurisdictions making the role of the Section 5 preclearance process necessary to prevent impairment of minority voting strength.

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[17] Letter from R. Alexander Acosta, Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, to C. Havird Jones, Jr., Esq., Senior Assistant Attorney General (February 26, 2004).

[18] *See also United States v. Charleston County* and *Moultrie v. County Council*, 316 F.Supp.2d 268 (D.S.C. 2003)(suit challenging the at-large method of electing the nine member Charleston County Council under Section 2 of the Voting Rights Act. In particular, the court found evidence of white bloc voting and concluded that in 10 general election involving Black candidates, "white and minority voters were polarized 100% of the time."). *Id.* at 278.

II.

Policy Perspectives

***1. Why is Section 5 preclearance still necessary?***

The Section 5 coverage formula was put into place after Congress thoroughly reviewed the record before it in 1965, and subsequently renewed in 1970, 1975 and 1982. During each of these deliberations Congress documented widespread evidence of persistent violations of minority voting rights in covered jurisdictions. The record before this Congress presents continued evidence of such violations, and highlights the necessity for continued review of voting changes to protect minority voters in covered jurisdictions. For example, since the VRA's 1982 renewal, violations of minority voting rights have taken the form of last minute election date or polling place changes, discrimination at the polls, and familiar dilutive tactics of "cracking" and "packing" minority voting districts.[19] Additionally, as noted in the first part of my testimony, contemporary reports from the field illustrate that voting discrimination in covered jurisdictions is alive and well, and significantly continues to be checked by the prophylactic protection.

Section 5 preclearance also plays an important role in deterring covered jurisdictions from enacting discriminatory voting changes. Although many VRA opponents and

[19] *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).

commentators point to a recent reduction in DOJ objections as evidence of the decreasing need for Section 5 -- this analysis oversimplifies the many ways in which the law serves to protect minority voters. Excluded from the category of objection statistics are other categories of deterred and rejected voting changes. These include matters that were denied preclearance by the Washington D.C. District Court; matters that were settled while pending before that court; voting changes that were withdrawn, altered or abandoned after the DOJ made formal More Information Requests (MIRs)[20]; as well as any recognition that the very existence of preclearance deters discriminatory voting changes in the first place. Taken together, these categories provide a more holistic view of the sizeable impact, deterrent effect, and continued need for Section 5's provisions. Moreover, without the Section 5 preclearance provisions many jurisdictions that have experienced a long history of exclusionary practices in voting would have lacked the incentive to tailor their electoral changes in a non-discriminatory fashion. Even with Section 5 in place, many covered jurisdictions made voting changes that disadvantaged minority voters without preclearing them with the DOJ. Despite vigorous enforcement efforts, the DOJ -- with its limited resources -- is unable to ensure that jurisdictions have submitted every voting change for preclearance. Without Section 5, the DOJ's ability to monitor discrimination against minority voters would be severely handicapped, and the VRA's deterrent effect on covered jurisdictions would be lost. The hearings on the current House and Senate renewal bills – like those in previous decades – contain evidence that the burdens that would be placed upon voters to vindicate their rights in the absence of preclearance would be substantial.

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[20] *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 Jun 9, 2006) (assessing the deterrent effect of Section 5 through an examination of the issuance of MIRs by the DOJ).

Given an extensive and carefully assembled record of continued voter discrimination in covered jurisdictions, and the evidence that Section 5 has operated to correctly identify the jurisdictions where preclearance is most necessary given past and current patterns of voter discrimination, I believe that maintaining Section 5 preclearance is not only appropriate, but is critical to the continued success of the VRA.

***2. Does Congress still have the power to renew Section 5?***

Yes, in light of the strong, record of both historical and current voting discrimination before Congress, it continues to have the power to renew Section 5 of the VRA. Several factors support this conclusion. First, the VRA's renewal is consistent with recent Supreme Court precedent. The *Boerne* decision and its progeny, while requiring that Congress be deliberate in the exercise of its Fourteenth and Fifteenth Amendment enforcement powers, do not place a substantial limitation on Congressional power to enact remedial or prophylactic legislation in the area of race.[21] In fact, *Boerne* and the subsequent case law in this area suggest that Congressional power is at its height when it enacts remedial or prophylactic legislation to protect the fundamental rights of individuals in classes afforded heightened levels of constitutional scrutiny.[22] These are the precise circumstances at play here. Congress has before it an extensive record of both historical and current instances of voting discrimination that persuasively illustrates a measurable degree of progress but also the intractability of this problem in covered jurisdictions, necessitating continued Congressional protection of those jurisdictions. This record at issue here is distinguishable from the record under review in *Boerne*. Moreover,

[21] *See, e.g.* the post-*Boerne* cases *Nevada Dept. of Human Res. v. Hibbs,* 538 U.S. 721 (2003); *Tennessee v. Lane,* 541 U.S. 509 (2004) (suggesting that where Congress acts to remedy problems in areas traditionally subject to higher judicial scrutiny, the sweep of its power is greater).

[22] *See Hibbs,* 538 U.S. at 735, in which the Court upheld Congress's abrogation of state's sovereign immunity under the Family Medical Leave Act (FMLA) because the act was intended to prevent sex discrimination; and *Lane,* 541 U.S. at 529, in which 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.

*Boerne* and the cases that followed the Court cited the VRA as the exemplar of Congress's enforcement power under the Fourteenth and Fifteenth Amendments.

Additionally, the Court recently reaffirmed its support of Congressional action on the issue of minority voting rights in the 1999 case *Lopez v. Monterey County.*[23] In this post-*Boerne* decision, the court cited both *Katzenbach* and *City of Rome* favorably, and upheld the validity of preclearance in "jurisdictions properly designated for coverage."[24] The *Lopez* decision was decided just weeks after another Supreme Court case in which *Boerne* was invoked to invalidate a congressional enactment.[25] In light of this recent decision, there is nothing to suggest that Congress now lacks the authority to renew Section 5 of the VRA under the record before it.

Finally, this VRA renewal process does not stand alone. It is worth noting that a different constitutional moment occurs when Congress legislates under the Civil War Amendments *de novo,* as in *Boerne,* in contrast to when Congress is extending an existing piece of successful civil rights litigation. The Court has explicitly recognized that Congress acts as a continuing body when reviewing evidence, and that previous legislative findings and experience are properly part of the current record.[26] In light of the strong record currently before Congress, which is supported by the records from 1965, 1970, 1975, 1982 and 1992, it seems readily

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[23] *Lopez v. Monterey Cty.,* 525 U.S. 266, 285 (1999) (holding that "In short, the Voting Rights Act, by its nature, intrudes on state sovereignty. The Fifteenth Amendment permits this intrusion, however, and our holding today adds nothing of constitutional moment to the burden the Act imposes.").

[24] *Lopez v. Monterey County,* 525 U.S. 266 (1999).

[25] *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Bd.,* 527 U.S. 666 (1999)(distinguishing remedial and prophylactic voting legislation).

[26] *See Fullilove v. Klutznick,* 448 U.S. 448, 502-502 (1980), noting that:

> Congress has no responsibility to confine its vision to the facts and evidence adduced by particular parties. Instead, its special attributes 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.

apparent that Congress has satisfied its burden under the *Boerne* doctrine and has the power to renew Section 5.

***3. Do the benefits of preclearance outweigh the costs?***

Yes – Section 5 preclearance has led to widespread and well-documented benefits for minority voters with relatively low administrative or economic costs. From an economic and public policy standpoint, Section 5 is a cost-effective means to prevent discrimination. Every DOJ objection, or withdrawn, altered or abandoned voting change in response to a DOJ more information request (MIR), represents a potential lawsuit – and more importantly a deprivation of the right known to be "preservative" of all other. Blocking and deterring changes is undoubtedly better and more cost-effective than having to litigate them; Section 5 thus removes the need for private parties to spend their own and usually judicial resources to stop discriminatory changes.

Section 5 also plays an important educative function in covered jurisdictions. Through the MIR process, and as part of the submission process in general, there is extensive communication between the DOJ and the submitting jurisdiction. This communication thus facilitates public awareness and compliance with the law even short of the provisions affirmative deterrence effects.

The DOJ also applies the preclearance standard with a degree of flexibility that takes into account the nature of the electoral change being reviewed, and the time before the proposed change would take effect. For example, last minute polling place changes will be reviewed quickly before elections, whereas for more complex changes, the DOJ will be more likely to use its statutorily given 60-day review period. The DOJ's actions following Hurricanes Katrina and

Rita further illustrate the flexible nature of preclearance review. After the hurricanes, the DOJ immediately sent a letter to the Secretaries of State in Mississippi and Louisiana acknowledging that they would be ready to expedite voting changes.[27]

Although Section 5 does require jurisdictions to take steps to comply and carefully consider the impact of voting changes, many of the costs and inconvenience arguments are overstated. More significantly, the cases from *Katzenbach* forward the Supreme Court has recognized that the imposition of costs must be weighed against the gravity of the harm being prevented – viewed in this light, on the record before Congress, the balance falls on the side of Section 5 to continue to protect the fundamental right to vote.

***4. Is there a need to change the Section 4 coverage formula?***

The evidence in the record does not indicate that the existing Section 4 coverage formula, or "trigger," needs to be revised or updated. The evidence in the record indicates that the existing coverage formula has proven extremely effective in addressing voter discrimination in the jurisdictions where voters most need protection, and has allowed for tailored responses in both covered and non-covered jurisdictions, where circumstances warrant, through administration of the bail-in and bailout provisions.

With respect to the existing coverage formula, the unique history and deeply entrenched nature of voting discrimination in covered jurisdictions strongly support the use of prophylactic measures to protect minority voters in these particular areas. In several covered states, for over a century before the passage of the VRA – and in many states up until the 1980's or early 1990's – not a single black was elected to Congress. Local circumstances in many places were not much better. Section 5, through "triggering" covered jurisdictions, has thus performed the important

[27] *See e.g.* Letter from Bradley J. Schlozman to Honorable Al Ater, September 7th 2005 available at http://www.usdoj.gov/crt/voting/la_katrina.htm (visited on June 20, 2006).

function of protecting the rights of minority voters in the places they are most at risk, and in which they have the most to gain.

Additionally, as set out above, because the Supreme Court considers both the history and ongoing nature of discrimination when weighing Congress's legislative power to enforce the Fourteenth and Fifteenth amendments, the years 1964, 1968 and 1972, which are referred to in the current trigger formula, remain relevant to assessing the jurisdictions in which minority voters are most in need of protection.

It bears emphasis that the registration and turnout levels that, in combination with the history of tests or devices, determine coverage were not the only evil that the VRA sought to eradicate. Depressed registration and turnout was a symptom of a much larger problem of discrimination in voting and Congress and courts have both recognized that mandate of the VRA does not end there.[28] The registration and turnout data were used as a proxy for discrimination – a proxy that informed but did not exclusively determine the inquiry. As in 1982, Congress can appropriately look to the experience in covered jurisdictions to assess if preclearance is still effective in light of the dangers that continue to exist.

Moreover, the existing bailout and bail-in provisions – Sections 4(a) and 3(c) of the act – operate in tandem with the Section 5 Coverage formula to ensure that the scope of Section 5 is appropriately contracted or expanded.[29] To date, every jurisdiction that has tried to bail out has

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[28] *See e.g. Sumter County, S.C. v. U.S.*, 555 F. Supp. 694, 707 (D.D.C. 1983)( "Obviously, the preclearance requirements of the original act and its 1982 amendment had a much large purpose than to increase voter registration in a county like Sumter to more than 50 percent.").

[29] To "bail out" of coverage under the VRA under section 4(a)(1), a covered jurisdiction must demonstrate compliance with the VRA for a ten-year period immediately preceding the filing of a bailout action. This compliance requires that the jurisdiction took "positive steps," including: (i) eliminated voting procedures and methods of election which inhibit or dilute equal access to the electoral process; (ii) engaged in constructive efforts to eliminate intimidation and harassment of persons exercising rights protected under this act; and (iii) engaged in other constructive efforts, such as expanded opportunity for convenient registration and voting for every person of voting age and the appointment of minority persons as elected officials throughout the jurisdiction and at all stages of the voting process. Under section 3(c) of the act, a court may order an uncovered jurisdiction to submit its voting

been successful, and those jurisdictions have expressed satisfaction with both the existing bailout formulation as well as the results they have achieved.[30] Additionally, courts have imposed Section 5 preclearance on jurisdictions where violations of the voting rights of their minority citizens justify future oversight.[31]

There is no evidence in the record, of which I am aware, indicating that the existing bailout provisions are particularly onerous or difficult to administer. According to J. Gerald Hebert, who served as legal counsel to all of the jurisdictions who have bailed out since the 1982 amendments, the issue is not that the bailout provisions are difficult or that jurisdictions are applying and being denied, but simply that "jurisdictions are just not applying."[32] While this commentary perhaps suggests the need for increased awareness of the availability of bailout by covered jurisdictions, it does not suggest that the existing provisions are not working. Given this evidence, it stands to reason that the existing coverage formula and bailout provisions have provided, and will continue to provide, an important incentive for covered jurisdictions to comply with Section 5 as was intended at their enactment.

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changes in accordance with the requirements of Section 5 if appropriate judicial findings are made, usually with respect to Section 2 litigation.

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

[31] *See Jeffers v. Clinton*, 740 F. Supp. 585, 586 (E.D. Ark. 1990), *aff'd*, U.S. 1019 (1991) (where a court held "that the State of Arkansas has committed a number of constitutional violations of the voting rights of black citizens," and in particular had "systematically and deliberately enacted new majority-vote requirements for municipal offices, in an effort to frustrate black political success in elections traditionally requiring only a plurality to win," the court imposed the preclearance requirement on the state); *See also Sanchez v. Anaya*, Civ. No. 82-0067M (D.N.M. 1984) (three-judge panel authorizing preclearance of redistricting plans over a ten year period).

[32] Hebert testimony, supra note 30.

**5. Should Section 5 be extended nationwide?**

Proposals to extend Section 5 nationwide are designed to end the application of the statute for both legal and practical reasons. While applying Section 5 nationwide may seem attractive upon first blush, doing so would extend the VRA beyond the targeted jurisdictions that have an established history of discrimination and make it vulnerable to a constitutional challenge. The existing record does not support nationwide expansion to places where, among other things there are no minority voters. Indeed, no serious argument can be advanced that nationwide coverage of Section 5 would be "congruent and proportional" to address the harms it is designed to cure -- namely a history of significant discrimination against minority voters -- as required by the Supreme Court's recent precedents. Accordingly, it would be disingenuous for those who seek to conform to the contours of the *Boerne* decisions to support nationwide extension. Congress has appropriately focused on the history of discrimination that gave rise to the coverage formula, and the evidence of persisting forms of discrimination when evaluating which jurisdictions remain subject to the preclearance requirements.

On the practical side, nationwide application of Section 5 would be extremely difficult, if not impossible, for the DOJ to administer, given the volume of voting changes that would have to be reviewed. This expansion of coverage would dilute the DOJ's ability to appropriately focus their work on those jurisdictions where discrimination has been and continues to be a problem.

***6. Are the proposed modifications to the statute appropriate?***

The proposed modifications to the statute realign the standards for Section 5 with long-standing judicial interpretations of and Congressional intent regarding Section 5. First, the

proposed bill amends Section 5 of the Act to prohibit *all* unconstitutional discrimination with regards to the right to vote, not just discrimination that is also retrogressive. This modification responds to the holding of *Reno v. Bossier Parrish II (Bossier II),* which established a preclearance standard under which intentionally discriminatory voting changes (i.e. those motivated by racial animus) must be precleared where minority voters are not made worse off. This decision makes little sense, and ultimately allows for discrimination that not only violates the purpose of the VRA, but also is itself unconstitutional. The Fifteenth Amendment and the VRA each have, as one of their principal purposes, the eradication of historic and long-maintained voting discrimination. It is both unnecessary and inefficient for the federal government to turn a blind eye to purposefully discriminatory acts while covered jurisdictions persist in, renew, or develop invidious voting schemes. The modification to Section 5 will prevent this from occurring.

The proposed bill also restores the original "ability to elect" test for measuring minority voting strength. In *Georgia v. Ashcroft,* the Supreme Court abandoned this straightforward non-retrogression test in favor of a confusing, amorphous, and difficult to administer "influence" standard.[33] This new standard permits electoral changes where the DOJ can identify that proposed plans trade "influence district" for "ability to elect" districts [34] Although there may be situations where minority "influence" is measurable and important, in reality discerning such instances seems not only unrealistic, but administratively unworkable. For instance, in the absence of any clear metric for "influence," which was not provided by the Court in *Georgia v. Ashcroft,* it would be difficult to evaluate the tradeoffs that this case injected into the Section 5 analysis. Additionally, an influence trade-off theory could be used to cloak purposefully

[33] *Georgia v. Ashcroft,* 539 U.S. 461 (2003).
[34] *Id.* at 482 (the court defined 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.").

retrogressive or discriminatory acts from meaningful Section 5 review. The "ability to elect" standard proposed by the current bill has withstood the test of time, and proven workable both judicially and administratively as a means of protecting minority communities' ability to elect the candidates of their choice.

Finally, the proposed bill would amend Section 14 of the VRA to allow prevailing parties to recover reasonable litigation expenses in addition to attorney's fees. Given the complex nature of VRA litigation, litigants currently bear significant expense furnishing witnesses, experts and other trial necessities. The proposed amendment will assist the efforts of all parties seeking to enforce the provisions of the VRA, and prevent worthwhile cases from going untried due to lack of funds.

***7. Does the record suggest that renewal of the language assistance provisions is necessary?***

S 2703 also provides a straight reauthorization of Sections 4(f)(4) and 203 for twenty-five years, based upon a well-documented need for language assistance among language minority citizens whose access to the political process has been barred by discrimination in voting and education.

Congress plainly has the authority to remove barriers to political participation by language minority U.S. citizens. In *Katzenbach v. Morgan*, the United States Supreme Court upheld the language assistance provisions in Section 4(e) as a valid exercise of congressional enforcement powers under the Fourteenth and Fifteenth Amendments.[35] The Court reasoned that Congress may have "questioned whether denial of a right deemed so precious and fundamental in our society was a necessary or appropriate means of encouraging persons to learn English, or

[35] 384 U.S. 641, 650 (1966).

of furthering the goal of an intelligent exercise of the franchise."[36] *Katzenbach* is consistent with the Supreme Court's 1923 decision in *Meyer v. Nebraska*, which held that "the protection of the Constitution extends to all, to those who speak other languages as well as those born with English on the tongue."[37] As a result, Congress has broad remedial powers to reauthorize Sections 4(f)(4) and 203.

The record supports the exercise of those powers, as the bill recognizes in reaffirming the findings in Section 203(a).[38] The Judiciary Committee and this Subcommittee have received substantial evidence documenting discrimination in voting and education that supports maintaining the protections in Sections 4(f)(4) and 203 of the Voting Rights Act for the four covered language groups. [39] I will briefly summarize some of that evidence, first focusing on voting discrimination, and second turning to the lack of equal educational opportunities in the three states that became subject to the preclearance and minority language assistance provisions in 1975: Alaska, Arizona and Texas.

The need for language assistance in Alaska remains high, but is largely unmet.[40] There is substantial non-compliance with Section 203, including lack of oral language assistance, no voter

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[36] 384 U.S. at 658.

[37] 262 U.S. 390, 401 (1923).

[38] 42 U.S.C. § 1973aa-1a(a).

[39] For example, in Arizona, the Department of Justice has objected to four statewide redistricting plans since 1982 because of their discriminatory impact on language minority citizens, including one in the 1980s, two in the 1990s, and one in 2002. DR. JAMES THOMAS TUCKER & DR. RODOLFO ESPINO ET AL., VOTING RIGHTS IN ARIZONA 1982-2006, at 4, 17, 54, 56-57 (2006). In 1989 and 1994, the Department of Justice brought successful cases against the State of Arizona and Apache, Coconino, and Navajo Counties for denying American Indian voters access to the political process, which continued to be a problem as recently as 2002. *United States v. Arizona*, No. CIV.-94-1845, 1994 U.S. Dist. LEXIS 17606 (D. Ariz. 1994); *United States v. Arizona*, No. CIV-88-1989-PHX-EHC (D. Ariz. 1989) (consent decree amended Sept. 27, 1993).

[40] NATALIE LANDRETH & MOIRA SMITH, VOTING RIGHTS IN ALASKA 1982-2006, at 3, 8, 12, 23 (2006). For example, 80.5 percent of Alaska Native graduating seniors are not proficient in reading comprehension, they have failure rates on standardized tests that are more than 20 percent higher than non-Native students, and their graduation rates lag more than 15 percent behind the statewide average. *Ibid.* at 27-28.

outreach, and the absence of language assistance by telephone.[41] Voter turnout in these isolated Native communities trails statewide turnout by nearly seventeen percent.[42]

In Arizona, the Department of Justice has objected to four statewide redistricting plans since 1982 because of their discriminatory impact on language minority citizens, including one in the 1980s, two in the 1990s, and one in 2002.[43] Since 1982, more than 1200 federal observers have been deployed to Apache, Navajo, and Yuma Counties, identifying substantial non-compliance in the availability and quality of language assistance to American Indian and Latino voting-age citizens.[44] In 1989 and 1994, the Department of Justice brought successful cases against the State of Arizona and Apache, Coconino, and Navajo Counties for denying American Indian voters access to the political process, which continued to be a problem as recently as 2002.[45] Indeed, just last week the DOJ brought a Section 203 case in Cochise County, Arizona where a consent decree is currently before the court.

The record also contains evidence about the importance of the language assistance provisions and oversight under Section 5 in Texas, where 22.4 percent of voting age citizens are Latino and 12.3 percent are African-American.[46] Since 1982, Texas has the second highest number of Section 5 objections interposed by the DOJ, including at least 107 objections, 10 of which were for statewide voting changes.[47] A majority of all Section 5 objections to

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[41] *Ibid.* at 32-36.

[42] *Ibid.* at 25.

[43] DR. JAMES THOMAS TUCKER & DR. RODOLFO ESPINO ET AL., VOTING RIGHTS IN ARIZONA 1982-2006, at 4, 17, 54, 56-57 (2006).

[44] *Ibid.* at 5, 17, 50-54.

[45] *United States v. Arizona*, No. CIV.-94-1845, 1994 U.S. Dist. LEXIS 17606 (D. Ariz. 1994); *United States v. Arizona*, No. CIV-88-1989-PHX-EHC (D. Ariz. 1989) (consent decree amended Sept. 27, 1993).

[46] Census 2000, STF-3 and STF-4 data.

[47] NINA PERALES, LUIS FIGUEROA & CRISELDA RIVAS, THE MINORITY VOTING EXPERIENCE IN TEXAS SINCE 1982: DEMONSTRATING THE IMPORTANCE OF REAUTHORIZATION OF THE VOTING RIGHTS ACT 3, 15-16 (2006).

discriminatory voting changes in Texas have been since 1982, which have affected nearly 30 percent of Texas's 254 counties, where 71.8 percent of the State's non-white voting age population resides.[48] Texas also leads the nation in several categories of voting discrimination, including recent Section 5 violations and Section 2 challenges.[49] For example, in 2004, Waller County was stopped from disenfranchising African American students at Prairie View A&M who were trying to vote for two African American students running for County office. In 2002, Section 5 prevented the City of Seguin from dismantling a Latino city council district and then from canceling the candidate-filing period to prevent Latino candidates from running in the district and winning a majority of seats. In 2002, DOJ used Section 5 to prevent the City of Freeport from restoring at-large elections that had been eliminated after a successful voting rights lawsuit brought by Latino and African American voters who comprised a majority of the City's population.

The need for language assistance in jurisdictions across the nation is extreme in many places. [50] Among all covered jurisdictions, an average of 13.1 percent of citizens of voting age are limited-English proficient (LEP) in the languages triggering coverage.[51] These LEP U.S. voting age citizens also experience high illiteracy rates. According to the 2000 Census, covered

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[48] *Ibid.* at 3, 15.

[49] *Ibid.*

[50] For example, the need for language assistance in Alaska remains high, but is largely unmet. The Full Committee heard testimony from Natalie Landreth that residents of nearly 200 Native villages accessible only by plane live in abject poverty, have high unemployment rates, the lowest levels of education, and a high level of limited-English proficiency that impair their ability to participate in elections. For example, 80.5 percent of Alaska Native graduating seniors are not proficient in reading comprehension, they have failure rates on standardized tests that are more than 20 percent higher than non-Native students, and their graduation rates lag more than 15 percent behind the statewide average. There is substantial non-compliance with Section 203, including lack of oral language assistance, no voter outreach, and the absence of language assistance by telephone. NATALIE LANDRETH & MOIRA SMITH, VOTING RIGHTS IN ALASKA 1982-2006 (2006).

[51] DR. JAMES THOMAS TUCKER & RODOLFO ESPINO, MINORITY LANGUAGE ASSISTANCE PRACTICES IN PUBLIC ELECTIONS EXECUTIVE SUMMARY 21 (Mar. 2006) (summarizing July 2002 Census determinations for Section 203 coverage).

language minority citizens have an average illiteracy rate of 18.8 percent, nearly fourteen times the national rate.[52]

High LEP and illiteracy rates are the product of past and present educational discrimination. Since 1975, at least twenty-four successful educational discrimination cases have been brought on behalf of ELL students in fifteen states, fourteen of which are presently covered in whole or in part by the language assistance provisions.[53] Cases brought on behalf of ELL students remain pending in Alaska, Illinois, and Texas.[54] Consent decrees or court orders remain in effect for ELL students statewide in Arizona and Florida, and in the cities of Boston, Denver, and Seattle, each of which is covered by the language assistance provisions.[55]

Educational discrimination is compounded by the absence of sufficient adult ESL programs in most of the covered jurisdictions. A majority of surveyed ESL providers in sixteen states covered by Section 203 reported that they have lengthy waiting lists, many ranging from one to three years.[56]

Unequal educational opportunities afforded to covered language minority groups continue to result "in high illiteracy and low voting participation."[57] The barriers posed by educational discrimination, language and the absence of sufficient ESL classes, and high illiteracy result in extremely depressed voter participation. According to the Census Bureau, in the November 2004 Presidential Election, Hispanic voting-age U.S. citizens had a registration

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[52] *Ibid.*

[53] DR. JAMES THOMAS TUCKER, UNEQUAL EDUCATIONAL OPPORTUNITIES FOR ENGLISH LANGUAGE LEARNERS IN SECTION 203 COVERED JURISDICTIONS (June 2006).

[54] *Ibid.*

[55] *Ibid.*

[56] DR. JAMES THOMAS TUCKER, WAITING TIMES FOR ADULT ESL CLASSES AND THE IMPACT ON ENGLISH LEARNERS 3, 18 (June 2006).

[57] 42 U.S.C. § 1973aa-1a(a).

rate of 57.9 percent and Asian voting-age U.S. citizens had a registration rate of only 52.5 percent, compared to 75.1 percent of all non-Hispanic white voting-age U.S. citizens.[58] Therefore, Sections 4(f)(4) and 203 should be renewed, as provided by S. 2703.

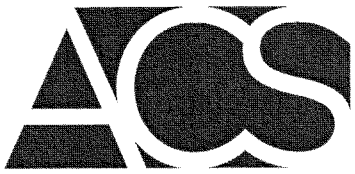
***8. Do the expiring provisions serve to enhance political inclusion of race and language minorities, or further balkanize society?***

The expiring language assistance and Section 5 preclearance provisions, while taking race and language proficiency into account, are fundamentally aimed at including all citizens in the electoral process and ensuring that their votes will carry weight equal to that of all other citizens. Promoting minority citizens' right to exercise their right to vote is fundamental to including them in the American political system, and these provisions take these factors into account in order to protect voters from discrimination on the basis of race or language minority status. Given that racially polarized voting remains intense in many parts of covered jurisdictions, the VRA, as amended, was designed to both give minority voters a voice in the political process and provide the opportunity for minority candidates to hold office. The VRA's success in providing African American, Latino, Native American and Asian Americans a voice in the democratic process after substantial exclusion results in an inclusive political system, not an exclusive one. Even opponents of the VRA point to increases in minority representation as evidence of progress. Although nobody asserts that the provisions will be necessary in perpetuity, the record indicates that gains have been recent, attributable, in part, to the VRA, and that they are susceptible to being lost.

[58] U.S. CENSUS BUREAU, Table 4a, Reported Voting and Registration of the Total Voting-Age Population by Sex, Race and Hispanic Origin: November 2004. Unfortunately, the Census Bureau does not report the registration and turnout data for American Indian or Alaska Native voters. What is known is that American Indian and Alaska Native voter registration and turnout is still below non- American Indian and Alaska Native averages in many parts of the country. For example, voter turnout in these isolated Native communities trails statewide turnout by nearly seventeen percent. NATALIE LANDRETH & MOIRA SMITH, VOTING RIGHTS IN ALASKA 1982-2006 (2006).

Nothing about the expiring provisions serves to "balkanize" society or, encourages "racial gerrymandering." Residential racial segregation in the U.S. has a long history, and remains a reality today. Consequently, the preference for single-member districts will lead to many districts with high concentrations of geographically compact minority voters. The Supreme Court has limited the extent to which race can drive line-drawing after *Shaw v. Reno,* which ensures that there is no real prospect that any alleged distortions will occur in the future. It seems odd to assert that the bill that has done so much to move us away from exclusion would now implausibly be blamed for leading to it.

Furthermore, for language minorities, the expiring provisions certainly enhance political inclusion. English-only voting materials bar non-English speaking citizens from voting by effectively imposing a literacy test as a condition of exercising the franchise. In response, the expiring language access provisions allow non-proficient citizens to exercise their fundamental right to vote. Rather than excluding non-proficient citizens from voting, and thus from the political system, the language access provisions promote the inclusion of all citizens -- many of whom are the victims of voting discrimination and unequal educational opportunities. The right to vote outweighs the state interest in encouraging individuals to learn English, which can be accomplished in other, less burdensome ways.




# Congressional Power to Extend Preclearance Under the Voting Rights Act

**By Pamela S. Karlan**

**June 2006**

# CONGRESSIONAL POWER TO EXTEND PRECLEARANCE UNDER THE VOTING RIGHTS ACT

*Pamela S. Karlan*[*]

At the signing ceremony for the Voting Rights Act of 1965, President Lyndon B. Johnson called the Act "one of the most monumental laws in the entire history of American freedom."[1] The Act is rightly celebrated as the cornerstone of the Second Reconstruction. That we needed a *Second* Reconstruction is an important fact about American history: the *First* Reconstruction, which at one point saw levels of voter turnout among black men and black electoral success that would be the envy of any state today[2] ended with cynical political compromises, concerted vote suppression, and judicial indifference.[3] It took the Civil Rights Movement of the 1950's and 1960's to resuscitate the fourteenth and fifteenth amendments' promise of political integration.

That promise still has not been fully redeemed. Certainly, we have not yet attained universal adult citizen suffrage. Over 1.4 million black citizens are disenfranchised today by offender disenfranchisement statutes that, like our continued embrace of the death penalty, distinguish the United States from every other advanced democracy.[4] Many states have recently adopted restrictive voter I.D. requirements that threaten to become a new form of poll tax.[5] Language barriers still prevent many citizens from effectively casting their ballots.[6] And in many parts of the country, minority voters either remain unable to elect the candidates of their choice or are able to do so only

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[*] Kenneth and Harle Montgomery Professor of Public Interest Law, Stanford Law School; Co-Director, Stanford Supreme Court Litigation Clinic.

[1] David J. Garrow, Protest at Selma: Martin Luther King, Jr., and the Voting Rights Act of 1965, at 132 (1978).

[2] See J. Morgan Kousser, The Shaping of Southern Politics, Suffrage Restrictions and the Establishment of the One-Party South, 1880-1910 (1974) (black turnout); J. Morgan Kousser, Colorblind Injustice: Minority Voting Rights and the Undoing of the Second Reconstruction 19 (1999) (black electoral success).

[3] See Pamela S. Karlan, Loss and Redemption: Voting Rights at the Turn of a Century, 50 Vand. L. Rev. 291 (1997); see also Kousser, Colorblind Injustice, supra note 2, at 12-53.

[4] See Pamela S. Karlan, Convictions and Doubts: Retribution, Representation, and the Debate Over Felon Disenfranchisement, 56 Stan. L. Rev. 1147 (2004).

[5] See Common Cause/Georgia v. Billups, 406 F. Supp.2d 1326, 1361-66 & 1367-70 (N.D. Ga. 2005) (issuing a preliminary injunction against Georgia's new photo ID law as an undue burden on the fundamental right to vote in violation of the fourteenth amendment and as an unconstitutional poll tax in violation of the twenty-fourth amendment). For more extensive discussion of voter I.D. requirements, see Daniel P. Tokaji, The New Vote Denial: Where Election Reform Meets the Voting Rights Act, 57 S. Car. L. Rev. 689, 711-12 (2006). Professor Tokaji has also posted a number of valuable discussions of voter I.D. requirements and litigation on his blog, Equal Vote, including a chart listing current litigation: http://moritzlaw.osu.edu/electionlaw/litigation/index.php.

[6] See Glenn D. Magpantay, Asian American Access to the Vote: The Language Assistance Provisions (Section 203) of the Voting Rights Act and Beyond, 11 Asian L.J. 31 (2004); see also Ana Henderson, English Language Naturalization Requirements and the Bilingual Assistance Provisions of the Voting Rights Act (2006) (showing that the levels of English literacy necessary to pass naturalization tests, or possessed by many native-born citizens, are far below the level necessary to fully understand election materials) (on file with the author) .

from deliberately constructed majority-minority districts.[7]

One of the Act's most targeted remedies – the preclearance regime of sections 4 and 5,[8] which requires certain jurisdictions to satisfy federal authorities that proposed changes in their election laws have neither a discriminatory purpose nor a discriminatory effect before implementing them – is set to expire in 2007.[9] Congress is now considering proposals to extend the preclearance regime for another twenty-five years and to amend the standard for preclearance in response to recent Supreme Court decisions. The level of bipartisan support within both the House and the Senate makes it almost certain that the Act will be renewed in some form. The question thus arises: does Congress retain the power to impose this "complex scheme of stringent remedies"[10] or has the world changed?

In this position paper, I address one aspect of the question: have recent changes in legal doctrine undercut congressional authority? This question has occasioned a fair amount of recent commentary, much of it focused on the implications of the Rehnquist Court's "new federalism."[11] I suggest, to borrow from Tennyson's Ulysses, that while much is taken, much abides: the preclearance regime continues to satisfy the Supreme Court's construction of congressional enforcement powers under the Reconstruction Amendments. And I go further, to suggest that the Court's decisions under the elections clause of Article I, § 4 and under the equal protection clause with respect to political gerrymanders reinforce the Act's constitutionality.

## I. FROM "STRONG MEDICINE" TO WATERED *BEER*: THE EVOLUTION OF THE PRECLEARANCE REGIME

The provisions of the original Voting Rights Act were "strong medicine."[12] Despite an earlier

[7] See, e.g., Testimony of Fred Gray Before the Sen. Judiciary Comm. (May 17,2006)(available at http://judiciary.senate.gov/testimony.cfm?id=1894&wit_id=5358) (noting that in Alabama all but one of the 35 black state legislators was elected from a majority African-American district, and the remaining legislator was elected from a district that was 48% black).

[8] 42 U.S.C. §§ 1973b, 1973c.

[9] The bilingual ballot provisions of section 203, which require certain jurisdictions to provide voting materials in languages other than English, are also set to expire in 2007. See 42 U.S.C. § 1973aa-1a.

[10] South Carolina v. Katzenbach, 383 U.S. 301, 315 (1966).

[11] See, e.g., Richard L. Hasen, Congressional Power to Renew the Preclearance Provisions of the Voting Rights Act After *Tennessee v. Lane*, 66 Ohio St. L.J. 177 (2005); Ellen D. Katz, Reinforcing Representation: Congressional Power to Enforce the Fourteenth and Fifteenth Amendments in the Rehnquist and Waite Courts, 101 Mich. L. Rev. 2341, 2361-74 (2003); Richard H. Pildes, The Future of Voting Rights Policy: From Anti-Discrimination to the Right to Vote 20 (May 2006) (NYU Law School, Public Law Research Paper No. 06-10, available at http://ssrn.com/abstract=900161); Victor Andres Rodriguez, Comment, Section 5 of the Voting Rights Act of 1965 After Boerne: The Beginning of the End of Preclearance?, 91 Cal. L. Rev. 769 (2003); Paul Winke, Why the Preclearance and Bailout Provisions of the Voting Rights Act Are Still a Constitutionally Proportional Remedy, 28 N.Y.U. Rev. L. & Soc. Change 69 (2003). See also Pamela S. Karlan; Two Section Twos and Two Section Fives: Voting Rights and Remedies After *Flores*, 39 Wm. & Mary L. Rev. 725 (1998).

[12] Voting Rights Act: Hearings on H.R. 6400 Before Subcomm. No. 5 of the House Comm. on the Judiciary, 89th Cong. 110 (1965) (statement of Representative Chelf).

Supreme Court ruling that had upheld the constitutionality of literacy tests,[13] section 4 immediately suspended such tests in various jurisdictions with a history of depressed political participation[14] – a suspension that was made nationwide and permanent by subsequent amendments to the Act.[15] Sections 6, 7, and 8 authorized the appointment of federal registrars and examiners to make sure that minority citizens' names were placed on the voting rolls and that they were able actually to cast ballots.[16] Most importantly, section 5 "shift[ed] the advantage of time and inertia from the perpetrators of the evil to its victims,"[17] providing that jurisdictions covered by section 4 could make no changes to their election laws without first obtaining federal approval through what came to be known as the "preclearance" process.[18] To obtain preclearance a covered jurisdiction bore the burden of proving that its proposed change would have neither a discriminatory purpose nor a discriminatory effect.

The preclearance regime was enacted originally for a five-year period, but Congress has thrice extended and expanded its scope. In 1970, the Act was amended to continue the regime for an additional five years while bringing several additional jurisdictions (including three boroughs of New York City) within its strictures.[19] In 1975, the regime was extended for an additional seven years and Congress changed the triggering formula in section 4 to include the use of English-only election materials in jurisdictions with substantial numbers of voting-age citizens who were members of a language minority,[20] thereby covering a number of additional jurisdictions, including Texas, Arizona, Alaska, and several counties in Florida, California, and South Dakota. And in 1982, Congress extended the preclearance regime for another twenty-five years while also creating a more detailed "bailout" process that released covered jurisdictions if they could show compliance with the Act's requirements, the elimination of procedures that inhibited or diluted equal access, and "constructive efforts" to expand opportunities for political participation.[21]

Section 5 has been critical to the Act's success with respect to both first- and second-generation issues.[22] With respect to first-generation issues involving the right to register and to vote, section 5

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[13] Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45 (1959).

[14] See 42 U.S.C. § 1973b(a)(1).

[15] See Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, tit. 1, § 102, 89 Stat. 400 (codified as amended at 42 U.S.C. § 1973aa(b) (2000)).

[16] 42 U.S.C. §§ 1973d, 1973e, 1973f.

[17] South Carolina v. Katzenbach, 383 U.S. 301, 328 (1966).

[18] Covered jurisdictions can obtain preclearance either through an administrative process within the Department of Justice or by obtaining a declaratory judgment from a three-judge district court in the District of Columbia. See 42 U.S.C. § 1973c. For extensive discussions of the preclearance process, see, e.g., Howard Ball, Dale Krane & Thomas Lauth, Compromised Compliance: Implementation of the 1965 Voting Rights Act (1982); Michael J. Pitts, Section 5 of the Voting Rights Act: A Once and Future Remedy?, 81 Denver U.L. Rev. 25 (2003).

[19] The list of covered jurisdictions is contained in the appendix to 28 C.F.R. Part 51.

[20] See 42 U.S.C. § 1973b(f)(3).

[21] 42 U.S.C. § 1973b(a)(1)(F).

[22] For discussions of this taxonomy, see, e.g., Lani Guinier, The Triumph of Tokenism: The Voting Rights Act and the

has been used to block a variety of restrictive changes, such as voter I.D. requirements, voter purges and reregistration requirements, and changes in polling places that render them less accessible to minority voters.[23] And the prospect of precipitating a section 5 objection letter from the Department of Justice or of failing to obtain a declaratory judgment from a three-judge federal district court has undoubtedly deterred many jurisdictions from even adopting discriminatory changes in the first place.[24] With respect to second-generation issues involving the dilution of minority voting strength, section 5 has blocked and deterred practices such as discriminatory annexations and adoptions of at-large elections. At roughly the same time that Congress was adopting section 5, the Supreme Court was imposing an one-person, one-vote requirement on virtually all elections conducted from districts.[25] The result of one-person, one-vote is to require decennial readjustment of district lines to account for population changes revealed by the Census. Thus, the Constitution requires covered jurisdictions to implement changes every ten years in their congressional, state legislative, county commission, city council, and school board districts; section 5 prevents them from implementing those changes unless the jurisdictions can show neither a discriminatory purpose nor a discriminatory effect. The fortuitous, and fortunate, intersection of one-person, one-vote and section 5 has had a major impact in forcing covered jurisdictions to adopt apportionment plans that provide minority voters with opportunities to elect candidates of their choice.[26]

Section 5's force has been somewhat blunted over the years by four Supreme Court decisions, two of which – *Reno v. Bossier Parish School Board ("Bossier II")*[27] and *Georgia v. Ashcroft*[28] – are the subject of proposed amendments to section 5. Thirty years ago, in *Beer v. United States*,[29] the

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Theory of Black Electoral Success, 89 Mich L Rev. 1077, 1093 (1991); Samuel Issacharoff, Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence, 90 Mich. L Rev 1833, 1838-39 (1992). I have used a slightly different terminology to refer to three nested sets of voting-related interests: participation (which concerns the entitlement to cast a ballot and have that ballot counted); aggregation (which concerns rules for tallying votes to determine election winners, including such practices as apportionment); and governance (which involves the ability to achieve one's policy preferences enacted within the process of representative decisionmaking). See Pamela S. Karlan, The Rights to Vote: Some Pessimism About Formalism, 71 Tex. L. Rev. 1705 (1993).

[23] For discussions of section 5 objection letters, see, e.g., Ball, *supra* note 18; Laughlin McDonald and Daniel Levitas, The Case for Extending and Amending the Voting Rights Act. Voting Rights Litigation, 1982-2006: A Report of the Voting Rights Project of the American Civil Liberties Union 8-, http://www.votingrights.org (March 2006); Hiroshi Motomura, Preclearance Under Section 5 of the Voting Rights Act, 61 N.C.L. Rev. 189 (1983); 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, 84 Neb. L. Rev. 605 (2005).

[24] For more discussion of the Act's deterrent function, see *infra* text accompanying notes 96-102.

[25] See Wesberry v Sanders, 376 U.S. 1 (1964) (congressional districts); Reynolds v. Sims, 377 U.S. 533 (1964) (state legislatures); Avery v. Midland County, 390 U.S. 474 (1968) (local elected bodies).

[26] For an empirical examination, see Chandler Davidson and Bernard Grofman, Quiet Revolution in the South: The Impact of the Voting Rights Act, 1965-1990, at 381 (1994) (stating that the creation of majority-black legislative districts in covered jurisdictions was "largely the result of Justice Department preclearance denial or southern legislators' expectations of it").

[27] 528 U.S. 320 (2000).

[28] 539 U.S. 461 (2003).

[29] 425 U.S. 130 (1976).

Court limited what counts as a "discriminatory effect" for purposes of triggering a section 5 objection. The Court held that section 5 was designed "to insure that no voting-procedure changes would be made that would lead to a *retrogression* in the position of racial minorities with respect to their effective exercise of the electoral franchise."[30] Thus, in considering a proposed change, the section 5 authority asks the question "whether the ability of minority groups to participate in the political process and to elect their choices to office is *augmented, diminished, or not affected* by the [proposed] change."[31] As long as minority voters will not be left worse off after the change, the jurisdiction is entitled to preclearance. Put somewhat differently, changes that merely perpetuate a pre-existing level of exclusion – even one that would violate section 2 of the Voting Rights Act[32] because it results in minority voters having "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice"[33] – are not objectionable for having a discriminatory effect.

For many years, the Department of Justice nonetheless objected to many such changes, declaring itself unable to conclude that jurisdictions proposing changes that perpetuated the exclusion of minority citizens had met their burden under section 5 of showing that such changes lacked a discriminatory purpose. But in *Bossier II*, the Supreme Court constricted the meaning of "discriminatory purpose," holding that section 5 does not prohibit adoption of changes enacted with a discriminatory but nonretrogressive purpose.[34] Thus, the Department of Justice or the three-judge court must preclear even plans that violate the fourteenth or fifteenth amendments as long as those plans simply intentionally perpetuate (or deliberately fail to fully ameliorate) the existing denial or dilution of minority voting rights. Such plans are, of course, vulnerable to attack under both the Constitution and section 2 of the Voting Rights Act, but the burdens of litigation and persuasion rest on the excluded citizens, rather than the jurisdiction.

For thirty years, the retrogression standard was applied in redistricting cases by asking whether the minority community's ability to elect candidates of its choice would be diminished by the proposed change. In *Georgia v. Ashcroft*, however, the Court switched gears, declaring that "a court should not focus solely on the comparative ability of a minority group to elect a candidate of its choice" in deciding whether a plan was retrogressive.[35] Rather, the Court held that section 5 "gives States the flexibility to choose" among "theor[ies] of effective representation"[36]: a state might choose in one redistricting cycle to "create a certain number of 'safe' districts, in which it is highly likely that minority voters will be able to elect the candidate of their choice," and then decide in a subsequent cycle to "create a greater number of districts in which it is likely – although perhaps not

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[30] Id. at 141.

[31] Id. (quoting H.R. Rep. No. 94-196, at 60 (1975) (emphasis in *Beer*)).

[32] 42 U.S.C. § 1973.

[33] 42 U.S.C. § 1973(b).

[34] See 528 U.S. at 336.

[35] 539 U.S. at 480.

[36] Id. at 482.

quite as likely as under the benchmark plan – that minority voters will be able to elect candidates of their choice,"[37] thereby giving minority voters less "descriptive representation" while presumably according them more "substantive representation."[38]

In looking at the question of substantive representation, the Court identified an additional metric for assessing the minority group's ability to participate in the political process. Section 5 review might "examine the comparative position of legislative leadership, influence, and power for representatives of the benchmark majority-minority districts" under the old and new plans:

> [I]n a representative democracy, the very purpose of voting is to delegate to chosen representatives the power to make and pass laws. The ability to exert more control over that process is at the core of exercising political power. A lawmaker with more legislative influence has more potential to set the agenda, to participate in closed-door meetings, to negotiate from a stronger position, and to shake hands on a deal. Maintaining or increasing legislative positions of power for minority voters' representatives of choice, while not dispositive by itself, can show the lack of retrogressive effect under § 5.[39]

Thus, because the plan under review in Georgia was designed to maintain Democratic control over the state senate and because the representatives elected by Georgia's black voters were all Democrats, a plan that reduced somewhat black voters' ability to elect their candidates of choice might satisfy section 5 if it bolstered the Democrats' chance of retaining legislative control.[40] This focus on minority group members' prospects within the process of representative decisionmaking stood in some tension with the Court's earlier decision in *Presley v. Etowah County Commission*.[41] There, the Court had held that "[c]hanges which affect only the distribution of power among officials are not subject to section 5 because such changes have no direct relation to, or impact on, voting."[42] Thus, *Georgia v. Ashcroft* seems to create an anomalous world in which changes that augment or preserve the political power of representatives elected from minority communities can be used to justify granting preclearance while changes that diminish that power cannot justify an objection.[43]

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[37] Id. at 480.

[38] Id. at 481 (citing Hanna Pitkin, The Concept of Representation 60-91 (1967)).

[39] Id. at 483-84.

[40] I analyze and criticize this reasoning in Pamela S. Karlan, *Georgia v. Ashcroft* and the Retrogression of Retrogression, 3 Election L.J. 21 (2004).

[41] 502 U.S. 491 (1992).

[42] Id. at 506.

[43] This anomaly is reflected in the history of the recent mid-decade Texas congressional re-redistricting. See Section 5 Recommendation Memorandum at 28-29, 62-63, 72 (Dec. 5, 2003) (available at http://moritzlaw.osu.edu/blogs/tokaji/2005/12/more-concern-about-justice.html, by clicking through on the link "another leaked memo"); cf. Recent Case: Election Law – Voting Rights Act – District Court Holds That Section 2 Vote Dilution Claim Does Not Extend to the Protection of Influence Districts, 117 Harv. L. Rev. 2433 (2004) (describing the tension between *Georgia v. Ashcroft's* analysis under section 5 and the district court's failure to find a section 2 violation in the Texas re-redistricting, which eliminated several "influence districts").

## II. FROM SECTION 5 TO ARTICLE I AND BACK AGAIN: SOURCES OF CONGRESSIONAL POWER TO PROTECT VOTING RIGHTS

Each time that Congress has taken up the Voting Rights Act of 1965, it has relied on its powers under the enforcement clauses of the Fourteenth and Fifteenth Amendments.[44] Those amendments recognized a special role for Congress, as opposed to the courts, in protecting individual rights. As then-Professor Michael McConnell has explained:

> Section Five of the Fourteenth Amendment was born of the fear that the judiciary would frustrate Reconstruction by a narrow interpretation of congressional power. . . . As Republican Senator Oliver Morton explained: "the remedy for the violation of the fourteenth and fifteenth amendments was expressly not left to the courts. The remedy was legislative, because in each the amendment itself provided that it shall be enforced by legislation on the part of Congress."[45]

The Supreme Court has continued to recognize that special role when it comes to the protection of fundamental rights and traditionally excluded groups. In *City of Boerne v. Flores*, the Court observed that a distinction exists between "measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law."[46] And it recognized that "Congress must have wide latitude" with respect to measures that fall in the first – remedial *or* prophylactic – category.[47] In particular, the Court pointed to the Voting Rights Act of 1965 as an exemplar of appropriate legislation under the Fourteenth Amendment, even though some provisions clearly "prohibit[ed] conduct which [was] not itself unconstitutional and intrude[d] into 'legislative spheres of autonomy previously reserved to the States.'"[48]

So why have so many commentators suggested that the Rehnquist Court's new federalism decisions cast doubt on Congress's power to extend the Voting Rights Act? In part, their hesitation may reflect *Boerne*'s citation of only pre-1982 Voting Rights Act cases[49]: the Court's opinion might

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[44] In 1965, Congress relied expressly on its power under section 5 of the Fourteenth Amendment (as opposed to under section 2 of the Fifteenth Amendment) only with respect to the suspension of literacy tests with respect to the voting eligibility of citizens educated in U.S.-flag schools where the language of instruction was not English. See 42 U.S.C. § 1973b(e). The remainder of the Act relied on its power under section 2 of the Fifteenth Amendment. In later years, however, Congress has made clear that it is relying on its "fourteen-5" enforcement powers with respect to the entire Act.

[45] Michael McConnell, Institutions and Interpretation: A Critique of *City of Boerne v. Flores*, 111 Harv. L. Rev. 153, 182 (1997) (quoting Cong. Globe, 42d Cong., 2d Sess. 525 (1872)).

[46] 521 U.S. 507, 519 (1997).

[47] Id. at 519-20.

[48] Id. at 518 (quoting Fitzpatrick v. Bitzer, 427 U.S. 445, 455 (1976)).

[49] The Court cited South Carolina v. Katzenbach, 383 U.S. 301 (1966) (upholding the suspension of literacy tests in covered jurisdictions, the appointment of federal registrars and examiners, and the imposition of a 5-year preclearance requirement); Katzenbach v. Morgan, 384 U.S. 641 (1966) (upholding the suspension of literacy tests for voters who were educated in American-flag schools where the language of instruction was not English); Oregon v. Mitchell, 400 U.S. 112 (1970) (upholding a 5-year nationwide ban on literacy tests and similar voting requirements for registering to vote);

be taken to deliberately avoid passing on the question whether the 1982 extension of the preclearance regime satisfied the congruence and proportionality requirements *Boerne* articulates.

But skepticism about congressional enforcement power under *Boerne* more likely rests not on *Boerne* itself, but on a parallel line of cases involving one particular exercise of congressional enforcement power. The Term before *Boerne*, in *Seminole Tribe of Florida v. Florida*,[50] the Supreme Court held that Congress cannot use its Article I powers (such as the commerce power) to abrogate the Eleventh Amendment sovereign immunity states enjoy against lawsuits by private citizens.[51] In the decade since *Seminole Tribe* and *Boerne*, the Supreme Court has frequently revisited the question of congressional power, and although it may be somewhat premature, even now, to say that the dust has settled completely, the following principles articulated in the decided cases may be helpful in understanding the scope of Congress's power to amend and extend the Voting Rights Act.

First, the Court has drawn a sharp distinction between the scope of Congress's *regulatory* power, to which it continues to give broad effect, and Congress's *remedial* arsenal, which *Seminole Tribe* and its progeny have narrowed. In cases such as *Alden v. Maine*,[52] *Kimel v. Florida Bd. of Regents*[53] and *Board of Trustees v. Garrett*,[54] the Court expressly noted that Congress *could* bind the state officials and agencies involved and require them to follow federal law. What it could *not* do was enforce those constraints by authorizing private damages actions. The *Alden* Court explicitly compared private damages lawsuits, which it held foreclosed by the eleventh amendment, to lawsuits brought by the United States to enforce individuals' rights, noting that "[s]uits brought by the United States itself require the exercise of political responsibility," which brings them within the "plan of the [Constitutional] Convention" and "subsequent constitutional amendments" regarding the relationship between the federal and state governments.[55]

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City of Rome v. United States, 446 U.S. 156 (1980) (upholding a 7-year extension of the preclearance regime enacted in 1975 and the refusal to preclear changes that have a discriminatory effect, regardless of their purpose). It notably did *not* cite decisions such as Morse v. Republican Party of Virginia, 517 U.S. 186 (1995), Clark v. Roemer, 500 U.S. 646 (1991), City of Pleasant Grove v. United States, 479 U.S. 462 (1987), and NAACP v. Hampton County Election Comm'n, 470 U.S. 166 (1984), that had broadly construed section 5 as it had been extended in 1982.

[50] 517 U.S. 44 (1996).

[51] There is a voluminous academic criticism regarding the Court's reliance on the eleventh amendment to preclude suits based not on diversity of citizenship but rather on the presence of a federal question, and at virtually every point over the last forty years, the Court has been divided on this question 5-4 despite a nearly complete turnover in its membership.

[52] 527 U.S. 706 (1999) (holding that the eleventh amendment bars suits for violations of federal law against unconsenting states even in state court).

[53] 528 U.S. 62 (2000) (holding invalid Congress' abrogation of sovereign immunity for claims under the Age Discrimination in Employment Act).

[54] 531 U.S. 356 (2001) (holding invalid Congress's abrogation of sovereign immunity for claims involving employment discrimination in violation of the Americans with Disabilities Act). I discuss the entire line of cases more fully in Pamela S. Karlan, Disarming the Private Attorney General, 2003 U. Ill. L. Rev. 183.

[55] Alden, 527 U.S. at 756.

Second, with respect to Congress's power under the fourteenth and fifteenth amendments, the Court has not only continued to recognize the vitality of *Fitzpatrick v. Bitzer*,[56] but has further held that congressional remedial and prophylactic power is at its strongest when Congress acts to remedy or prevent the kinds of practices that the Court has subjected to heightened judicial scrutiny. Put in simple terms, when Congress acts to protect a fundamental right or when it acts to protect a suspect or quasi-suspect class, its powers are broader than when it acts to promote equality more generally. Thus, in *Tennessee v. Lane*,[57] the Court upheld Congress's abrogation of states' sovereign immunity under Title II of the Americans with Disabilities Act with respect to the fundamental right of access to the courts, and in *Nevada Dep't of Human Resources v. Hibbs*,[58] it upheld Congress's abrogation of states' sovereign immunity under the Family and Medical Leave Act because the act was intended to prevent sex discrimination in violation of the equal protection clause. Moreover, *Hibbs* and *Lane* also reaffirm the principle that Congress can "enact prophylactic legislation proscribing practices that are discriminatory in effect, if not in intent, to carry out the basic objectives of the Equal Protection Clause."[59]

Third, the Court has implicitly recognized a special role for Congress in addressing equal protection values in situations where courts are ill-equipped to confront those issues without congressional guidance. In *Vieth v. Jubelirer*,[60] the Court revisited the constitutionality of partisan political gerrymanders.[61] All nine Justices acknowledged that excessive partisan gerrymanders raise serious constitutional questions and all nine located the constitutional infirmity at least in part in the equal protection clause.[62] And yet, a majority of the Court refused to adjudicate the plaintiffs' challenge to Pennsylvania's congressional redistricting. Justice Scalia, in a plurality opinion for himself, Chief Justice Rehnquist, and Justices O'Connor and Scalia, would have held political gerrymandering claims nonjusticiable altogether, because "no judicially discernible and manageable standards for adjudicating political gerrymandering claims have emerged."[63] Justice Kennedy, concurring in the judgment, was unwilling to foreclose the possibility that such standards might

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[56] 427 U.S. 445 (1976) (holding that Congress has the power, under section 5 of the fourteenth amendment, to abrogate states' sovereign immunity in order to enforce the prohibitions of section 1 of the fourteenth amendment).

[57] 541 U.S. 509 (2004).

[58] 538 U.S. 721 (2003).

[59] Lane, 541 U.S. at 520.

[60] 541 U.S. 267 (2004).

[61] For more extensive discussions of the case, see, e.g., Richard Briffault, Defining the Constitutional Question in Partisan Gerrymandering, 14 Cornell J.L. & Pub. Pol'y 397 (2005); Luis Fuentes-Rohwer, Domesticating the Gerrymander: an Essay on Standards, Fair Representation, and the Necessary Question of Judicial Will, 14 Cornell J.L. & Pub. Pol'y 423 (2005); Samuel Issacharoff and Pamela S. Karlan, Where To Draw the Line?: Judicial Review of Political Gerrymandering, 153 U. Pa. L. Rev. 541 (2004); Richard H. Pildes, Foreword: The Constitutionalization of Democratic Politics, 118 Harv. L. Rev. 28, 55-66 (2004).

[62] See Vieth, 541 U.S. at 292, 293 (plurality opinion) (expressing an assumption that severe partisan gerrymandering is "incompatib[le] . . . with democratic principles" and "unlawful"); id. at 313-14, 316 (Kennedy, J., concurring in the judgment); id. at 319 (Stevens, J., dissenting); id. at 347-52 (Souter & Ginsburg, JJ., dissenting); id. at 365 (Breyer, J., dissenting).

[63] Id. at 281 (plurality opinion).

emerge in the future, but he explained that "[t]he lack . . . of any agreed upon model of fair and effective representation" made it difficult for courts to determine, "by the exercise of their own judgment," whether a particular plan unconstitutionally "burden[s] representational rights."[64]

But although the plurality thought *courts* could not provide a remedy for partisan gerrymanders, it recognized that "the Framers provided a remedy," at least for gerrymandered congressional districts, in the elections clause.[65] While the clause locates initial control over congressional elections in the state legislatures, it provides that "Congress may at any time by Law make or alter such Regulations."[66] Since 1842, Congress has used this power to impose a particular theory of representation on the states, by requiring the use of geographically defined single-member districts to elect Representatives.[67] The decision to use such districts reflects, among other things, a commitment to a form of proportionality, in which one faction or party cannot capture a state's entire congressional delegation (as might be true under an at-large system) and a preference for geographically discrete and insular groups over groups whose members are not geographically concentrated.[68] Thus, Congress has a special role to play in ensuring fair representation in federal elections that includes choosing among theories of effective representation.

Arguably, that role should carry over to ensuring fair representation in state and local elections as well.[69] The fourteenth and fifteenth amendments expressly confer enforcement power on Congress, and the abrogation analysis in *Fitzpatrick v. Bitzer* recognizes that the amendments marked a profound "shift in the federal-state balance."[70] The new allocation of authority parallels the allocation under the elections clause: under section 45 of the fourteenth amendment and section 2 of the fifteenth amendment, Congress can override the states' initial decisions if the intervention safeguards the equal protection, due process, and antidiscrimination values expressed by those amendments.

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[64] Id. at 307 (Kennedy, J., concurring in the judgment).

[65] Id. at 275 (plurality opinion).

[66] U.S. Const. Art. I, § 4.

[67] See Vieth, 541 U.S. at 276 (plurality opinion).

[68] See Rosemarie Zagarri, The Politics of Size (1987); see also Samuel Issacharoff, Pamela S. Karlan and Richard H. Pildes, The Law of Democracy: Legal Structure of the Political Process 1156-1160 (rev. 2d. ed. 2002); see also Branch v. Smith, 538 U.S. 254 (2003) (discussing the single-member district requirement of 2 U.S.C. § 2c.

[69] Although the elections clause does not speak directly to state or local elections, one of the rationales voiced in support of the clause in the ratifying debates resonates here as well. A delegate at the Massachusetts convention warned that state legislatures might often be tempted to "make an unequal and partial division of the states into districts for the election of representative," and that "[w]ithout these powers in Congress, the people can have no remedy." The elections clause, however, would "provid[e] a remedy, a controlling power in a legislature, composed of senators and representatives of twelve states, without the influence of our commotions and factions, who will hear impartially, and preserve and restore to the *people* their equal and sacred rights of election." Vieth, 541 U.S. at 276 (plurality opinion) (quoting 2 Debates on the Federal Constitution 27 (J. Elliot 2d ed. 1876)).

Moreover, the guaranty clause of Art. IV, § 4 (which provides that "The United States shall guarantee to every State in this Union a Republican Form of Government") has also been construed to confer power on Congress to safeguard the political processes of the states.

[70] See Fitzpatrick, 427 U.S. at 455-56.

The Supreme Court's recent decisions under the elections clause have confirmed the longstanding interpretation of the clause as a grant of essentially plenary authority. In *Cook v. Gralike*,[71] the Court stated that the clause "encompasses matters like 'notices, *registration, supervision of voting, protection of voters*, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns.'"[72] And it is "well settled" that Congress can "override state regulations" involving these matters."[73] Moreover, even when Congress does *not* intervene, the states' regulatory power is not an aspect of their sovereignty:

> Because any state authority to regulate election to those offices could not precede their very creation by the Constitution, such power had to be delegated to, rather than reserved by, the States. . . . No other constitutional provision gives the States authority over congressional elections, and no such authority could be reserved under the Tenth Amendment.[74]

Finally, the elections clause has long been interpreted to give Congress power over so-called "mixed elections" – that is, to permit Congress to regulate all aspects of an election (or an electoral process) used even in part to select members of Congress.[75] So, for example, defendants have been convicted in federal court for vote buying with respect to local offices that appeared on the same ballot as *uncontested* primaries for congressional office.[76]

Taken together, these various lines of cases suggest that congressional power is at its apogee when Congress acts to protect fundamental rights, to protect suspect or quasi-suspect classes, to regulate electoral processes that involve the selection of members of Congress, to deal with issues relating to politics and political value judgments that are relatively unamenable to judicial resolution under the Constitution alone, and does so through mechanisms that "require the exercise of political responsibility" by the federal government.

All of these factors are in play with respect to the preclearance regime. First, the Supreme Court has recognized, for over a century, that the right to vote is a "fundamental political right, because

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[71] 531 U.S. 510 (2001).

[72] Id. at 523-24 (emphasis added) (quoting Smiley v. Holm, 285 U.S. 355, 366 (1932)). The list of practices that the Supreme Court has found within the scope of Congress' election clause power includes recounts, see Roudebush v. Hartke, 405 U.S. 15, 24-25 (1972), registration and certification of results, see United States v. Gradwell, 243 U.S. 476, 483 (1917), and violations of state-imposed duties involving congressional elections, see Ex parte Clarke, 100 U.S. 399, 404 (1879).

[73] Foster v. Love, 522 U.S. 67, 69 (1997).

[74] Cook, 531 U.S. at 522. Thus, for example, courts have uniformly rejected states' tenth amendment-based challenges to the expansive voter registration requirements of the National Voter Registration Act (the "Motor Voter" law). See, e.g., ACORN v. Miller, 129 F.3d 833 (6th Cir. 1997); ACORN v. Edgar, 56 F.3d 791 (7th Cir. 1995); Voting Rights Coalition v. Wilson, 60 F.3d 1411 (9th Cir. 1995), cert. denied, 516 U.S. 1093 (1996).

[75] See In re Coy, 127 U.S. 731 (1888).

[76] See United States v. McCranie, 169 F.3d 723 (11th Cir. 1999).

preservative of all rights."[77] Indeed, one of the reasons the elections clause gives Congress "'comprehensive' authority to regulate the details of elections," is because "experience shows" that safeguards "'are necessary in order to enforce *the fundamental right* involved.'"[78]

Second, the Voting Rights Act protects groups – racial and ethnic minorities[79] – that are normally entitled to heightened scrutiny under the equal protection clause. To be sure, the Act reaches conduct that would not itself violate the equal protection clause, since it reaches acts that have a discriminatory effect regardless of the purpose behind them. But *Hibbs* as well as the Court's own voting rights cases applying various results tests all rest on an understanding that Congress can prohibit practices that have a disparate impact as part of its enforcement of the rights protected by the equal protection clause.

Third, the Voting Rights Act involves an area – regulation of the political process – that both raises important issues of political fairness that are not fully determined by the sweeping commands of sections 1 of the Fourteenth and Fifteenth Amendment and that are particularly within the expertise of politicians. Part of the reason the Supreme Court has grappled with the justiciability of political gerrymandering claims for nearly forty years is precisely because the issue calls on courts to decide among hotly contested theories of effective representation. To give just one example that bears on the proposed amendment to section 5 responding to *Georgia v. Ashcroft*, people active in and knowledgeable about politics differ vociferously about whether, in crafting electoral districts, political fairness is better ensured by drawing each district to be as competitive as possible (which increases both the chances that any individual voter will cast a decisive ballot and the risk that small changes in electoral preferences can produce grossly disproportionate legislative bodies) or by drawing districts that are predictably controlled by identifiable blocs of voters (which can produce proportional representation of the blocs within the legislative body but which results in larger numbers of voters casting essentially meaningless, or "wasted," votes).[80] Thus, with respect to apportionment, any regulation of the process demands choosing among theories of representation: if the Court cannot do this in the first instance, then Congress should perhaps have more leeway to make initial choices.

Finally, the preclearance regime of section 5 represents a quintessential exercise of political responsibility. In replacing case-by-case adjudication directly under the Constitution with an

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[77] Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886); see also, e.g., Bush v. Gore, 531 U.S. 98, 104 (2000) (per curiam); Kramer v. Union Free School Dist., 395 U.S. 621, 627 (1969); Harper v. State Board of Elections, 383 U.S. 663, 667 (1966).

[78] Foster, 522 U.S. at 72 n.2 (emphasis added) (quoting Smiley v. Holm, 285 U.S. at 366)).

[79] Although the Act's terminology prohibits discrimination on the basis of race or membership in a "language minority group," 42 U.S.C. § 1973b(f), the way "language minority group" is defined – it refers only to "persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage." 42 U.S.C. § 1973l(c)(3) – shows that the Act is reaching various forms of racial discrimination.

[80] For one recent exchange on this issue, compare Nathaniel Persily, In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders, 116 Harv. L. Rev. 649 (2002), with Samuel Issacharoff, Gerrymandering and Political Cartels, 116 Harv. L. Rev. 593 (2002) and Samuel Issacharoff, Why Elections?, 116 Harv. L. Rev. 684 (2002).

administrative regime designed to deter as well as to remedy denials of the right to vote, Congress (and ultimately the executive branch in the course of administrative preclearance) finally exercised the power it had been given by the enforcement provisions of the Reconstruction amendments.

The necessary parties to a judicial preclearance proceeding are the covered jurisdiction and the United States.[81] And the covered jurisdiction is always the plaintiff, invoking the jurisdiction of the federal court. Thus, section 5 raises none of the specific concerns that the abrogation cases involve, since it does not implicate the eleventh amendment. Nor does the preclearance regime inherently run afoul of general federalism concerns. In fact, the Supreme Court has repeatedly turned aside constitutional challenges based on the structure of the preclearance regime itself.[82] Most recently, in *Lopez v. Monterey County*, the Court rejected a covered jurisdiction's *Boerne*-inflected challenge, stating that while "the Voting Rights Act, by its nature, intrudes on state sovereignty[, t]he Fifteenth Amendment permits this intrusion."[83] The permissible intrusion involves not only the requirement of preclearance, but also the imposition of the burden of proof on the covered jurisdiction to show not only the absence of a discriminatory purpose, but also the absence of a retrogressive effect.[84] And as we have already seen, with respect to the Act's regulation of a mixed electoral process – and the bulk of the voting practices preclearance reaches occur within the mixed process[85] – even the more atmospheric federalism of the tenth amendment holds little sway.

Ironically, one of the policy-based criticisms of the current administration's policies – that preclearance decisions are often subject to political considerations and that the recommendations of career personnel are overridden by presidential appointees – may actually reinforce the constitutionality of the preclearance regime by showing that it *is* subject to "the exercise of political responsibility."[86]

### III. THE EVIDENCE OF THINGS NOT SEEN: THE PROPRIETY OF EXTENDING PRECLEARANCE

Under *Boerne*, legislation constitutes appropriate enforcement of the provisions of the

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[81] In an administrative preclearance proceeding, the jurisdiction files a submission. Individuals and groups are permitted to comment on the submission. 28 C.F.R. § 51.29. Individual voters may be permitted to intervene in a preclearance declaratory judgment action if they satisfy the requirements of Fed. R. Civ. P. 24. See Georgia v. Ashcroft, 539 U.S. at 476-77; NAACP v. New York, 413 U.S. 345, 365 (1973). Finally, if a jurisdiction fails to seek preclearance of a voting change, individuals can sue, seeking an injunction barring use of the new practice unless and until the jurisdiction obtains preclearance. But these so-called "coverage lawsuits" are normally brought using the Ex parte Young fiction and naming a state official as the formal defendant.

[82] See, e.g., Lopez v. Monterey County, 525 U.S. 266 (1999); City of Rome v. United States, 446 U.S. 156 (1980); South Carolina v. Katzenbach, 383 U.S. 301 (1966).

[83] 525 U.S. at 284-85.

[84] See id. at 283.

[85] The major exception concerns annexations, which are a major source of concern under section 5, and which it would be hard to characterize as part of a mixed election system. By contrast, no state now operates dual voter registration systems and the majority of all state and local offices are filled at elections where federal candidates also appear on the ballot.

[86] Alden, 527 U.S. at 756.

Reconstruction era amendments if there is "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[87] Given *Boerne*'s implicit reaffirmance of *City of Rome v. United States*,[88] which had upheld both the substance and duration of the 1975 extension of the preclearance regime, and *Lopez*'s rejection of a *Boerne*-based attack on section 5,[89] the only plausibly open constitutional question is whether something has changed between *City of Rome*, *City of Boerne*, *Lopez* and today to render an act Congress once had the power to pass now beyond its authority to renew.

The predicate for such a holding would presumably be that political conditions in the covered jurisdictions have changed so substantially that the strong medicine of preclearance is no longer warranted – what Rick Hasen colorfully calls "the 'Bull Connor is Dead' problem."[90] As evidence of this change, commentators cite the huge increase in minority registration and the numbers of minority elected officials within covered jurisdictions.[91] Some scholars have claimed that minority turnout in covered jurisdictions has come to exceed minority turnout in other parts of the nation.[92] Others have pointed to the minuscule, and declining, number of objections interposed under section 5.[93]

The difficulty with all this evidence is that it is entirely consistent with two contradictory stories. Under the optimistic story, either the preclearance regime or secular changes in race relations have worked a fundamental transformation in politics within the covered jurisdictions: minority citizens are now integrated into the political process in a way that will not be undone by lifting preclearance. The political situation of minority citizens within covered jurisdictions thus no longer differs in a legally significant way from their position in the remainder of the country. The decline in the number of objections reflects the lack of either the desire or the practical ability of covered jurisdictions to make retrogressive changes. Minority elected officials, and the political party – the Democrats – that depends on minority electoral support (often even for the success of its non-minority candidates and officials), can prevent backsliding. Under the realist story, the preclearance regime both played, and continues to play, a more critical role in minority citizens' political integration. Put simply, the realists (among whom I count myself) think that the political gains

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[87] 521 U.S. at 520.

[88] 446 U.S. 156 (1980); see Boerne, 521 U.S. at 518 (citing City of Rome).

[89] See Lopez, 527 U.S. at 282-83.

[90] Hasen, supra note 11, at 179.

[91] See e.g., Samuel Issacharoff, Is Section 5 of the Voting Rights Act a Victim of Its Own Success?, 104 Colum. L. Rev. 1710, 1712-14 (2004); Pildes, supra note 61, at 86-93.

[92] See, e.g., Charles S. Bullock, III, and Ronald Keith Gaddie, Assessment of Voting Rights Progress in Oklahoma, tbl. 2 (2006) (comparing levels of black registration in covered and non-covered states) (available at http://www.aei.org/publications/pubID.24279/pub_detail.asp). For reasons Nate Persily has explored, Bullock and Gaddie seem to have overestimated the degree of black turnout relative to white turnout because they incorrectly lumped Latinos in with other non-black voters. See Nathaniel Persily, Thoughts on VRA Reauthorization, Election Law Blog, May 18, 2006 (http://electionlawblog.org/).

[93] See Hasen, supra note 11, at 190-92.

minority citizens have achieved since the passage of the Act are sufficiently recent[94] and the incentives for officials to ignore the interests of minority voters are sufficiently attractive that backsliding would occur in the absence of the Act's substantive and procedural protections.

To understand why the evidence regarding Section 5 objections does not answer the question whether circumstances have changed, it is important to understand that Section 5 operates in four distinct, albeit related, ways. First, section 5 performs a *blocking* function: the Department of Justice or the three-judge district court can deny a covered jurisdiction the right to implement discriminatory changes. Section 5 has been used, even since the last extension in 1982, to block more than 1,000 changes that would have impaired the rights of literally millions of voters in covered jurisdictions.[95]

But the other three ways section 5 functions are *not* captured in the record of objections. Most obviously, section 5 performs a *deterrent* function. Jurisdictions that know that a change will not be precleared may decide not even to attempt making it. Here, preclearance performs a valuable function not fully captured by other, more global prohibitions on discriminatory election practices. Under all of the other prohibitions, the burden of challenging a government practice falls on the affected individuals.[96] The cost of such suits, however, is often prohibitive. Consider one famous example. In *City of Mobile v. Bolden*,[97] the Supreme Court held that the fourteenth amendment and the then-existing version of section 2 of the Voting Rights Act required plaintiffs who claimed racial vote dilution to prove that the challenged electoral system was adopted or maintained for purposefully discriminatory reasons. In order to prove such a purpose, on remand the plaintiffs hired three historians to trace the history of Mobile's election system. Based on the evidence they uncovered after months of archival work, the district court ultimately issued a lengthy opinion tracing the tortuous history of the city's electoral practices that found a series of discriminatory modifications.[98] But the cost of proving what turned out to be a blatant series of constitutional violations was staggering: the plaintiffs' lawyers logged 5,525 hours and spent $96,000 in out-of-pocket expenses, and these figures do not include the expenses incurred by the Department of Justice after it intervened or the costs of hiring the expert witnesses,[99] which are not now compensable.[100]

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[94] In the first years following passage of the Act, there was widespread noncompliance with section 5. See Laughlin McDonald, The 1982 Extension of Section 5 of the Voting Rights Act of 1965: The Continued Need for Preclearance, 51 Tenn. L. Rev. 1, 77-79 (1983) (providing a long list of unprecleared changes in covered jurisdictions) (hereafter McDonald, Continued Need). Some jurisdictions remain in defiance of the submission requirement even today. See Laughlin McDonald, The Voting Rights Act in Indian Country: South Dakota, A Case Study, 29 Am. Indian L. Rev. 43, 44 (2004) ("From the date of its official coverage in 1976 until 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.") And it was not really until after the 1982 amendments to the Act that minority voters began to elect significant numbers of representatives to many public bodies.

[95] See McDonald and Levitas, supra note 23, at 4-5.

[96] To be sure, the United States can bring suit on behalf of citizens who suffer disenfranchisement or dilution, but such suits are relatively rare.

[97] 446 U.S. 55 (1980).

[98] Bolden v. City of Mobile, 542 F. Supp. 1050, 1056-68, 1074-77 (S.D. Ala. 1982).

[99] Chandler Davidson, The Recent Evolution of Voting Rights Law Affecting Racial and Language Minorities, in Quiet Revolution, supra note 26, at 21, 29.

Given the minuscule size of the voting rights bar, placing the burdens on individual voters – who, after all, may have relatively little incentive to vote in the first place, let alone litigate their right to vote – means many discriminatory changes may go unchallenged.

This deterrent function is especially important with respect to changes at the local level.[101] Local minority communities may be unaware of the potential political consequences of some changes and especially ill equipped to find attorneys and fund litigation.[102] Moreover, in contrast to statewide legislative or congressional redistricting, where there are often political incentives for one of the major parties to raise claims on behalf of minority voters, changes at the local level – particularly if they involve issues such as annexations or setting the date for special elections – may be of insufficient interest to groups outside the local community for them to fund the litigation.

The fact that there are relatively few objection letters does not undercut the conclusion that section 5 performs a valuable deterrent function. If section 5 perfectly deterred retrogressive changes, there would of course be no objection letters at all: jurisdictions wouldn't attempt to make retrogressive changes and so would never have to submit such changes for review. So we need to look beyond blocking and deterrence to ask whether there would be incentives to retrogress (or not to ameliorate existing exclusion) in the absence of section 5. The other two functions performed by section 5 suggest there would be.

Section 5 creates a *bargaining chip* that may play a critical role in the ability of minority representatives "to pull, haul, and trade" within the political process.[103] Since all political deals take place in the shadow of the law, the negotiations among politicians in covered jurisdictions are inflected by the preclearance standards. The minority community's ability to "appeal" relatively costlessly to federal authorities increases its leverage in demanding accommodation of minority concerns. This is particularly true when it comes to redistricting. In the absence of section 5's non-retrogression requirement, the Democratic Party might be tempted to spread concentrations of minority voters among several districts, rather than preserving majority-minority seats: such a strategy would increase the probability of Democrats winning elections and minority voters' only alternative to voting for white-sponsored Democratic candidates in so-called "influence" districts would be to stay home, thereby potentially throwing the election to even more objectionable Republican candidates. Section 5's non-retrogression principle forecloses that particular strategy, at least in part, and requires white Democrats to offer more of the potential electoral gains from redistricting to their minority colleagues.

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[100] The proposed amendments to the Voting Rights Act would make experts' fees compensable as part of an attorney's fees award to a prevailing plaintiff.

[101] Mike Pitts explores this point in more detail. See Pitts, supra note 23, at 611-18.

[102] The lack of financial and organizational resources is one of the reasons I am somewhat skeptical of Heather Gerken's recent proposal, which would require covered jurisdictions only to provide advance public notice of proposed changes, leaving it to "community representatives, public interest groups, and other parts of civil society" to negotiate with the jurisdiction and to demand preclearance review only if the negotiations break down. See Heather K. Gerken, A Third Way for the Voting Rights Act: Section 5 and the Opt-In Approach, 106 Colum. L. Rev. 708, 717 (2006).

[103] Johnson v. De Grandy, 512 U.S. 997, 1020 (1994).

Finally, section 5 provides *political cover*. It enables political actors in covered jurisdictions to blame federal authorities for adopting voting-related practices that benefit minority voters, rather than having to take full responsibility for those changes. While the anti-commandeering jurisprudence of *New York v. United States*[104] and *Printz v. United States*[105] may rest on the view that clear lines of responsibility are important for political accountability, when it comes to protecting the voting rights of minority citizens, there may be a countervailing consideration. As an historical matter, white voters in the south have tended to resist minority political aspirations, and to punish politicians they see as catering to minority interests.[106] This backlash phenomenon seems to be alive and well today: one of the factors behind the way Texas Republicans redrew the state's congressional map was to eliminate the seats of white Democrats in order to "marginalize Democrats as the black-and-brown party and drive white voters to the Republican side of the political divide."[107] Thus, even when officials know that avoiding retrogression in the adoption of new voting practices is the right thing to do, they may be deterred from doing so by the political consequences. Section 5 provides them with a justification for doing the right thing.

The other potential constitutional question arises with respect to the carrying forward of the earlier triggering formulas for deciding which jurisdictions should be covered by the preclearance regime. The current formulas look at turnout in the 1964, 1968, and 1972 presidential elections.[108] Given that all these elections occurred decades ago, is there any warrant for continuing to single out these jurisdictions for preclearance?[109]

Phrasing the question this way, however, may distort the inquiry. The triggering formula was never intended to capture jurisdictions because of problems on one particular election date. Rather, it was simply a facially neutral tool for covering jurisdictions because of a pervasive history of minority disenfranchisement. The triggering formula has always been a product of principle mixed with pragmatic politics. To be sure, not every jurisdiction with a history of pervasive racial

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[104] 505 U.S. 144 (1992).

[105] 521 U.S. 898 (1997).

[106] See, e.g., V.O Key, Jr., Southern Politics in State and Nation (1949); Laughlin McDonald, The Counterrevolution in Minority Voting Rights, 65 Miss. L.J. 271, 308 (1995).

[107] The Ghettoization of Texas Democrats, Austin American-Statesman, Jan. 16, 2004, at A16 (editorial).

As I have explained elsewhere, to the extent that the Voting Rights Act has caused the political realignment of the South, the causal connection is not so much that the creation of majority-minority districts has deprived other Democratic candidates of sufficient support, but that the very enfranchisement of black voters created the opportunity for the Republican "southern strategy." See Pamela S. Karlan, Loss and Redemption: Voting Rights at the Turn of a Century, 50 Vand. L. Rev. 291, 314-20 (1997).

[108] See 42 U.S.C. § 1973b(b).

[109] The Supreme Court has never developed a doctrine of constitutional desuetude, although its affirmative action cases have suggested, with respect to race-conscious remedies, that the temporary nature of such remedies plays a role in their constitutionality. See, e.g., Grutter v. Bollinger, 539 U.S. 306, 342-43 (2003). But the preclearance regime does not involve conventional affirmative action: it imposes no burden or disadvantage on white individuals on account of their race.

discrimination in voting was originally covered. For example, the trigger rested on use of a literacy test, and not a poll tax, even though there was substantial evidence of the discriminatory purpose and effect of poll taxes.[110] Thus, section 5 provided protection to blacks on the Mississippi side of the Mississippi River Delta but not on the opposing shore in Arkansas. And Texas became a covered jurisdiction only in 1975, as a result of its discrimination against language minorities. Still, the trigger did a reasonably good job of picking up most, if not all, the places with a history of pervasive violations of the Fourteenth and Fifteenth Amendments.[111]

Moreover, the Act already contains mechanisms for more closely tailoring coverage to continued need. Under section 4(a) of the Act as amended in 1982, "bailout" has been available to jurisdictions brought within the triggering formula that can show their compliance with both the Act and with the underlying constitutional commands for fair and inclusive political processes.[112]

Thus, the bailout provision provides for lifting section 5 coverage from jurisdictions where it is no longer appropriate.[113] The extension of the Act works in tandem with the bailout provision to create a meaningful incentive for jurisdictions to undertake the affirmative inclusion efforts bailout demands in order to avoid remaining under the coverage regime for a lengthy period of time.[114] At the same time, under section 3(c) of the Act, there is "bail-in" as well: a court that finds a violation of the fourteenth or fifteenth amendment can order coverage of a jurisdiction not already subject to preclearance.[115] In light of the possibilities for bailout and bail-in, the fact that the list of formulaically covered jurisdictions might be somewhat over- or under-inclusive does not pose a

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[110] The year before the Voting Rights Act was passed, the Twenty Fourth Amendment forbid conditioning the right to vote in elections for federal office on payment of "any poll tax or other tax," and the next year, in striking down Virginia's attempt to circumvent the amendment by imposing a certificate of residency requirement on citizens who sought to register without paying the commonwealth's poll tax, the Supreme Court stated that "[t]he Virginia poll tax was born of a desire to disenfranchise the Negro." Harman v. Forssenius, 380 U.S. 528, 543 (1965). In Harper, the Supreme Court struck down imposition of a poll tax in *any* election as a violation of the fundamental right to vote.

[111] 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.").

[112] An earlier, more lenient bailout standard was upheld in South Carolina v. Katzenbach, 383 U.S. at 332. For a discussion of the bailout provision, see Paul F. Hancock & Lora L. Tredway, The Bailout Standards of the Voting Rights Act: An Incentive to End Discrimination, 17 Urb. Law. 379, 392 (1985); McDonald, Continued Need, supra note 94, at 47-53; Richard A. Williamson, The 1982 Amendments to the Voting Rights Act: A Statutory Analysis of the Revised Bailout Provisions, 62 Wash. U. L.Q. 1, 6 (1984); Winke, supra note 11, at 106-10.

[113] According to the Department of Justice, "Eleven political subdivisions in Virginia (Augusta, Frederick, Greene, Puliaski, Roanoke, Rockingham, Shenandoah, and Warren Counties and the Cities of Fairfax, Harrisonburg, and Winchester) have 'bailed out'," in each case with the consent of the federal government. http://www.usdoj.gov/crt/voting/sec_5/covered.htm (last visited May 25, 2006).

[114] See McDonald, Continued Need, supra note 94, at 53 (citing See S. Rep. No. 97-417, at 60-61 (1982)).

[115] 42 U.S.C. § 1973a(c). See, e.g., Jeffers v. Clinton, 740 F. Supp. 585, 586, 601-02 (E.D. Ark. 1990) (ordering Arkansas to preclear any new majority-vote (or runoff) requirements before putting them into place, because the state had "committed a number of constitutional violations of the voting rights of black citizens" related to such requirements); aff'd, 498 U.S. 1019 (1991); McMillan v. Escambia County,559 F. Supp.720, 727 (N.D. Fla. 1983) (referring to the Fifth Circuit's imposition of a preclearance requirement on the country under section 3(c)); McDonald, Continued Need, supra note 94, at 30 n.191 (discussing pocket trigger cases).

serious constitutional problem.

Finally, a subsidiary evidentiary question concerns the relevance of evidence that covered jurisdictions continue to use practices that have a racially disparate impact to the continued *risk* of constitutional violations in the absence of strong prophylactic measures such as section 5. Some commentators have suggested that the large number of section 2 lawsuits in covered jurisdictions provides little warrant for extending section 5 given that, since 1982, section 2 has prohibited the use of voting and election-related practices that have a discriminatory effect regardless of the underlying purpose.

One consequence of the 1982 amendment of section 2 is that plaintiffs are rarely called upon to prove, and courts are rarely called upon to find, that a defendant jurisdiction has engaged in purposeful racial discrimination that would violate the Constitution as well. This is not to say that such purposeful discrimination does not exist. Evidence of discriminatory effects remains powerfully probative of the risk of an underlying unconstitutional purpose in adopting or maintaining the exclusionary system.[116] Moreover, it is important to remember *why* Congress amended section 2 to impose an effects test. Eliminating the requirement that jurisdictions be labeled intentional discriminators was not simply a means of making it easier for minority voters to attack existing exclusion from the political process. Congress also chose to move attention away from a jurisdiction's intent because, even in cases where such intent can be proved, an intent test is "unnecessarily divisive because it involves charges of racism on the part of individual officials or entire communities."[117] Requiring findings of purposeful race discrimination in order to remedy the continued political exclusion of minority citizens can actually *exacerbate* racial tensions. Congress has made the eminently sensible judgment that the best way of combating the lingering effects of past, unconstitutional racism in the political process is *not* to require name-calling and condemnation in the litigation process but to simply bring about the effective integration of minority citizens into the political process.

## IV. Section 5 and Amending Section 5: Congress's Authority to Change the Standard for Preclearance

Each time Congress has addressed the question whether to extend the preclearance period, it has also amended the Act in some way or another to strengthen its protections. In 1970, when Congress extended preclearance for another five years, it also extended the ban on literacy tests nationwide. In 1975, when it extended preclearance for seven years, it made the ban on literacy tests permanent. In 1982, when it extended preclearance for another twenty-five years, it also amended section 2 of the Act to bar, nationwide, the use of any voting practices or procedures that had a racially

[116] See Rogers v. Lodge, 458 U.S. 613, 618 (1982) (evidence of an invidious purpose can be inferred from the fact that a challenged practice has a racially disparate impact).

[117] S. Rep. 97-417, p. 36 (1982).

discriminatory result, regardless of the purpose behind them.

This time around, Congress has responded to two recent Supreme Court decisions that significantly altered the preclearance regime, by amending the standards for section 5 preclearance to change what counts as a discriminatory purpose or a discriminatory effect. The change with respect to the meaning of discriminatory purpose seems relatively uncontroversial, as a matter of either policy or constitutional doctrine. And the latter change, while it may be controversial as a matter of policy, nonetheless lies within Congress's enforcement power.

In *Bossier II*, the Supreme Court held that section 5 does not prohibit adoption of changes enacted with a discriminatory but nonretrogressive purpose. Such changes do, of course, violate the Constitution. For example, a jurisdiction that deliberately chooses a redistricting plan that continues to ensure the electoral exclusion of minority-sponsored candidates violates the fourteenth amendment. A jurisdiction that responded to the National Voter Registration Act's requirements for making registration more accessible by locating polling places used by minority voters in inaccessible locations in order to depress turnout would violate the fifteenth amendment as well. [118]

Congress has proposed amending section 5 to provide that the term "purpose" includes "*any* discriminatory purpose,"[119] and not merely a retrogressive purpose. In light of the Supreme Court's recent unanimous decision in *United States v. Georgia*,[120] this amendment should pose no constitutional issue. There, the Court addressed the question whether Congress could abrogate states' sovereign immunity under Title II of the Americans with Disabilities Act, which prohibits discrimination in public services or programs. "No one doubts," the Court declared, "that § 5 grants Congress the power to 'enforce . . . the provisions' of the [Fourteenth] Amendment by creating private remedies against the States for *actual* violations of those provisions."[121] Thus, even with respect to the most tightly constrained form of congressional action – explicit override of the eleventh amendment's conferral of sovereign immunity against private citizen lawsuits – Congress has wide-ranging power to adopt remedies for actually unconstitutional conduct. The *Bossier Parish II* "fix" authorizes objections only with respect to proposed changes that are themselves unconstitutional. Here, section 5 adds to the self-executing prohibition of the fourteenth and fifteenth amendments only two relatively narrow features. First, if a jurisdiction chooses to seek

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[118] Prior to the passage of the Fifteenth Amendment, many states expressly limited the franchise to whites. A state that adopted a new strategy for perpetuating that past, purposeful disenfranchisement B for example, Oklahoma, with its adoption of the "Agrandfather clause," see Guinn v. United States, 238 U.S. 347 (1915), and its subsequent attempt to circumvent Guinn by giving excluded voters only a two-week window to register or forever lose their rights, see Lane v. Wilson, 307 U.S. 268 (1939) B would violate the Fifteenth Amendment even if the new device "served only to perpetuate those old laws and to effect a transparent racial exclusion." Rice v. Cayetano, 528 U.S. 495, 513 (2000). Indeed, had only retrogressive purposes justified section 5 objections, it is not clear how section 5 would have operated immediately after its enactment since substituting one discriminatory stratagem for another would not necessarily produce retrogression, rather than simple perpetuation of existing exclusion.

[119] Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, H.R. 9, § 5(c) (emphasis added).

[120] 126 S.Ct. 877 (2006).

[121] Id. at 881.

administrative preclearance before the Department of Justice, rather than judicial preclearance from a three-judge federal district court, section 5 permits the executive branch to block such unconstitutional conduct, at least temporarily;[122] in any event, section 5 prevents the jurisdiction from implementing the change until some federal authority preclears it. Second, section 5 places the burden of proof on the jurisdiction rather than the party challenging the proposed change. But to the extent that these burdens are imposed on changes that are allegedly unconstitutional, Congress's remedial scheme is entirely appropriate.

The *Georgia v. Ashcroft* "fix" responds to a different sort of problem. In that case, as we have already seen, the Court held that section 5 "gives States the flexibility to choose one theory of effective representation over [an]other,"[123] and thus to adopt a redistricting plan that reduces the minority's ability to elect candidates of its choice in favor of one that increases the number of minority influence districts and preserves the intra-legislative power of officials elected from minority communities. Explicit in the Court's analysis was an acknowledgment that the decision about how best to protect minority voters' right to fair, equal, and effective representation involves a choice among very different theories.

In the 2007 amendments, Congress has chosen among those theories, providing that a change that "will have the effect of diminishing the ability of" minority voters "to elect their preferred candidates of choice denies or abridges the right to vote" for purposes of section 5 review.[124] Thus, the creation of influence districts – from which minority voters *cannot* elect the candidate they prefer, but can instead only choose among candidates preferred by other groups[125] – cannot substitute for the elimination of districts from which minority voters currently elect the candidate of their choice.

It is not my aim here to explain why Congress should embrace the theory that minority voters are most effectively represented when they can actually elect candidates of their choice – a theory that groups with control over the redistricting process almost always adopt for themselves – rather than simply having some "influence" over the election of candidates sponsored by, and beholden to, other communities.[126] To some extent, Congress has already embraced that theory in section 2 of the

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[122] While a decision by the Department of Justice to object to a change submitted for administrative preclearance is unreviewable, Morris v. Gressette, 432 U.S. 491, 504-05 (1977), a jurisdiction that receives an objection letter from the Department can still file suit seeking judicial preclearance. The court addressing the jurisdiction's request for a declaratory judgment gives no weight to the Department's objection.

[123] 539 U.S. at 482.

[124] Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, H.R. 9, § 5(b) (emphasis added) .

[125] For a discussion of the difference between "influence" districts and "coalitional districts" – that is, districts in which majority voters can actually elect their preferred candidate by attracting non-minority support – see Richard H. Pildes, Is Voting Rights Law Now at War With Itself?: Social Science and Voting Rights in the 2000s, 80 N.C.L. Rev. 1517, 1539–40 (2002).

[126] I have addressed this question in Karlan, Retrogression of Retrogression, supra note 40.

Voting Rights Act, which protects the right both to "participate" and to "elect,"[127] showing that the two rights are discrete. I want simply to highlight one point to which I have already adverted. Once we recognize that this is a choice among theories, Congress has the constitutional power to make that choice. Congress, and not the courts, decided in 1842 that congressional elections should be conducted from single-member districts – and has since then neither retreated to permitting elections at large nor adopted any of the systems of proportional representation used by most other Western democracies – thereby embracing a particular "theory of representation" from among the constitutionally available ones. So too, Congress can choose, particularly in the context of ensuring equal political opportunity for historically excluded groups, to impose a standard that looks at changes in the groups' ability to elect candidates of their choice rather than a more nebulous and speculative standard that poses a threat of once again relegating minority voters' political aspirations to an afterthought. Particularly in light of *Vieth*'s invitation to Congress to address difficult questions of fair representation, the *Georgia v. Ashcroft* "fix" lies well within its constitutional competence.

## IV. CONCLUSION

The preclearance regime of the Voting Rights Act has properly been characterized as strong medicine. But the disease to which it was addressed was pervasive and persistent and had proved itself resistant to less stringent remedies. Congress should have the authority, under its enforcement powers, to conclude that the course of treatment is not yet fully complete and to prescribe another round of medicine. Particularly given the Court's most recent decisions dealing with congressional power, there is no reason to revisit the unbroken line of cases upholding the provisions of the Voting Rights Act as appropriate legislation.

[127] 42 U.S.C. § 1973(b).

## Punitive approach no longer needed

Lynn Westmoreland - For the Journal-Constitution
Monday, May 29, 2006

The Voting Rights Act of 1965 worked. It changed Georgia dramatically for the better.

I want to see the Voting Rights Act renewed. Like any product crafted in 1965, the law needs updating --- the states that had voting rights abuses 41 years ago aren't necessarily the states that have problems in 2006.

When first passed, the Voting Rights Act overturned the institutionalized discrimination embedded in the laws of Georgia and other Southern states.

As a result, Georgia today represents a model of voter equality for states with diverse populations.

In fact, an academic study documents that black Georgians vote at higher rates than white Georgians. There are nine black statewide elected officials --- most of whom defeated white opponents --- including our attorney general, the labor commissioner and three state Supreme Court justices, one of whom is chief justice. Four of our state's 13 members of the U.S. House are African-Americans --- two of whom represent majority-white districts. It would be difficult to find a state with a more diverse group of elected officials.

Today, our nation's best and brightest African-Americans flock to Georgia not for Freedom Rides, but for great opportunities and a high quality of life.

Yet, despite Georgia's revolutionary strides in voter equality, the Voting Rights Act still treats Georgia as if it's a backward society governed by the laws of Jim Crow.

The original Voting Rights Act created a formula to determine which states were denying minority citizens their right to vote. Congress applied the formula to the 1964 election turnout numbers and Georgia was one of several states that essentially failed the test. The law allowed the federal government to approve or disapprove all election law changes in those states, from redistricting to moving voting precincts.

Renewing the law as it is would keep Georgia in the penalty box for 25 more years. It doesn't make sense to subjugate Georgia to the whims of federal bureaucrats until 2031 based on the turnout of an election featuring Barry Goldwater and Lyndon Johnson.

If Georgia's sins can never be forgiven, should there be an Accused Witch Protection Act that applies only to Massachusetts? Should our foreign policy treat South Africa as if it's still governed by a racist apartheid regime?

The U.S. Supreme Court ruled in 1966 that singling out states in the Voting Rights Act was constitutional only because it was "narrowly tailored" to address a specific problem and "temporary."

We're already well past "temporary" at 41 years and we've addressed the specific problem.

I'm proposing that Congress update the Voting Rights Act by reviewing states' performance in 2004 elections. Without these changes, I feel sure the law will be thrown out by the courts because its criteria are now outdated, arbitrary and decidedly not "temporary."

The Voting Rights Act has served our nation well. We dishonor the accomplishments of the law if we pretend nothing's changed since 1965.

U.S. Rep. Lynn Westmoreland, a Grantville Republican, represents Georgia's 8th Congressional District.

May 02, 2006, 6:42 a.m.
An Insulting Provision
Congress is set to renew an outdated and unnecessary Voting Rights Act restriction that applies only to certain states.

By Edward Blum

Just when you thought Republicans in Congress couldn't dump on conservative principles any more than they already have, along comes the next show stopper. Judiciary Committee leaders in both chambers will introduce legislation today to reauthorize the expiring penalty provisions of the 1965 Voting Rights Act (VRA). Not happy with the revulsion resulting from last year's Bridge to Nowhere, the heirs of Ronald Reagan are poised to renew until 2031 a bill that will fortify racial gerrymandering throughout the nation.

On August 6, 2007, after more than 40 years of going hat-in-hand to the federal government for permission to change any voting practice, the Deep South states along with Texas, Arizona, and Alaska are scheduled to be dropped from Section 5 of the Voting Rights Act. This section—also know as the "preclearance" provision—requires nine states in their entirety and parts of seven others to get permission from the U.S. Attorney General or the D.C. federal courts before changes can be made in voting procedures—for example, before a polling place can be moved or a redistricting plan implemented. When the VRA was passed in 1965, this provision made sense—after all, the Jim Crow South had perfected ways of keeping blacks from the polls. Preclearance ended that. Nevertheless, Congress recognized that Section 5's penalty provision was an unusual intrusion into areas constitutionally reserved for the states, and so it designed the provision to expire after five years. It's still in effect today, however, after congressional extensions in 1970, 1975, and 1982.

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, blacks and Hispanics are full and equal participants in the electoral process in the states covered by section 5. In fact, recent studies conducted for the American Enterprise Institute indicate that the electoral position of African-Americans and Hispanics is better in covered states like Georgia and Texas, than in non-covered ones like Arkansas, Wisconsin, and Tennessee. The old roadblocks to minority voting in Section 5 states are gone. Forever.

Yet, apart from a few courageous members of Congress, the Republican congressional leadership, cheered on by the Bush Administration, is hell-bent on keeping this system in place. Why? Two reasons: First, Republicans don't want to be branded as hostile to minorities, especially just months from an election. After all, every American knows how important the VRA was in securing voting rights for Southern blacks. And even though only Section 5 is up for reauthorization, Democrats will claim Republicans want to "turn back the clock" if they voice any doubts. Who wants to rebut that charge?

The second reason is that Republicans as well as Democrats have grown to love the racial gerrymandering Section 5 promotes. Since Republicans control the redistricting process in most of the states covered by Section 5 (in fact, every whole state covered was as red as can be in 2004), during the next round of redistricting GOP state legislators will argue that Section 5 requires them to draw ultra-safe, minority-packed congressional districts.

This bug-splat-like racial gerrymandering has the effect of bleaching the surrounding districts of reliable Democratic voters, creating numerous safe Republican districts. What greater distain for the bedrock principle of colorblind equal rights can there be? Congressmen are supposed to represent individuals in a geographically-defined community of interest—not of skin color or ancestry. To make matters worse, these segregated racial homelands have been encouraged by judges who have made a complete mess of the Voting Rights Act case law.

Over the last few years, the Supreme Court has tried to clear up some of the confusion it previously created over how states must draw districts in order to comply with Section 5. One case in particular, *Georgia* v. *Ashcroft*, gave state legislatures more leeway in unpacking minorities from ultra-safe minority districts. The Court noted in a 5-4 decision that minorities' interests may be better served if they aren't stuffed into one district, creating a majority of minorities, but instead spread into surrounding districts where they may have greater influence in election contests. The conservatives on the court—Justices Rehnquist, Scalia, Thomas, and Kennedy—joined the majority opinion written by Justice O'Connor by noting that "the Voting Rights Act, as properly interpreted, should encourage the transition to a society where race no longer matters."

So what does the Republican Congress plan to do with this valuable legal doctrine? Well, they plan to overturn it by making compliance with Section 5 dependent upon the election of minority-preferred candidates. This will ensure heavily packed minority congressional districts that stifle competition, ideologically polarize elections, and insulate Republican representatives from minorities and minority representatives from Republicans.

In the end, Section 5 is not only unjust in that it singles out some states and ignores others when there is no longer any reason to do so; it is also unfair to voters—especially minority voters—because it promotes racial gerrymandering and racial segregation, which is just the opposite of the original goals of the Voting Rights Act.

President Bush has said he supports reauthorization of Section 5 and looks forward to working with Congress on it. Really, Mr. President, how can you support legislation that keeps Texas in the penalty box, but not neighboring New Mexico, Oklahoma, or Arkansas? Do you trust these other states to treat minority voters fairly, but not Texas? The same needs to be asked of every senator and congressman from the eight other Section 5 states.

Maybe a trip to the woodshed this November is the only thing that will get Republicans back on track. Like the saying goes, no matter how cynical you get in Washington, it's impossible to keep up.

*—Edward Blum is a visiting fellow at the American Enterprise Institute and is the author of a forthcoming book on the Voting Rights Act from AEI Press.*

**Senate Judiciary Committee**

**Subcommittee on the Constitution, Civil Rights, and Property Rights**

# Voting Rights Act:
# Policy Perspectives and Views from the Field

**Testimony of**
**Professor David T. Canon**
**Department of Political Science**
**University of Wisconsin, Madison**

**June 21, 2006**

**1. Statement of Qualifications**

I am a professor of political science at the University of Wisconsin, Madison. My research interests are in race and representation, political careers, congressional reform, partisan realignments, and the historical analysis of Congress. My major research on the question of racial representation was published in *Race, Redistricting, and Representation: The Unintended Consequences of Black-Majority Districts* [University of Chicago Press, 1999]. This book was the winner of the American Political Science Association's Richard F. Fenno Prize for the best book published on legislative politics in 1999. I am author of approximately 25 scholarly articles and chapters, three scholarly books, seven edited volumes, and a major reference work on congressional committees.

I have testified as an expert in two voting rights cases in federal court and as an expert consultant in two other federal voting rights cases. In one of those cases, I was asked by the attorneys for the United States to analyze the Georgia State Senate redistricting plan under the new "totality of circumstances" test to analyze factors affecting whether the plan is retrogressive under § 5 of the Voting Rights Act (in the remand of *Georgia v. Ashcroft*). As outlined in the majority opinion in *Georgia v. Ashcroft*, this analysis must balance the loss of "ability-to-elect" districts that provide minority voters with equal opportunities to elect their candidates of choice against the potential gain of substantive representation in so-called "coalitional" and "influence districts." The majority opinion also urged the lower court to examine other factors such as substantive representation of black interests that may flow from African American legislators' leadership positions in the institution. My report conducted that analysis, but the case did not go to trial so I was not deposed and did not testify.

My testimony will examine several important issues that are relevant to why the Voting Rights Act should be renewed. I will focus my comments on issues that I have directly addressed in my research: the importance of the Voting Rights Act (VRA) in providing for the representation of racial and ethnic interests in the U.S. Congress, the importance of Section 5, and ability-to-elect and influence districts in the context of *Georgia v. Ashcroft.*

**2. The Voting Rights Act and Racial Representation in Congress: The Necessity of Ability-to-Elect Districts**

The 1982 Voting Rights Act Amendments and subsequent interpretation by the Supreme Court in the 1980s (especially *Thornburg v. Gingles*, 478 US 30, 1986) required that minorities be provided with equal opportunities able to "elect representatives of their choice" when their numbers and configuration permitted. The 1982 Amendments do not guarantee the right to achieve proportional representation by ensuring that the percentage of minority representatives will be equal to the percentage that minority voters comprise in the jurisdiction. Instead, Section 2 protects the right of minority voters to have equal opportunities to elect their candidates of choice, regardless of whether that candidate of choice is a minority or non-minority. In other words, it is the minority voters' choice, not the race or ethnicity of the candidate, that matters. As a practical matter, however, in most cases minority voters will prefer to elect candidates who are also minorities. In that sense, the Voting Rights Act provides equal opportunities for minorities to achieve descriptive representation. This is the same context within which the Supreme Court used the term in *Georgia v. Ashcroft.*

Therefore, when I refer to "descriptive representation" in my testimony, I am referring to the equal opportunity of minority voters to elect their chosen candidates, which in most cases will result in descriptive representation.

As a result of the 1982 Amendments, in 1992, 15 new U.S. House districts were specifically drawn to help African Americans to elect their chosen candidates to Congress and ten districts were drawn to help Latinos elect their chosen candidates. Section 5 of the VRA played a key role in producing this outcome, as the Department of Justice required several covered states to create minority majority districts, based on its interpretation of what was required by the 1982 VRA Amendments and the *Gingles* decision. Some of these ability-to-elect districts were challenged by the landmark *Shaw v. Reno* (509 U.S. 630, 1993). However, subsequent decisions made it clear that race could continue to be a factor in congressional redistricting as long as it did not predominate over other traditional districting principles, especially when racial and partisan motivations were intertwined (*Easley v. Cromartie,* 532 U.S. 234, 2001).

Those who argue that certain provisions of the Voting Rights Act should not be extended, and opponents of the Act more generally, point to the isolated success that minority candidates, such as Douglas Wilder, Barack Obama, J.C. Watts, Julia Carson, and Emmanuel Cleaver, have had in winning elections in which a majority of the electorate is white as evidence that special protection for ability-to-elect districts through the pre-clearance process is no longer needed.

There is little support for the optimistic view that blacks will win many House seats in white majority districts. The numbers are stark: of the 28,410 U.S. House elections from the adoption of the 15th Amendment in 1870 through 2004, only 563 (2%) produced black winners

(107 individuals). A more meaningful statistic for the purposes of this discussion is the proportion of blacks who have been elected in black-majority and white-majority districts since the passage of the Voting Rights Act in 1965 (before the Voting Rights Act, the distinction between white-majority and black-majority districts was fairly meaningless because a large proportion of blacks were disenfranchised). In the 8,047 House elections in white-majority districts between 1966 and 2004 (including special elections), only 49 (0.61%) were won by blacks.

This number is even more striking when one considers the unusual circumstances surrounding nearly all of those elections. First, 11 of the 49 victories are accounted for by Ron Dellums (D-CA). He represented what *The Almanac of American Politics* describes as "the most self-consciously radical district in the nation" [Barone, Ujifusa, and Matthews 1975, 66; the 11 elections were from 1970-1990. The district has not been white-majority since 1992]. The combination of the urban ghetto of Oakland and the radical white voters from Berkeley make this district an extreme outlier.

Six elections are accounted for by Alan Wheat, who was elected in 1982 by winning the Democratic nomination with only 31% of the vote. As the only black candidate in the field of eight, he was able to rely on his base of black votes (he had been a state legislator in a black majority district before running for the House). After wining the primary over a field that split the white vote, he was able to win the general election in the heavily Democratic district. Subsequently, Rep. Wheat was able to appeal to white voters after gaining the power of incumbency and was easily reelected to the seat in a district that was only 25% black, until he lost a bid for the U.S. Senate in 1994.

Katie Hall (D-IN) also won election under fortuitous circumstances, but she was not able to maintain her seat in a district that was only 22% black. When Adam Benjamin (D-IN) died of a heart attack in September, 1982, the congressional district party chair was mandated by state law to name the party's nominee (the primary had already passed). Richard Hatcher, the black mayor of Gary, was the district chair and named Hall for the slot. Party leaders were outraged that Benjamin's widow was not named, but Hall narrowly won the general election against a Republican whom the *Almanac* described as "pathetically weak" [Barone and Ujifusa 1985, 452; the Republican nominee only spent $10,526 in losing the election]. In the next election, Hall managed only 33% of the vote in the Democratic primary, a strikingly low figure for an incumbent, and one that closely matches the 30% minority population of the district.

Andrew Young (D-GA) and Harold Ford (D-TN) account for seven elections and will be discussed below. Gary Franks (R-CT) and J.C. Watts (R-OK), who account for five of the cases, won as Republicans and are not considered by black leaders as sympathetic to black interests. In fact, Franks waged a vicious battle simply to be included in the Congressional Black Caucus.

The 1996 elections raised hopes that blacks would start winning more often in white-majority districts. Five black incumbents, all in the South, lost significant numbers of black voters when their black-majority districts were ruled unconstitutional, but were still able to win. Three of those, Cynthia McKinney (D-GA), Sanford Bishop (D-GA), and Corrine Brown (D-FL), won in white-majority districts. Even more significantly, Julia Carson (D-IN) won an open seat race in a district that was 69% white and had been held by Andrew Jacobs (D-IN) for 20 years. These results led to headlines such as "Is the South Becoming Color Blind?" [Fletcher 1996, 13; Sack 1996, 1]. However, McKinney and other supporters of majority-black districts argued that

black incumbents were able to win through the power of incumbency [McKinney 1996, 26]. Since 1996, only two additional non-incumbent African Americans were elected to the House in white-majority districts (both in 2004): Gwen Moore (D-WI) in a district that had a bare majority of white voters (50.4%) and Emmanuel Cleaver (D-MO), the two-term mayor of Kansas City, won in a district that is 66% white.

Therefore, only three of the 49 elections (Carson, Moore, and Cleaver) provide much hope for black victories in white-majority districts.[1] On the other hand, 302 of the 353 elections (85.6%) between 1966 and 2004 in black-majority House districts have produced black representatives, including all of them since 2002. (Districts that are neither black-majority, nor white-majority are not included in this analysis).

The success of black politicians noted above in white-majority House districts, the elections of Douglas Wilder as governor of Virginia, Carol Moseley Braun and Barack Obama (D-IL) to the Senate, and Norm Rice as mayor of Seattle, indicate that blacks **can** win with white-majority electorates. However, as David Lublin points out, "their victories attract attention precisely because of their exceptional nature. Empirical evidence indicates that racial composition of the electorate overwhelms all other factors in determining the race of a district's representative" [Lublin 1995, 112-13]. **The numbers bear repeating: only 49 of 8,047 elections in white-majority U.S. House districts have provided black winners since 1966,**

[1]Two additional districts, the 1st in Missouri in the 1980s (William Clay) and the 7th in Illinois (George and Cardiss Collins) in the 1970s were barely majority-white if voting-age-population rather than total population is used.

**and most of those were in unusually liberal districts or with some other idiosyncratic context that prevents generalizing to other districts.** While the Voting Rights Act and its amendments, in my opinion, only provide an equal opportunity for black voters to elect candidates of choice rather than guaranteeing that outcome, 49 of 8,047 elections is not much of an equal opportunity.

Therefore, ability-to-elect districts are typically comprised of a majority of the relevant minority voters. This certainly is not always required, and the specific level of minority population required for a "performing" district should be examined by map-drawers and the courts every ten years on a case-by-case basis, depending on the levels of racially polarized voting. In districts in which there is substantial crossover voting in biracial or multi-racial blocs, it is possible for ability-to-elect districts to have less than 50% minority voters. The "packing" of minority voters (into districts comprised of at least 60-65% minority voters) promoted by some voting rights advocates and politicians in the early 1990s appears to be unnecessary.

**3. The Necessity of Renewing the Pre-Clearance Provision of Section 5[2]**

[2]My view that Section 5 of the VRA should be renewed appears to be in direct contrast to Professor Carol Swain's position. Her web site notes, "With the 40-year-old Voting Rights Act's key provisions scheduled to expire in 2007, Swain recently told journalist Jonathan Tilove of the Newhouse News Services that 'Section 5 ought to be allowed to gracefully expire in 2007.'" (http://www.carolmswain.net/news.html, the link "Professor Carol Swain Comments on Voting Rights Act in Newhouse News Article"). The on-line version of the article is Jonathan Tilove, "Voting Rights Act, at

40, Faces Reauthorization Amid Topsy-Turvy Politics," August 5, 2005, http://www.newhousenews.com/archive/tilove080405.html.

Given the concentration of black voters in the South, the legacy of legal discrimination, and the centrality of debate over renewal of the pre-clearance provisions of Section 5, it is important to separate the South in this analysis (southern districts and states comprise most of the areas covered by Section 5).[3] Following Reconstruction when federal troops withdrew and the Republican party left the South [Valelly 1995], blacks were almost completely disenfranchised through the imposition of residency requirements, poll taxes, literacy tests, the "grandfather clause," physical intimidation, other forms of disqualification, and later the white primary [Davidson 1993, Davidson and Grofman, 1994]. Because of these practices no African Americans were elected to Congress from seven southern states originally covered by Section 5 of the Voting Rights Act between 1897 and 1973.[4]

Before the 1990 reapportionment, the South held a majority of the nation's districts that had between ten and thirty percent black voters, and a large majority of the so-called "black influence" districts (30-50%). However, no districts in the South were black majority in the 1970s and only three were black majority in the 1980s. Given the patterns of racial bloc voting, no blacks were elected from majority white districts in the South between 1980 and 1994. Two, Andrew Young (D-GA) in 1972 and Harold Ford (D-TN) in 1974, were elected in districts that

[3]For purposes of my testimony, I will not be discussing areas covered for minority language groups under Section 4(f)(4) of the Voting Rights Act. Instead, I will focus my testimony on African Americans in the South. I would like to note, however, that in my experience, much of my analysis of African Americans is equally applicable to Latinos.

[4]The years in which no African Americans were elected to Congress for the seven covered states are: Alabama (1877-1993), Georgia (1876-1987), Louisiana (1877-1991), Mississippi (1883-1987), South Carolina (1897-1993), Texas (first African American elected in 1973), Virginia (1891-1993; 11 political subdivisions have subsequently "bailed out" from Section 5 coverage, so the entire state of Virginia is no longer covered). Other southern states that are partially covered by Section 5 have a similar record (Florida had a gap from 1876-1993 and North Carolina from 1901-1993. Data are from Amer, 2004.

were 44% black and 48% black, respectively, but both districts became black-majority after the 1980 redistricting. Thus, the creation of new black-majority districts in the South in 1992 gave blacks a realistic opportunity to elect black politicians for the first time since Reconstruction.[5]

This is a central argument in favor of extending the pre-clearance provision of Section 5 of the Voting Rights Act. It was nearly impossible for blacks to be elected to Congress from the South before the pre-clearance process required the creation of black-majority districts in the South that provided black voters with equal opportunities to elect their chosen candidates: blacks were not elected in majority-white districts in the South and state legislatures did not draw black-majority districts until they were compelled to by the law and the pre-clearance process. Recall, we are not talking about ancient history here, but 1990-1992.

[5]Additional evidence of the difficulty of electing black in majority-white districts in the South is provided by state legislative races where only one percent of all white-majority districts elected black state legislators in the 1980s. On the other hand, 77% of black majority districts elected blacks to the lower house and 62% of black majority districts sent blacks representatives to the upper house in the 1980s [Handley and Grofman 1994, 345].

Critics of the pre-clearance provision also point to the extremely low rate of rejection by the Department of Justice. Some have interpreted this as evidence that pre-clearance is no longer needed because objectionable plans are claimed to be relatively rare. However, this ignores an important mechanism that helps generate this low rate of rejection: because of the pre-clearance process, covered states are less likely to *submit* electoral arrangements and institutions that violate the Voting Rights Act. There is no doubt that the deterrent effect is real as documented by a recent study by Professor Luis Fraga of the impact of more information requests by the Justice Department on discriminatory voting changes.[6] While the analogy is imperfect, nobody advocates pulling all traffic cops off the streets because voluntary compliance with traffic laws is relatively high. If police officers no longer monitored speed limits or ticketed drivers for running stop signs and traffic lights, it is fairly clear that violations of the law would increase. Similarly, if pre-clearance was abandoned, it is very likely that more local governments and even some states would be more likely to implement laws that harmed minority voting rights. Critics of Section 5 respond by saying the harmed voters would still be able to sue under Section 2 of the Voting Rights Act. Pre-clearance is a more effective tool than relying on litigation to enforce the law because many potential plaintiffs would not have the resources necessary to initiate law suits and discriminatory voting changes would be allowed to go into effect, probably for several years while the litigation was pending.

Second, pointing to the relatively low rate of rejection also ignores the fact that the voting

[6]Luis Ricardo Fraga, "More Information Requests and the Deterrent Effect of Section 5 of the Voting Rights Act," unpublished paper, delivered at the symposium Protecting Democracy: Using Research to Inform the Voting Rights Reauthorization Debate, The Chief Justice Earl Warren Institute on Race, Ethnicity and Diversity, University of California, Berkeley, School of Law (Boalt Hall), and the Institute of Governmental Studies, University of California, Berkeley, Washington, DC, February 9, 2006.

changes that *were* rejected between 1996 and 2005 represent the full range of tactics that have been used in the South to abridge voting rights including moving and reducing the number of polling places, changing from district-based to at-large elections, annexations and redistricting that dilute minority voting power (including three state-wide redistricting plans: Georgia, South Carolina, and Texas), and an administrative plan for implementation of the National Voter Registration Act of 1993. These are not trivial violations that can be ignored, but important changes in electoral practices that would have hurt minority voting rights if the pre-clearance process had not been in place (see http://www.usdoj.gov/crt/voting/sec_5/obj_activ.htm for a complete list of Section 5 rejections).

Third, there are additional reasons why the number of objections have declined. The Supreme Court's decision in *Reno v. Bossier Parish II* (520 US 471, 1997) prevents the Department of Justice from objecting to intentionally discriminatory voting changes merely because they do not have a retrogressive effect. *Bossier II* has had a tremendous negative impact on the ability of the Department of Justice to object to discriminatory voting changes.[7] Finally the recent decline in Section 5 objections is consistent with the pattern of fewer submissions being made in mid-decade after the substantial volume of submissions are made earlier in the decade during the decennial redistricting cycle.

**4. Influence and Ability-to-Elect Districts in the Context of *Georgia v. Ashcroft***

Congress is also considering restoring the standard for "retrogression" that was in place

[7]Peyton McCrary, "How the Voting Rights Act Works: Implementation of a Civil Rights Policy: 1965-2005, *South Carolina Law Review* 57:4 (Summer, 2006): 785-825.

before *Georgia v. Ashscroft* (539 US 461, 2003). The proposed legislation would clarify 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 (rather than allowing ability-to-elect districts to be traded off for influence districts).[8]

I support this clarification of Section 5. Two types of objections have been made to the new "totality of circumstances" test of *Georgia v. Ashcroft*: 1) that the new test is vague and unworkable, 2) that allowing influence districts to be traded off for ability-to-elect districts would erode the gains in the opportunities to elect candidates of choice that have been made in the Congress in the past forty years. I find the second point to be the most compelling reason to restore the legal standard that preceded *Georgia v. Ashcroft*.

**Test is unworkable** The majority opinion in *Georgia v. Ashcroft* outlined a new Section 5 "totality of circumstances" analysis. Specifically, to determine whether a plan is retrogressive under Section 5 of the Voting Rights Act the state must demonstrate that any loss of equal opportunities to elect candidates of choice (often resulting in descriptive

[8]The new retrogression analysis mentions three types of districts: ability-to-elect, coalitional, and influence. Ability-to-elect districts are those in which minority candidates of choice are usually elected. Coalitional districts provide a lesser opportunity to elect minority legislators and may or may not elect them depending on the levels of racially polarized voting and turnout (most crucially, the level of white crossover voting for minority preferred candidates). Influence districts are those in which minority candidates do not win, but minority voters are said to be able to play a significant role in electing candidates who will be sympathetic to their interests. The precise lines of division among them depends on the relative levels of turnout and racially polarized voting between white and minority voters.

representation) that may flow from "unpacking" safe black majority districts, must be offset by gains in substantive representation that may come from the creation of greater number of influence and coalitional districts. While the Court did not provide detailed guidance on how to assess the potential tradeoff between what it termed "descriptive" and "substantive" representation, it asserts that states are permitted a choice in maintaining this balance as long as the overall level of representation of black voters was not diminished under the plan in question. The majority opinion says, "Section 5 leaves room for States to use these types of influence and coalitional districts. Indeed, the States' choice ultimately may rest on a political choice of whether substantive or descriptive representation is preferable. The State may choose, consistent with Section 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. [internal citations omitted] . . . In assessing the comparative weight of these influence districts, it is important to consider the likelihood that candidates elected without decisive minority support would be willing to take the minority's interests into account." [p.18.]

While the general principles of this new totality of circumstances analysis for retrogression are clear, the specific application of the principles is not. The dissent in *Georgia v. Ashcroft* lays out the challenges posed by this broadened analysis:

> Indeed, to see the trouble ahead, one need only ask how on the Court's new understanding, state legislators or federal preclearance reviewers under §5 are supposed to identify or measure the degree of influence necessary to avoid the retrogression the Court nominally retains as the §5 touchstone. Is the test purely *ad hominem*, looking merely to the apparent sentiments of incumbents who might run in the new districts? Would it be enough for

> a State to show that an incumbent had previously promised to consider minority interests before voting on legislative measures? Whatever one looks to, however, how does one put a value on influence that falls short of decisive influence through coalition? Nondecisive influence is worth less than majority-minority control, but how much less? Would two influence districts offset the loss of one majority-minority district? Would it take three? Or four? The Court gives no guidance for measuring influence that falls short of the voting strength of a coalition member, let alone a majority of minority voters. Nor do I see how the Court could possibly give any such guidance. The Court's "influence" is simply not functional in the political and judicial worlds.

I share some of these concerns about the complexity of this task. Substantive representation requires that legislators are aware of the preferences of their constituents and take concrete legislative action to address those concerns.[9] Political scientists have studied a broad range of actions that legislators take on behalf of their constituents and there is no universal agreement of which actions provide the best measures. David Mayhew examined the "electoral connection" that drives the behavior of members of Congress. In their effort to stay in office, representatives will appeal to their constituents through "advertising, credit claiming, and position taking" [Mayhew 1974]. Morris Fiorina pointed to the importance of constituency service, especially dealing with bureaucratic red tape, as another dimension of representation [1989].[10] Richard Fenno discussed the range of "home styles" that legislators will cultivate to represent their constituents in a variety

[9]Miller and Stokes, 1963; Achen, 1975; a review essay by Donald Matthews [1984] on this subject that was written twenty years ago had twenty pages of references and research on the topic has proliferated since then. Several review essays that focus explicitly on racial representation include hundreds of references on the topic [see McClain and Garcia, 1993, Canon 1999b, McKee 2004].

[10]Fiorina also discusses the negative consequences of this behavior: the desire to provide constituency service (because it is a relatively costless way to win votes) means that legislators will tolerate or even encourage inefficiencies in the bureaucracy to provide more demand for their services.

of ways [1978; 2003; the more recent book examines how several African American members of Congress represent their constituents in their districts and in Washington D.C. both through their "home styles" and a range of legislative activities]. Richard Hall analyzed participation on committees and on the floor to gauge what members of Congress do to represent their constituents' interests beyond simple roll call voting [Hall 1996]. My book on race and representation in Congress examined bill sponsorship and cosponsorship, speeches on the floor, roll call voting, committee assignments, leadership positions, and a range of activities in the district to determine how legislators represent racial interests [Canon 1999a].

To return to the questions raised in the dissent: the vast literature on representation makes it clear that the "apparent sentiments of incumbents who might run in the new districts" or an incumbent who "had previously promised to consider minority interests before voting on legislative measures" would not meet the standard of substantive representation outlined by the Supreme Court. Substantive representation means taking concrete action (engaging in committee work to write legislation, building coalitions, sponsoring and cosponsoring legislation, and engaging in constituency service) and staking out specific positions (on roll call votes and in speeches on the floor) in response to constituents' needs and preferences rather than merely exhibiting an "apparent sentiment" or "previous promise.

While I believe that it is possible to provide the type of evidence that would be required by this new totality of circumstances test, depending upon what measure of "influence" is used, one aspect of the test raises serious "real world" question of application. Given the large

variation in the responsiveness of politicians who are elected in influence districts, one cannot know until well after the fact whether a given representative will be "sympathetic to the interests of minority voters," as required by the new test. For example, if the *Georgia v. Ashcroft* misinterpretation of Section 5 is not corrected in the VRA renewal, a state may decide that minority interests would be better served by having three influence district instead of one ability-to-elect district and two districts with less than 25% African American voting-age-population. Under the new retrogression standard, this tradeoff could be upheld as non-retrogressive if a subjective determination is made that minority interests would be better served by this arrangement. However, this claim, of course, is simply a *prediction* of how the newly elected politicians are likely to behave based on previous patterns of behavior in similar districts. It is quite possible that the representatives elected in the new influence districts would be completely non-responsive to minority interests. At that point, minority voters probably would have no recourse: it is extremely unlikely that the federal courts would be willing to redraw the district lines in the middle of a reapportionment cycle based on the evidence of non-responsiveness and the affected voters would no longer have the ability to elect candidates of their choice given that they would comprise a relatively small proportion of the district. This reason alone is enough to restore the old standard of retrogression. Under the new test it is extremely likely that a plan may be accepted as non-retrogressive, but then prove to be harmful to the interests of minority voters in subsequent years.

Finally, if the "totality of circumstances" test for retrogression is allowed to stand, this would ensure that courts would have to make the political judgment of how much "influence" is enough. It is extraordinarily undemocratic for the least representative branch, the judiciary, to

make such fundamental political decisions that will directly affect the ability of minority voters to participate in the political process. Furthermore, the courts are not particularly well suited to make such inherently political decisions. That is precisely why federal courts have been so reluctant to do so, even in cases with compelling evidence of non-responsiveness.[11]

Returning to the point of the non-responsiveness of white representatives elected in influence districts, rather than simply relying on hypothetical examples, it would be useful to examine evidence from the state of Georgia that I collected to be used in the remand of *Georgia v. Ashcroft.* To determine whether state senators sponsored legislation to represent the interests of their black constituents, I coded all 1,509 bills that were sponsored in the Georgia senate between January 1, 1999, and January, 13, 2004, according to whether the bill's primary impact was on African American constituents, or what I refer to as having "racial" content in one of four possible categories: non-racial, part-racial, racial (and in support of minority interests), and a few bills that were racial but adverse to the interests of African American constituents.

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[11]For example, in *Presley v. Etowah County Commission*, 502 U.S. 491 (1992), the Supreme Court rejected a claim that the powers of elected officials were changed to minimize the power of a newly elected black official because there was no "workable standard" that the court could use to draw "lines between those governmental decisions that involve voting and those that do not." Other courts have also been reluctant to allow responsiveness claims for similar reasons. See *Smith v. Winter*, 717 F.2d 191, 198 (5th Cir. 1983); *Kardules v. City of Columbus*, 95 F.3d 1335, 1358 (6th Cir. 1996) (Batchelder, J., concurring).

"Racial issues" include those that explicitly refer to race or policies that specifically deal with issues concerning race and civil rights such as discrimination, affirmative action, and racial profiling. Examples from the 2003 legislative session would include SB 115 on Minority Business Enterprise programs and the various votes on the state flag (the underlying bill for the flag votes was actually a House Bill, HB 380, but there were 20 roll calls in the Senate on the issue). "Part racial issues" are not explicitly racial but are implicitly racial, often involving a subtext of race. These are issues that have a disproportionate impact on the black community and are of central concern to black constituents. Crime, welfare, education programs for the disadvantaged, predatory lending, and issues concerning economic development in Atlanta are some of the general topics. Specific examples from the 2003 session include SB 157 on payday lending, SB 309 on street gangs and graffiti, and 348 on tire scrap and disposal (which disproportionately affects minority communities). A vast majority of issues in the state senate are "non-racial" in their content: highways, taxes, issues concerning municipal elections and judgeships, hunting, veterans issues, and most health and education issues (except those that are targeted for the disadvantaged). Recent specific examples include SB 317 and 328 on deer hunting, SB228 on special license plates for pro sports teams' foundations, SB 459 the "War on Terrorism Act of 2002," and my favorite, SB 461 on "hunting marsh hens from boats powered by electric motors." I cross-checked my list with the subset of roll calls identified in the *Georgia Legislative Review*, a publication produced by the Clark Atlanta University that identifies issues of great interest to minority and poor constituents in Georgia in each legislative session.

Most of the bills were easy to code from the title of the bill and the abstract. About 5% of the bills required reading the actual text of the bill and in a few cases doing additional research to

determine the racial focus of the bill (from newspaper accounts or other sources such as the *Georgia Legislative Review*). The data were gathered from the Georgia State Senate's web page. The web page lists the full text of all bills and the sponsor and first four co-sponsors of the bill (more recent sessions list five cosponsors; to ensure comparability of the data across legislative sessions I only analyze the first five names listed even if six are provided). While the process of determining the level of racial representation in influence and ability-to-elect districts was not especially difficult in this instance, it was very time-consuming and somewhat tedious! In some cases, it can be expensive and extremely difficult to prove lack of responsiveness.[12] That is why in the context of Section 2 cases, it is just one factor to be considered, and is not determinative of a claim.[13]

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[12]See *Lee County Branch of NAACP v. City of Opelika*, 748 F.2d 1473, 1480 n.11 (11th Cir. 1984) (noting the plaintiffs estimated that "80 percent of their time spent in developing and trying this case originally was devoted to the issue of responsiveness").

[13] See generally S. Rep. No. 417, 97th Cong., 2d Sess. 29 (1982), reprinted in 1982 U.S.C.C.A.N. at 207 (one of the factors that may be considered in assessing a vote dilution claim is "whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group"); *Gingles*, 478 U.S. at 36-37 (citing the Senate Judiciary Committee Majority Report factors for violation of § 2). The Senate Report also provides that "[u]nresponsiveness is not an essential part of a plaintiff's case" because of the difficulty of proving it. S. Rep. No. 417, at 29 n.116,

reprinted in 1982 U.S.C.C.A.N. at 207 n.116.

My research revealed that there is a huge gap between the proportion of bills sponsored and cosponsored by whites and blacks in terms of their racial content. African American Democrats average about 40% of their bills with some racial content, Republicans average are 3%, while white Democrats have a much broader range from a little over 5% to about 19% in the different sessions (for an average of about 12%). The number of white Democrats needed to equal the legislative output of an African American senator ranges from two (in the 2003-2004 session) to about six in the 1999-2000 session. The similar ratios for Republicans are in eight to nine range. Neither Democrats nor Republicans become increasingly responsive to black interests as the percentage of BVAP in their district increases. This lack of responsiveness is precisely the type of evidence that addresses the totality of circumstances analysis of retrogression. Based on this evidence white senators in districts with at least 25% BVAP are not adequately responsive to black interests to compensate for the loss of representation of an ability-to-elect district. Many of the state senators in influence districts sponsored little or no legislation with racial content.

A similar pattern is evident in an analysis of resolutions that were submitted in the Georgia State Senate. To identify the resolutions that were in recognition of the black community I did a full-text search of all senate resolutions from January, 1999-January, 2004 (2,247 resolutions total). Some examples of these resolutions from the 2003 session include SR 114 - recognizing African American Business Enterprise Day, SR 201 - honoring the Alpha Kappa Alpha Sorority, and SR 99 which tribute to Horace King, a "master covered bridge builder" and former slave. These resolutions tend to have African American sponsors and co-sponsors, with a few white Democrats on many of the resolutions. There is a huge range in the

number of Senate resolutions sponsored by each senator that have a racial focus; for some African American members, nearly a third of their sponsored resolutions have a racial focus. At the other extreme 18 Republicans and 12 white Democrats did not have *any* resolutions with racial content. Jack Hill (D-4 in 2001-2002), one of the party switchers that gave control of the state senate to Republicans, had 173 resolutions, none of which had any racial content, despite representing a district that was over one-quarter black. While most resolutions are of purely symbolic value, sometimes symbolic politics can have important political meaning, as with the heated debate in Georgia over the state flag. Symbolic resolutions of this nature are one significant indicator of a representative's sympathy and responsiveness to the minority community. By this measure, many of the white politicians in influence districts provided virtually no representation of minority interests. Clearly the threat of non-responsive representatives in influence districts is not just hypothetical.[14]

My research on the Georgia state senate and my larger research project on racial representation in the U.S. House of Representatives [Canon, 1999] both conclude that the interests of African American voters are best served by being represented by African American politicians. This conclusion is in contrast to the views of Carol Swain, who argues that African American interests are better served through maximizing the number of Democrats in office (which means trading off ability-to-elect districts for influence districts). Swain says, "When

[14]I should note that this comprehensive analysis of bill sponsorship and cosponsorship does not capture the full range of legislative behavior that would be necessary to fully describe representation. My book on race and representation [Canon 1999] also examined roll call voting, the racial composition of the member's staff, speeches on the floor of the House, legislative leadership positions, committee assignments, constituency newsletters, district office location, and coverage of the member's activities in the local press. This research took nearly two years to complete, and clearly is beyond the scope of what would be possible to conduct for any given court case.

representation is defined more broadly than shared race, then there is evidence to suggest that political party or, more specifically, whether a Democrat is in office, is as important as the race of the representative. In fact, there is evidence to suggest that this is more important. Given the way minorities define their policy preferences, their substantive interests are best served by the election of more Democrats" [Swain 1997, 321]. My evidence shows that this is not the case when a employing a broad range of measures of representation. This argument will be elaborated below by examining the links between descriptive and substantive representation.

**"Descriptive" versus "Substantive Representation"** The second set of questions raised in the dissent, concerning the balance between more influence districts and fewer ability-to-elect districts, also raises serious concerns about the new retrogression test. While the representation literature provides the basis for developing quantifiable estimates of the representation of minority voters' interests in influence districts, coalitional, and ability-to-elect districts, there is no obvious way to determine how many influence districts are necessary to balance the loss of an ability-to-elect district.

This task is difficult because of the challenges posed by measuring the representational benefits that flow from what the Court calls "descriptive representation." The benefits of descriptive representation are widely accepted by most people who study this topic, but difficult to precisely measure. To apply this problem to the analytical task presented in the new retrogression test, consider the following: if an analysis of the more easily measured aspects of substantive representation shows that two white Democrats in influence districts provide the same

level of substantive representation as one African American legislator in an ability-to-elect district, one could conclude that trading one ability-to-elect district for two influence districts is non-retrogressive *only if* descriptive representation is seen as having no additional value (either from additional difficult to measure aspects of substantive representation or from the intrinsic value of representation itself). But nearly everyone who has examined this issue agrees that descriptive representation has *some* intrinsic value and some tangible but difficult to measure aspects. Even strong critics of black majority districts such as Abigail Thernstrom argue,

> Whether on a city council, on a county commission, or in the state legislature, blacks inhibit the expression of prejudice, act as spokesmen for black interests, dispense patronage, and often facilitate the discussion of topics (such as black crime) that whites are reluctant to raise. That is, governing bodies function differently when they are racially mixed, particularly where blacks are new to politics and where racially insensitive language and discrimination in the provision of services are long-established political habits [1987, 239].

The problem is how to define the degree of these additional benefits. The benefits of descriptive representation mentioned here by Thernstrom clearly have substantive impact: changing the terms of debate, bringing up issues that would otherwise not be discussed, forcing others in the room to be more inclusive and tolerant are real, tangible effects but they are very difficult to assess with the typical measures of legislative behavior.

Thus the value of descriptive representation that often results from ability-to-elect districts can be broken into three parts: the purely symbolic benefits (having positive role

models), substantive benefits that are difficult to measure such as those mentioned above, and substantive benefits that can be measured (roll call votes, leadership positions, committee positions, and sponsored and cosponsored legislation). Of these three components, only the latter can be assessed in any systematic fashion.

The standard literature on racial representation attempts to measure substantive representation by simply focusing on roll call voting (usually summary indices of roll call voting such as LCCR or ADA scores). However, this is clearly an inadequate method for measuring substantive representation. Consider the behavior of two white members, both of whom represent a 35% black district. Both members are relatively moderate on the standard ADA, LCCR-type of measures and occasionally sponsor legislation and make speeches that would be of interest to black constituents. The first member has an all-white staff, locates her district offices in the mostly-white suburbs, and does not mention any legislative activities that would be of primary interest to black constituents in her newsletters. The second member has a racially diverse staff both in Washington and the district, locates one district office in the inner-city and another in the suburbs, and proudly trumpets in his most recent newsletter his legislative activity on "redlining" in the insurance and financial sectors. The standard roll call analysis of congressional behavior would not uncover any difference between these two members. However, the second member is clearly making more of an effort to maintain a biracial coalition and reach out to African American constituents than the first member. Therefore, more comprehensive analysis of congressional behavior is necessary to uncover the nature of racial representation in any given district.

The intrinsic value of descriptive representation is ultimately a value judgement, but

given the obvious substantive benefits, it is unwise to sacrifice the tangible gains that have been made in descriptive representation in Congress resulting from ability-to-elect districts for the uncertain gains that may come from having more influence districts. The unequal opportunities minority voters experienced in most states prior to the 1990 round of redistricting – including no African American members of Congress from seven southern states between 1897 and 1973 – proves that point.

I also want to address one critique that has been made by opponents of overturning this part of *Georgia v. Ashcroft*. Some have argued that by protecting ability-to-elect districts under Section 5, it will create a "one-way rachet" that would prevent the percentage of minority voters in minority-majority districts from ever being shifted to surrounding districts. This means, the argument goes, that districts will become increasingly segregated by race. However, there is nothing in the proposed legislation that would require that result. Ability-to-elect districts are defined by circumstances that prevail in a given area. Areas that do not have racially polarized voting and have substantial cross-over voting and biracial coalitions could move to lower percentages of minority population and still have performing districts. For example, if an area consistently elects black politicians with substantial white support, it could move from ability-to-elect districts that have 55% black voting age population to having 45% black VAP. Such a move would not be retrogressive under the proposed legislation because they would still be ability-to-elect districts. Minority majority districts are not cemented into place under the proposed legislation, but rather it guarantees that the opportunity to elect candidates of choice cannot be taken away from voters who have enjoyed that opportunity in the past.

**5. Conclusion**

The Voting Rights Act has been one of the most important pieces of civil rights legislation in U.S. history. The VRA should be renewed and strengthened. In my testimony I have argued the following:

- Ability-to-elect districts are necessary to elect significant numbers of minority legislators.
- The protection of ability-to-elect districts does not imply that districts are permanently set at a given level of minority voters; the percentage of minority voters can be reduced if they still have an opportunity to elect candidates of their choice.
- The pre-clearance provision of Section 5 should be renewed because the number of minority politicians would almost certainly be reduced without this provision.
- The lower rate of objections of Section 5 submissions by the Department of Justice should not be seen as evidence that the provision is no longer needed because of the deterrent effect of Section 5 and other reasons that I have described above.
- Creating influence districts may not enhance the representation of minority interests because many politicians in influence districts are not responsive to the interests of their minority constituents.
- Non-responsive influence districts mean that minority voters would have no recourse to address the retrogression of their voting rights.
- Descriptive representation that often results from ability-to-elect districts has inherent value that cannot be measured by the "totality of circumstances" approach outlined in *Georgia v. Ashcroft.*

Therefore, I recommend that the Senate pass S. 2703 without amendment.

## Bibliography

Achen, Christopher H. 1975. "Measuring Representation." American Journal of Political Science 22: 475-510.

Amer, Mildred L. "Black Member of the United States Congress: 1870-2004," Congressional Research Service, CRS Report for Congress, July 28, 2004, #RL 30378.

Canon, David T. 1999a. Race, Redistricting, and Representation: The Unintended Consequences of Black-Majority Districts. Chicago: University of Chicago Press.

Canon, David T. 1999b. "Electoral Systems and the Representation of Minority Interests in Legislatures." *Legislative Studies Quarterly* 24:3 (August, 1999): 331-85.

Canon, David T., and Charles Stewart III. 2002. "Parties and Hierarchies in Senate Committees, 1789–1946," in *U.S. Senate Exceptionalism*. Edited by Bruce I. Oppenheimer. Columbus, OH: Ohio State University Press, 157-81.

Davidson, Chandler. 1993. "The Voting Rights Act: A Brief History." In Controversies in Minority Voting: The Voting Rights Act in Perspective. Bernard Grofman and Chandler Davidson eds. Washington, D.C.: The Brookings Institution.

Davidson, Chandler and Bernard Grofman, eds. 1994. Quiet Revolution in the South: The Impact of the Voting Rights Act, 1965-1990 (Princeton, N.J.: Princeton University Press).

Fenno, Richard F. 1973. Congressmen in Committees. Boston: Little, Brown and Co.

Fenno, Richard F. 1978. Home Style: House Members in Their Districts. Boston: Little, Brown.

Fenno, Richard F. 2003. Going Home: Black Representatives and Their Constituents (Chicago: University of Chicago Press).

Fiorina, Morris P. 1989. Congress: Keystone of the Washington Establishment. New Haven: Yale University Press, 2nd ed.

Fraga, Luis Ricardo. "More Information Requests and the Deterrent Effect of Section 5 of the Voting Rights Act," unpublished paper, delivered at the symposium Protecting Democracy: Using Research to Inform the Voting Rights Reauthorization Debate, The Chief Justice Earl Warren Institute on Race, Ethnicity and Diversity, University of California, Berkeley, School of Law and the Institute of Governmental Studies, University of California, Berkeley, Washington, DC, February 9, 2006.

Hall, Richard L. 1996. Participation in Congress. New Haven, CT: Yale University Press.

King, Gary. 1989. Unifying Political Methodology: The Likelihood Theory of Statistical Inference. Cambridge: Cambridge University Press.

Kessler, Daniel and Keith Krehbiel. 1996. "Dynamics of Cosponsorship," American Political Science Review 90: 555-566.

Lublin, David Ian. 1997. The Paradox of Representation: Racial Gerrymander and Minority Interests in Congress. Princeton, N.J.: Princeton University Press.

McClain, Paula D., and Garcia, John A. 1993. "Expanding Disciplinary Boundaries: Black, Latino, and Racial Minority Groups in Political Science." In Political Science: The State of the Discipline II. Edited by Ada W. Finifter. Washington, D.C.: American Political Science Association, 247-79.

McCrary, Peyton. "How the Voting Rights Act Works: Implementation of a Civil Rights Policy: 1965-2005, *South Carolina Law Review* 57:4 (Summer, 2006): 785-825.

McKee, Seth C. "The Impact of Congressional Redistricting in the 1990s on Minority Representation, Party Competition, and Legislative Responsiveness." Paper presented at the Annual Meeting of the Southern Political Science Association Meeting, New Orleans, January, 2004.

Matthews, Donald R. 1984. Legislative Recruitment and Legislative Careers." Legislative Studies Quarterly, 9:4, 547-585.

Mayhew, David R. 1974. Congress: The Electoral Connection. New Haven: Yale University Press.

Miller, Warren E., and Stokes, Donald E. 1963. "Constituency Influence in Congress. American Political Science Review 57: 45-56.

Rohde, David W. 1991. Parties and Leaders in the Postreform House. Chicago: University of Chicago Press.

Swain, Carol M. 1993. Black Faces, Black Interests: The Representation of African Americans in Congress. Cambridge, Mass.: Harvard University Press.

Swain, Carol M. 1997. "Not 'Wrongful' by any Means: The Court's Decisions in the Redistricting Cases." Houston Law Review 34:315-21.

Thernstrom, Abigail. 1987. Whose Votes Count? Affirmative Action and Minority Voting Rights. Cambridge, MA: Harvard University Press.

Valelly, Richard M. 1995. "National Parties and Racial Disenfranchisment." In Classifying by Race. Paul Peterson, ed. Princeton, N.J.: Princeton University Press, 188-216.

Whitby, Kenny J. 1997. The Color of Representation: Congressional Behavior and Black Interests. Ann Arbor: University of Michigan Press.

Wilson, Woodrow. 1885. Congressional Government. Cleveland: World Publishing.

http://www.macon.com/mld/macon/14701171.htm

**May 31, 2006**

**Judge: Westmoreland right on Voting Act**

I read U.S. Rep. Lynn Westmoreland's piece in the Sunday, May 21 Telegraph, and find that I am in basic agreement with the views he expressed regarding the Voting Rights Act of 1965.

This legislation was passed by Congress and signed into law by President Lyndon Johnson to deal with the fact that many blacks were routinely denied the right to vote in many southern states. This denial was in direct violation of the 15th Amendment to the Constitution of the United States and was a shameful use of arbitrary power by the states which allowed it.

Congress, in passing the Voting Rights Act, used the general election of 1964 to automatically apply to any state or political subdivision in which two findings have been made: (1) the Attorney General has determined that on Nov. 1,1964, it maintained a "test or device" and (2) the Director of the Census has determined that less than 50 percent of its voting age residents were registered on Nov. 1, 1964, or voted in the presidential election of Nov. 1964.

With the exception of one county in Arizona, one county in Hawaii, the state of Alaska, and one county in Idaho, which were originally included in the coverage of the act, all the rest were south of the Mason-Dixon line. What could be fairer than to use the election of 2004 in the same manner as the election of 1964 was used by Congress when the Act was first passed?

The Supreme Court held that the Voting Rights Act was narrowly tailored to address a specific problem, and was" temporary " in duration. 40 years hardly seems temporary, and the problem has been solved insofar as the state of Georgia is concerned.

Duross Fitzpatrick is a senior judge in the U.S. District Court for the Middle District of Georgia.

**Written Testimony of Alexander Keyssar**
Matthew W. Stirling, Jr. Professor of History and Social Policy
Chair, Democratic Institutions and Politics
Kennedy School of Government
Harvard University

Submitted to the Senate Committee on the Judiciary
June 12, 2006

I submit this testimony to the Senate Committee on the Judiciary in the hope that it may prove to be of assistance in considering renewal of the special provisions of the Voting Rights Act of 1965. I am aware that the committee has been holding hearings on this subject and that some questions have been raised regarding the necessity, or desirability, of renewing Section 5's pre-clearance provision as well as the language assistance provisions in Section 203.

I write as a scholar and as an historian who has spent many years studying the history of voting rights in the United States. In addition to numerous articles in scholarly journals and the popular press, I am the author of The Right to Vote: The Contested History of Democracy in the United States, published in the fall of 2000 (with a slightly updated paperback edition published the following year).[1] That book is a history of the right to vote in the United States from the nation's founding through the late 1990s. I am currently the Matthew W. Stirling, Jr., Professor of History and Social Policy at the Kennedy School of Government, Harvard University.

Contemporary political scientists, law professors, and voting rights lawyers are better equipped than I to analyze the operation and impact of specific provisions of the VRA since 1965. But as an historian, I would like to locate the current deliberations against the backdrop of the prolonged effort to achieve universal suffrage in the United States, an effort that stretched from the 1780s through the 1960s. Key features of that backdrop – and the dynamics of the history – seem to be directly relevant to your deliberations regarding reauthorization of the Voting Rights Act.

[1] The book was awarded prizes as the best book in American history in 2001 by both the American Historical Association and The Historical Society. It was also a finalist for the Pulitzer Prize in History, the Los Angeles Times Book Award, and the Francis Parkman Prize.

Several historical patterns seem to be particularly pertinent, and they are itemized below.

1. The expansion of voting rights in the United States has been a very long and slow process. At our nation's birth, the franchise was highly restricted; and it took until roughly 1970 for the United States to achieve something close to universal suffrage. That the process took so long reveals a dimension of our history that is uncomfortable but that we need to acknowledge: our polity has always possessed men and women who opposed equal political rights for all citizens.

2. Progress in the expansion of the franchise has been piecemeal and fitful, not steady and gradual. There have been prolonged periods when efforts to broaden the franchise were stymied, sometimes followed by breakthrough moments where a great deal was achieved. The most prominent landmarks in the history of suffrage were: the early nineteenth century (when most property and tax requirements were removed); the post-Civil War era of Reconstruction (when the Fourteenth and Fifteenth Amendments were passed); 1920 (when the Nineteenth Amendment was finally ratified, enfranchising women); and the 1960s when both Congress and the Supreme Court took pioneering steps to guarantee democratic rights to Americans. The Voting Rights Act, of course, was at the center of this last surge in democratization.

The broad historical pattern suggests that progress towards expanding democratic rights has been possible only at particular historical junctures. It also suggests that curing systematic discrimination or bans in voting rights has generally been a prolonged process, taking many years to achieve. It took seventy-five years of organizing for women's suffrage to be achieved – and even longer for African Americans to secure their basic political rights.

3. In the course of our history, the right to vote has sometimes been narrowed as well as expanded: there have been many episodes where gains were reversed, and men and women who possessed the right to vote were subsequently disenfranchised. In some instances, such as women in New Jersey between 1790 and 1807, large groups of citizens who possessed the right to vote were subsequently disenfranchised by new legislation. In other examples, the reversals were partial, undercutting constitutional provisions or the intent of early legislation: e.g. in some states that had banned property or tax-paying requirements for voting for constitutional offices, those requirements were later re-instituted for municipal elections.

Among the many groups of voters who experienced these rollbacks in democratic rights, in different places and at different times, were: Native Americans (in various states); non-citizen declarants (in more than a dozen states); paupers or recipients of public welfare (roughly a dozen states); men and women who were illiterate (many states) or

illiterate in English (e.g. New York); men and women who did not pay taxes; convicted felons; and citizens whose jobs prevented them from getting to the polls before sundown.[2]

Indeed, disenfranchisements have been so frequent that during one prolonged period in our nation's history (roughly 1870 to 1920), the dominant trend was towards narrowing the franchise and reducing the proportion of citizens who possessed the right to vote. The progress of democracy in the United States has not been unilinear.

4. These rollbacks and reversals have been of immense significance in the history of racial restrictions on the right to vote. This sad pattern became visible even before the Civil War. Between 1790 and 1820, African Americans were disfranchised in three states where they had initially been permitted to vote; elsewhere de facto discrimination was formalized in law. In 1835, North Carolina added the word "white" to its constitutional requirements for voting; and in 1857 the Supreme Court ruled that African Americans, free or slave, could not be citizens of the United States. At the end of the 1850s, the percentage of African Americans who could vote in the United States was smaller than it had been at the nation's founding.[3]

This pattern, of course, was repeated in dramatic fashion in the decades that followed the Civil War. The Fourteenth and Fifteenth Amendments provided a solid constitutional foundation for banning

[2] For details and documentation, see Keyssar, Right to Vote, Chapters 3, 5, 7.
[3] Keyssar, Right to Vote, pp. 54-55.

racial discrimination in voting, and for a decade or more (depending on the state), African Americans turned out to vote in large numbers, in both the South and the North. During the final decades of the nineteenth century, however – as is well known – the vast majority of African Americans in the South were disfranchised once again, thanks to the operation of a panoply of devices expressly designed to keep blacks from voting; this occurred in all of the jurisdictions covered by the Voting Rights Act of 1965.

Indeed, it was precisely this reversal – the disfranchisement of previously and formally enfranchised African Americans – that led to, and demanded, the Second Reconstruction of the 1960s and the passage of the Voting Rights Act of 1965. The VRA was, in effect, legislation designed to enforce the Fifteenth Amendment, which had already been the law of the land for nearly a century. The VRA was deemed necessary precisely because many states had chosen – for decades – to deliberately circumvent the Fifteenth Amendment.

5. In this context, the pre-clearance provision of Section 5 of the VRA must be understood as a mechanism to prevent another round of rollbacks and reversals in the gains achieved by African Americans. The drafters of the VRA clearly recognized that the historical record made a powerful case for ongoing oversight and protection of the voting rights of African Americans: just as the Fifteenth Amendment had been circumvented by devices such as literacy tests, the intent of

the Voting Rights Act could readily be circumvented through other devices or alterations in the structure or mechanisms of elections. The pre-clearance provision was designed to prevent such circumventions, which would deprive American citizens of their political rights.

6. The denial of political rights to language minorities also has a long and complex history, dating back at least to the passage of the first literacy tests in the middle of the nineteenth century. As late as the 1940s, eighteen states denied the franchise to men and women who could not establish that they were literate in English. Although such restrictions were often justified as methods of insuring that the electorate was well-informed, in practice they commonly served to suppress the political participation of particular ethnic populations. The same was true of the more informal barriers that existed when non-English speaking citizens encountered ballots printed only in English. Section 203 of the 1975 Voting Rights Act constituted an affirmative step by the federal government to prevent the barrier of language from becoming a barrier to political participation.[4]

Conclusion

Over the very long run, the history of the right to vote in the United States is a history of increasing inclusion, of growing democratization. But that very long-run perspective ought not obscure how contested, and embattled, that history has been. Not all changes in voting rights law have been for the better; our country has not always

[4] Keyssar, Right to Vote, pp. 227, 265.

moved in the direction of greater democratization; frequently, in one state or another, the change has been in the opposite direction.

As this Committee considers renewal or reauthorization of key provisions of the Voting Rights Act, I would urge it to be mindful of this historical record. Our history (as well as the history of other nations) makes plain that the right to vote can be as fragile as it is fundamental, and that a society committed to democracy needs to safeguard that right with great energy and ongoing zeal.

Thank you for permitting me to submit this testimony for your consideration.

**STATEMENT OF SENATOR PATRICK LEAHY**
**RANKING MEMBER, COMMITTEE ON THE JUDICIARY**
**"REAUTHORIZING THE VOTING RIGHTS ACT'S TEMPORARY PROVISIONS:**
**POLICY PERSPECTIVES AND VIEWS FROM THE FIELD"**
**HEARING BEFORE THE SUBCOMMITTEE ON THE CONSTITUTION,**
**CIVIL RIGHTS AND PROPERTY RIGHTS**
**JUNE 21, 2006**

This afternoon the Chairman of this Subcommittee has called for a hearing with a very broad scope. In the full Judiciary Committee, we have already held six hearings on various aspects of S. 3274, the Voting Rights Act Reauthorization and Amendments of 2006. We have heard from dozens of academics, practitioners and local election administrators in the course of these hearings. They have provided hours of testimony and represented many different perspectives. I anticipate we will receive similar testimony at this subcommittee hearing today.

I regret that despite Chairman Sensenbrenner's strong leadership in holding a dozen hearings and building a strong bipartisan consensus in favor of H.R. 9, the House of Representatives postponed their vote on the Voting Rights Act this afternoon. We all know it would have received overwhelming bipartisan support and we need to act now. I expect that they will move forward very soon because the Voting Rights Act is a keystone of the body of civil rights laws that changed our country. Congresses since then have come together in bipartisanship to renew the Act, recognizing its continuing vitality and importance. It would be a travesty for the 109th Congress to break that historic solidarity with American values and with the importance of protecting the foundational right to vote.

The Chairman of the Judiciary Committee has stated that he intends to complete hearings on reauthorizing the Voting Rights Act by early next week. We have dedicated significant time to this matter over the course of three months now and I hope we can complete consideration of the bill at executive sessions before the Independence Day recess. Despite today's unnecessary delay, we expect the House of Representatives to vote soon on final passage of its bill, and we expect that bipartisan vote to be overwhelmingly in support of the bill. Now, the spotlight turns to us and time is of the essence. Instead of holding hearing after hearing on the very same provisions, Members can invite witnesses to submit written testimony that they believe to be relevant to this most important civil rights issue.

In his famous "I have a dream" speech, Martin Luther King, Jr. noted that "[w]hen the architects of our republic wrote the magnificent words of the Constitution and the Declaration of Independence, they were signing a promissory note to which every American was to fall heir." The Voting Rights Act is one of the most important methods of enforcing this promise. Congress has reauthorized and revitalized the Act four times, each time with overwhelmingly bipartisan support pursuant to its constitutional powers.

The enactment of the Voting Rights Act in 1965 transformed the landscape of political inclusion. As people are able to register, vote, and elect candidates of their choice, their interests get attention and their rights are protected. Prior to the Act, minorities of all races faced major barriers to participation in the political process, through the use of such devices as poll taxes, exclusionary primaries, intimidation by voting officials, language barriers, and systematic vote dilution. We have made significant progress toward a more inclusive democracy but the obstacles to full enjoyment of the franchise have morphed over time. Fortunately, instances of blatant denials of the right to vote are far less common but the abridgment of the right is still a major problem in some parts of the country. We should not let this historic Act sunset merely because the obstacles have becomes more subtle. Abridgement of the right to vote is a violation of the "promissory note" that our nation's founders embedded in the Constitution and that their successors wrote into the 15th Amendment.

We have heard from numerous witnesses that if we fail to reauthorize the Act's expiring provisions, in particular Sections 5 and 203, we risk our Nation backsliding on fundamental freedoms. Unfortunately, the work of the expiring provisions to remedy the denial of voting rights remains incomplete in many parts of the country. We must give these provisions time to solidify the gains that we have been making as a Nation.

Our Committee record is full of modern instances of discriminatory tactics employed since the Act was last reauthorized in jurisdictions covered by the temporary provisions. The state reports prepared by civil rights experts and practitioners set forth in great detail evidence of recurring problems in those jurisdictions. I look forward to the completion of the remaining state reports and their inclusion in the Senate hearing record.

The Chairman of this Subcommittee is one of the leading Republican co-sponsors of Senate Bill 2703. I look forward to working with him to pass this legislation to reauthorize and revitalize the Voting Rights Act. I extend a warm welcome today to the witnesses who have traveled here to testify and look forward to receiving their testimony.

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June 22, 2006

The Honorable Sam Brownback
United States Senate Committee on the Judiciary
Chair, Subcommittee on the Constitution, Civil Rights and Property Rights
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Senator Brownback:

The National Council on Disability (NCD) wishes to express its strong support for reauthorizing the provisions of the Voting Rights Act (VRA) set to expire in 2007. NCD is an independent federal agency charged with making recommendations to the President and Congress to enhance the quality of life for all Americans with disabilities and their families. NCD's overall purpose is to promote policies and practices that guarantee equal opportunity for all individuals with disabilities, regardless of the nature or severity of the disability; and to empower individuals with disabilities to achieve economic self-sufficiency, independent living, and integration into all aspects of society. NCD is required by its authorizing statute to advise the Administration and Congress regarding laws and issues that affect people with disabilities.

NCD is aware of the June 21, 2006 hearing on VRA in the Senate Judiciary Committee's Subcommittee on the Constitution, Civil Rights and Property Rights. The foundation of our democratic form of government is the right to vote. Voting is the most important tool Americans have to influence the policies the government adopts that affect every aspect of our lives - from tax policy, to preserving our environment, to protecting equal opportunity in housing and employment. To ensure that all Americans have this important tool, we must make sure that every American has an equal opportunity to cast an effective ballot. Unfortunately, even today, many eligible voters continue to face barriers that inhibit the exercise of this basic right. It is under these circumstances that NCD emphasizes the need for the reauthorization of the VRA.

For nearly a decade, NCD has made specific recommendations and published information with respect to aspects of citizens' voting rights, including election practices and their impacts on people with disabilities. NCD's findings address voting systems, voter registration, polling place access, poll worker training, and other factors aligned with the current need for reauthorization of the VRA. NCD's 1997 publication, *National Disability Policy: A Progress Report*, called for new voting systems to be made accessible to all people with disabilities. In its 1999 report, *Implementation of the National Voter Registration Act by State Vocational Rehabilitation Agencies*, NCD reported that 75 percent of people with disabilities who received services from state

vocational rehabilitation agencies were never asked to register to vote, as the law requires. A 2000 Harris poll indicated that 42 percent of this group still was not offered the opportunity to register. NCD's August 2, 2005 paper, *Enjoyment of the Right to Participation in Political and Public Life by Persons with Disabilities: Illustrations of Implementation from the United States,* provides examples of voting accessibility that work in favor of disenfranchised people. The paper discusses the need to prioritize accessibility by including training for poll workers and election officials to ensure that they understand how to make appropriate accommodations for voters with disabilities, a population comprised in part of seniors, people from diverse racial and ethnic groups, and people with alternative language needs.

NCD made four key recommendations in its 2001 paper, *Inclusive Federal Election Reform,* that remain relevant to current deliberations surrounding reauthorization of the VRA: (1) The President and Congress must enact federal legislation that incorporates the use of modern technological concepts and systems capable of ensuring full participation by all citizens; (2) The President and Congress must address complex issues and concerns surrounding existing federal legislation [such as the VRA] and effective ways to improve those laws through amendments or regulatory action while maintaining current rights and protections; (3) Bipartisan national, state, and local voter registration and get-out-the-vote initiatives are encouraged for people with disabilities and other disenfranchised Americans; and (4) The President and Congress must contact key citizens from disenfranchised groups and include them on any commission or similarly named body to investigate the status of the full range of voting accessibility issues in America.

The VRA is still needed to ensure that all citizens, including people with disabilities, as well as seniors, people within the lower socio-economic levels, people from diverse racial and ethnic groups and people with language needs, are provided an equal opportunity to participate in the political process. The existing VRA paved the way for more Americans to vote and set the stage for initial dialogue that resulted in the enactment of supplementary laws addressing the enfranchisement of people with disabilities. Since the VRA's enactment, the rise in voter registration has brought to the forefront a number of needs that should be considered at reauthorization, such as accessibility enforcement components and the coordination of new technologies, including universal design. In collaboration with other pertinent laws, reauthorization of the VRA can boost full participation in the political process by all citizens.

NCD urges our nation's leaders to respond in a timely manner to these recommendations in order to ensure full participation in the democratic processes. Full participation by all eligible citizens allows our society to harness the knowledge and resources of the community as a whole. Inclusion strengthens and enlivens America's political and public life, and our society at-large will be the ultimate beneficiary.

NCD is available to provide you with advice and assistance pertaining to these and other issues of importance to people with disabilities and welcomes any inquiries from you and your staff. Please contact either NCD's Director of Policy, Jeff Rosen, or NCD's

Congressional Liaison, Mark Seifarth, at (202) 272-2004 (voice) or (202) 272-2074 (TTY).

Sincerely,

Lex Frieden
Chairperson

**STATEMENT**

**of**

**JOHN J. PARK, JR.**

**before the**

**SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS AND PROPERTY RIGHTS**
**COMMITTEE ON THE JUDICIARY**
**UNITED STATES SENATE**

**for its hearing on the**

**VOTING RIGHTS ACT: POLICY PERSPECTIVES AND VIEWS FROM THE FIELD**

**June 21, 2006**

Mr. Chairman, members of this Committee, thank you for the opportunity to provide testimony regarding the very important issue of the renewal of certain sections of the Voting Rights Act. Since the beginning of 1997, my work in the Office of the Attorney General of Alabama has included the representation of State election officials in redistricting, voting rights, Section 5, and election law matters and participation in the preclearance process.[1] In my testimony, I will draw on my experience which leads me to several conclusions. One of those is that, in recent litigation, political motivations have played a more significant role than the face of the pleadings, the court decision, or both, would indicate. Another is that, even if it plans to reauthorize Section 5, Congress should limit the scope of Section 5's coverage and the duration of the reauthorization.

In submitting my testimony, I do not wish to minimize the scope of past discrimination in Alabama or question the decisions of Congress to pass the Voting Rights Act in 1965 and renew it in 1982. Likewise, I do not overlook the contributions of brave men and women who fought to secure the civil rights and voting rights of the African-American citizens of Alabama and other covered jurisdictions. Without their efforts, it might not be possible to suggest that there is no need to renew Section 5 or that the coverage of Section 5 should be pared back. Their efforts helped to change the covered jurisdictions, however, and Congress should reward those covered jurisdictions that have changed by displaying a measure of confidence in them.

In my judgment, Congress should not further increase the coverage of Section 5 over the covered jurisdiction. Leaving aside the question whether the record supports reauthorization or tightening, treating Section 5 as a one-way ratchet fails to take into

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[1] A list of representative court decisions is attached.

account the degree to which Alabama and other covered jurisdictions have changed since 1965. In the most recent presidential elections, black voters voted at a slightly higher rate than white voters. Turnout among black voters was 63.9%, compared to 63.1% among white voters. These rates are far above the rate of participation in 1964. Systematic barriers to the participation of minority voters have been removed, and there is no substantial likelihood that they will return. Moreover, the Alabama Legislature now includes a caucus of minority members in each house that is not strong enough by itself to pass legislation but is, likely, strong enough to block legislation that it views as detrimental to its interests. Alabama and the other covered jurisdictions should be rewarded, not punished, for their progress.

In suggesting that Congress relax the scope of Section 5's coverage, I do not suggest that Congress change the prohibition on the use of tests and devices to determine eligibility to vote. Congress included the prohibition on the use of tests and devices in the Voting Rights Act because it concluded that covered jurisdictions were using them to exclude minority voters, and it included Section 5 to preclude covered jurisdictions from implementing new discriminatory laws after previous discriminatory laws were declared unconstitutional. Maintaining the prohibition on the use of tests and devices provides substantial protection to minority voters without regard to whether Section 5 is renewed, tightened, or relaxed. Indeed, registration and participation rates show that there are no systematic barriers to minority participation.

Furthermore, the constitutional rule of one-person-one-vote in redistricting, even the relaxed rule that applies to the States, has been a substantial engine of change. In 1968, J. Harvie Wilkinson pointed out the effects of applying a rule of one-person-one-

vote in Virginia on the Byrd Machine, which lost strength as legislative districts migrated toward the interstate highways and away from the Machine's rural base.[2] The same thing is happening in Alabama as the Legislative districts migrate from rural parts of the State toward the larger cities and their suburbs. In Alabama, the African-American legislative caucuses described above are the product of the one-person, one-vote rule and other considerations.

In the remaining portions of this testimony, I will first discuss how the State of Alabama handles its obligations under Section 5. Then, I will suggest some ways in which the coverage of Section 5 might be relaxed without adversely affecting the interests of minority voters.

### A. The Burden on the Office

The State of Alabama almost always obtains preclearance of changes in its election laws and procedures through the administrative process. I am not aware of any instance in which the State has sought judicial preclearance before a three-judge federal district court sitting in the United States District Court for the District of Columbia.

The Legislature sits in one regular session each calendar year and may be called into one or more special sessions. After the legislative sessions are done and action by the Governor has been taken, an Assistant Attorney General reviews the legislation to identify any changes in election law that must be precleared. Preclearance submission packages are prepared for changes of statewide application and for some local laws. With local laws that affect one of Alabama's 67 counties, we try to send the work related

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[2] Wilkinson, Harry Byrd and the Changing Face of Virginia Politics, 1945-1966 (1968).

to the preclearance submission to a local attorney; sometimes the local attorney can and will do the work. If not, an Assistant Attorney General will prepare the submission.

In the 2006 Regular Session, the Legislature passed laws that put some 25 constitutional amendments on ballots. It also passed some 14 laws of general applicability that affect voting, including a 370 page revision of the State's election code. Some 24 local laws also appear to require preclearance. We are working to submit all of these new laws to the United States Department of Justice.

Since I have been in the Office of the Attorney General, the preparation of preclearance submission letters has been an extra duty assigned to an attorney who already had a substantial workload. For some years, that attorney's regular workload involved the drafting of opinions regarding issues of Alabama law. More recently, the duties have been in addition to the duties of an Assistant Attorney General who has represented the State, its agencies, and employees in litigation. The duties related to preclearance are not a full-time job, but may periodically take up a substantial amount of time.

For my part, I have prepared or participated in the preparation of a number of preclearance submissions, consulted with the attorney preparing others, and litigated the adequacy of submissions that I did not prepare. More particularly, I participated in the preparation of the preclearance submissions for the State's legislative, congressional, and State Board of Education redistricting plans in 2001 and 2002, doing much of the drafting of the letters. More recently, in litigation involving a number of municipalities in the State of Alabama, I worked with local counsel to determine whether the municipality needed to change the district lines for its governing council to incorporate changes

captured in the 2000 Census and comply with one-person-one-vote constitutional obligations. I helped several local counsel prepare their preclearance submission letters and did one myself for the City of Lipscomb. I did so because, while not a typical client for an Assistant Attorney General, Lipscomb was an orphan jurisdiction, that is, a jurisdiction without a lawyer and with limited funds. Finally, in cases like *Ward v. Alabama* and *Boxx v. Bennett*, I defended the adequacy of the State's preclearance submission letters.

My work with local counsel has shown me that experience with voting rights issues and preclearance is not widely distributed in the legal community. This lack of widespread knowledge and experience is a problem where an entire State is covered, as Alabama is. This Office is called on to shepherd local counsel through the process or to do it for them. It also reflects the fact that, while the Act covers the entire State, much of the State's business, including its legal business, proceeds without ever coming in contact with Section 5.

## B. Proposed Changes

### 1. Remove Coverage for De Minimis Changes.

Congress should amend Section 5 so that it no longer covers de minimis changes that have proven to have no potential for discrimination. Covered jurisdictions and subdivisions submit changes in the location of polling places, the setting of special elections, and the inclusion of referenda on constitutional amendments for review. I suggest that those changes, and others, have a de minimis effect and should be removed from the scope of Section 5. Alternatively, the Department of Justice should classify the

submissions that it receives according to type, so that the workload attributable to *de minimis* changes can be identified.

The applicable regulations provide a number of examples of changes that must be precleared, including "[a]ny change . . . . in the location of polling places." 28 C.F.R. § 51.13(d). The counties and municipalities of Alabama and other covered subdivisions secure polling places and, generally, do not seek to change them on a whim. In this election cycle, we have learned that one polling place had to be changed because the building that housed the earlier version collapsed. We also learned that, some two weeks before an election, local election officials were told that a hurricane in 2005 had destroyed a polling place. In each case, we had to ask USDOJ for permission to make a change and might have had to wait for up to 60 days for that permission to come, unless expedited treatment was requested and received.

With respect to the setting of special elections, the applicable regulations provide that the discretionary setting of a special election, whether to fill a vacancy or to put a constitutional amendment to the voters, is subject to preclearance. 28 C.F.R. § 51.17. This holds true even where the proposed constitutional amendment has no effect on voting; where the amendment affects voting, both the special election setting and the substance of the amendment must be precleared if the amendment passes.

A three-judge federal district court sitting in the Northern District of Alabama rejected the contention that the Legislature's selection of a date for a special election on a referendum had the potential for discrimination. *Greene County Racing Commission v.*

*City of Birmingham,* 772 F. Supp. 1207 (N.D. Ala. 1991) (three-judge court).[3] In particular, the court rejected the claim that setting the special election on a day near the day on which the public schools opened did not have the potential for discrimination. The court noted that "schools will be opening for white, blacks, and all other racial groups at the same time" and found "no evidence that the opening of schools will impact blacks to a greater or lesser degree than whites." 772 F. Supp. at 1217.

Subsequently, I was involved in litigation involving another special election in the Birmingham area. The referendum involved a plan for the construction of a domed stadium and the related financing. On the eve of the election, a Section 5 claim was filed complaining that the date had not been precleared. We made a submission, but contended that it was unnecessary. Ultimately, preclearance was obtained on an expedited basis.

In both cases, the Section 5 claim most likely disguised opposition to the substance of the referendum. The Greene County Racing Commission would have to compete with the proposed thoroughbred horse racing and pari-mutuel wagering facility in Birmingham. Similarly, the referendum on public improvements attracted substantial opposition and was defeated in the end. Section 5 gave the opponents of the substance of the provision a tool that allowed for the possibility of a delay in the voting.

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[3] On appeal, the United States Supreme Court vacated the District court's judgment and remanded the case with instructions to dismiss as moot. *See Harris v. City of Birmingham*, 505 U.S. 1201, 112 S. Ct. 2986 (1992). The dismissal, based on *United States v. Munsingwear, Inc.*, 340 U.S. 36, 71 S. Ct. 104 (1950), calls for vacatur. Even so, the decision of the three-judge federal district court has "persuasive value [because] it illustrate[s] the manner in which similar claims have been treated." *See Greene County Racing Commission*, 772 F. Supp. at 1216 fn. 14 (discussing similarly vacated prior decision in *Hawthorne v. Hinley*, 756 F. Supp. 527 (M.D. Ala. 1990)).

In other instances, the State includes referenda on constitutional amendments on the ballot for primary or general elections. That inclusion must be precleared even though the State is already conducting an election at the time. It must be precleared even though the proposed amendment may not relate to voting. Finally, it must be precleared notwithstanding the fact that, whether the referendum is put on a special election ballot or the ballot for a regularly scheduled election, someone frequently thinks it should have been done differently. In *Greene County Racing Commission*, the three-judge federal district court saw no significance in the fact that the referendum was not set on the day when the Mayor of Birmingham and two city council members were up for election, noting "[t]he best that can be said for this claim is that any election having no candidates for public office is likely to produce a lower voter turnout than will an election at which candidates for public office are running." 772 F. Supp. at 1216. In other cases, opponents fear too large a turnout. Both concerns are, fundamentally, political and outside the purview of Section 5.

The Department of Justice has advised the Committee that last year it made only one objection out of 4,734 submissions. Indeed, since 1965, the Attorney General has objected to only 1,401 submissions out of the 120,868 received by the Department of Justice. And, in the last ten years, there have been only 37 objections. The records of the Department of Justice also show that, in the past 15 years, none of the changes that Alabama made in polling places, the inclusion of referenda on ballots, and the setting of special elections produced an objection. In fact, nearly all of the objections received by the State or its subdivisions since 1986 relate to redistricting or annexation. Even so, we expend time and effort to submit changes in polling places and other *de minimis* changes

for review. The Committee should ask the Department of Justice to provide greater detail regarding the kind of changes that are submitted.

**2. Update the Baseline Date.**

Congress should update the date used as the baseline for the determination of coverage. In 28 C.F.R. § 51.4(b), the regulations state:

> Section 5 requires the preclearance of changes affecting voting made since the date used for the determination of coverage. For each covered jurisdiction that date is one of the following: November 1, 1964; November 1, 1968; or November 1, 1972.

*Id.* In the case of Alabama, and most of the other Southern states, any change in voting standards, practices, or procedures from those that were in place on November 1, 1964 must be precleared before it can be implemented.

The continued use of a baseline that is 42 years old presents a serious practical problem. None of the election officials who were serving in 1964 is still serving today, and those 1964 election officials are not available to tell us what procedures they used. With statutes and regulations, it is possible to identify those that were in place on November 1, 1964, and we do that. But, state election officials can tell us how they implement those statutes and regulations, filling in the gaps with practices that they do not reduce to writing. When we defend against a Section 5 claim, we need to be able to call on state election officials to explain what they do, but we must now trace that practice back to 1964.

The case of *Connors v. Bennett*, 202 F. Supp. 2d 1308 (M.D. Ala. 2002) (three-judge court), illustrates the practical difficulties that the continued use of a baseline that was then 38 years old presents. The litigation in *Connors* started after the Republican Party, in response to a challenge, disqualified a candidate for its nomination for a seat in

the State Legislature on the ground that he did not live in the district he sought to represent. The Party had already certified its list of candidates to the Secretary of State within the five days allowed under Alabama law, and the Secretary of State had already certified the list of primary candidates to the probate judges when the Party advised the Secretary of State of the disqualification. The Secretary of State then amended his certification advising the probate judges in the legislative district not to include the name of the disqualified candidate on the primary ballot.

The disqualified candidate filed suit in state court, which ordered that his name appear on the ballot. In so doing, the state court gave no effect to § 17-16-12, Code of Alabama (1995), which provides:

> The name of no candidate shall be printed upon any official ballot unless such person is legally qualified to hold the office for which he is a candidate and unless he is eligible to vote in the primary election in which he seeks to be a candidate and possesses the political qualifications prescribed by the governing body of his political party.

*Id.* In addition, the state court rejected the contention that granting relief would constitute a change because, before November 1, 1964, the Secretary of State had honored party request to remove candidates from the primary ballot even after the party had certified its candidates. In fact, the state court rejected a letter from the Justice Department's Voting Section, written in response to a letter that I wrote, in which the Voting Section stated that it believed the directive to place the name of the disqualified candidate on the ballot was a change.

Evidence to support that practice came from the State's Archives, which included correspondence between the Secretary of State and the political parties. The changes had been made, but the party's changes did not appear to arise from a disqualification. On

that narrow ground, which, in other words, is the State produced a spotted cow with the wrong spots, the court rejected the argument.

The State could do no better than to consult the Archives in this case. If election officials with knowledge were available, their testimony might have been persuasive. As it was, while the State could have and did consult its present election officials, their experience could take the State back only to about 1990.

Congress should change the baseline date to the present so that state election officials who know of the State's practices can defend them. Moreover, anything that was in place in 1964 and is still in place is immune from Section 5 challenge, and any change from what was in place that has been precleared is presumptively acceptable. Any other changes are those that have not been precleared or objected to and will likely not be challenged on Section 5 grounds. The likelihood that injury will result from updating the baseline is minimal. That likelihood of injury hardly outweighs the benefit of helping the State use its election officials to defend their practices.

**3. Clarify the Criteria for Bailout.**

Section 4(a) of the Act establishes criteria and a procedure by which covered jurisdictions can graduate from the coverage of Section 5. In 1982, Congress amended Section 4(a) to provide that "any subdivision of a [covered] State (as such subdivision existed on the date such determination was made with respect to such State) though such determinations were not made with respect to such subdivision as a separate unit," can also file a bailout action. This language appears to modify the holding in *City of Rome v. United States*, 446 U.S. 156, 100 S. Ct. 1548 (1980), and may account for the fact that several counties in Virginia have successfully bailed out.

As with the date for the coverage determination, Congress should update Section 4(a). To the extent that it applies to political subdivisions of a covered State "as such subdivision existed on the date such determinations were made with respect to such State," it is frozen at November 1, 1964 for Alabama and other covered Southern States. Some new municipalities have been created, and they should also be allowed to bail out if, after ten years, they can satisfy the criteria.

In addition, political parties and other covered entities that are not political subdivisions of a covered State should also be authorized to pursue bailout. When the Alabama Republican Party asked about the possibility of filing a bailout action, it was told that it was not entitled to file. Denying the possibility of exit to a covered entity raises serious constitutional issues. The Alabama Republican Party has complied with its obligations under Section 5, and there is no record of any objection by USDOJ to its party rules. While there have been objections to the Democratic Party's state and local rules, the Party has submitted its rules and any changes for review under Section 5. In the 2004 election cycle, both political parties prevailed in Section 5 actions filed by disqualified candidates by showing that the party's rules had been precleared; the disqualification, which represented the application of previously precleared standards, practices, and procedures, was not a Section 5 problem.

More significantly, neither of the State's political parties has any interest in discriminating on the basis of race. Both want as many votes as they can get and are not picky about where they come from. The African-American community may vote solidly Democratic, but that is the community's choice; the African-American community is not

locked in to that choice. In short, the political parties of covered jurisdictions appear to be good candidates for bailout. They should be empowered to file.

**4. Any Extension Should be for less than 25 years.**

The State of Alabama and its subdivisions have diligently attempted to comply with their obligations under Section 5, and the local courts have noted that the State has proceeded in good faith. *See Connors v. Bennett*, 202 F. Supp. 2d at 1322 (Thompson, J., concurring); *Ward v. Alabama*, 31 F. Supp. 2d 968, 974 (M.D. Ala. 1998) (three-judge court). In addition, there is no substantial difference between the participation rates of majority and minority voters. In short, Alabama sees little need for 25 more years of coverage.

## REPRESENTATIVE CASES

*Sinkfield v. Kelly*, 121 S. Ct. 446 (U.S. 2000) (consolidated with *Bennett v. Kelley*).

I represented the Secretary of State of Alabama in this case. We appealed from a decision by a three-judge federal district court which held that seven Alabama legislative districts were the product of unconstitutional racial gerrymandering. *See Kelly v. Bennett*, 96 F. Supp. 2d 1301 (M.D. Ala. 2000)(three-judge court). The United States Supreme Court reversed the district court's decision, agreeing with our argument that the Kelly Plaintiffs lacked standing.

Other decisions in this redistricting case include:

*Thompson v. Smith*, 52 F. Supp. 2d 1364 (M.D. Ala. 1999)(three-judge court).

In this decision, the district court agreed with our argument and gave preclusive effect to a decision of the Circuit Court of Montgomery County, Alabama. In a 1998 trial, in which I represented Alabama election officials, that court ruled against other redistricting plaintiffs on their vote dilution and one-person-one-vote claims. In this decision, the three-judge federal district court applied the Alabama trial court's ruling to other redistricting plaintiffs.

*Rice v. Sinkfield*, 732 So. 2d 993 (Ala. 1998).

In this case, the Alabama Supreme Court adopted my contention that the appeal from the Circuit Court of Montgomery County's ruling, which we would later apply preclusively, was – or would soon become – moot.

*Rice v. Smith*, 988 F. Supp. 1437 (M.D. Ala. 1997)(three-judge court).

In this decision, the district court dismissed the claims of two plaintiffs without prejudice and stayed further proceedings with respect to the claims of other plaintiffs. The ruling was made over the plaintiffs' objections and agreed with the position we set forth.

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

> In 1988, the district court entered an injunction that changed the size and method of election of the Baldwin County Commission. As a remedy for past State violations of the United States Constitution and the Voting Rights Act, the court increased the size of the Commission from four to seven members and directed that they be elected from single-member districts rather than at-large. In its 1994 decision in *Holder v. Hall*, 512 U.S. 874 (1994), the United States Supreme Court held that the remedial powers of a federal district court under the Voting Rights Act did not include changing the size of an elected body. *Holder* undercut the district court's 1988 injunction and, in this case, the district court vacated the injunction and returned the Commission to its previous size and method of election. I represented the Probate Judge and supported the parties who challenged the injunction. On appeal, the Eleventh Circuit held that a vote dilution claim seeking the creation of an influence district was not cognizable under the Voting Rights Act.

*Reform Party of Alabama v. Bennett*, 18 F. Supp. 2d 1342 (M.D. Ala.), *aff'd*, 158 F. 3d 1171 (11th Cir. 1998).

> In this case, I represented the Secretary of State of Alabama and other State election officials who were sued by a third party seeking an injunction that would result in their being placed on the ballot. The third party sought to excuse the late filing of names of their nominees by pointing to erroneous oral advice they received from the Office of the Secretary of State. The district court declined to estop the State from applying the clear, unambiguous statutory requirements to bar the listing of the Reform Party candidates on the ballot. The Eleventh Circuit affirmed the district court's judgment in favor of the State election officials.

*Gustafson v. Johns*, __ F. Supp. 2d __, 2006 WL 1409083. (S.D. Ala. 2006) (three-judge court).

In this case, I represented State Election Officials who were sued by nineteen individual plaintiffs who challenged the districting plans for the State Senate and State House of Representatives. The plaintiffs contended that the plans were the product of unconstitutional racial gerrymandering. The district court dismissed the claims holding that they were barred by *res judicata*. The district court found that the interests of these plaintiffs were adequately represented by the plaintiffs in *Montiel v. Davis* and other challenges to the same plans.

*Montiel v. Davis*, 215 F. Supp. 2d 1279 (S.D. Ala. 2002)(three-judge court).

In this case, a three-judge federal district court granted summary judgment in favor of State Election Officials on a challenge to the new redistricting plans for the Alabama State Senate and State House of Representatives. The court rejected the Plaintiffs' claims that those plans did not comply with constitutional one-person-one-vote standards and illegally diluted the plaintiffs' votes in violation of Section 2 of the Voting Rights Act. I represented the State Election Officials.

*Connors v. Bennett*, 202 F. Supp. 2d 1308 (M.D. Ala. 2002) (three-judge court).

This case arose from the Republican Party's disqualification of a candidate for its nomination for a seat in the State Legislature. The disqualified candidate obtained relief from a state trial court, which rejected the State' contention that granting relief would represent a change covered by Section 5. The State showed that, before November 1, 1964, state election officials had honored the requests of political parties to take candidates off the ballot even though the party had already submitted its certified list of candidates. Republican Party officials then filed this action seeking to preclude the enforcement of the state-court ruling unless it was precleared. The federal district court

*Boxx v. Bennett*, 50 F. Supp. 2d 1219 (M.D. Ala. 1999).

In this case, I represented the Secretary of State of Alabama who was sued by individual plaintiffs who contended that regulations authorizing a recount of votes cast using electronic voting machines could not be implemented because the State's preclearance submissions did not adequately identify the change. In the underlying election, the margin was 37 votes out of more that 212,000 cast, an infinitesimal difference. Regulations promulgated by the State's Electronic Voting Commission permitted the recount and provided that, if the recount changed the result, an election contest could be filed. The Regulations were precleared in 1984 when first promulgated and again in 1998, when other portions were changed. The district court held that because the State did not identify the effect of the recount provision as a change with specificity, the recound could not be conducted. *Cf. Eubanks v. Hale*, 752 So. 2d 1113 (Ala. 1999) (Challenger ultimately prevails).

*Ward v. Alabama*, 31 F. Supp. 2d 968 (M.D. Ala. 1998) (three-judge court).

In this case, I represented the State of Alabama and State Election officials who were sued by plaintiffs who challenged the implementation of a change in the State's absentee voting procedures. The change was made in a statute after a record of abuses in absentee voting change in its submission, but did not say in the letter.

*Rice v. English*, 835 So. 2d 157 (Ala. 2002).

In this case, I represented the Secretary of State of Alabama and several probate judges. Those election officials were named as defendants in a challenge to the redistricting plan for the Alabama State Senate. The challenge was based on provisions of the State Constitution. The trial court rejected the contention that the population of the districts was not sufficiently "as nearly equal to each other . . . as may be," and the Alabama Supreme Court affirmed the judgment in favor of the Secretary of State and probate judges.

# VRA

## Suit Turns Voting Rights Act on Its Head

By EMILY WAGSTER PETTUS, Associated Press Writer

Ike Brown is a legend in Mississippi politics, a fast-talking operative both loved and hated for his ability to turn out black voters and get his candidates into office.

That success has also landed him at the heart of a federal lawsuit that's about to turn the Voting Rights Act on its end.

For the first time, the U.S. Justice Department is using the 1965 law to allege racial discrimination against whites.

Brown, head of the Democratic Party in Mississippi's rural Noxubee County, is accused of waging a campaign to defeat white voters and candidates with tactics including intimidation and coercion. Also named in the lawsuit is Circuit Clerk Carl Mickens, who has agreed to refrain from rejecting white voters' absentee ballots considered defective while accepting similar ballots from black voters.

Brown shakes off the allegations.

"They've been trying to target me for years, the attorney general and all them, because we're so successful," the 52-year-old says. "Hey, if you're a failure, nobody will mess with you. But we're successful in east Mississippi."

The Justice Department complaint says Brown and those working with him "participated in numerous racial appeals during primary and general campaigns and have criticized black citizens for supporting white candidates and for forming biracial political coalitions with white candidates."

Noxubee County — a rural area along the Alabama line named for a Choctaw word meaning "stinking water" — has a population of 12,500, 69 percent black and 30 percent white.

Whites once dominated county politics here, but now only one white person holds countywide office, and he says Brown tried to recruit an out-of-county black candidate to run against him three years ago.

The federal case against Brown, scheduled for trial this fall, represents a change in direction in the use of the Voting Rights Act, says Jon Greenbaum, director of the voting rights project for the Washington-based Lawyers Committee for Civil Rights Under Law.

The law was written to protect racial minorities in the 1960s when Mississippi and other Southern states strictly enforced segregation.

"The main concern we have in the civil rights community isn't necessarily that that DOJ brought this case," Greenbaum says. "It's that the department is not bringing meritorious cases on behalf of African-American and Native American voters."

Justice Department records show the department's last voting-rights case alleging discrimination against black voters was filed in 2001. Since then, six cases have been brought on behalf of voters of Hispanic or Asian descent in five states — plus the case involving white voters in Mississippi.

Justice Department spokesman Eric Holland would not comment on the case, but provided stacks of documents, including the consent decree signed by Mickens, Noxubee County's chief elections officer.

Brown, a former tax preparer, served 21 months in prison in the 1990s on a felony conviction of preparing fraudulent federal income-tax returns. He retained his right to vote. The same federal judge who handled his earlier trial is now overseeing the Justice Department case.

"This case is real simple," Brown says, stretching back in a maroon chair during an interview in Mickens' office, where voter-registration records are kept. "Find me one white person that was discriminated against."

The main white person who makes the claim is Ricky Walker, the county prosecuting attorney who believes Brown recruited an opponent for him simply because he's white, an action Walker called "racist."

Walker says that when he qualified to run again in 2003, Brown brought in a black lawyer from another part of the state to run against him. A circuit judge found that the lawyer, Winston James Thompson III, had not established residency, and Thompson was not allowed on the ballot.

"I think he just wanted to have a person in that office that he had some control over, a black person," Walker says.

Brown, chairman of the Noxubee County Democratic Party since 2000, says Thompson recruited himself.

Brown's defense attorney, prominent black Republican Wilbur Colom, disagrees with Brown's political views but defends his right to speak.

"I think Ike does play race politics," Colom says. "He is a black political leader who fights the fight like we were still in the 1970s. He doesn't recognize the progress that we have made."

But Colom criticizes the Justice Department for filing a complaint against a black political consultant while ignoring similar behavior by white political operatives in Mississippi.

"It has overtones of politics and that's the wrong road for Civil Rights Division of the Justice Department," the attorney says. "It's going to destroy their credibility the next time they ask black people to listen to them."

Democratic state Rep. Reecy Dickson says Brown is a political celebrity who evokes strong reactions from friends and foes. Brown moved to Noxubee County in 1979 to work on Dickson's campaign for county superintendent of education and later helped her bid for the Legislature.

Asked if Brown is fair, she smiles slightly.

"The question comes down to: What is fair in politics?" Dickson says. "I heard someone say once, 'Fair died a long time ago.'"

Brown sees the Justice Department case as whites dissatisfied with growing black political power in east Mississippi — particularly his power. He says the lawsuit is a way to muddy his name.

"It's all about voter suppression," he says.

# Congress of the United States
Washington, DC 20515

June 9, 2006

The Honorable J. Dennis Hastert
Speaker, US House of Representatives
H-232 Capitol
Washington, DC 20515

The Honorable John Boehner
Majority Leader, US House of Representatives
H-107 Capitol
Washington, DC 20515

Dear Speaker Hastert and Majority Leader Boehner:

We appreciate the leadership and focus you have both demonstrated as you serve in your positions in our leadership. Many of us have concerns about specific portions of the upcoming renewal of the Voting Rights Act (VRA), and request that the renewal legislation (H.R. 9) be given full floor consideration, including amendments, and not be brought under a suspension of the rules. We fully support renewal of the VRA, but only if it can be modernized.

When the House debated the last reauthorization in 1981, the Rules Committee reported an open rule (H.Res. 222 in the 97th Congress) and the House considered 14 amendments to the legislation. Since this legislation will be in effect for the next 25 years, and our grandchildren will be the ones dealing with renewal, a full debate is necessary and appropriate.

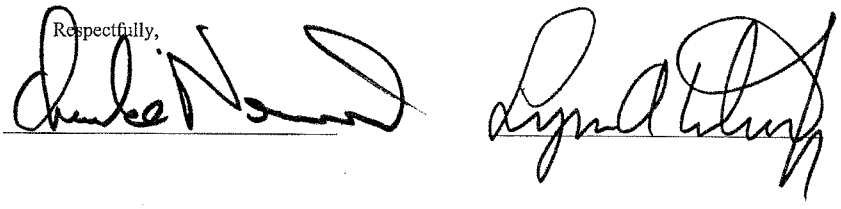
We have expressed concerns and offered effective policy solutions consistent with the intent of the original Voting Rights Act, the effort to reauthorize the Act, and the sensitive political realities. We are and will remain passionate about and committed to this issue, long past any vote on the House Floor.

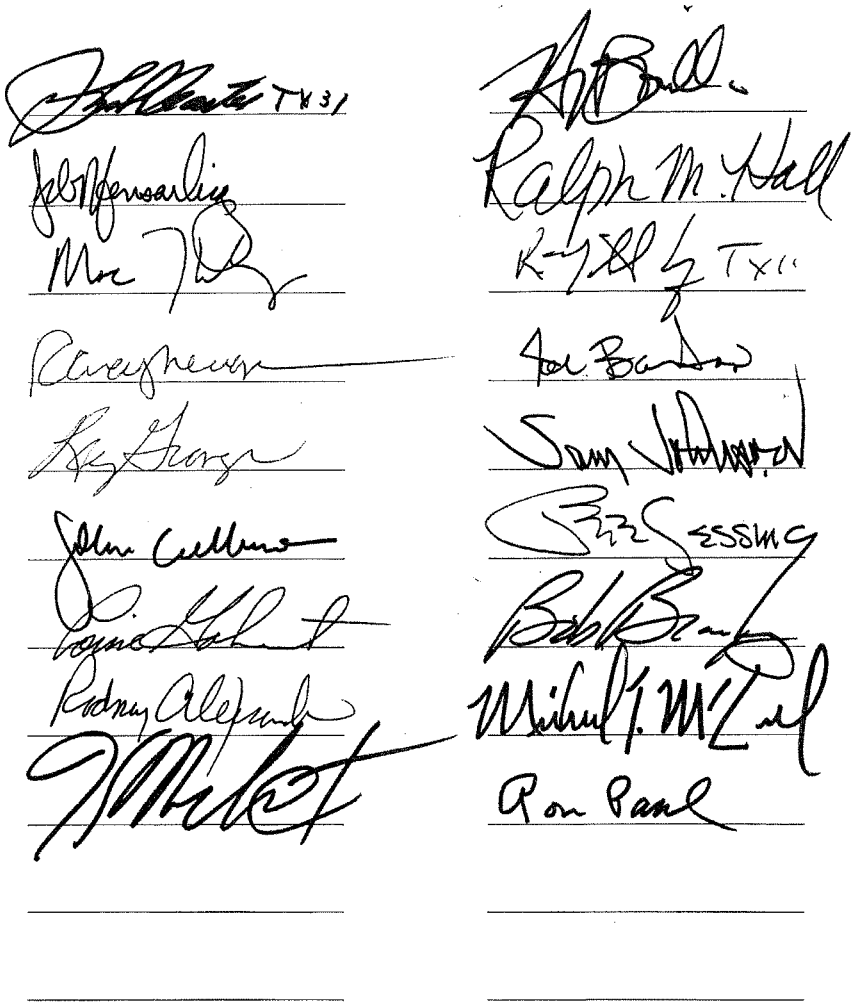
We are grateful you have taken the time to listen to our concerns. We implore you to take steps to address our apprehension with H.R. 9 as currently drafted. The formula in Section 5 can be updated to reflect today's realities. Section 203 can be amended to avoid a more serious burden on the states. A lack of willingness to update the Voting Rights Act to reflect the 21st Century, simply because the alternative is more palliative to some of our fiercest political opponents, is inexcusable. Holding some jurisdictions to outdated standards is not good for our nation, our minority constituents, or our party.

As a significant number of the Republican Party's most faithful members in the House, we would find it incredibly undesirable for the resolution to this current difference on how to approach VRA renewal to cause future cracks in our party's cohesiveness. We fear it absolutely will.

It only makes sense on legislation as momentous as the Voting Rights Act to let the House work its will on this legislation, and we request that this vital bill be brought under regular order with amendments allowed.

Respectfully,

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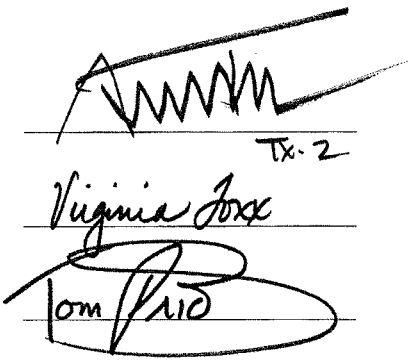
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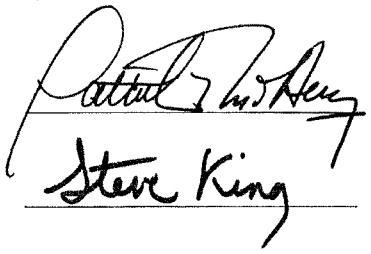
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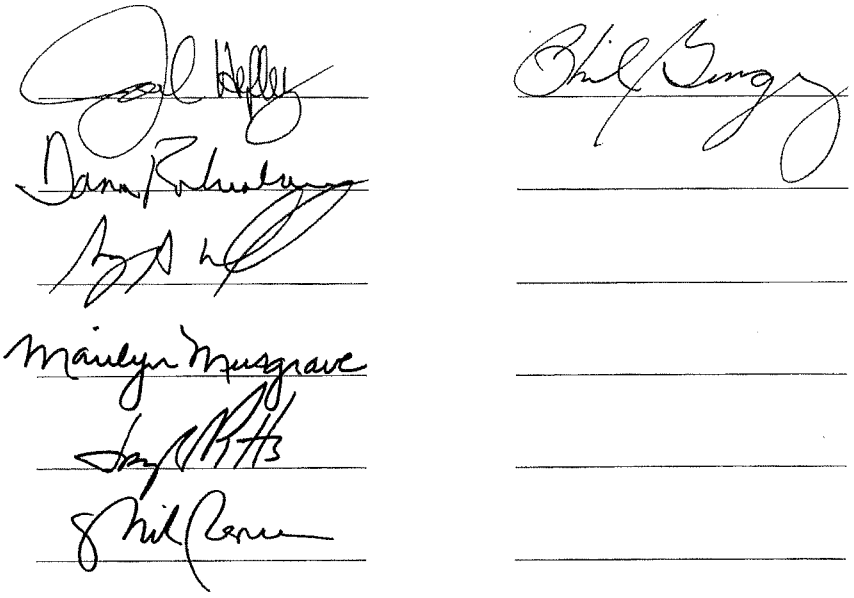

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Barbara Cubin

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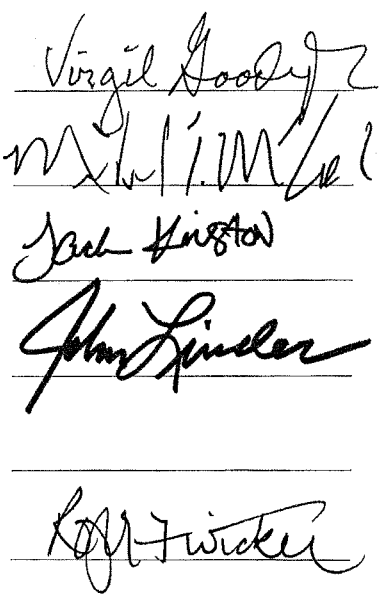

Testimony of

THE HONORABLE GERALD A. REYNOLDS

Chairman

UNITED STATES COMMISSION ON CIVIL RIGHTS

on

# VOTING RIGHTS ACT: POLICY PERSPECTIVES AND VIEWS FROM THE FIELD

Before the

SUBCOMMITTEE ON THE CONSTITUTION,
CIVIL RIGHTS, AND PROPERTY RIGHTS
U.S. SENATE

June 21, 2006

TESTIMONY OF THE HONORABLE GERALD A. REYNOLDS

June 21, 2006
Dirksen Senate Office Building 226
2:00 PM

Mr. Chairman, Senator Feingold, and members of the Subcommittee— I am Gerald A. Reynolds and have served as Chairman of the United States Commission on Civil Rights since December 2004. The Commission is an independent bipartisan agency established by Congress in 1957 to investigate complaints alleging that citizens are being deprived of their right to vote for reason of their race, color, religion, sex, age, disability, or national origin, or by reason of fraudulent practices; to study and collect information relating to discrimination or a denial of equal protection of the laws under the Constitution because of the same bases; to appraise federal laws and policies with respect to discrimination or denial of equal protection of the laws because of the same bases; to serve as a national clearinghouse for information in respect to discrimination or denial of equal protection of the laws because of the same bases; to submit reports, findings, and recommendations to the President and Congress; and to issue public service announcements to discourage discrimination or denial of equal protection of the laws. The Commission has been called the "conscience of the Nation" on civil rights matters, and our recommendations to Congress have often led to the enactment of critical legislation. In particular, the Commission was instrumental in providing the evidence of pervasive discrimination in voting that led to the passage of the Voting Rights Act in 1965. We also reported on the initial efforts to enforce the act immediately after its passage; and provided reviews and analyses that assisted Congress in deciding to extend and expand the act's temporary provisions in 1970, 1975, and 1982.

Since 1961, the Commission has adopted twelve statutory reports and has produced thirty publications on the subject. I am pleased to appear you before you today to discuss the temporary provisions of the Act, in light of the Commission's historic and vital role in its early development and subsequent reauthorizations.

Our most recent work on this subject continues the Commission's record of service in this area. Our most recent reports on the temporary provisions of the Voting Rights Act endeavor to provide this Congress with a factual predicate to consider whether current conditions justify the scope and reach of the law as originally conceived.

Beginning in October 2005, the Commission undertook an extensive review of the impending expiration of the Act's emergency provisions. We heard testimony from noted experts in the field, reviewed thousands of pages of documents the Justice Department provided to the Commission, and reviewed relevant court decisions, books, articles, and previous Commission reports on the issue—all with an aim of providing objective data that can inform the decision-making of all participants in the re-authorization process. Our resulting publications were carefully drafted and supported by an extensive factual record. Those publications include a statutory report entitled *Voting Rights Enforcement and Reauthorization* and a briefing report entitled *Reauthorization of the Temporary Provisions of the Voting Rights Act.*

I understand that Commission staff have provided copies of these publications for members of this Subcommittee. I should also note that both publications, including a dissent, are available to the general public and interested parties on our website at http://www.usccr.gov. My testimony today summarizes the findings and recommendations of both publications.

The years preceding the adoption of the Voting Rights Act were marked by systemic voting abuses which denied hundreds of thousands of Americans access to voting booths on account of race. A 1961 Commission report is particularly telling. The report identified 100 counties across the Nation where African-Americans were prevented from voting— "by outright discrimination or by fear of physical violence or economic reprisal"; and pervasive and unlawful violence by police used to repress voting rights.

As the Supreme Court cited in *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356, 373 (2001), Congress had determined at that time that "there persisted an otherwise explicable e 50-percentage point gap in the registration of white and African-American voters in some states." Also, Congress relied on the findings from the Commission, the Department of Justice, and federal courts that the covered states were engaged in a pattern of unconstitutional behavior. A Senate Report from 1965 found that in every voting discrimination suit that had been brought against Alabama, Louisiana, and Mississippi for example, both the district court and the court of appeals had found "discriminatory use of tests and devices"—devices such as literacy, knowledge, and moral character tests. 89 S. REP. 162 at 9. The Senate concluded that these were not "isolated deviations from the norm," but rather "had been pursuant to a pattern of practice of racial discrimination." Id. at 10.

Such invidious practices had driven down the average registration rate for black citizens in the covered states down to 29.3 percent. *See id.* at 42.

We have come a long way in 45 years and the years since the Voting Rights Act was adopted. The current Commission would be hard-pressed to discover the same kinds

of discriminatory voting practices that our predecessor Commissions encountered—the kinds of discriminatory practices documented in that 1961 report and others like it that impelled Congress to adopt the Voting Rights Act and, in particular, Section 5. Both government action and perhaps even a change in society's fundamental views on equality have helped to remove many of the barriers to full citizenship since that time. This is particularly true in jurisdictions that are covered by Section 5.

**In those covered jurisdictions, we have seen black registration voting rates substantially increase in recent decades.** Data presented to the Commission suggests that Southern blacks register and vote at rates comparable to, if not higher than, the rest of the Nation. Research also indicates that since 1984 black registered voters have closely tracked the voting age population in the original Section 5 states. For most of the period studied, black registration rates lagged behind those for whites, but for the last four elections for which data are available, black registration in five of the six original Section 5 states *exceeded* that of black registration in non-southern states. Most notably, in two Section 5 states, black turnout has been consistently above the national average.

**At the same time, we have witnessed remarkable strides in the number of blacks and other minorities holding elected office.** According to data compiled by Ronald K. Gaddie, Professor of Political Science at the University of Oklahoma, in earlier times, only one black state legislator held office in all of the seven states originally covered by Section 5—combined. Today, by Dr. Gaddie's estimation, a black person in the South is more likely to have a black representative than anywhere else in the country. While none of the Section 5 states studied by Dr. Gaddie has yet reached proportionality, three states—according to his research—are approaching those levels. And the number

of black representatives in the covered jurisdictions has increased at the congressional level as well—from three in 1991 to eleven today.

**Another important statistic to consider is the overall declining percentage of objections that the U.S. Department of Justice has issued in response to state and local modifications to election procedures.** The central placement of this finding in our statutory report directly reflects the importance that the Commission attached to this particular finding. The findings were reached based on a review of primary source documents subpoenaed by the Commission from the Department of Justice and reviewed internally by Commission staff.

As you know, Section 5 requires certain states and localities to obtain federal approval before modifying voting practices and procedures—what is known as a preclearance review process. Whenever a covered jurisdiction (as defined in Section 4 of the Act) enacts or seeks to administer a change in voting practice and procedure, that jurisdiction must obtain federal approval. Approval can be obtained from the Attorney General of the United States or, alternatively, a special panel of the U.S. District Court for the District of Columbia. The Attorney General has the option of expressly rejecting any modified change that could potentially enact new discriminatory voting practices and procedures.

Comparing the total number of proposals submitted for preclearance review with the number of objections issued by the DOJ over an extended period of time serves as an important indicator in assessing whether there is a continued need for Section 5. The overall numbers and scope of objections serve as a possible indicator of actual or potential discriminatory voting changes still occurring in the covered jurisdictions.

Analysis of objections is preferable to other indicators, such as declaratory judgments or withdrawal letters because these categories are so small as compared to Justice Department objections.

Between August 1965 and June 30, 2004—according to our analysis—jurisdictions filed 117,057 voting change submissions for Justice Department review. Since 1965, the Justice Department has objected to 1,400 preclearance submissions. The current extension period between 1982 and 2004 has had the lowest level of DOJ objections of any time in Section 5's history. But, in my opinion, the most revealing fact uncovered by Commission staff is that overall DOJ records show a dramatic and continuous decline in the percentage of objections to proposed changes over the 40-year period of the Act—dropping from 14.2 percent in the period 1965-1974 to a mere 0.7 percent in the period 1982-2004. These decreases may lead one to question the continuing utility of the expiring provisions given that Section 5's frequency of application for the purpose of interposing an objection has declined to less than one percent in recent decades.

Some have argued that the number of objections interposed has increased, and indeed, our review confirms that the number of objections filed by the DOJ rose from 429 in 1975-1981 to 752 in the period 1982-2004. Although it is true that objections have increased in absolute terms, this is largely because the number of overall submissions has skyrocketed—from 1,542 in the 1965-1974 period to 101,641 total submissions over roughly the last 25 years. Additionally, the Commission observed that the ratio of objections to submitted changes dropped to 0.7 percent in recent years— demonstrating a

decline. Despite developments in the courts and other arenas, the Commission noted a broader and fairly consistent decline over an elongated 39-year period.

**Many have opined that the expiring provisions of the Voting Rights Act are constitutionally worrisome and encroach heavily on the role of State and local governments.** Samuel Issacharoff, the Harold R. Medina Professor of Procedural Jurisprudence at Columbia Law School, has referred to Section 5 as an "extraordinary intervention" that permits the federal government to "overcome the normal presumptions of state autonomy and respect for federalism." Indeed, in this respect Section 5 is unique among federal laws because of the change it imposes on the traditional relationship between the federal government and state and local governments.

As the statutory report documents, federal law historically presumes state and local laws are valid unless and until challenged in court and found to violate a federal provision. Under Section 5, however, the presumption is reversed, and state and local laws are presumed invalid unless and until the Attorney General or the District Court determines them lawful. Justice Black's dissent in *South Carolina v. Katzenbach* recognized this arrangement as an "uncommon exercise of congressional power."

The Supreme Court has not reconsidered Section 5's constitutionality since the 1982 extension. Pervasive discrimination is more distant in time and, as I discussed earlier, broader social changes have expanded opportunities to minorities. As time passes and the pervasiveness of discrimination becomes increasingly more distant, some commentators have expressed concern that Section 5's encroachment on state authority will loom larger and raise continuing constitutional concerns. In its briefing, the Commission urged Congress to consider congruence and proportionality of Section 5 to

recent voting discrimination and to developing a careful and complete record of discrimination in the course of reauthorization, given Section 5's unique infringement upon traditional state and local prerogatives.

Consideration of congruence and proportionality should include a carefully developed record of purposeful voting discrimination, including denial of ballot access and vote dilution. Congress should concentrate on developing records of evidence that are comparable for both covered and noncovered jurisdictions so that laws governing each may be appropriately directed. As much as possible, Congress should rely upon theories of discrimination that are likely to achieve broad consensus and survive judicial scrutiny, rather than upon controversial arguments that may be vulnerable to legal challenge. If Congress should find evidence of voter discrimination, it should also ensure that any reauthorized preclearance procedures are proportional to that evidence. With this proportionality in mind, Congress might consider amendments regarding the formula for determining covered jurisdictions, the stringency of the bailout standard, the extent of state and local procedures subject to preclearance, and the length of the term of the extension. Such changes, if enacted by Congress, might do well to ensure Section 5's proportionality.

Ultimately, however, Congress will first need to balance the question as to whether current conditions in covered jurisdictions justify a continued "extraordinary intervention," to quote Professor Issacharoff, in the first place.

**Although my testimony today has focused on the continued utility of Section 5, similar arguments have been raised regarding the efficacy and continuing need for Sections 4(f)4 and 203 as well as Sections 6 through 9.** These concerns are

discussed at great length in the statutory report. Sections 4(f)4 and 203 require various localities to provide election materials and information in one or more languages in addition to English. In 1986 and 1997, however, the U.S. Government Accountability Office examined the costs associated with the provision of bilingual voting assistance under Section 203. The GAO study found that larger jurisdictions are required to provide assistance in multiple languages and at numerous polling places at significantly higher costs. New York and Santa Clara, California, for example, spent more than half a million dollars for this purpose in just one year alone. In response, some commentators have argued that Section 203 wastes government resources, because—as the Commission observed—it requires jurisdictions to expend limited election funds on materials that are seldom used.

Sections 6 thru 9 enable the federal government to send federal voting registrars (examiners) and polling place monitors (observers) to covered jurisdictions. Examiners and observers can be sent to those political subdivisions covered in the Section 4 formula. Although, like Section 5, Sections 6 through 9 were originally intended to be in effect for only five years, these provisions were also extended in 1970, 1975, and 1982. Like Section 4(f)4 and 203, the continuing utility of Sections 6 thru 9 should also be re-examined. The last time an examiner was used was in 1982 and 1983—and that was to register voters—but registration procedures today are now governed by the National Voter Registration Act of 1993. Although the Commission noted that the observer program, by contrast, continues to play a vital role in modern elections, many jurisdictions certified for observers have not been sent observers in years. Franklin

County, Mississippi, for example, was certified in 1967 but has had no observers sent since 1968.

**Throughout this re-authorization process, Congress needs to carefully weigh and consider these and other issues related to the constitutional, legal, and policy aspects of the temporary provisions of the Voting Rights Act.** This is not to say that the Voting Rights Act, as a whole, does not—and will not—remain an essential piece of the Nation's collective effort to ensure equal access to the ballot box. On the contrary, the Senate has not been asked today to consider the efficacy of the Act as a whole. Rather, the question before this body is whether it is constitutionally justified and appropriate as a matter of policy to renew the expiring provisions. We can all agree that the Voting Rights Act is one of the Nation's most important civil rights successes. In my opinion, its bedrock principles— those principles explicitly made permanent in the Act and embedded in our modern national culture — should remain permanent.

However, with regard to the expiring provisions— those being considered by this Subcommittee today— all of the expert panelists before the Commission acknowledged that in 1965 there was a strong need for Section 5 and the other provisions of the Act. Pervasive, systemic, and often violent repression required vigorous and direct federal intervention to secure a basic constitutional right, even though such intervention infringed on the prerogatives of localities. Such was the price to be paid in 1965 to rid the evils of intentional discrimination in voting—and this much is not in dispute. What reasonable people—even the most noted experts in the field—can dispute is whether this infringement remains as appropriate and necessary decades after the apparent cessation of

the unlawful police action and physical violence that the Commission documented in 1961.

As noted in the statutory report that we released just last month, some observers may see the data I noted earlier as demonstrating that Section 5 has accomplished its goals as a deterrent and that further reauthorization is not warranted. Conversely, others may interpret the apparent success of Section 5 and related provisions to warrant extending Section 5's coverage to the rest of the 50 states, to the extent permissible under the Constitution. Alternatively, some may point to the decline in the number of objections as due to recent Supreme Court interpretations of the Section 5 nondiscrimination standard, which they might argue Congress should overturn. Still others may conclude that Section 5 should be re-authorized—but in a different form which better reflects recent experiences—perhaps by amending the coverage formula or bailout restrictions or shortening future extension periods.

Mr. Chairman, my goal of the Commission is not to recommend any one course of action over another with respect to the options that I have just outlined. Nor is my goal to recommend outright that Congress re-authorize or not re-authorize the temporary provisions at issue. Rather, as I stated earlier, my goal today, consistent with the Commission's statutory mission, is to provide objective data that can inform this Subcommittee's decision-making process as you consider this important issue.

What the Commission has recommended, however, in light of Section 5's unique infringement on the traditional prerogatives of state and local governments, is that Congress carefully consider the congruence and proportionality of that section in light of recent voting discrimination. To this extent, Congress should carefully define the scope

of voting rights discrimination by focusing on intentional discrimination as prohibited by the Fourteenth and Fifteenth Amendments. To endure legal challenge, Congress should then carefully develop a record of purposeful discrimination and, in so doing, rely upon theories of discrimination that are likely to achieve broad consensus.

**Ultimately, these issues are ripe for further study by this Subcommittee.** The Commission urged, in its briefing report on this matter, for Congress to hold comprehensive hearings regarding re-authorization of the temporary provisions. Such hearings will allow for decision-makers to identify and carefully consider those issues that the Commission has identified as potentially problematic in the re-authorization process. To this extent, I am personally pleased to deliver this testimony today in an effort to assist you in your efforts to perform serious fact-finding and substantial deliberation.

It has been said that the Voting Rights Act, as initially adopted, was one of the most important pieces of legislation ever crafted. The Act has been crucial in ensuring that African-Americans and other minorities have the same opportunities to participate in the American democratic process. Nonetheless, the Commission believes that the continued utility and necessity for certain temporary provisions of the Act needs to be considered in the light of all available objective data along with constitutional and federalism concerns—including the data, arguments, and analysis I have been fortunate to share with you this afternoon.

Mr. Chairman, this concludes my prepared testimony. I would be happy to answer any questions you might have.

**OFFICE OF THE COUNTY ATTORNEY**
County of Augusta, Virginia
18 Government Center Lane, P. O. Box 590
Verona, Virginia 24482-0590
(540) 245-5017 (Voice)
(540) 245-5096 (Fax)

**Steven L. Rosenberg**
**County Attorney**
srosenberg@co.augusta.va.us

June 19, 2006

The Honorable Arlen Specter
United States Senate
Chairman, Senate Judiciary Committee
711 Hart Building
Washington, DC 20510

The Honorable Patrick J. Leahy
United States Senate
Ranking Democratic Member,
Senate Judiciary Committee
433 Russell Senate Office Building
Washington, D.C. 20510

Re: Voting Rights Act of 1965

Dear Senators Specter and Leahy:

I understand that the Senate Judiciary Committee is presently considering the extension of the provisions of Section 5 of the Voting Rights Act of 1965 (the "Act"), which will otherwise expire in 2007. I further understand that the committee's consideration of Section 5 also includes a review of those provisions of Section 4 of the Act which allow covered jurisdictions to obtain a termination of coverage or "bailout" from the requirements of Section 5. To assist the committee in its deliberations, I would like to share with you Augusta County, Virginia's recent experience with the bailout process.

The Board of Supervisors of Augusta County, Virginia first determined to seek a bailout in March 2004. For this purpose, the board authorized this office to engage outside counsel knowledgeable in election law to assist with the county's efforts. Those efforts commenced in earnest in March 2005. The county obtained its bailout in November 2005, when a Consent Judgment and Decree was entered by the United States District Court for the District of Columbia.

In seeking a bailout, the county desired to eliminate the costs of repeated preclearance submissions to the Attorney General and to obtain more flexibility for the registrar's office in its voter outreach efforts. As importantly, the members of the Board of Supervisors welcomed the opportunity to demonstrate the county's past compliance with the Act—a condition of the bailout.

On the whole, the process was a positive one for the county. Initially, the county furnished county records to the Department of Justice for review. Thereafter, on several occasions during the Spring of 2005, a team of attorneys from the Voting Section visited the county to conduct interviews with county residents and officials, and to further review county records. The team conducted its activities efficiently and productively, working with county staff and the county's outside counsel to complete a thorough examination of the county's record of compliance with the Act. While the team identified two minor changes the county had not submitted for preclearance, the county was permitted to make preclearance submissions for those changes in conjunction with the bailout process, and the submissions were approved.

As required by Section 4, the county also posted notices of its intention to seek a bailout at multiple locations in the county and conducted a public hearing on March 9, 2005.

In conclusion, Augusta County was able to achieve a bailout at a reasonable cost, with a benefit that will continue indefinitely. Based on the county's experience, the bailout provisions of Section 4 establish a workable mechanism for covered jurisdictions to terminate coverage under Section 5.

I would be pleased to furnish any additional information you, other members of the committee or the committee's staff may desire.

Very truly yours,

Steven L. Rosenberg

cc: The Honorable Chairman and Members
of the Board of Supervisors of Augusta
County, Virginia

Patrick J. Coffield
County Administrator

Susan Miller
Registrar of Voters

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**Testimony of Professor Carol M. Swain**
**Vanderbilt University**
**June 21, 2006**



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**Testimony of Carol M. Swain, Vanderbilt University Law School**
**United States Senate Committee on the Judiciary**
**Reauthorization of Section 5 of the Voting Rights Act**
**June 21, 2006**

Chairman Brownback, ranking member Feingold and other distinguished members of the Committee; I am especially honored to share my views about the renewal of Section 5 of the Voting Rights Act, a renewal that I fully support, but not in its present form.

The bill under consideration risks falling into the category of poorly crafted legislation that will not serve national interests, the interests of minority voters, or the legacy of slain civil rights activists and civil rights leaders such as Fannie Lou Hamer, Rosa Parks, and Coretta Scott King, for whom this legislation is so aptly named.

I strongly urge the Senate to withstand the interest group pressure and delay action on the Reauthorization Bill until the Congress has had sufficient time to draft legislation adequate for the task at hand: legislation that will protect the rights of all Americans while providing states and localities with incentives to comply with a national law.

George Washington is quoted as saying that the purpose of the Senate is to "cool" house legislation as a saucer cools a hot liquid. The Senate, as the more deliberative body, is to serve as a fence against the intense passions of the House and the often emotional public. By operating as the framers intended, the Senate can facilitate the national interest by serving as a hedge against ill-conceived legislation that places the needs and goals of politicians above the interest of the people.

In this statement, I make three main points about S. 2703:

(1). The preclearance provisions, which focus only on certain jurisdictions, are not adequate to protect the needs and interests of the American people. In order to ensure Congress is targeting every jurisdiction that is discriminating, and only those that are discriminating, Congress should take two steps: New voting rights protections should be enacted and extended nationwide, and bailout provisions should be made easier for covered jurisdictions who have established records of compliance.

(2) *Georgia v. Ashcroft*[1] should not be treated as if it were as egregious as *Reno v. Bossier Parish School Board II,* a decision that would require the Department of Justice to clear plans created with a discriminatory purpose.[2] Congress should address the latter decision by giving content to "discriminatory purpose."

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[1] 539 U.S. 461 (2003)
[2] 528 U.S. 320 (1999).

(3). Section 5 of the Voting Rights Act should be reauthorized before it expires on August 6, 2007. The bill should be modified and strengthened before it is extended for another 25 years.

## 1. THE BILL IS FLAWED IN ITS HANDLING OF THE "PRECLEARANCE" PROVISION.

The preclearance provision requires "covered" jurisdictions to get prior approval for every voting-related change, no matter how minor, from the U.S. attorney general or the D.C. District Court before action is taken.

(a.) The bill under consideration fails to modify the preclearance provision to make "bailout" easier for covered jurisdictions where violations have ceased or have dramatically decreased. An easier bailout procedure would reward states and localities that have established histories of compliance and sensitivity to the needs of voters.

(b.) The bill under consideration does not extend protections to voters in non-covered jurisdictions where some of the most egregious violations have taken place and are likely to continue unless we adopt national uniform voting rights (See Attachment I for a list of places where violations continue).[3] Unconstitutional violations of voting rights have occurred in uncovered states and jurisdictions that include parts of California, Florida, Hawaii, Tennessee, and Pennsylvania (see Attachment 1).

An obvious solution for the aforementioned problems is to extend the preclearance provision to the nation as a whole and to streamline the process to allow covered jurisdictions with good records of compliance to bailout. The growing diversity of the nation and the pattern of voting rights violations suggest a need for national uniform voting legislation like the 2002 Help America Vote Act (HAVA)[4] and the 1993 National Motor Voter Registration Act (NVRA)[5], which operate under a different philosophy than the current voting rights model.[6]

The enactment of national voting rights legislation and a more streamlined bailout provision would address some of the concerns raised by Professor Samuel Issachroff [7]and others about the constitutionality of the present bill and whether it could survive Supreme Court scrutiny, especially as it relates to the "congruence and proportionality" test, which

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[3] Only a small fraction of covered jurisdictions have been found guilty of unconstitutional voter discrimination and in about half of these cases, white voters were among the victims.
For more information, please see the University of Michigan Law School's Report on the Voting Rights Initiative, which included a database of 209 cases and the ACLU's 867 page Report on the Case for Extending and Amending the Voting Rights Act. The University of Michigan Report can be found in the October 18, 2005 House Record. See Hrg. Before the Subcommittee on the Constitution of the Committee on the Judiciary, H. Rep. 109-70 at 964 (October 18, 2005). The ACLU report can be found at http://renewthevra.civilrights.org/resources/details.cfm?id=41190,

[4] Pub. L. No. 107-252, 116 Stat. 1666 (codified and amended as 42 U.S. C. 15301 (2000).

[5] Pub. L. 103-31, 107 Stat. 77 (codified as amended CT 42 U.S. C. gg1 (2000)

[6] Richard H. Pildes, "The Future of Voting Rights Policy: From Anti-Discrimination to the Right to Vote," forthcoming, Howard Uni. L. J, 2006.

[7] For more detail, please see Senate Testimony of Samuel Issachroff, New York University School of Law, on the Reauthorization of Section 5 of the Voting Rights Act, May 9, 2006. Hearing before the Senate Committee on the Judiciary (May 9, 2006). A slightly different perspective is found in Richard L. Hansen's "Congressional Power to Renew the Preclearance Provisions of the Voting Rights Act After *Tennessee v. Lane*," 66 Ohio State L.J., 177 (2005).

demands a relationship between where violations occur and the reach of legislation designed to address the problem (see *City of Boerne v. Flores*).[8] Of course, to enact a better law, it would be necessary for the Senate to courageously place the brakes on the current bill and delay reauthorization until better legislation can be drafted. Better legislation will come from the collective efforts of concerned scholars, activists, and lawmakers working together diligently for the greater good.

## 2. THE CURRENT BILL UNWISELY SEEKS TO OVERTURN *GEORGIA V. ASHCROFT*[9]

The interests of politicians are not always congruent with the interests of their constituents. Simply put, what serves the reelection needs of Black Democrats and white Republicans does not necessarily advance the interest of the public as a whole. Black Democrats desire safe, non-competitive seats in majority-minority districts. White Republicans prefer to represent districts where voters are more amenable to conservative appeals; because blacks vote overwhelmingly Democratic, this typically means mostly-white districts. *Georgia v. Ashcroft* threatens to create a measure of uncertainty for both groups of politicians. Indeed, Professor David Mayhew has argued that politicians are single-minded seekers of reelection.[10] As such, they have a vested interest in creating systems and structures that facilitate the predictable attainment of their reelection goals.

Of course, politicians can rise above narrow self-interest. The black Democrats in Georgia who testified in favor of unpacking majority-minority districts placed the interests of their party and their constituents above their desire to have safe, non-competitive districts. Many have since back pedaled on this issue. Situations that need to be avoided legislatively are those in which incumbents are allowed to demand and retain secure sinecures for as long as they wish to remain in office.

*Georgia v. Ashcroft* is especially important because the Court seemingly applied a Section 2 Totality of Circumstances test to a set of factors that in the past seemed relatively straightforward. The Court ruled in favor of allowing politicians greater latitude to create influence and coalitional districts by unpacking and dispersing minority voters in what had been relatively safe majority districts.[11] By doing so, the Court changed the non-retrogression standard developed and applied in *Beer v. United States*[12]and other voting rights cases that had been interpreted to mean that localities and states had to protect existing minority electoral gains and could not take actions that would decrease the percentage of minority voters in majority-minority districts. Their aim was to increase the number of Democrats in office.

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[8] 521 U.S. 507 (1997).
[9] 539 U.S. 461 (2003).
[10] David Mayhew, *Congress: The Electoral Connection*. New Haven, CT: Yale University Press, 1974.
[11] For more information, see House Testimony of Laughlin McDonald, Director of the Voting Rights Project and Director of the American Civil Liberties Union, before the House Committee on the Judiciary (November 9, 2005) and Michael J. Pitts, "Georgia v. Ashcroft: It's the End of Section 5 As We Know It (And I Feel Fine)., 32 Pepperdine L. Rev. 265 2004-2005.
[12] 425 U.S. 130 (1976).

As I have argued in my book, *Black Faces, Black Interests: The Representation of African Americans in Congress,* there is a real trade off between descriptive representation, *i.e.* more black faces in office, and substantive representation, *i.e.* more people in legislatures to form coalitions and vote for your preferred political agenda. For the latter, political party is far more important than the race of the representative. As long as blacks hold the views that they do, they will best be represented by the election of more Democrats to office. This might change, however, if blacks are disbursed strategically so that they can affect more legislators. Packing minority voters in 50 plus 1 percent voting-age-districts can waste black votes and black influence. All voters are better off when they have more people in office who support their legislative agendas.

*Georgia v. Ashcroft* is a good decision because it allows for the creation of more opportunities for minorities to form coalitions and exert influence on politicians outside their own racial and ethnic groups. Most importantly, the unpacking of majority-minority districts in traditionally Democratic districts does not bar the election of qualified minority politicians who have proven again and again their abilities to garner white crossover votes. Table 1 (Attachment 2), shows that between 1970 and 1990, eight blacks were elected from legislative districts that ranged from 4 to 46 percent black in their voting-age-populations. Since then numerous blacks have been elected to statewide offices. Race is no longer a barrier to the election of qualified black Democrats in historically Democratic districts. Indeed, the success of the Republican Party's "Southern Strategy" has provided a place of refuge for whites who dislike blacks because they are black. It is not farfetched to conclude that the white southerners who remain in the Democratic Party of the new South have resolved their racial problems with blacks.[13]

**3. SECTION 5 MUST BE STRENGTHENED AND REAUTHORIZED BEFORE IT EXPIRES ON AUGUST 6, 2007**

Some issues are non-negotiable. Reauthorizing Section 5 falls into the category of the non-negotiable legislation that must be passed if the nation is to maintain its progress with race relations. A failure to renew Section 5 would send a negative message to the American public who now see the issue as being about whether blacks and other minorities will continue to *retain* their right to cast an unfettered ballot, rather than about the more complex issues surrounding the preclearance provision, the fairness and adequacy of the bailout provision, whether to legislatively overturn recent Supreme Court decisions, and whether to maintain the provision of bilingual language ballots. The question, therefore, is whether this distinguished body will rise to the occasion and replace Section 5's outdated mechanism of requiring preclearance in certain jurisdictions with a nationwide mechanism such as HAVA that provides effective protection to all voters.

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[13] Thomas B. Edsall and Mary D. Edsall. *Chain Reaction: The Impact of Race, Rights, and Taxes on American Politics*. New York: W.W. Norton (Reprint Edition, August 1992).

Whatever is done must be done carefully and deliberately. African Americans have a strong distrust of the Republican Party and their marriage to the Democrats often seems on rocky ground. It crucial, therefore, to educate as many voters as possible about what is truly at stake. Voters are not fools. If it is explained to them carefully about the extent of voting violations that occur nationally, the difficulty of bailout for jurisdictions covered since 1964, and the strategic value of coalitional districts and how the current bill does not serve their needs, I believe a critical mass of people who currently are misinformed about the current bill will coalesce behind those who champion a more deliberative process designed to ensure the passage of stronger, more effective legislation.

My book, *Black Faces, Black Interests* discusses the future of black representation in America. Chapter 10 in particular delineates several ways to increase the substantive representation of African Americans that go beyond the mere creation of majority-minority districts (Attachment 3). As our great nation grows more and more racially and ethnically diverse, the need will only intensify to protect and expand the voting rights of all Americans. We have an unprecedented opportunity to do just that as we work on the Reauthorization of Section 5 of the Voting Rights Act.

**Attachment I**

**Cases Finding That a State Committed Unconstitutional Racial Discrimination Against Voters**

Below is a summary of all the cases located in which a court or a settlement found a constitutional violation of voting rights.

It is based on a review of the ACLU's 867-page Report on the Case for Extending and Amending the Voting Rights Act,[14] which discusses 293 cases brought since June 1982, and the database for the University of Michigan Law School Voting Rights Report.[15] The database was constructed by searching the "federal court" databases of Westlaw or Lexis for any case that was decided since June 29, 1982 and mentions section 2, 42 U.S.C. § 1973. Of all the identified section 2 lawsuits, 209 produced at least one published liability decision under section 2.

Only **six** cases resulted in a finding that a covered jurisdiction committed unconstitutional discrimination against minority voters. **Six** cases ended in a finding that found that a covered jurisdiction had committed unconstitutional discrimination against white voters. Four cases in non-covered jurisdictions found unconstitutional voting practices against minority voters, and two against white or majority 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. Accordingly, these cases are not relevant evidence for reauthorization.

## I. COVERED JURISDICTIONS DISCRIMINATING AGAINST VOTERS

**Alabama:**

*1)* ***Hunter v. Underwood***, 730 F.2d 614 (11th Cir. 1984), *affirmed* 471 U.S. 222 (1985) (ACLU Rep., p. 51).
The ACLU represented two voters who were disenfranchised under a nearly 80 year-old law that prohibited those who had committed a "crime of moral turpitude" from voting. *Id.* at p. 52. The court struck down the law because there was evidence that when it was adopted in the early 1900s, the legislators intended to disenfranchise black voters. The Supreme Court unanimously affirmed that, in view of the proof of racial motivation and continuing racially discriminatory effect, the state law violated the Fourteenth Amendment.

*2)* ***Dillard v. City of Foley***, 926 F. Supp. 1053 (M.D. Ala. 1995) (ACLU Rep., p. 57).

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[14] The ACLU report can be found at http://renewthevra.civilrights.org/resources/details.cfm?id=41190, or http://www.votingrights.org/resources/downloads/ACLU%20Voting%20Report%20Final.pdf.
[15] The University of Michigan report can be found in the October 18, 2005 House record. *See* Hrg. before the Subcommittee on the Constitution of the Committee on the Judiciary, H.Rep. 109-70, at 964 (Oct. 18, 2005). The database can be found at http://sitemaker.umich.edu/votingrights.

African American plaintiffs in the City of Foley, Alabama, filed a motion to require the City to adopt and implement a nondiscriminatory annexation policy and to annex Mills Quarters and
Beulah Heights. Plaintiffs also claimed that the City had violated section 5 and section 2. As a result of negotiations, the parties entered into a consent decree. The decree found plaintiffs had established "a prima facie violation of section 2 of the Voting Rights Act and the United States Constitution." *Id.* at p. 59.

*3)* ***Brown v. Board of School Comm'rs.,*** 706 F. 2d 1103 (11th Cir. 1983) (U Mich. L.Rep., http://www.votingreport.org.).
A class of African American voters challenged Mobile County's at-large system for electing School Board members. In 1852, Mobile County created at-large school board elections of 12 commissioners. In 1870, the election procedures changed; instead of selecting all 12 commissioners, voters would select 9 of the 12 and the other 3 would be appointed. This system had the effect of ensuring minority representation on the school board. In 1876, the Alabama state legislature eliminated the Mobile County school board system and returned the County to the 1852 at-large election scheme which remained in effect until this suit was brought.

The district court found that by re-instating the at-large election system, the Alabama state legislature intended to discriminate against African Americans in Mobile County in violation of the Fourteenth and Fifteenth Amendment. The Eleventh Circuit affirmed.

**Georgia**

*4)* ***Miller v. Johnson:*** 515 U.S. 900 (1995) (*ACLU Rep.*, 126-27).
In August 1991, the Georgia legislature adopted a congressional redistricting plan based on the new census containing two majority minority districts--the Fifth and the Eleventh. A third district, the Second, had a 35.4% black voting age population. The state submitted the plan for preclearance, but the Attorney General objected to it. Following another objection to a second plan, the state adopted a third plan which contained three majority black districts, the Fifth, the Eleventh, and the Second. The plan was precleared on April 2, 1992. Following the decision in Shaw v. Reno, a lawsuit was filed by white plaintiffs claiming that the Eleventh Congressional District was unconstitutional. One of the plaintiffs was George DeLoach, a white man who had been defeated by McKinney in the 1992 Democratic primary. Although the Eleventh District was not as irregular in shape as the district in Shaw v. Reno, the district court found it to be unconstitutional, holding that the "contours of the Eleventh District . . . are so dramatically irregular as to permit no other conclusion than that they were manipulated along racial lines." The Supreme Court affirmed. It did not find the Eleventh District was bizarrely shaped, but it held the state had "subordinated" its traditional redistricting principles to race without having a compelling reason for doing so. The court criticized the plan for splitting counties and municipalities and joining black neighborhoods by the use of narrow, sparsely populated "land bridges." On remand the district court allowed the plaintiffs to amend their complaint to challenge the majority black Second District, which the court then held was unconstitutional for the same reasons it had found the Eleventh District to

be unconstitutional, [and] the legislature adjourned without adopting a congressional plan.

*5)* ***Common Cause v. Billups:*** 4:05-CV-201 HLM (N.D. Ga.) (*ACLU Rep.*, 185-91).
The Department of Justice precleared the photo ID bill on August 26, 2005. The ACLU filed suit in federal district court, charging the law violated the state and federal constitutions, the 1965 Voting Rights Act, and the 1964 Civil Rights Act. The district court issued a preliminary injunction holding plaintiffs had a substantial likelihood of succeeding on several grounds, including claims that the photo ID law was a poll tax and violated the equal protection clause of the Constitution. The state appealed to the Eleventh Circuit, which refused to stay the injunction. In an attempt to address the poll tax burden cited by the district court in its injunction, the Georgia legislature passed a hew photo ID bill providing for free photo identification cards.

*6)* ***Clark v. Putnam County:*** 168 F.3d 458 (11th Cir. 1999) (*ACLU Report at 384-89*).
In 1997, four white plaintiffs filed a lawsuit challenging the constitutionality of the majority black county commission districts as racial gerrymanders in violation of the *Shaw / Miller* line of cases. In January 2001, the district court dismissed the complaint. The Eleventh Circuit reversed, holding that the district court erred in failing to find unconstitutional intentional discrimination.

**Louisiana:**

*7)* ***Hays v. Louisiana***, 515 U.S. 737 (1995) (ACLU Rep., p. 481).
White plaintiffs successfully challenged Louisiana's Fourth Congressional District as unconstitutional "race-conscious" redistricting. *Id.* at p. 481. The Supreme Court granted cert., but then dismissed the case for lack of standing.

**North Carolina:**

*8)* ***Shaw v. Hunt***, 517 U.S. 899 (1996) (ACLU Rep., p. 513).
The 12th District of North Carolina was 57% black and was persistently challenged by white voters and its boundaries were considered by the Supreme Court four separate times. The ACLU participated as an amicus in defending the constitutionality of the 12th District. In 1996, the Supreme Court struck down the plan for the 12th District on the grounds that race was the "predominant" factor in drawing the plan and the State had subordinated its traditional redistricting principles to race. *Id.*

**South Carolina:**

*9)* ***Smith v. Beasley***, 946 F. Supp. 1174 (D.S.C. 1996) (ACLU Rep., p. 572).
White voters filed suit in 1995 challenging three state senate districts. A year later, another group of white voters filed suit challenging nine house districts. In both cases, the plaintiffs claimed that the districts were drawn with race as the predominant factor in violation of the Shaw/Miller line of decisions. The cases were consolidated for trial, and

black voters, represented by the ACLU, intervened to defend the constitutionality of the challenged districts. Following a trial, a court issued an order in September 1996, finding three of the challenged senate districts and nine of the house districts unconstitutional because they "were drawn with race as the predominant factor." *Id.*

**Texas:**

*10)* ***League of United Latin American Citizens,*** 648 F. Supp. 596 (W.D. Tex. 1986) (U Mich. L.Rep., http://www.votingreport.org).
Latino plaintiffs argued that the at-large election system diluted their votes. The parties agreed to a court order that eliminated the election scheme and defendants submitted a proposal in which four trustees would be elected from single-member districts and three would be elected at large. Plaintiffs objected and filed a plan in which all seven trustees would be elected from single-member districts. The court, applying *Gingles* and the totality-of-circumstances tests, held that defendants' plans violated section 2 and the Fourteenth and Fifteenth Amendment. The court ordered that a seven-member district plan for electing trustees be immediately implemented according to district boundaries drawn by the court.

**Virginia:**

*11)* ***Moon v. Meadows,*** 952 F. Supp. 1141 (E.D. Va. 1997) (ACLU Rep., p. 691).
In 1995, several white voters challenged the Third Congressional District in federal court as an unconstitutional racial gerrymander. In 1997, the district court invalidated the Third Congressional District, finding that race had predominated in drawing the district and that the defendants could not adequately justify their use of race as a districting factor.

*12)* ***Pegram v. City of Newport News,*** 4:94cv79 (E.D.Va. 1994) (ACLU Rep., p. 714).
In July 1994, the ACLU filed suit on behalf of African American voters challenging the at-large method of city elections in the City of New Port. On October 26, 1994, a consent decree was entered in which the City admitted that its at-large system violated section 2 as well as the Fourteenth and Fifteenth Amendments. The consent decree required the City to implement a racially fair election plan.

## II. NON COVERED JURISDICTIONS DISCRIMINATING AGAINST VOTERS

**California:**

*1)* ***Garza v. County of Los Angeles,*** 918 F.2d 763 (9th Cir. 1990) (U Mich. Law School's Report. http://www.votingreport.org).
Latino voters alleged that district lines for the Los Angeles County Board of Supervisors were gerrymandered to dilute their voting strength. Plaintiffs requested creation of a district with a Latino majority for the 1990 Board of Supervisors election. The Ninth Circuit affirmed that the County had adopted and applied a redistricting plan that resulted in dilution of Latino voting power in violation of section 2, and by establishing and

maintaining the plan, the County had intentionally discriminated against Latinos in violation of the Fourteenth Amendment's Equal Protection Clause.

**Florida:**

*2)* ***McMillan v. Escambia County,*** 748 F.2d 1037 (11th Cir. 1984) (U Mich. L.Rep., http://www.votingreport.org).
Black plaintiffs claimed that the at-large election of county commissioners in Escambia County diluted their voting power in violation of section 2 and the Fourteenth and Fifteenth Amendments. The district court found that the State had not implemented the plan with a racially discriminatory purpose, but it had maintained it with such a purpose.

**Hawaii:**

*3)* ***Arakaki v. Hawaii,*** 314 F.3d 1091 (9th Cir. 2002) (U Mich. L.Rep., http://www.votingreport.org)
A group of Hawaiian citizens of various ethnic backgrounds sued the State of Hawaii alleging that the requirement that those appointed to the Office of Hawaiian Affairs must be of Native Hawaiian ancestry violated the Fourteenth Amendment, the Fifteenth Amendment, and section 2 of the Voting Rights Act. The Eleventh Circuit found that the restriction on candidates running for Office of Hawaiian Affairs on the basis of race violated the Fifteenth Amendment as well section 2 of the Voting Rights Act. The Ninth Circuit vacated the district court's judgment that the Fourteenth Amendment had also been violated because plaintiffs did not have standing to challenge the appointment procedures.

**New York:**

*4)* ***Goosby v. Town Bd. of Town of Hempstead,*** 180 F. 3d 476 (2d Cir. 1999) (U Mich. L.Rep., http://www.votingreport.org).
Representatives of the Town Board of Hempstead were chosen through at-large elections. African American voters alleged that they were unable to elect their preferred candidates. The district court held that the at-large elections violated section 2 and ordered the Town to submit a six single-member district remedial plan. The Board submitted two plans. The one the Board preferred was a two-district system, consisting of one single-member district and one multi-member district. The other plan consisted of six single-member districts. The district court held that the two-district plan violated the Fourteenth Amendment, but the six-district plan did not.

The Board appealed. The Second Circuit affirmed the district court's holding that the Board's proposed two-district plan violated section 2 and the Fourteenth Amendment because blacks had no access to the Republican Party candidate slating process.

**Pennsylvania:**

*5)* ***Marks v. Stinson,*** 1994 WL 146113 (E.D. Pa. Apr. 26, 1994) (U Mich. L.Rep., http://www.votingreport.org).

Republican candidate for State Senate, Bruce Marks, the Republican State Committee and other plaintiffs challenged the election of Democrat William Stinson for the Second Senatorial District. Although Marks received approximately 500 more votes from the Election Day voting machines than Stinson, Stinson received 1000 more votes than Marks in absentee voting. Marks and the other plaintiffs contended that Stinson and his campaign workers encouraged voters to undermine proper absentee voting procedures and requirements, such as falsely claiming that they would be out of the county or would be physically unable to go to the polls on Election Day. Plaintiffs also contended that Stinson and the other Defendants had focused their efforts to encourage illegal absentee voting on minorities.

The court held: 1) defendants violated plaintiffs' First Amendment rights of association because plaintiffs were denied the freedom to form groups for the advancement of political ideas and to campaign and vote for their chosen candidates; 2) defendants' actions denied plaintiffs' right to Equal Protection by discriminating against the Republican candidate and by treating persons differently because of their race; 3) defendants violated plaintiffs' Substantive Due Process right to vote in state elections by abusing the democratic process; and 4) defendants improperly applied a "standard, practice, or procedure" in a discriminatory fashion in violation of the VRA, targeting voters based on race and denying minority voters the right to vote freely without illegal interference. Finally, the court ordered the certification of Bruce Marks as the winner of the Second Senatorial District seat for the 1993 Special Election because Marks would have won the election but for the illegal actions of the defendants.

**Tennessee:**

*6)* ***Brown v. Chattanooga board of Comm'rs,*** 722 F. Supp. 380 (E.D. Tenn. 1989) (U Mich. L.Rep., http://www.votingreport.org).
Black citizens of Chattanooga sued the Board of Commissioners for its use of at-large elections.
The court held: 1) applying the *Gingles* test, the method of electing Board of Commissioners violated section 2 because the electoral practice resulted in an abridgment of black voter's rights; and 2) the Property Qualified Voting provision of the Chattanooga charter violated the Fourteenth Amendment under rational basis review because permitting a nonresident who owns a trivial amount of property to vote in municipal elections does not further any rational governmental interest.

## III. CONSTITUTINAL VIOLATIONS NOT INVOLVING RACE

*1)* ***Vander Linden v. Hodges***, 193 F.3d 268 (4th Cir. 1999) (ACLU Rep., p. 562).
Residents of Dorchester, Berkeley, and Charleston Counties, in South Carolina, filed suit in 1991 alleging that the counties' legislative delegation structure violated the Fourteenth Amendment's one-person, one-vote requirement and was adopted with an unconstitutional purpose to discriminate against African American voters. The district court rejected both claims. The Fourth Circuit held that the structure violated the one-

person, one-vote rule (making no findings of discriminatory intent) and did not address the second claim.

*2)* ***NAACP v. Board of Trustees of Abbeville County School District No. 60***, Civ. No. 8-93-1047-03 (D.S.C. 1993) (ACLU Rep., p. 583).
The Board of Trustees of Abbeville County School District 60 traditionally consisted of nine members, five of whom were elected from single member districts and two each from two multi-member districts. African Americans were 32% of the population of the school district, but all the districts were majority white and only one member of the board was African American. In 1993, black residents of the school district and the local NAACP chapter filed suit challenging the method of electing the board of trustees as violating the Constitution's one person, one vote requirement and violating section 2 by diluting minority voting strength. The court decided that the existing plan for the board "is an unconstitutionally malapportioned plan, and is in violation of sections 2 and 5 of the Voting Rights Act." *Id.* at 584.

*3)* ***Duffey v. Butts County Board of Commissioners:*** Civ. No. 92-233-3-MAC (M.D. Ga.) (*ACLU Report at 237-38*).
Suit challenging districting plans for Board of Education and Board of Commissioners that were determined to be malapportioned after the 1990 census. Plaintiffs sought, and obtained, a preliminary injunction finding that the election districts were "constitutionally malapportioned." Parties entered consent decree that retained five single member districts for both boards and established two majority black districts. Plan was precleared by DOJ.

*4)* ***Calhoun County Branch of the NAACP v. Calhoun County:*** Civ. No. 92-96-ALB/AMER(DF) (M.D. Ga.) (*ACLU Report at 238-40*).
1979 suit to enjoin the use of at-large elections for failure to comply with Section 5. The county had changed to at-large voting in 1967 following increased black registration. A three-judge panel enjoined the at-large scheme, finding it had never been submitted for preclearance. A consent order then created five single-member districts, two of which were majority black, and two at-large seats. After the 1990 census, black voters again sued, alleging the districts were malapportioned. According to the ACLU report, "the district court entered an order enjoining the upcoming primary election for the board of education under the malapportioned plan. The parties then agreed upon a new plan that complied with the equal population standard and maintained two of the districts as majority black."

*5)* ***Frank Davenport v. Clay County Board of Commissioners, NO. 92-98-COL (JRE) (M.D. Ga.):*** Civ. No. 92-98-COL (JRE) (M.D. Ga.) (*ACLU Report at 256-59*).
The county had failed to preclear its change to an at-large system of voting for county commissioners in 1967. In 1980, members of the local NAACP challenged the at-large system and the failure to comply with Section 5. The court found a section 5 violation, which resulted in a return to single-member districts. After the 1990 census showed the commission districts to be malapportioned (and following an attempt to create equal

districts which was not precleared before a 1992 legislative poison pill provision rendered it void), the ACLU sued seeking a remedial plan for the upcoming elections. The parties entered a consent decree in which the county admitted the districts were malapportioned in violation of the Fourteenth Amendment's one person one vote requirement and agreed to the redistricting plan which had been created before the 1992 poison pill invalidated it. The plan was precleared by DOJ.

*6)* ***Jones v. Cook County:*** Civ. No. 7:94-cv-73 (WLS) (*ACLU Report at 271-72*). The ACLU filed suit on behalf of black voters in 1994, alleging that the county board of commissioners and board of education districts were constitutionally malapportioned after the 1990 census. According to the ACLU's report, "In a hearing on December 19, 1995, county officials agreed that 'the relevant voting districts in Cook County are malapportioned in violation of the equal protection clause of the fourteenth amendment to the United States Constitution.' A consent decree allowed sitting commission members to retain their seats but implemented a new plan, correcting the malapportionment for the 1996 elections."

*7)* ***Thomas v. Crawford County:*** 5:02 CV 222 (M.D. Ga.) (*ACLU Report at 272-74*).
2002 suit alleged single-member districts were malapportioned in violation of the constitution's one-person-one-vote principle. The plaintiffs won summary judgment and a preliminary injunction to prevent elections from taking place under the plan. The court adopted a plan that maintained two majority-black districts.

*8)* ***Wright v. City of Albany:*** 306 F. Supp. 2d 1228 (M.D. Ga. 2003) (*ACLU Rep. 289-93*).
Black residents of the city, represented by the ACLU, sued in 2003 to enjoin use of an allegedly constitutionally malapportioned districting plan and requested that the court supervise the development and implementation of a remedial plan that complied with the principle of one person, one vote, and the VRA. According to the ACLU report, "In a series of subsequent orders, the court granted the plaintiffs' motion for summary judgment, enjoined the pending elections, adopted a remedial plan prepared by the state reapportionment office, and directed that a special election for the mayor and city commission [be] held in February 2004."

*9)* ***Woody v. Evans County Board of Commissioners:*** Civ. No. 692-073 (S.D. Ga. 1992) (*ACLU Report at 297-300*).
In 1992, the ACLU filed suit on behalf of black voters challenging an allegedly malapportioned districting plan for the county commission and board of education under the Constitution and Section 2 of the VRA. According to the ACLU report, "on June 29 the district court enjoined 'holding further elections under the existing malapportioned plan for both bodies.'"

*10)* ***Bryant v. Liberty County Board of Education:*** Civ. No. 492-145 (S.D. Ga.) (*ACLU Report at 340-42*).

"Because Liberty County was left with a malapportioned districting plan based on the 1980 census, the ACLU filed suit in 1992, on behalf of black voters seeking constitutionally apportioned election districts for the county. The court granted plaintiffs' motion for preliminary injunctive relief on July 7, 1992, and the following year the parties agreed to a redistricting plan in which two of the six single member districts contained majority black voting age populations. The plan was precleared by the Justice Department on April 27, 1993."

*11)* ***Hall v. Macon County:*** Civ. No. 94-185 (M.D. Ga.) (*ACLU Report at 348-49*). According to the ACLU Report, "The [Georgia] general assembly failed to redistrict the two boards during its 1992, 1993, and 1994 sessions, and in 1994, the ACLU filed suit on behalf of Macon County residents against county officials seeking a constitutional plan for the 1994 elections. On July 12, 1994, the court enjoined the upcoming election and ordered the parties to present remedial plans by July 15, 1994. In March 1995, the court ordered a five district plan that remedied the one person, one vote violations and ordered special elections be held."

*12)* ***Morman v. City of Baconton:*** Civ. No. 1:03-CV-161-4 (WLS) (M.D. Ga.) (*ACLU Report at 364-65*).
Suit to block the use of a constitutionally malapportioned districting plan following the 2000 census. According to the ACLU Report, "Black residents of Baconton, with the assistance of the ACLU, then filed suit in federal court to enjoin use of the 1993 plan on the grounds that it would violate Section 5 and the Fourteenth Amendment. The day before the election the court held a hearing, and, hours before the polls opened, granted an injunction prohibiting the city from implementing the unprecleared and unconstitutional plan."

*13)* ***Ellis-Cooksey v. Newton County Board of Commissioners:*** Civ. No. 1:92-CV-1283-MHS (N.D. Ga.) (*ACLU Report at 370-73*).
According to the ACLU report, the 1990 census showed that the five single member districts for the county board of commissioners and board of education were constitutionally malapportioned. "After the legislature failed to enact a remedial plan, the ACLU filed suit on behalf of black voters in Newton County in June 1992, seeking constitutionally apportioned districts for the commission and school board. The suit also sought to enjoin upcoming primary elections, scheduled for July 21, 1992, as well as the November 3 general election. The parties settled the case the following month and the court issued an order that '[t] he 1984 district plan does not constitutionally reflect the current
population.'"

*14)* ***Lucas v. Pulaski County Board of Education:*** Civ. No. 92-364-3 (MAC) (M.D. Ga.) (*ACLU Report at 380-84*).
Black residents of the county, represented by the ACLU, filed suit in 1992 to enjoin upcoming elections under an allegedly constitutionally malapportioned plan. According to the ACLU report, "On October 14, 1992, the district court entered a consent order involving the board of Education, affirming that 'Defendants do not contest plaintiffs'

allegations that the districts as presently constituted are malapportioned and in violation of the Fourteenth Amendment of the Constitution.'"

*15)* ***Cook v. Randolph County:*** Civ. No. 93-113-COL (M.D. Ga.) (*ACLU Report at 389-93*).
According to the ACLU Report, "On October 5, 1993, black voters, represented by the ACLU, filed suit. They asked the court to enjoin elections for the school board and board of commissioners on the grounds that the districting plan for both bodies was either malapportioned in violation of the Constitution and Section 2, or had not been precleared pursuant to Section 5. Later that month, on October 29, the parties signed a consent order stipulating that the existing county districts were malapportioned, and agreeing on a redistricting plan containing five single member districts with a total deviation of 9.35%. Three of the five districts were majority black."

*16)* ***Houston v. Board of Commissioners of Sumter County:*** Civ. No. 94-77-AMER (M.D. Ga.) (*ACLU Report at 420-22*).
The ACLU brought suit in 1984 on behalf of black county residents charging that the five member board of county commissioners was malapportioned in violation of the Constitution and Section 2 of the VRA. The suit also charged defendants with failing to secure preclearance of a valid reapportionment plan under Section 5. According to the ACLU Report, "After plaintiffs moved for a preliminary injunction to block the 1984 board of commissioners election, a consent order was issued acknowledging that the districts were malapportioned, and instructing both parties to submit reapportionment plans to the court. . . . On February 27, 1985, after trial on the merits, the court ruled the challenged plan unconstitutional and directed the defendants to adopt a new plan and seek preclearance under Section 5 within 30 days."

*17)* ***Cooper v. Sumter County Board of Commissioners:*** Civ. No. 1:92-cv-00105-DF (M.D. Ga.) (*ACLU Report at 422-23*).
After the release of the 1990 census, the ACLU broguth suit on behalf of black plaintiffs, alleging that the county's commission districts were malapportioned in violation of the constitutional principle of one person, one vote. On July 27, 1992, the district court entered a consent order finding "malapportionment in excess of the legally acceptable standard."

*18)* ***Williams v. Tattnal County Board of Commissioners***: Civ. No. CV692-084 (S.D. Ga.) (*ACLU Report at 426-27*).
After the 1990 census, the ACLU, on behalf of black residents, sued to enjoin further use of an allegedly constitutionally malapportioned districting plan. According to the ACLU Report, "On July 7, 1992, the district court, finding that the existing plan was malapportioned, enjoined the July 1992, primary elections for the board of commissioners and board of education until such time as an election could be held under a court ordered or a precleared plan."

*19)* ***Spaulding v. Telfair County:*** Civ. No. 386-061 (M.D. Ga.) (*ACLU Report at 431-33*).

In September 1986, the ACLU riled suit on behalf of five black voters alleging that the county board of education was malapportioned. According to the ACLU Report, "On October 31, 1986, less than a week before the November general election, the court entered a consent order staying the elections, ordering a new apportionment plan, and providing for a special election. The court found that 'Plaintiffs have established a prima facie case that the current apportionment of the Board of Education is in violation of the Fourteenth Amendment,' and required the defendants to develop and implement a new apportionment for the school board within 60 days."

***20) Crisp v. Telfair County:*** CV 302-040 (S.D. Ga.) (*ACLU Report at 439-41*).
The ACLU sued in August 2002, alleging that the county commission lines were malapportioned in violation of the Constitution and Section 2 of the VRA. According to the ACLU Report, "After plaintiffs filed suit, the county stipulated that its commission districts were malapportioned, and that 'It is possible...to draw a five single member district plan with at least one majority black district in Telfair County.' The plaintiffs then filed for summary judgment and asked the court to hold the existing plan unconstitutional and order a new plan into effect. . . . Ruling that the existing plan was malapportioned and 'violates the one person, one vote standard of the equal protection clause of the Fourteenth Amendment,' the court noted that the plan had been submitted for Section 5 preclearance and ruled the motion for summary judgment was 'largely moot.'"

***21) Holloway v. Terrell County Board of Commissioners:*** CA-92-89-ALB/AMER(DF) (M.D. Ga.) (*ACLU Report at 441-44*).
In June 1992, the ACLU filed suit on behalf of black voters challenging the malapportionment of the county board of commissioners under the Constitution and Section 2 of the VRA. According to the ACLU Report, "After the reapportionment suit was brought in 1992, defendants admitted the plan was malapportioned . . . . The parties negotiated a new redistricting plan, corrected the malapportionment, and created two effective majority black districts. Despite this agreement, the county proposed, and had the 1993 Georgia General Assembly adopt, a redistricting plan which plaintiffs did not support. . . . In February 1994, the Department of Justice precleared the county's redistricting plan over the objections of the black community . . . ."

***22) Flanders v. City of Soperton:*** Civ. No. 394-067 (S.D. Ga.) (*ACLU Report at 447-49*).
According to the ACLU Report, "in November 1994, the ACLU again brought suit on behalf of black voters in Soperton, challenging the five member city council as malapportioned in violation of one person, one vote. . . . A consent order was filed August 7, 1995, in which both parties agreed the city election districts were malapportioned, and adopted a districting plan with a total deviation of 6.8% that contained two majority black districts of 75.34% and 72.92% black voting age population, respectively."

**Attachment 2: Table 1**

Black Representatives of Majority-White Districts[16]

| District | Principal city | Representative | Years served | BVAP | HVAP |
|---|---|---|---|---|---|
| CN-5 | Waterbury | Gray Franks | 1991– | 4 | 3 |
| MO-5 | Kansas City | Alan Wheat | 1983– | 20 | 2 |
| IN-1 | Gary | Katie Hall | 1982–1984 | 22 | 7 |
| CA-8 | Berkeley | Ronald Dellums | 1971– | 24 | 6 |
| GA-5 | Atlanta | Andrew Young[a] | 1973–1977 | 40 | 1 |
| IL-7 | Chicago[b] | George Collins | 1971–1973 | 44 | 3 |
| TN-8 | Memphis[c] | Harold E. Ford | 1975– | 47 | 1 |
| MO-1 | St. Louis[d] | William Clay | 1969– | 46 | 1 |

*Sources:* Compiled from data in Linda Williams, ed., *The JCPS Congressional District Fact Book,* 3rd ed. (Washington, D.C.: Joint Center for Political Studies, 1988), p.20; *Congressional Quarterly Weekly Report,* November 10, 1990, pp. 3822–3823; "The 101st Congress, 1989–1990," Congressional Black Caucus Foundation, September 1990.

*Note:* BVAP = Black voting-age percentage of district population at the time the representative was in office; HVAP = Hispanic voting-age percentage of district population at the time the representative was in office.

a. Resigned his seat on January 29, 1977, to become U.S. ambassador to the United Nations.
b. Majority-black district since the redistricting of the 1980s.
c. Majority-black district since the redistricting of the 1980s, now the ninth district.
d. Historically black until the redistricting of the 1980s lowered the BVAP.

[16] The above table is a modification of Table 6.1 of *Black Faces, Black Interests: The Representation of African Americans in Congress.* Harvard University Press, 1993, 95): Reprinted by University of America Press (2006), p. 117.

# 10 · The Future of Black Congressional Representation

*I would rather have three white representatives who vote with me and one who votes against me, than one black who votes with me and three whites who vote against me. It's real simple; it's mathematics.*

—INTERVIEW WITH REPRESENTATIVE CRAIG WASHINGTON, *October 22, 1991*

What are the preconditions for increased representation of black interests in Congress? Do black members of Congress have distinctive characteristics? What can be expected from the future?

## Preconditions of Increased Black Representation

1. *Creating newly black districts will not significantly increase black representation.*

The most common strategy for electing black representatives has centered on claiming and creating districts with black majorities. At one time this was the surest means of electing blacks to Congress, but in the 1990s its potential as a strategy has been exhausted. Black politicians are already representing all of the country's majority-black congressional districts, and after the 1992 elections relatively few areas remain where blacks are sufficiently concentrated for courts and state legislatures to create new districts. Future significant growth in the number of blacks in Congress cannot come from creating newly black districts.

2. *Increased black representation from majority-white districts is possible.*

A more promising strategy is to elect blacks in districts without black majorities. Only 1 percent of majority-white districts have African-

American representatives, but they offer blacks the greatest potential for growth. Over 90 percent of the nation's 435 congressional districts have white majorities. Black politicians are already elected from districts of widely varying racial composition (see Figure 10.1). From 1970 to 1990 eight black representatives were elected in majority-white districts that ranged from 4 to 46 percent black in their voting-age populations; an additional nine black representatives were elected from heterogeneous districts, and still another seven were elected from districts that fell short of being 65 percent black. We can assume that each of the majority-white

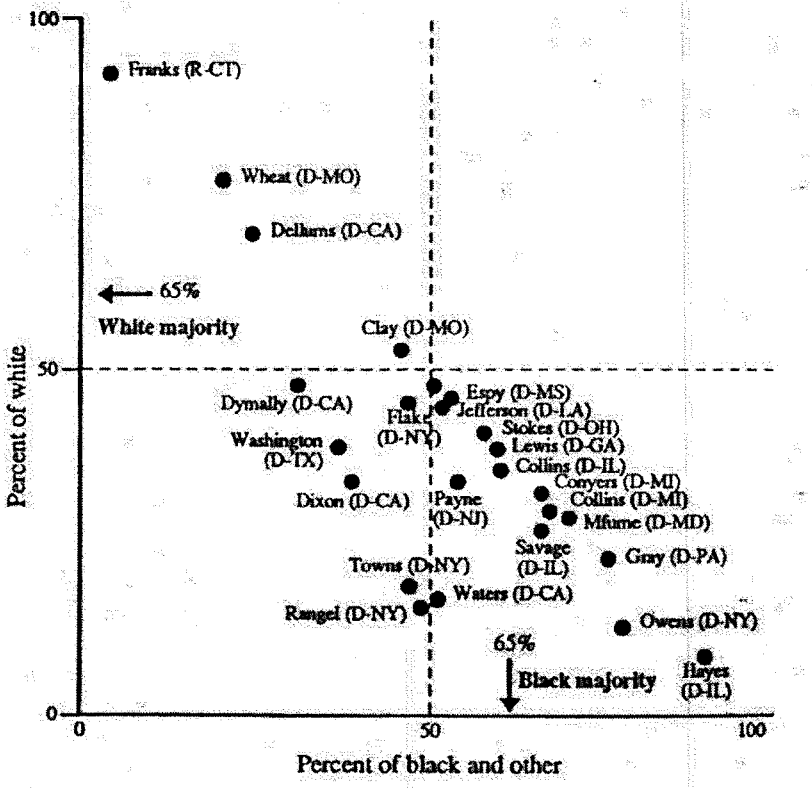


*Figure 10.1.* Black voting-age percentage of population in congressional districts represented by blacks in 1991. Data compiled from Linda Williams, ed., *The JCPS Congressional Fact Book* (Washington, D.C.: Joint Center for Political Studies, 1988).

districts that elected black representatives had actual black voter registration and turnout rates somewhat lower than the population percentages listed in the election history tables.

There have been black victories in white districts despite the fact that black candidates are often discouraged from running for office in majority-white geographical areas. According to the conventional wisdom, black candidates will lose in such areas because of the racism of white voters. At present, knowledge of why voters sometimes vote along racial lines and sometimes cross over to support a candidate from a different racial group is deficient. What we know is based on a handful of comparative studies of local governmental elections and case studies of the statewide races of Tom Bradley, Douglas Wilder, and Edward Brooke.[1] Broader studies on the electability of black candidates running in white constituencies tend to focus on the attitudes white Americans hold toward blacks as a group.[2] From the negative stereotypes that many whites use to label blacks, these studies reach pessimistic conclusions about the prospect of electing more blacks in majority-white constituencies. They fail to take account of a key electoral fact: candidates run as individuals and not as categorical groups. This is a crucial distinction. It is possible for someone to dislike a group, but to make exceptions for individual group members.

Voters do usually favor candidates from their own racial or ethnic group.[3] Indeed, a candidate's race is an important cue for predicting his or her position on a host of issues. Henry Brady and Paul Sniderman have demonstrated that voters use their likes and dislikes of "politically strategic groups" to calculate their policy positions on major issues. Similarly, Edward Carmines and James Stimson have found that whites and blacks have a striking ability to estimate each other's positions on issues such as busing, guaranteed jobs, minority aid, and rights of the accused.[4] Because blacks tend to be more liberal than whites on many issues, in the absence of further information whites will tend to assume that black candidates are liberal. It follows that conservative white voters who know no more about a candidate than that he or she is black may vote against that candidate. In effect, the racially polarized voting of such individuals is a rational response to a lack of information. By the same token white voters who learn that a black candidate shares their views and values may well vote for that candidate on the issues. It is instructive that the black candidates who have been most successful in winning white support typically have provided the voters with plenty of information about themselves.

*3. "Packing" black voters diminishes the overall representation of blacks.*

In 1991 seven congressional districts ranged from 66 to 90 percent black. The result was wasted black votes and influence. Less concentrated black populations in these districts might have made it possible to elect more black politicians overall. Let us consider what might happen if policymakers abandoned the practice of drawing "safe" black districts with an aggregate majority of at least 65 percent. Assuming, of course, that the black electorate is politically active, or that it can be mobilized when necessary, the dispersion of a large black population across different congressional districts could have positive results. There could be better representation for blacks overall.[5] Instead of one black politician representing a congressional district that is 70 or 80 percent black, one black representative might have a 50 to 55 percent black district, and other (possibly white) representatives would be influenced by the remaining black voters in adjacent districts.

To accept reduced black populations in existing and future black-majority districts, African Americans would need to think beyond their desire for black faces and black solidarity. Black faces in political office do not guarantee the substantive representation of the policy preferences of the majority of African Americans. President Reagan responded to minority demands for such representation by appointing a conservative Hispanic (Linda Chavez) and a black (Clarence Pendleton) to the Civil Rights Commission. Neither of them reflected the policy preferences of large numbers of the members of their respective groups.

Black districts with smaller percentages of black voters would give more African-American candidates an incentive to build multiracial coalitions. Lowering the threshold of black voters has other implications: blacks dispersed over more districts might encourage greater responsiveness from white elected officials. No politician can afford to concentrate on one racial or ethnic group to the exclusion of others. Most representatives know that ignoring a significant minority population can be political suicide, because an opponent can build a coalition of disaffected groups.[6] Less overwhelmingly black districts would also undoubtedly make their own representatives feel less secure. Many of the representatives would become more attentive and vigilant, and therefore their constituents would profit.

Much of the future growth of black substantive and descriptive representation will depend on coalition building with other racial and ethnic groups. The issue of biracial coalitions between whites and blacks

has been intensely debated since the 1960s, when Stokely Carmichael and Charles V. Hamilton wrote their classic book on black power.[7] Carmichael and Hamilton warned against coalitions with whites until blacks had had the opportunity to develop independent bases of power that would allow them to be more than junior partners. Now, in the 1990s, it can be argued that the time has come.

*4. Whites can represent the interests of blacks.*

White representatives who support the goals of blacks, however these goals are defined, are a further source of black representation. As we saw in Chapter 8, Peter Rodino and Lindy Boggs (and before her, Hale Boggs) took seriously their mandate to represent black interests even when their districts were still majority-white. They supported and helped push civil rights legislation and Great Society programs through a reluctant Congress at a time when the few blacks in Congress lacked the seniority, clout, experience, and other resources to take on leadership roles.[8] Rodino and Boggs, nevertheless, found themselves assailed by the argument that "only blacks can represent black interests." African Americans who advance such arguments may not recognize that they are placing such a high value on descriptive representation that they are ignoring other characteristics of representatives that may be in the group's interests, such as age, seniority in Congress, and history of responsiveness. Whenever a black majority, regardless of whether it is in a newly created district or not, is not represented by a black politician, the argument that only blacks can represent blacks is made. Yet descriptive representation of blacks guarantees only black faces and is, at best, an intangible good; substantive representation is by definition real and color blind. Substantive representation can be measured by a politician's performance on indicators such as voting and casework.

Many white members of Congress perform as well or better on the indicators used in this book than some black representatives. Many of the white associate members of the Black Caucus have already shown that they are prepared to and can serve the interests of blacks by actively working to frame legislation that will benefit disadvantaged groups and by supporting causes that the majority of African Americans consider in their interest (see Table 10.1). Some of them, moreover, are high in seniority and hold congressional leadership positions that enable them to act effectively on advancing their legislative agendas. Although associate members are not allowed to participate in the CBC's closed-door

*Table 10.1.* Legislative records of selected Congressional Black Caucus associate members, 101st Congress

| District | Representative | Year elected | BVAP 1980s | HVAP 1980s | COPE rating | LCCR rating |
|---|---|---|---|---|---|---|
| NY-7 | Gary Ackerman | 1983 | 11 | 17 | 99 | 100 |
| AK-1 | Bill Alexander | 1968 | 16 | 1 | 70 | 100 |
| WI-1 | Les Aspin | 1970 | 3 | 2 | 86 | 87 |
| CA-44 | Jim Bates | 1982 | 13 | 22 | 83 | 93 |
| CA-26 | Howard Berman | 1982 | 4 | 20 | 87 | 93 |
| LA-2 | Lindy Boggs | 1973 | 52 | 3 | 77 | 87 |
| CA-36 | George Brown, Jr. | 1972 | 7 | 20 | 90 | 93 |
| CA-10 | Don Edwards | 1962 | 5 | 24 | 94 | 100 |
| PA-1 | Thomas Foglietta | 1980 | 29 | 7 | 96 | 93 |
| MA-4 | Barney Frank | 1980 | 1 | 1 | 91 | 100 |
| TX-24 | Martin Frost | 1978 | 29 | 11 | 79 | 93 |
| CT-2 | Sam Gejdenson | 1980 | 3 | 1 | 95 | 80 |
| MO-3 | Richard Gephardt | 1976 | 1 | 1 | 82 | 89 |
| NJ-14 | Frank Guarini | 1978 | 11 | 24 | 92 | 80 |
| MD-5 | Steny Hoyer | 1981 | 31 | 2 | 94 | 100 |
| MA-8 | Joseph Kennedy II | 1986 | 4 | 3 | 93 | 100 |
| NC-3 | Martin Lancaster | 1986 | 25 | 2 | 73 | 87 |
| CA-11 | Tom Lantos | 1980 | 6 | 12 | 94 | 87 |
| CA-18 | Richard Lehman | 1982 | 6 | 21 | 93 | 100 |
| MI-17 | Sander Levin | 1982 | 10 | 1 | 95 | 100 |
| OH-1 | Thomas A. Luken | 1976 | 14 | 1 | 78 | 100 |

meetings, some would if they were given the opportunity, as Robin Tallon's attendance and participation at a Black Caucus meeting suggested (see Chapter 7). Furthermore, the white associate members of the Black Caucus are not the only whites on Capitol Hill who are willing to help blacks.

What difference does the race of the representative make for the representation of black policy preferences? If the mean interest-group scores of white and black Democrats on two of the indicators of black interests are contrasted, there is only a shade of difference between white and black Democrats (see Figure 10.2). Similarly, in a multivariate regression analysis that includes the race of the representative as one of the independent variables, race is statistically insignificant (see Table 10.2).[9] It is evident that partisanship and region are far more important than race in predicting whether representatives will pursue black interests as here defined. The black Republican representative Gary Franks confirms this pattern by following party lines. Franks was the only black

*Table 10.1* (continued).

| District | Representative | Year elected | BVAP 1980s | HVAP 1980s | COPE rating | LCCR rating |
|---|---|---|---|---|---|---|
| WA-7 | James McDermott | 1988 | 8 | 2 | — | — |
| MD-4 | C. Thomas McMillen | 1986 | 19 | 1 | 100 | 100 |
| CA-13 | Norman Mineta | 1974 | 2 | 10 | 89 | 87 |
| MD-8 | Constance Morella | 1986 | 8 | 4 | 63 | 93 |
| NC-5 | Stephen Neal | 1974 | 15 | 1 | 54 | 80 |
| OH-20 | Mary Oakar | 1976 | 2 | 2 | 94 | 87 |
| CA-5 | Nancy Pelosi | 1987 | 9 | 12 | 96 | 86 |
| FL-18 | Claude Pepper | 1962 | 13 | 50 | 94 | 100 |
| VA-2 | Owen Pickett | 1986 | 21 | 2 | 83 | 80 |
| WV-4 | Nick Rahill II | 1976 | 6 | 1 | 88 | 100 |
| NJ-8 | Robert Roe | 1969 | 12 | 10 | 91 | 87 |
| NC-7 | Charlie Rose | 1972 | 25 | 2 | 64 | 87 |
| CO-1 | Patricia Schroeder | 1972 | 11 | 15 | 75 | 87 |
| SC-6 | Robin Tallon | 1982 | 37 | 1 | 69 | 73 |
| PA-18 | Doug Walgren | 1976 | 2 | — | 85 | 93 |
| OR-3 | Ron Wyden | 1980 | 5 | 2 | 31 | 100 |
| Mean scores, white CBC members | | | 12.9 | 8.6 | 83.8 | 91.7 |
| Mean scores, black CBC members | | | | | 98.4 | 93.0 |

*Source:* "The 101st Congress, 1989-1990," Congressional Black Caucus Foundation, September 1990.

*Note:* BVAP = Black voting-age percentage of district population; HVAP = Hispanic voting-age percentage of district population; COPE = AFL-CIO Committee on Political Education; LCCR = Leadership Conference on Civil Rights. This table excludes senators and members of the Congressional Hispanic Caucus who are also Black Caucus members.

House member to vote in support of the war in the Gulf, against civil rights legislation, and against family leave.

The staffs of the white Democrats that I interviewed were racially diverse, and staffers can be said to provide a surrogate form of representation for racial subgroups. The black representatives of heterogeneous, newly black, and majority-white districts also had racially diverse staffs. Such staffs enable representatives to avoid being perceived as representatives of only their own racial group. One way they do this is by placing aides from other racial groups in strategic locations. As one high-ranking white staffer of a black representative explained to me, a key part of his job is to "just hang out" and mingle with prominent whites in the district, watching for any dissatisfaction with the congressman.

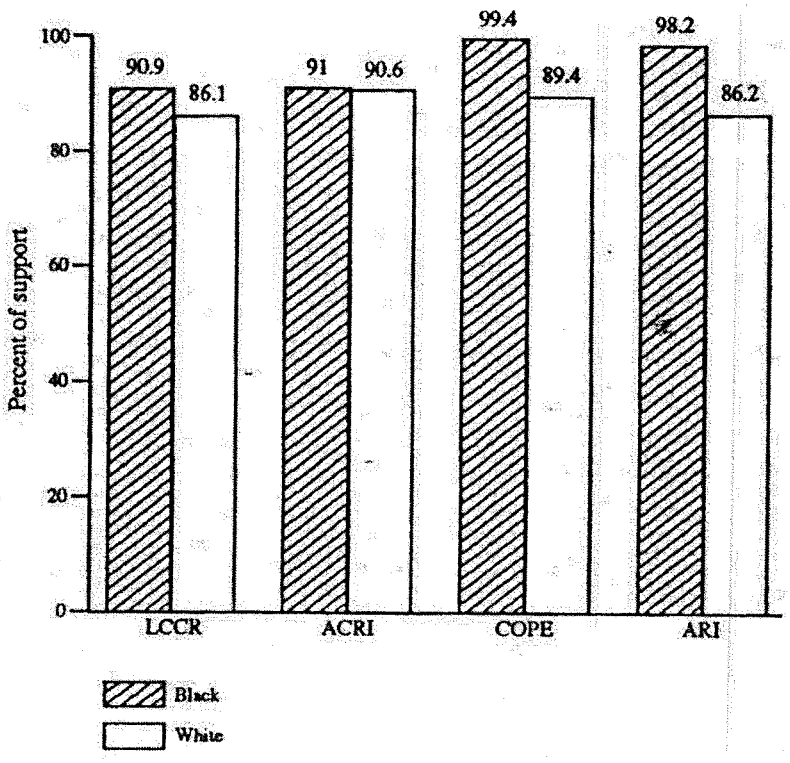


*Figure 10.2.* Racial comparison of Democrats' voting behavior on the four indicators of black interest, 100th Congress. Data compiled from U.S. Census, roll-call votes, and published reports of the Leadership Conference on Civil Rights and the AFL-CIO Committee on Political Education.

Many white Democrats appear to be fully at ease in interacting with their black constituents, just as black representatives like Alan Wheat are with their white voters. A black aide to the white North Carolina congressman Charlie Rose, who represents a district that is 27 percent black, told me that "black folks make my boss feel right at home." Rose

*Table 10.2.* Multivariate analysis of influences on representatives' support of black interests

| | Indicators measuring support | | | |
|---|---|---|---|---|
| Variables | LCCR | COPE | ACRI | ARI |
| Party | 48** | 55** | 48** | 59** |
| | (2.2) | (2.0) | (2.4) | (2.0) |
| Region | −17** | −16** | −16** | −12** |
| | (2.6) | (2.3) | (2.8) | (2.4) |
| Interactive term* | 6 | 15 | 8 | 12 |
| | (9.7) | (9.0) | (10.7) | (9.1) |
| Race of representative | 2 | 3 | −3 | 6 |
| | (4.8) | (4.6) | (5.4) | (4.6) |
| $R^2$ | .58 | .67 | .52 | .70 |

*$p \leq .05$. **$p \leq .01$.

*Note:* The regression coefficients are unstandardized. The numbers in parentheses are standard errors.

LCCR = Leadership Conference on Civil Rights rating; ACRI = Alternative Civil Rights Index; COPE = AFL-CIO Committee on Political Education rating; ARI = Alternative Redistributive Index.

attends many family reunions, weddings, and similar functions in his district. As his aide put it: "[Rose] loves to sit down and chew the fat with blacks. He loves going into their homes. When we ride through the district, he'll just stop by people's homes. He doesn't wait for events or invitations. If he knows that someone is having a homecoming or something like that, he'll stop by the church. That's just the way he is."[10]

A white representative who makes an effort to get along with blacks may find it possible to get valuable campaign support from black representatives. In Rose's case a tradition of such support began when the District of Columbia's nonvoting delegate, Walter Fauntroy, showed him a notebook listing prominent blacks in the district:

> He thumbed through his notebook and said to me, "Charlie, do you know these people?" I said: "Do I know them! That's the people that sent me here." "Well," he said, "all of these people want you to vote for home rule for the District of Columbia." I said: "I'll be very happy to do that, but I need something from you first." I got Andy Young and Fauntroy together and told them both: "I'm going to vote and work to help you pass home rule for the District of Columbia, but I want you to come down to my

> district and speak for me, when I'm running for reelection." They both agreed, and for fifteen years or more, it has been sort of a tradition that I invite a black congressman to come into my district to make a speech.[11]

White representatives have other ways of gaining black support. They may, for example, donate large sums of money to black churches and other black organizations, or purchase seats for the Black Caucus's annual legislative weekend dinner, perhaps giving tickets to black leaders in their districts. Perhaps the most controversial strategy is the use of election day "walking around money," which can be viewed as vote buying. Indeed, some local black leaders are known to take advantage of white politicians' need for black support and collect money from both the Democrats and the Republicans.

Unfortunately, white liberal Democrats who view themselves as the allies of African Americans cannot always count on black support. Many white liberal representatives are threatened by redistricting plans that ignore their records of responsiveness to blacks and their interests. Some reverse discrimination suits may come from the former allies of blacks when white liberals find themselves redistricted out of seats to make way for black descriptive representation.[12] Black politicians argue that a person's race should not be used against him or her, but many also argue that only blacks can represent black interests. They are, in effect, using a double standard and leaving themselves open to attack. When the argument is advanced that only blacks can represent blacks, this implies that blacks and whites are separated by an unbridgeable gap. White Americans are noticing that some black politicians use blatant racial appeals such as "vote black" to galvanize their supporters. Yet white politicians who dare hint at racial solidarity will find themselves forever branded as racist.[13] Black leaders must reflect on how white politicians fit into their overall plan to increase black political power. An abandonment of double standards would facilitate cooperation between whites and blacks.

*5. Blacks can represent the interests of whites.*

As we have seen in Chapters 4, 5, and 6, black representatives can represent the needs and desires of white voters without compromising their ability to support the type of public policy agendas favored by the majority of African Americans. The election of blacks in heterogeneous and majority-white districts is particularly fruitful because it can increase black representation descriptively *and* substantively. Mike Espy,

Alan Wheat, and Ron Dellums are among the black representatives whose support among whites increased during their time in Congress. These members have gained the trust of white voters while representing the legislative agenda that most blacks seem to prefer.

*6. Descriptive representation has its own value.*

Although a white representative can "think, act, and talk black," he or she can never *be* black. White representation of blacks will never replace black representation. Like the members of other ethnic groups, African Americans are proud of the achievements of their group. Blacks are especially pleased when there is a black "first"—the first black to do or achieve something, to break a real or perceived barrier. The presence of black representatives in Congress, regardless of their political party, fulfills a host of psychological needs that are no less important for being intangible. One need only attend an annual Black Caucus legislative weekend to see the pride that the hundreds of blacks who attend the affair have in the group of congressional black representatives. Black representatives are celebrities—icons for their group. Michael Preston writes: "Symbolic representation is not only desirable but necessary for black Americans. Blacks need role models in government; they need representatives that they believe will represent their interests; they need to know that good leadership (or bad) is not dominated by one race or group."[14]

Although black Republicans do not represent the substantive interests of the majority of African Americans, they have something valuable to contribute to both whites and blacks. Their counterintuitive positions help to remind people that blacks are not monolithic. Confronted with this information, as Americans were in the case of the Clarence Thomas confirmation hearings, when impressive blacks testified for both sides, white Americans may be more likely to treat blacks as individuals and less likely to succumb to racial polarization.

## The Special Characteristics of Black Representatives

From George Crockett, the old-style radical, to Mervyn Dymally, the former lieutenant governor of California with a Ph.D., we have seen that black representatives are marvelously varied. Nonetheless, they tend to have numerous qualities in common. Many, if not all of them, for example, have a broader view of what makes up their constituency than do most white representatives. Richard Fenno, Jr., has observed that

representatives' perceptions of their constituencies resemble nests of concentric circles, consisting of their personal, primary, reelection, and geographical constituencies: that is, their circles of friends and intimates, voters they can count on in a primary election, those they can count on in a general election, and all the people who reside within their districts.[15] Most black representatives have a still wider sense of their constituencies that extends to national and even international concerns.[16] The national constituency includes all blacks and disadvantaged people within the United States; the international constituency extends to people of color throughout the world.

A sign of this broader view of constituency was evident in my interview with Dymally, who complained that too much of his time was taken up by people not technically his constituents, but added that he would never send anyone away. Representatives George Crockett and William Gray expressed their eagerness to help non-Caucasians from Africa, the Pacific, and the Caribbean nations. Dymally summed up the feelings of many when he told me that "if the Jews can advance the interests of Israel, surely a black congressman can do something for his people."[17] The Texas Democrat Mickey Leland provided poignant evidence of the breadth of identifications of many black representatives in his tragic death while in Africa on a mission of famine relief. He once told constituents and colleagues: "I am now an activist on behalf of humanity everywhere in any part of the world where people are desperate and hungry for the freedoms and rights they deserve as human beings."[18] Before Leland's death, his district administrator told me: "What people don't understand is that Mickey Leland must be the Congressman for the entire Southwest. There isn't another black congressman in this general vicinity, unless you go to the deep South or the Midwest."[19]

The efforts of black representatives to represent international interests can be a source of tension in most American black communities, as constituents struggle to overcome the ravages of drugs, AIDS, homelessness, and unemployment at home. To some black constituents, black representatives appear more concerned with conditions in South Africa and the Middle East than they are with the crises in their own constituencies. Some black representatives make themselves vulnerable to such criticisms by turning to foreign policy issues that appear to be easier for them to tackle than domestic issues.

Whenever a black representative is elected, he or she is likely to be contacted by blacks throughout the region for assistance. This might be

expected, in view of Sidney Verba and Norman Nie's finding that African Americans tend to be reluctant to contact white public officials.[20] Representative Donald Payne has observed some of these tendencies. He comments: "Black constituents feel comfortable with me, and see that I feel comfortable with them. I always have, because I have always been a minority in this majority. They don't take me as a threat. They know that I'm very concerned about issues that affect them. If you don't care about your own number one, there's something wrong with you."[21] Because so many African Americans share his view, black representatives are confronted with an above-average number of requests. Serving needs beyond district lines can, of course, be a significant burden on the resources of any black representative. A similar phenomenon occurs when there is only one Democrat within easy reach in an area: often people who are Democratic party members are reluctant to request casework from a Republican representative.

Not surprisingly, black representatives generally come from districts that have many problems, and their constituents generate many requests for service. Nevertheless, black representatives vary enormously when it comes to their actual approach to casework. Some black members (and a few whites) run their offices like social welfare agencies. Some become actively involved in legal matters and will even write to parole boards; others steer clear of such matters. Representatives set the tone for the type of constituency service that their office will render. They do this by either seeking or discouraging cases, by making themselves accessible to their constituents, or by closely monitoring and responding to complaints. In rare cases they adopt a hands-off approach, leaving everything to the staffers. Several black representatives and staffers have complained to me: "Black constituents are difficult to help because they wait until the eleventh hour. They appear at the office shortly before an eviction or job loss." "Black constituents are so demanding. They want us to turn over the world in a minute, and then they wonder what took us so long." "Our policy is for all of our staffers to stop what they are doing when someone enters the office. That individual gets our attention."[22]

Often black representatives' emphasis on casework is evident in their allocation of staff. Most of the black representatives I interviewed placed more of their staffers in their district office than did white members. Such a decision is reasonable, given the findings of Bruce Cain, John Ferejohn, and Morris Fiorina, who conducted a comparative study of British and American legislative-constituency relations and found that

blacks consider policymaking the least important of a representative's activities; in their view, it lags behind helping constituents and protecting the district.[23]

Another characteristic marks many black representatives, especially those in historically and newly black districts (although it does not distinguish them from all members of Congress). They are relatively immune from an incentive that Mayhew and others view as central to congressional behavior—preoccupation with reelection.[24] Black representatives from historically black districts are essentially guaranteed reelection if they survive their primaries. They have reelection rates exceeding even the high rates of House incumbents in general. This presumably helps to explain the fact that in 1989, in spite of intense public uproar about a proposed 51 percent congressional pay raise, 56 percent of the blacks in the House (13 of 23) voted for the increase in contrast with 8 percent (35 of 412) of the non-African-American House members.

Issues of self-esteem, real or alleged wrongdoing, and unfair treatment or even persecution present other special problems for black representatives and contribute to the uniqueness of their concerns. For most black representatives a measure of respect and status in the world outside of politics comes with the job. This may not transfer to their dealings with colleagues inside the chamber, where everyone is supposed to be equal. Individuals who have been accorded high prestige in their communities may find they have to fight hard for the respect of their white colleagues.

This may help explain why many black representatives feel that a white establishment is seeking to discredit them through charges of misconduct related to the use of their official positions for financial gain. Charges against black representatives are often unsubstantiated and have to be dismissed after the accused has spent thousands of dollars in legal fees.[25] Although there are also white representatives who find themselves in similar situations, most blacks see a double standard in the accusations and in the manner these cases are resolved. The harassment of black elected officials has been the subject of several reports by human rights groups.[26] Some black representatives have reacted to what they see as their vulnerability by being exceptionally cautious.[27] Even so, many of them complain about being victimized by white journalists who they believe are rewarded for writing negative stories about black politicians. The weight that black representatives attach to maintaining

a respectable public image makes the charges of misconduct a particularly crippling part of their political lives.

Another distinctive aspect of the legislative experience of African Americans in Congress is the financial security provided by holding office. In contrast with whites, many of whom take salary cuts to serve in Congress, blacks often enter Congress from low-paying jobs—as low as $15,000 per year, according to some members' accounts. Moreover, positions beyond the congressional level have traditionally always been available to whites, but only more recently have changes in the political environment made it possible for blacks to aspire to higher office. Jesse Jackson's presidential bids and the election of African Americans to statewide offices raise new possibilities for all blacks—positions that were once considered unobtainable are now well within reach. As strategic politicians, representatives know what is needed for winning such offices, and some are quietly amassing financial war chests. The Black Caucus has for a long time pursued statehood for the District of Columbia, and this goal is related to the pursuit of higher office by blacks. If the District is granted its statehood, blacks will have a chance to attain several very powerful positions: a governorship and two senatorial seats as well as one representative seat. In anticipation, several black representatives have positioned themselves so that they could easily declare residency and run for office. Presently the cost of running for higher office is great, and blacks have so far had only limited success in winning statewide races (though the number of successful candidacies is increasing). One representative commented, "I would love to be a senator, but if I run and lose I have no place to go." Black representatives are usually rational enough not to give up seats to run for higher office. Two who did, Yvonne Burke (D-CA) and Parren Mitchell (D-MD), were defeated—thus serving as powerful reminders to other blacks.

If financial incentives keep some black representatives from contesting statewide offices, they may lead others—particularly those whose congressional service makes them marketable in the private or not-for-profit sphere—to leave Congress for better positions. William Gray, for example, substantially increased his salary when he resigned from Congress in 1991 to head the United Negro College Fund.

To the extent that black members of Congress aspire to leadership positions within the House of Representatives, they may exhibit still other characteristics. One of these may be a muting of any militant impulses or radical views that they may have held. Recognizing the

truth of Sam Rayburn's aphorism that getting along requires going along, they are likely to try to fit in rather than rail against the political system.

It should not be surprising that black representatives have a number of distinctive qualities. Overall, however, blacks who have served in Congress in the twentieth century have fit into the system well and have succeeded in adapting it to their purposes and to those of their constituents.

## What Lies Ahead?

What is on the horizon for black congressional representation? The picture for the future is complex and not wholly consistent, but a number of trends are evident. One is that the advantage of incumbents in reelection will allow more black members to gain seniority. These gains will result in additional African-American influence in committees and on the Hill. But blacks in institutional power may become less willing to support controversial issues that are in the interests of the disadvantaged majority of American blacks. To the extent that black members of Congress turn into traditional legislative brokers, there will be a further weakening of the Black Caucus. Similarly, a loss of Black Caucus influence is likely to occur as its senior members retire—as has already occurred in the departure of Augustus Hawkins, chairman of the Education and Labor Committee, who left in 1990 after twenty-eight years of service, and in the resignation of Bill Gray as Majority Whip in 1991.

Another, different trend may result from the Republican party's strategy of providing voting rights activists with the technology to draw black-majority and Hispanic-majority districts in the next round of redistricting. If blacks and other minorities are packed in homogeneous districts, it will be less possible for minority voters to increase their descriptive and substantive representation.

In addition, a variety of developments are possible as a result of the close ties between black representation and the fortunes of the Democratic party.[28] To begin with, black influence would drop precipitously if the Democrats were to lose control of the House. Were this to happen, most African American legislators would automatically become minority members of the minority party. Gone would be the committee chairmanships, the leadership posts, and other key assignments.

The dependence of African Americans on Democrats for representa-

tion of their interests has other important implications for the future. Through 1988, the Democratic party had lost five of the last six presidential elections. As Merle and Earl Black show, a majority of white southerners have economic priorities that are different from those of blacks. Moreover, there is much evidence that increasing numbers of young people in the South are identifying themselves as Republicans.[29] This trend is also apparent in older age groups.

To the extent that the Democratic party finds it difficult to win presidential elections or to be in a position to promise all Americans a piece of the fading American dream, it must devise new public relations strategies to improve its image with members of all races. As Carmines and Stimson have shown in their fifty-year longitudinal analysis of issue evolution, race has transformed American politics in ways that are now harmful to the Democrats.[30] They cannot allow their party to be seen as the party of blacks any more than the Republicans can allow theirs to be the white man's party. Black leaders must, therefore, cooperate and allow the Democrats to pursue legislation that will benefit both races. Charles Hamilton explored an alternative strategy in 1976 when he addressed the National Democratic Party Convention and advocated a "de-racializing" strategy for the party. He suggested that blacks concentrate on the attainment of full employment, national health insurance, and income maintenance programs that would cut across racial lines.[31] Several social scientists have conducted research that suggests that legislation geared to help particular social classes, and not racially based remedies that alienate whites, will go furthest in helping blacks to achieve their public policy objectives.[32]

The current unrest among white Americans suggests that it is more important than ever before that blacks recognize white interests and be aware of the implications of pursuing racially polarizing issues.[33] African Americans cannot expect to win on all fronts. Their failure to get a particular policy enacted or supported by a white representative, moreover, does not mean that they are completely unrepresented. Rather, representation of blacks cannot be viewed in isolation from representation of whites. On some issues blacks should expect to lose. In past battles, southern white conservatives have regularly lost on civil rights. Only in racially and socially homogeneous districts can we expect stable representation of constituency opinion.[34]

The rise of black Republicans such as Gary Franks will reduce the dependency of blacks on the Democratic party for their congressional influence.[35] Prior to Franks's election, black Republicans ran almost

exclusively in no-win situations with limited financial support from their party. In fact, they were routinely promoted in races in which they stood no chance of winning. Examples of the latter include Virginia's senatorial race in 1988, when Maurice Dawkins, a black, ran against former Governor Chuck Robb, an extremely popular opponent, and Alan Keyes, who in 1988 took on incumbent Paul Sarbanes in Maryland, a state in which Democrats outnumber Republicans two to one. Both senatorial candidates complained of financial problems and a lack of party support.

The election of a black Republican has the result of increasing black descriptive representation, but ironically it does nothing to enhance black substantive representation as defined by groups such as the NAACP and the LCCR. Still, one cannot say dogmatically that the election of black Republicans will necessarily diminish the substantive representation of all African Americans. Not all blacks are poor or liberal. The existence of a growing black middle and professional class, often geographically and socially separate from poorer blacks, makes it difficult, if not impossible, to generalize about the "black interest."

Other changes can be envisaged. In addition to the election of black Republicans, we can expect black representation to be enhanced by the presence of black Democrats in the Senate. This has never occurred in the history of the institution (the only three black senators, so far, have been Republicans), but there are indications that it will. In North Carolina's senatorial race in 1990, for example, Harvey Gantt, a black Democrat, beat several white primary opponents, won the runoff election against a single white opponent, and came within several points of defeating Jesse Helms, the arch-conservative incumbent in a state that is 20 percent black. Despite speculation that racism was a major factor in the final outcome, Gantt's vote percentage (47 percent) was consistent with that of Helms's previous white opponents. He was able to hold Helms to his usual margin of victory.[36] Gantt's gains, along with the increasing number of blacks elected to statewide offices elsewhere in the nation, illustrate the potential for electing blacks to the Senate. The time may be coming when the U.S. Congress will be a truly racially diverse body. The defeat of two-term senator Alan Dixon (D-IL) in the 1992 Illinois Democratic primary by Carol Moseley Braun, a black woman, points in that direction.[37]

Nevertheless, it is not clear what the future holds for representation of black interests in the broader sense. Black communities are beset with problems. The needs of these communities cannot be adequately ad-

dressed by black representatives in Congress alone, even if we include the representatives from districts without large black populations. Not only must blacks in Congress make alliances with like-minded representatives from other races and ethnic backgrounds, but they must also rethink their own priorities and the relationship of those priorities to African-American needs. Twentieth-century black representation has been more substantive than ever before, but further progress requires new alliances and new strategies—and that in turn calls for recognizing the substantive representation of blacks coming from white members. As African Americans become more diverse and more politically sophisticated, we can expect further expansion in what constitutes "black interests," but there will be no reduction in the urgency of finding better and more effective ways to represent African Americans.

VANDERBILT Law School

May 14, 2006

The Honorable Arlen Specter
United States Senate
711 Hart Senate Office Building
Washington, D.C. 20510-3802

Dear Senator Specter:

I am an African-American political science and law professor at Vanderbilt University and have a longstanding interest in race and representation. My book, *Black Faces, Black Interests: The Representation of African Americans in Congress* has been cited three times by the U.S. Supreme Court in voting rights cases. The book has generally been recognized as a significant contribution to the study of race, voting rights, and American democracy, receiving, among other awards, the 1994 Woodrow Wilson prize for the best book published in the U.S. on government, politics or international affairs, the Harderman Prize for best scholarly work on Congress during 1994-1995, and the Key Award (co-winner) for the best book published on southern politics.

I write today both as a scholar and as a southerner who has given much thought to the issue of minority voting rights. Although I enthusiastically support the reauthorization of Section 5, I cannot in good conscience support S. 2703, a bill I find woefully inadequate for protecting minority voting rights. Consequently, I strongly urge this distinguished body to resist the temptation to join the House in rapidly passing a hollow, mostly symbolic, piece of legislation that despite its glorified name as the "Fannie Lou Hamer, Rosa Parks, Coretta Scott King Voting Rights Act", will not adequately address the issues of the 21st century. In fact, this pending legislation is quite possibly unconstitutional because of the lack of congruence and proportionality between where the violations occur and the reach of the Act (see City of Boerne v. Flores 521 U.S. 507 (1997)).

I would like to see the Senate put brakes on the process and work collectively to ensure that all alternative proposals are carefully debated and evaluated. By racing along with the House bill, the Senate is in danger of participating in the passage of symbolic legislation at a time when greater substance is needed. We need legislation that will take into account where we are today as a nation and where we would ideally like to go. Although we have seen substantial progress in certain areas of race relations, we know from the 2000 and 2004 elections that voting rights violations occur in unprotected states and localities across the nation. There is a critical need to do more to protect and expand the franchise if we are to be true to democratic principles.

I would like to see the Senate seriously debate the thoughtful proposals advanced by Professors Samuel Issachroff and Richard Pildes of New York University. These are law professors with impeccable credentials on civil rights issues. They have each raised alarms that need to be heeded. According to Professor Pildes, we need a different approach to voting rights enforcement. He has eloquently argued in favor of national uniform voting rights legislation such as the Help America Vote Act (HAVA) and the National Motor Voter Registration Act (NVRA), which operate under a different philosophy than current voting rights models (forthcoming Howard University Law article). Likewise, Professor Issachroff has carefully outlined the reasons why the pending bill risks being declared unconstitutional by the Supreme Court.

Indeed, it would be a grave mistake indeed for the Senate not to use this opportunity to update the legislation and provide for the bailout needs of jurisdictions that have established long records of compliance. Because I care so deeply about this issue, I appeal to this distinguished body to resist the temptation to rush this bill through and instead to address and pass legislation that will effectively meet the needs of a changing nation.

Sincerely,

*Carol M. Swain*

Carol M. Swain
Professor of Political Science and Law
Vanderbilt University Law School
131 21st Avenue South
Nashville, Tennessee 37203-1181
(615) 322-1001 (Office)
(615) 322-6631 (fax)
E-mail address: carol.swain@vanderbilt.edu
Personal Website: http://www.carolmswain.com

Wall Street Journal

# Incumbent Rights Act

Why Congress loves racial gerrymanders.

*Monday, June 12, 2006 12:01 a.m. EDT*

We're not in the business of making predictions. But you can be fairly certain that the coming debate over updating the Voting Rights Act will sidestep what's really at stake, which isn't the right to vote but rather the power of politicians to pick their voters through gerrymandering.

Unless Republican backbones miraculously stiffen, expect the expiring penalty provisions of the Voting Rights Act to be renewed this year for another quarter-century, and expect it to happen with huge bipartisan majorities pretending that this draconian infringement of federalist principles is still necessary in 2006.

Partly this is because it's an election year and the issue lends itself to demagoguery. The Voting Rights Act was crafted by Congress in 1965 to address black disenfranchisement in the Jim Crow South, and the circumstances that made federal intervention appropriate 40 years ago still occupy the memories of many Americans today.

Congress could reassure Americans that the most important provisions of the Voting Rights Act--the bans on poll taxes and literacy tests and grandfather clauses--are permanently enshrined in law and thus not in need of renewal. But the political reality is that an embattled GOP Congress has no interest in allowing Democrats to use opposition to something called the Voting Rights Act against Republican candidates in November.

There's another, even more cynical, reason so many in Congress favor renewal, and it has to do with the Section 5, or "preclearance," provision of the law. Under Section 5, Deep South states and a few others must get permission from the federal government before making any changes to their voting practices. By any measure today, from voter registration and participation rates to the success of minority candidates, the intervention has served the nation well. But having accomplished its goals, this provision of the Voting Rights Act is now being abused by political incumbents.

Section 5 requirements stipulate that new redistricting plans can never reduce the number of minority voting districts. And the politicians have used this as an excuse to create Congressional districts that have nothing to do with geographic integrity and only serve their party's election prospects. When Republicans are re-drawing the Congressional maps, they heavily concentrate minority voters into safe Democratic districts, which has the effect of creating even more safe Republican districts.

When Democrats are in control, they also try to divvy up these minority voting areas, albeit somewhat differently. Their goal is to maintain enough of a core black population in certain seats to satisfy the Section 5 requirement. But Democrats also want to spread enough other black voters around predominantly white neighborhoods in hopes that white liberals can also continue to get elected.

Thus has a law intended to protect minority voting rights been transformed into a tool for creating safe Congressional seats--and all the problems that come with entrenched political incumbents who are primarily concerned with the demands of their special interest patrons.

Renewal legislation was voted out of the House Judiciary Committee last month, 33-1, with Republican Steve King of Iowa as the lone, brave holdout. House Judiciary Chairman James Sensenbrenner is currently leaning on his Senate counterpart, Arlen Specter, to do the same. Everyone, including the White House, wants this off the table as soon as possible.

Some Republicans are taking comfort in the belief that the Section 5 provision may be unconstitutional at the end of the day. And it's certainly true that the Supreme Court hinted as much in decisions like *Shaw v. Reno* (1993), which held that a "reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who have little in common with another but the color of their skins, bears an uncomfortable resemblance to political apartheid."

Ten years later, in *Georgia v. Ashcroft*, the High Court said, "the Voting Rights Act, as properly interpreted, should encourage the transition to a society where race no longer matters." The reauthorization would do the opposite. If Congress and the President are counting on the Supreme Court--which now has a Texas redistricting case before it--to spare them from the job of clarifying this matter, they should recall that such a strategy didn't work out so well in the case of McCain-Feingold's campaign finance reform.

**SENATE JUDICIARY COMMITTEE**

**SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND PROPERTY RIGHTS**

# VOTING RIGHTS ACT: POLICY PERSPECTIVES AND VIEWS FROM THE FIELD

**TESTIMONY OF**
**DONALD M. WRIGHT,**
**GENERAL COUNSEL,**
**NORTH CAROLINA STATE BOARD OF ELECTIONS**

**JUNE 21, 2006**

Mr. Chairman and distinguished Members of the Subcommittee, thank you for your invitation to testify on S. 2703, the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 ("VRARA"). It is my privilege to testify as someone who works on the front-line with election officials in North Carolina who have to submit voting changes for Section 5 review.

I submit this written testimony as General Counsel of the North Carolina State Board of Elections office. Elections in North Carolina are under the jurisdiction of an independent five member bi-partisan board appointed for four years by the Governor upon the recommendation of the Democratic and Republican parties. The North Carolina State Board of Elections is an independent regulatory and quasi-judicial agency. The opinions expressed herein reflect my personal opinion based upon my extensive experience with general Voting Rights Act and specific Section 5 preclearance issues, and do not reflect the opinion or position of the North Carolina State Board of Elections. However, I can state that my opinions are shared by other senior staff of the North Carolina State Board of Elections.

Section 5

When I was appointed General Counsel of the North Carolina State Board of Elections in September 2000, I was not sure what to expect from the United States Department of Justice, Civil Rights Division, Voting Rights Section (hereinafter referred to as the USDOJ). From my first contact with USDOJ to the present, all my dealings as to Voting Rights Act issues have been prompt, efficient, and handled in a friendly, yet professional matter by their attorneys and staff. USDOJ Attorney Chris Herren was in charge of overseeing Section 5 preclearances for North Carolina for many years until April of this year. Mr. Herren, without abandoning his watchdog role for possible violations of the Voting Rights Act, was as open as any government employee, on any level of government, who I have ever dealt with. Mr. Herren and other Department staff promptly reviewed and responded to all of my phone calls, faxes, and e-mails to make Section 5 compliance easier.

The responsibility for overseeing North Carolina Section 5 submissions has now been assumed by Attorney Yvette Rivera. Attorney Rivera was kind enough to call me in April to introduce herself and informed me of the change. I have no reason to believe that she will not continue the same excellent level of service than Mr. Herren did. In addition, I have had pleasant dealings with all USDOJ employees and staff since 2000, and I have not had any complaint from any North Carolina jurisdiction that deals with the USDOJ to the contrary. The cooperative and efficient performance by the USDOJ has facilitated the cost effective and efficient submission of voting changes under Section 5 by me and election officials from North Carolina jurisdictions.

Forty North Carolina Counties are subject to Section 5 of the Voting Rights Act.[1] Wake County was originally included but bailed out by showing that non-citizen prisoner population was inadvertently used to calculate the County's original coverage under Section 5.

Most of the covered counties are located in the Northeastern section of North Carolina extending south from the Virginia line to the middle of the state and extending to just east of Interstate 95. In addition, there is a grouping of covered counties along the central southern border with South Carolina. There are seven Piedmont counties covered along the central northern border with Virginia, and one Mountain county (Jackson) covered under Section 4(f)(4) of the Voting Rights Act as a result of the Cherokee Indian population. Guilford County, which includes the cities of Greensboro and High Point, is the most populous covered county.

The responsibilities for making Section 5 submissions are set out by Article 6A of Chapter 120 of the North Carolina General Statutes. North Carolina has concisely described what must be included with preclearance requests, which has significantly streamlined the preclearance process by ensuring that voting changes are properly submitted the first time by following USDOJ guidelines. GS § 120-30.9B gives the North Carolina State Board of Elections responsibility for submitting voting changes codified in statewide statutes. In addition, all actions, policies, rules and procedures made or taken by the State Board of elections that are changes affecting voting are submitted by our agency. GS § 120-30.9C gives the North Carolina Administrative Offices of the Courts responsibility for submitting changes affecting voting in judical elections and districts. GS § 120-30.9D gives the North Carolina Secretary of State responsibility for submitting changes affecting voting that may be found in constitutional amendments. GS § 120-30.9E gives to county attorneys, GS § 120-30.9F gives to municipal attorneys, and GS § 120-30.9G gives to school board attorneys the responsibility for submitting changes affecting voting in their respective jurisdictions. In addition, the North Carolina Attorney General has the authority under GS § 120-30.9I to submit a voting change not timely made or submitted by an agency or jurisdiction. By practice, this alternate submission authority of the N.C. Attorney General has been used to have that office submit Congressional and Legislative redistricting acts and issues.

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[1] The forty counties include: Anson County, Beaufort County, Bertie County, Bladen County, Camden County, Caswell County, Chowan County, Cleveland County, Craven County, Cumberland County, Edgecombe County, Franklin County, Gaston County, Gates County, Granville County, Greene County, Guilford County, Halifax County, Harnett County, Hertford County, Hoke County, Jackson County, Lee County, Lenoir County, Martin County, Nash County, Northampton County, Onslow County, Pasquotank County, Perquimans County, Person County, Pitt County, Robeson County, Rockingham County, Scotland County, Union County, Vance County, Washington County, Wayne County, and Wilson County.

In my experience, Section 5 works effectively and efficiently. Generally, any delays in preclearance fall into four areas attributable to actions by the submitting jurisdiction: local governmental units not submitting voting changes or submitting them on a tardy basis; submissions that fail to provide the information required by state law or USDOJ regulations/guidelines to facilitate the Section 5 review process; failure to identify relevant circumstances or evidence that may delay consideration of the submission; and failure to promptly communicate with USDOJ in response to a request for additional information.

Occasionally, a county, municipal, or school board attorney may fail to submit a voting change for Section 5 preclearance either because they overlook it or they do not know about the process. This is especially true for smaller jurisdictions that have infrequent voting changes. The Board of Elections has made an effort to have local county board of election directors reach out to local government counsel in their counties to remind them of their submission responsibilities. This agency has offered and continues to offer any local government counsel information and guidance to any local jurisdiction about submissions, including sending them prior submissions that they can use as a model for their own submissions. When necessary, this agency will intervene with the USDOJ on behalf of a local jurisdiction that was late in submitting its submission, and needs expedited review before the end of the usual 60 day period. We have never had a situation where the USDOJ has failed to cooperate with our agency or local government to ensure that a preclearance issue did not delay an election.

Local government counsel also may not be aware of the requirements for the contents of a submission or when a submission is required. Each year the North Carolina State Board of Elections produces a new or supplements an existing election laws book that goes to every county election director, every county board of elections board member, most county attorneys, and other interested parties. This 1500 page volume, which includes both the full text of all state and federal elections laws, including the Voting Rights Act as well as the USDOJ regulations dealing with Section 5, CFR §§ 51-1 through 67. We have found this very helpful in allowing us to direct persons to the proper area of federal law and regulations if they have a question as to Section 5. As stated above, this agency also provides previously used preclearance submissions as models to be used. There are usually four statewide training educational sessions in even number years, and three in odd number years for county election administrators. Issues pertaining to Section 5 and the Voting Rights Act have been presented at these meetings, and will continue to be addressed as needed.

Furthermore, a delay in obtaining preclearance sometimes occurs when unusual circumstances are present in a preclearance matter that requires the USDOJ to take a closer look at the submission. It is always best to disclose to the USDOJ all aspects of a matter being submitted for preclearance, including identifying persons in the community who might be opposed to preclearance. The USDOJ has developed expertise and contacts that generally allows them to independently gauge the feelings of community groups and leaders as to a matter. Sometimes local jurisdictions do not provide the "total picture" regarding a submission because of an attitude of "what I don't tell them, they will never

know." Such a submission delays the USDOJ review and hurts the creditability of the submitting local jurisdiction.

It is embarrassing to admit, but sometimes local jurisdictions delay responding to requests for additional information from the USDOJ. The USDOJ is to be complimented because it facilitates submissions by following up with the jurisdictions in a regular and professional manner, often without results. If the Board of Elections learns of such a situation, we will let the non-responding jurisdiction know that they need to respond and work with them to provide all required information.

The costs of preclearance submissions are insignificant, except for redistricting submissions, which entail a large amount of detailed demographic information and election data. These redistrictings generally occur on a state, county, or municipal level once every ten years since they follow the release of the new census data. So even if they are large submissions, they are very infrequent. Any added costs for redistrictings and related submissions are justified because they have a significant impact on minority voters for the next ten years. Submissions of municipal annexations also are larger than a normal submission because of required population data, but these submissions also tend to be infrequent events. Like redistrictings, annexations have long-term consequences on minority voters that require taking a close look at them before they are implemented.

The "average" submission using the form guidelines in Subpart B of Part 51 of the CFR usually takes less than an hour to prepare and mail. The ease and cost of such submissions also improves with the use of previous submissions in an electronic format to prepare new submissions. In my experience, most submissions are routine matters that take only a few minutes to prepare using electronic submission formats readily available to me.

Many jurisdictions in North Carolina have staff counsel that prepare submissions as part of their ongoing duties, so additional costs are not incurred in those situations. The costs of submissions are significantly reduced by ensuring that they are promptly and correctly submitted the first time.

I am informed that some opponents criticize Section 5 for purportedly place a "burden" on covered jurisdictions. Their criticism is misplaced. Prior to a 2005 conference on the Voting Rights Act, I communicated with election officials in a dozen North Carolina counties about their opinions of the benefits and any burdens of Section 5 preclearance. Out of the dozen, only one county elections director stated that he desired that Section 5 not be renewed. The remainder of the directors viewed Section 5 as a manageable burden providing benefits in excess of costs and time needed for submissions. Since that time, I have occasionally discussed this issue with more affected directors, and the consensus of support for Section 5 continues to be very strong. These directors cite the following benefits:

- Section 5 can vindicate governmental units from allegations of discrimination or adverse racial effects. It provides a "seal of approval" that a voting change is not discriminatory because the USDOJ has precleared the change.

- Section 5 prevents actions that would have a discriminatory impact from going into effect, ensuring that all voters have equal opportunities to participate free of discrimination. Section 5 is much more cost effective and efficient than litigation regarding voting changes, which is expensive to both the submitting jurisdiction and the plaintiffs. In the meantime, the plaintiffs – and, in fact, all voters – suffer the discriminatory impact of the voting change during the several years it can take to bring a successful court challenge. Preventing this sort of expense, delay, and discriminatory implementation was the main reason Section 5 was enacted to begin with.

- Section 5 facilitates planning and administration of special elections. Preparation of special elections must be done well in advance. The longer an election is set prior to its running, the easier it is for the election administrator. Elections that need preclearance can be shielded from "last minute" adjustment than may burden the election administrator.

Favorable quotes from some of the North Carolina county election directors include:

- "I would hate to operate without it"

- Preclearance requirements are "routine...do not occupy exorbitant amount of time, energy, or resources"

- " I can always fall back on Section 5" as to my actions

- "It allows us an opportunity to assure the public that minority rights are being protected...and that someone is independently validating those decisions"

- "The history of _____ County causes our operations to be scrutinized and rightfully so. The first black to serve on the board of elections was 1991"

To the extent some critics argue there is a perceived "stigma" from being a Section 5 covered county, that argument does not dampen the strong overall support of the Voting Rights Act Section 5 provisions by the vast majority of our affected county election directors.

Minority Languages

Section 203 language assistance voting requirements only apply to one county in North Carolina. Although we have a growing Hispanic population, as of the 2000 Census the number of Hispanic voting age citizens has not grown to the extent to bring North Carolina within its coverage. North Carolina has passed a statute, GS 163-165.5A, which

requires ballot instructions, not the ballots themselves, to be available in Spanish in counties that have a Hispanic population (regardless of citizenship) of 6% or more. In addition, although no counties are required to have Spanish ballot instructions, most of them volunteer to do so because it facilitates voter participation.

North Carolina has one precinct covered under Section 4(f) (4) of the Voting Rights Act, the Qualla Precinct in Jackson County. Because of the Cherokee Indian population in that precinct, a Cherokee Language translator is present at the precinct at every election. There is no written language requirement because Cherokee is a historically unwritten language. There is no added cost because the translator is also a poll worker who is paid the same as other poll workers.

Election Monitors

North Carolina has experienced the presence of election monitors, but has not had any negative feedback from USDOJ in recent decades as to anything they observed or found during the course of an election. They operate in a matter than does not hinder or interfere with local election operations. In the process, federal observers facilitate compliance with the Voting Rights Act, calm emotions in a heated election, and help prevent discrimination from occurring in the polls.

Conclusion

Although there is less voting discrimination today in North Carolina than there was when the Voting Rights Act was enacted, I feel there is no reason, based upon cost, time, and any alleged "burden," to choose not to renew the temporary provisions. The "burden" upon North Carolina and its covered forty counties is not great especially in view of the benefits I have set out in this document. Besides the tangible "burden" Congress may weight in its consideration of renewal, there are the intangible values that a renewal maintains. Regardless of one's position on renewal, there is a consensus that the temporary provisions have had the effect of moving the consideration of adverse effects on the voting rights of minorities to the "front of the bus," as opposed to the "rear of the bus" where it was for much too long. There also continue to be instances in which Section 5 prevents discriminatory voting changes from being implemented in North Carolina. To tamper with these temporary provisions may jeopardize the substantial progress minorities have made in our State. We have come too far to go back to where we started and to send minorities back to the rear of the bus. It is too important to the legitimacy of our Democracy not to protect the right of all American citizens to participate, regardless of their race, color, creed, ethnicity, or native language.