S. HRG. 109–569

THE CONTINUING NEED FOR SECTION 5 PRE-CLEARANCE

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

ONE HUNDRED NINTH CONGRESS

SECOND SESSION

MAY 16, 2006

Serial No. J–109–77

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE

28–753 PDF WASHINGTON : 2006

For sale by the Superintendent of Documents, U.S. Government Printing Office
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S521-54

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THE CONTINUING NEED FOR SECTION 5 PRE-CLEARANCE

TUESDAY, MAY 16, 2006

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

The Committee met, pursuant to notice, at 9:32 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Edward M. Kennedy presiding.

Present: Senators Kennedy and Feingold.

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

Senator KENNEDY. The Committee will come to order.

If you are seeing a Democrat up here, you may be in disbelief, but it is the real thing.

[Laughter.]

Senator KENNEDY. I had forgotten what it feels like, but it is beginning to feel pretty good. Eternally hopeful in terms of the future.

Our Chairman, Senator Specter, had a previous meeting at 8:30 this morning on our immigration bill, and we have a judge that is going to be voted on at 10 o'clock, so he is necessarily detained over on the floor, as I imagine, in dealing with that Ninth Circuit. So we will move ahead with this morning's hearing. It is enormously important, and we are very grateful—I am—for him to have this hearing today. I will make a brief opening comment. I will include his statement in the record, introduce the witnesses, and then we will get started.

I commend our Chairman for calling this hearing on the key question of whether Section 5 is still needed today. President Johnson said these words in his message to Congress in the 1965 voting rights bill: "In our system, the first right and the most vital of all of our rights is the right to vote." Jefferson described the elective franchise as "the ark of our safety. Unless the right to vote be secured and undenied, all other rights are insecure and subject to denial for all of our citizens."

Section 5 of the Voting Rights Act has been one of the most effective defenses of that right. For over 40 years, this provision has helped to sustain the progress that was made by those who risked their lives and livelihoods in the civil rights movement. It is an essential protection against back-sliding by jurisdictions with a history of discrimination in voting. It prevents these jurisdictions from

changing their voting rules without first showing that the proposed changes have neither a discriminatory purpose nor effect.

As the Supreme Court stated in upholding Section 5 in *South Carolina* v. *Katzenbach*, "After enduring nearly a century of systematic resistance to the 15th Amendment, Congress might well decide to shift the advantage of time and inertia from the perpetrators of the evils to its victims."

The issue of whether Section 5 is still needed today has come up many times in these hearings, and although we bring different perspectives to this issue, each member, the Committee wants to ensure that any legislation passed in this area gets it right. We are mindful that the Supreme Court will carefully review the legislation we are considering under the standards it has applied in reviewing other civil rights laws in the past. In recent years, the Court struck down a key part of the AIDS discrimination in employment because it found the Congressional Record insufficient, *Board of Regents of Florida* v. *Kimel*. It also struck down one part of the Americans with Disabilities Act, *University of Alabama* v. *Garrett*. The Court based its decision in both these cases on the sufficiency of evidence in the hearing record. Both of those legislations were out of my Committee, the Human Resource Committee, and we thought we had met the standard in terms of the record in both of those areas. But this we want to make sure we are going to meet that requirement.

Congress has a special role in enforcing the 15th Amendment that prohibits racial and ethnic discrimination in voting. As the Supreme Court has noted, we have broader leeway in this area than in others because of the close link of the need to prevent discrimination in voting and the special goals of the 14th and 15th Amendments. In 1999, in *Lopez* v. *Monterey*, which was decided after the Court made clear the need for a specific record to support legislation under the 14th and 15th Amendments, the Court acknowledged that the Voting Rights Act by its nature intrudes on State sovereignty but noted that the 15th Amendment permits this intrusion to remedy discrimination in voting.

Despite having greater latitude in this area than in others, there is no question we must make a clear record on any legislation to extend the expiring provisions of the Act. So I thank the panel in advance for their help in evaluating this.

We have a very distinguished panel, and we want to thank them. This is enormously important. These are very distinguished individuals who have spent an enormous amount of time in this area and developed a great expertise, and we are very grateful to them for being with us today: Anita Earls is the Director of Advocacy, University of North Carolina Center for Civil Rights, Chapel Hill; Pamela Karlan, the Kenneth and Harle Montgomery Professor of Public Interest Law and Associate Dean for Research and Academics, Stanford School of Law; Keith Gaddie, Professor, Department of Political Science, University of Oklahoma; Theodore Arrington, Chair, Department of Political Science, University of North Carolina; and Richard Pildes, the Sudler Family Professor of Law at NYU.

[The prepared statement of Senator Kennedy appears as a submission for the record.]

So, we thank all of you. We will start in that order. We would prefer if you can keep your remarks to 5 minutes so we can get some questions in before the break for the vote on the floor. Thank you.

STATEMENT OF ANITA S. EARLS, DIRECTOR OF ADVOCACY, UNIVERSITY OF NORTH CAROLINA LAW SCHOOL CENTER FOR CIVIL RIGHTS, CHAPEL HILL, NORTH CAROLINA

Ms. EARLS. Thank you, Mr. Chairman. I am honored to have this opportunity to testify concerning the continuing need for Section 5 pre-clearance. Throughout the Section 5 covered jurisdictions, minority voters continue to face intentional and unconstitutional barriers to full and equal participation in the political process. There are at least five main sources of evidence documenting continued intentional discrimination in voting in the covered jurisdictions. I will list these sources and then summarize what they show.

The sources of evidence are: one, Section 5 objection letters; two, unsuccessful Section 5 declaratory judgment actions; three, reported opinions in Section 2 litigation; four, Section 2 cases resolved by consent decrees or unreported opinions; and, five, Section 5 submissions that are withdrawn by the submitting jurisdiction.

First, Section 5 objections since 1982 demonstrate that purposeful discrimination continues to occur in matters affecting voting. In the nine States that are substantially covered, there were a total of 682 objections from 1982 to 2004. Many of these objections included evidence that the change was motivated by a discriminatory purpose. One study of these objections reports that in the 1990's, fully 151 objections were based on purpose alone; another 67 objections relied on a combination of purpose and retrogression; and 41 on both purpose and the need to comply with Section 2. Thus, the intent prong was involved in a remarkable 74 percent of all objections in that decade.

The numerous objection letters from every covered jurisdiction document an extensive record of local officials seeking to change dates of election, change election district boundaries, change city boundaries, and make other changes in election procedures out of a desire to suppress, diminish, or negate the effect of minority voters.

The first appendix to my testimony summarizes the number of objection letters issued by the Department of Justice from the nine States since 1982, and the second appendix summarizes the legal grounds for those objections. It is important to note that many of the objections since 1982 have been to statewide changes, essentially affecting all of the voters in the State.

Second, declaratory judgment actions where jurisdictions were denied pre-clearance are evidence of discriminatory voting laws. Since 1982, there have been a total of 25 cases in which a three-judge panel considered the proposed change on the merits and denied pre-clearance.

Third are judicial findings of intentional discrimination in litigation brought under Section 2. Unfortunately, many of these findings are in unreported decisions. Indeed, the discrepancy between the number of reported opinions finding Section 2 violations and the total number of successful Section 2 cases is huge. In the nine

States that are substantially covered by Section 5, since 1982 there have been 66 reported cases finding a violation of Section 2 and 587 unreported cases. Thus, any review of reported cases along seriously understates the findings.

Nevertheless, while limited to only reported cases of published opinions, Katz's study concluded that 24 lawsuits since 1982 identified more than 100 instances of intentionally discriminatory conduct in voting. Eight of these 24 lawsuits were in jurisdictions covered by Section 5; 14 were in non-covered jurisdictions.

Many cases involving allegations of unconstitutional discrimination are resolved on the more narrow statutory grounds because courts always avoid constitutional questions if at all possible. Similarly, frequently there are allegations of unconstitutional conduct in litigation under Section 2 that is resolved by a consent decree. While defendants in such cases often must admit liability, typically they are not willing to admit to unconstitutional conduct. Thus, the fact that there have been so many Section 2 cases resolved in favor of plaintiffs is also relevant evidence that unconstitutional discrimination has occurred.

Fifth, Section 5 submissions withdrawn by the submitting jurisdiction before the Department of Justice has had a chance to issue its determination are further evidence of discrimination. From 1982 to 2004, 501 proposed changes affecting voting were withdrawn by jurisdictions after receipt of a "more information" letter. In these instances Section 5 review resulted in the abandonment of potentially discriminatory changes. Section 5 has opened the door for minority political participation, but the gains are recent and fragile.

Levels of registration of minority voters do not begin to tell the complete story. Congress and the Supreme Court have long recognized that the Voting Rights Act is intended to guarantee that minority voters get a ballot and have that ballot counted equally. Renewal of Section 5 is essential to protect that guarantee.

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

Senator KENNEDY. Thank you very much.

Professor Karlan?

STATEMENT OF PAMELA S. KARLAN, KENNETH AND HARLE MONTGOMERY PROFESSOR OF PUBLIC INTEREST LAW, AND ASSOCIATE DEAN FOR RESEARCH AND ACADEMICS, STANFORD UNIVERSITY SCHOOL OF LAW, STANFORD, CALIFORNIA

Ms. KARLAN. Thank you very much, Mr. Chairman, and thank you for the opportunity to testify today. You have my written remarks, and I want to highlight in my oral testimony today three points that come out of them.

The first is I know that you have heard from lots of witnesses about the *Boerne* line of cases, and as I explained in my written testimony, I think that the most relevant cases for our purposes here are *Tennessee* v. *Lane* and *Nevada* v. *Hibbs* because they recognize that Congress's power is at its apogee when it is dealing with fundamental rights or where it is dealing with suspect or semi-suspect classifications, and both of those are true of the Voting Rights Act. The Supreme Court has recognized that voting is

a fundamental right, and it has recognized that race discrimination is subject to the highest form of scrutiny.

What I think people have not discussed with you perhaps as much as they ought to is the two other sources that come out of the Constitution and the Supreme Court's recent cases that suggest that your power is at its apogee in dealing with the Voting Rights Act. The first of these is the Elections Clause—Article I, Section 4 of the Constitution—which the Supreme Court has recognized in post-Boerne cases, including *Cook* v. *Gralike* and *U.S. Term Limits* v. *Thornton*, as giving Congress absolutely plenary power over any election in which Federal officials are selected. And the Court has made clear in *Foster* v. *Love* that this includes protecting the right to register, protecting the right to vote, protecting the methods of election and the like.

And so when you are dealing with elections at which Federal officials are being selected or registration practices that deal with where Federal officials are being selected, Congress has more power and there is no federalism concern on the other side. The Supreme Court has rejected the idea that the Tenth Amendment has any role to play there.

Finally, in *Vieth* v. *Jubelier*—

Senator KENNEDY. Just on that point, I guess in your statement you talk about a mixed election, too. Could you just—

Ms. KARLAN. Yes, any election at which any Federal officials is covered. It does not matter that there are also State officials on the ballot, and I talk there a little bit about the criminal prosecution cases as ones where an uncontested House race is on the ballot and someone is prosecuted for vote fraud connected with a sheriff's race or the like.

Finally, on this point, in *Vieth* v. *Jubelier*, Justice Scalia, writing for a plurality of the Court, recognized that there are cases where there is a 14th Amendment violation that the courts cannot alone deal with because there is not a manageable judicial standard. And he points to figuring out what a fair and effective process of representation is there as something that Article I, Section 4, gives you the power to deal with even if the Court can't. And I think that is quite relevant to the *Georgia* v. *Ashcroft* fix.

My second point—so my first point is your power is at its apogee here. My second point is this case, unlike all of the previous *Boerne* line of cases that have come before the Court, deals with a renewal of an act that is already in place, and this has important consequences of two kinds. Let me give an analogy and then let me talk about the consequences.

The analogy is if you have a really bad infection and you go to the doctor, they give you a bunch of pills, and they tell you, "Do not stop taking these pills the minute you feel better. Go through the entire course of treatment because, otherwise, the disease will come back in a more resistant form." And the Voting Rights Act is strong medicine, but it needs to finish its course of treatment, and that has not yet happened for reasons that you have heard from other witnesses.

Now, some people have pointed to the fact that the number of objections has gone down over time, and they say, well, this shows that there is no necessity for the Act. To the contrary. If the Act

worked perfectly, there would be no objections, because if the Act worked perfectly, local- and State-level officials would be deterred from proposing changes that they cannot show have neither a discriminatory purpose nor a discriminatory effect.

I know from my own experience doing compliance in California, dealing with covered jurisdictions there, that the Voting Rights Act has a huge deterrent effect, and it has a huge effect in telling jurisdictions that the concerns of racial minorities should not be at the bottom of the list.

The third point I want to point to is about the evidentiary record in front of you. Some people have said that effects test cases are irrelevant to what is going on here. I want to give you two reasons why that is untrue.

The first comes out of the hearings and the legislative history of the 1982 amendments in which Congress explained one of the reasons for the results test in Section 2 is to avoid the difficult problem of having to call people racists in order to solve the exclusionary of minorities from the political process. So when courts decide cases on effects test reasons, they don't reach the question whether there is also a discriminatory purpose. But let me tell you from my own experience that if we had to show discriminatory purpose in lots of these cases, we could do it. But it would be damaging to the political system for minority voters who are seeking inclusion to call the officials they are then going to have to deal with racists in the future. And, therefore, I think the effects evidence is quite relevant to you.

I thank you very much for listening and look forward to questions.

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

Senator KENNEDY. Professor Gaddie?

STATEMENT OF RONALD KEITH GADDIE, PROFESSOR OF POLITICAL SCIENCE, UNIVERSITY OF OKLAHOMA, NORMAN, OKLAHOMA

Mr. GADDIE. Mr. Chairman, my thanks for the invitation to appear today. My written testimony deals mainly with the summary of analysis performed by myself and my colleague, Charles Bullock, at the University of Georgia funded by the American Enterprise Institute. This set of studies is an effort to document progress, or lack of progress, in voting rights in States covered by Section 5 of the Voting Rights Act.

To that end, in my oral statement what I would like to do is illuminate and highlight in summary fashion the findings of those reports and also point out some areas of concern with regard to what a renewed Section 5 should look like. No one can deny that there is a continuing need for Section 5 of the Voting Rights Act. The question that arises is: In what form should Section 5 appear? What should it be applied? To that end, what I hope to do is to illuminate these questions a bit further.

We have seen dramatic changes in American politics over the past 40 years. Minority voter participation has increased substantially. Descriptive representation of racial and ethnic minorities has never been so widespread. Southern blacks register and vote

at rates as high or higher than African-American and white voters in the rest of the Nation.

There is a two-party system in the South which fosters black political empowerment and office holding, but this empowerment is realized as the party of choice for most African-Americans, the Democratic Party, has been relegated to minority status in legislatures in five Section 5 States of the South.

When we look at the Section 5 States in the South and we consider them in the context of two other Southern States, Arkansas and Tennessee, what progress do we see in terms of minority participation in office holding? Well, first, Southern blacks have made dramatic gains at both the mass and the elite level. However, if the objective of the Voting Rights Act is proportional representation, that is an elusive goal, more easily achieved through voting than through elite participation.

In 2004, African-Americans registered at higher rates than whites in three Section 5 States and voted at higher rates in four Section 5 States. Of all the Southern States except Virginia, African-Americans registered and voted at rates at least 80 percent of that of white voters in the same States.

Overall, in terms of success in voter participation and also elite office holding, Alabama and Mississippi emerge as States in which African-Americans have been more successful politically, followed by North Carolina, and then Georgia, Louisiana, and South Carolina—all of which cluster closely together. Mississippi ranks first in black registration and turnout and for the proportionality of black mayors. Alabama ranks first in terms of African-American elected officials in general and in electing African-Americans to county commissions, city councils, and school boards. Mississippi ranks second in elected officials and city council members. On no dimension does Mississippi place worse than eighth among the 11 Southern States. Alabama, which scored second in terms of registration, State House members, and Senators, fares very poorly in terms of African-American representation in statewide offices, including statewide judicial offices.

The top six States in terms of overall progress are the ones that were caught by the initial trigger mechanism of the Voting Rights Act. The two States brought in later, Florida and Texas, place seventh and ninth in an 11-State South, respectively, in terms of voting rights progress.

The States never required to comply with Section 5, Arkansas and Tennessee, rank last and eighth, respectively. Of the States covered by pre-clearance since 1965, Virginia has the poorest performance, placing tenth on the composite scale.

Now, with regard to Section 5, what other questions do I have of concern as an empirical social scientist?

One, after two generations of implementation, are the goals of the Voting Rights Act achieved? The answer is variable by State. The progress of some States makes one wonder why the State continues to be covered in toto by Section 5.

Two, has Section 5 been altered by politics and the tool with which to advance party causes? Certainly political motives for the implementation of the Voting Rights Act are evident in the record of behavior of national and State actors and the implementation of

Section 5, especially in the redistricting process. There are partisan political consequences that arise from these political motivations.

Third, have the efforts to satisfy political goals and also the goals of the Voting Rights Act led to problematic or even illegal representative maps? Yes.

Fourth, has the standard for satisfying retrogression been altered by practice and the interpretation of the Supreme Court to possibly result in unintended consequences? Again, the answer is yes. The *Ashcroft* decision presents to me as a testifying expert and a political scientist a particular empirical challenge when making assessments of retrogression.

Thank you.

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

Senator KENNEDY. Thank you.

Professor Arrington?

STATEMENT OF THEODORE S. ARRINGTON, CHAIR, DEPARTMENT OF POLITICAL SCIENCE, UNIVERSITY OF NORTH CAROLINA-CHARLOTTE, CHARLOTTE, NORTH CAROLINA

Mr. ARRINGTON. Thank you, Mr. Chairman, for this invitation to speak before the Committee. Let me begin by stating that the Voting Rights Act is still needed and, therefore, should be reauthorized with some clarifications made necessary by the Supreme Court decisions in *Georgia* v. *Ashcroft* and *Bossier Parish II*. I will focus my comments on *Georgia* v. *Ashcroft* and the continuing impact of racially polarized voting on minority participation.

There is no question that we have come a long way since 1965. The Voting Rights Act, National Voter Registration Act, and other statutes have removed many barriers to voter registration by minorities. However, we still have a long way to go. Substantial disparities in both registration and turnout remain for many minorities, particularly Asian and Hispanic voting-age citizens. Even where those disparities may not be present, such as African-American voters in some areas, minority vote dilution is still a problem. It is still a problem because voting throughout the country is still strongly racially and ethnically polarized, as I have discovered in my expert testimony in voting rights cases throughout the country. When the candidates chosen by minority voters and those chosen by a majority group differ, election systems and arrangements must be able to provide equal opportunity for the minority voters to elect representatives of their choice. Section 5 of the Voting Rights Act requires covered jurisdictions to consider whether minority voters have such an equal opportunity. Section 2 of the Voting Rights Act provides a mechanism for assuring such equal opportunity throughout America. Both parts of the Voting Rights Act are still needed because seemingly racially neutral election procedures such as at-large voting, major vote requirements, and anti-single-shot provisions may combine with racially polarized voting to erect effective barriers to the ability of minority voters to have an equal opportunity to participate in the political process and an equal opportunity to elect representatives of their choice.

Georgia v. *Ashcroft* is an unworkable standard that undermines the ability of minority voters to have an opportunity to elect rep-

resentatives of their choice. In that case, a narrow 5–4 majority of the U.S. Supreme Court concluded that a jurisdiction could satisfy Section 5—and perhaps, by implication, Section 2—by substituting what are called influence district to provide substantive representation instead of creating or maintaining districts in which minority voters have a reasonable opportunity to elect representatives of their choice.

There are a number of problems with this. There are no clear guidelines for measuring influence districts or substantive representation. Like the Court's decisions about district shape in *Shaw* v. *Reno* and its progeny, we are left with no clear guidelines for drawing districts. There is no way to know how to comply with the Court's mandate. This is quite unlike the one-person/one-vote standard, which can be mathematically determined as the districts are being drawn.

At what level of minority concentration, short of a reasonable opportunity to elect representatives of their choice, does a district provide influence? Do minority voters have influence over a representative they voted against and whose policies they oppose? How many influence districts are equal to one opportunity to elect district to provide equal participation? The right to vote is not based on substantive representation, but an equal and meaningful right to participate and elect representatives of choice as the Congress has recognized in Section 2 of the Voting Rights Act.

Expert witnesses in voting rights cases are an essential part of the process because litigation involving Section 2 and the pre-clearance process of Section 5 are fact-intensive efforts. In the *Gingles* case, the United States Supreme Court specifically authorized the use of bivariate ecological regression analysis to measure the extent of racially polarized voting. The Court authorized this technique and the plurality opinion specifically rejected what is called "multivariate analysis" because the probative questions in voting rights litigation involve the extent to which minority and majority voters differ in their choice of candidates to represent them.

Racially polarized voting continues to be a pervasive feature of American politics. Race, ethnicity, and partisanship are inextricably intertwined, as every student in an introductory American politics course knows. Some experts for defendants in voting rights cases argue that partisanship or some other variable related to race or ethnicity is the "true cause," but the truth cause can always be traced back to race or ethnicity. The reauthorization of the Voting Rights Act should make it clear that influence districts and substantive representation are not acceptable substitutes for districts in which minority citizens have a reasonable opportunity to elect representatives of their choice.

Thank you, Mr. Chairman.

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

Senator KENNEDY. Thank you very much.

Professor Pildes?

STATEMENT OF RICHARD H. PILDES, SUDLER FAMILY PROFESSOR OF CONSTITUTIONAL LAW, NEW YORK UNIVERSITY SCHOOL OF LAW, NEW YORK, NEW YORK

Mr. PILDES. Thank you very much, Mr. Chairman. I consider it a great honor and a great responsibility to testify on renewal of the Voting Rights Act. I also consider it a somewhat painful moment for me because I have three concerns in particular I want to raise here.

First, I am concerned that the evidence in the record does not address an essential issue to the constitutionality of the proposed bill, and I am not aware that this concern, though I think it may be essential, has been addressed in the House hearings or in the previous hearings before this Committee.

The assumption so far of all of the evidence I have seen, or most of the evidence at least, is that it is sufficient to document continuing instances of problems in the area of race and voting rights in the covered jurisdictions. But I am very concerned that under the congruence and proportionality test that the Court now applies in this area, the Court is going to insist that there be some account of systematic differences between the covered and the non-covered areas of the United States.

There is very little evidence in the record on this, and, in fact, the evidence that is in the record suggests that there is more similarity than difference. For example, Professor Arrington has discussed racially polarized voting findings. The National Commission on the Voting Rights Act Report, which is an essential study and is part of this record, documents 23 cases from 16 States, since 1982, of polarized voting in statewide redistricting cases. Half are from covered States. Half are from non-covered States. So the racial polarization problem is not unique to the covered areas of the South, at least in this set of cases.

The Report also quotes judges making findings in various cases on discriminatory voting practices, but the language, which is very identical in these cases, comes from States like Maryland and Massachusetts and Florida, as well as the covered States. In fact, there are 24 cases reporting findings of intentional discrimination since 1982, 13 in non-covered States, 11 in covered States.

Now, I want to be clear about why I raise this point. It is not to assert that the bill as proposed is unconstitutional. But I look at this record as a lawyer concerned about how the courts will respond to it, trying to determine how best to ensure the constitutionality of a renewed Section 5, and I think this is an essential issue that has been neglected until now.

The second point I want to make is related to this issue. For the most part, national legislation in the voting rights area since the 1980's, in fact, has been a broad, uniform national type of legislation, whether in the Help America Vote Act or in the National Voter Registration Act, as two examples. And though not widely recognized, these statutes are very different models of how to protect voting rights through national legislation than is reflected in Section 5.

Section 5 has never protected the right to vote as such, and I think we tend to forget that. Section 5 is narrowly targeted in two

respects: it is geographically targeted, and it is targeted to the problem of racial discrimination in voting.

The more recent models of legislation from Congress, such as HAVA or the NVRA, are not selectively targeted in either of these ways. These statutes provide an alternative model that ought to be part of the discussion when we think about voting rights policy going forward in the important context provided by this renewal discussion and debate.

And the third point I want to make is about *Georgia* v. *Ashcroft* and the comments Professor Arrington mentioned about that case. The bill proposes to overrule *Georgia* v. *Ashcroft*. I consider that to be a mistake, one that will harm the long-term interests of minority voters, frustrate the formation of interracial political coalitions in the South, and be damaging to American democracy. And let me just remind the Committee of the facts of this case, which also powerfully illustrate and concretely demonstrate the changes even since 1982 in the Voting Rights Act in the South.

At the time of the Georgia redistricting at issue there, 20 percent of the State legislators were black, and with their virtually unanimous support, a coalition of white and black Democrats sought to unpack slightly three safe minority districts that the Act had been thought to require in the 1990's.

This was done because of the rise of robust two-party competition in the south, which was not present in 1982. This coalition of white and black Democrat legislators agreed that to maximize the possibility that the Democrats would retain control of the Senate in Georgia, a few seats would be put marginally more at risk for the prospect of minority legislators and Democratic legislators having Committee chairmanships and the like, and the power to effectively represent their constituents' interests.

The DOJ argued that the plan violated the Voting Rights Act. The Supreme Court, had it not rejected that view, would have, in my view, adopted or endorsed a policy that would have inverted the basic purposes of the Voting Rights Act. After all, here were black and white legislators willing to make their seats more dependent upon interracial voting coalitions. Here was a large contingent of black legislators, having entered the halls of legislative power, who now determined that they and their constituents would have more effective power as part of a Democratic Senate. Here was Congressman John Lewis, his life risked in the Selma march to help get the VRA enacted, his seat not at stake, testifying that this plan was in the interest of minority voters. And here were black legislators taking risks, cutting deals and exercising political agency to forge a winning coalition.

Yet the Act, under the interpretation of the Justice Department, would have denied these political actors the autonomy and the agency to make the hard choices at issue—and they were hard choices—even with partisan control of a major institution of State government in the south at stake.

The Court's decision permitting this deal instead recognizes room in the statewide redistricting context for some modest flexibility in Section 5, given the changes between 1982 and today. Indeed, the Georgia plan involved a modest amount of flexibility in a circumstance about as compelling as one can envision. If Congress

overturns *Georgia* v. *Ashcroft*, it will make even this limited amount of flexibility illegal.

More generally, I hope that debate over Section 5 does not remain locked within the models of the past. I suggest that much of the work of the Voting Rights Act that began in 1965 is most effectively taken up today by building on the models of HAVA and the National Voter Registration Act, and protection of the right to vote as such.

Thank you very much.

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

Senator KENNEDY. Thank you very much. Let me ask you just what is your response to the fact that the test is rather vague in the *Georgia* v. *Ashcroft*?

Mr. PILDES. I think I would have three things I would say in response to that, Senator. First, the decision is only from 2003. It has never been applied, as far as I am aware, in any court case or in any DOJ objection. It is simply too early to know how the courts or the Justice Department will apply it on a case-by-case basis, No. 1.

No. 2, remember, Section 2 is always present, so the worst-case scenarios that people describe or worry about will be protected against by virtue of Section 2. It is not possible to go back to a situation of 30 percent minority voters spread across every district in Alabama, given section 2 of the Act.

And third, the standard proposed in the bill to overturn *Georgia*, no "diminished ability to elect" itself has a rigidity and a mechanical quality that can lock into place minority districts in the south at populations that do not serve minority voters' interests. I don't know under a "no diminished ability to elect" standard if dropping the minority population from 60 percent to 55 percent is a violated, dropping it from 55 to 50 percent is a violation, or dropping it from 50 to 45 is. No "diminished ability to elect" is, in my view, a very rigid and very extreme overreaction to a decision which I believe is right on the facts, in *Georgia* v. *Ashcroft*. I am not sure if everybody agrees with me about that on this panel.

Senator KENNEDY. We are going to find out.

[Laughter.]

Mr. PILDES. But one question is whether *Georgia* is right on the facts, and a second and separate question is, whether the standard in the case is a troublesome standard and what to do in light of that?

Senator KENNEDY. And you do not believe that the pre-*Georgia* rule has the sufficient kind of flexibility to be able to deal with some of those issues?

Mr. PILDES. Well, if it did not permit the black-white legislative coalition and districting plan in Georgia, apparently not. And the Justice Department, remember, objected to that plan.

Senator KENNEDY. Professor Karlan?

Ms. KARLAN. Well, I think it is worth remembering one critical fact about *Georgia* v. *Ashcroft*, which is the Department of Justice got it right, because after the plan was put into effect, not only did one of the black legislators lose his seat, but a number of the black voters who were moved into districts where they were supposed to

have influence did in fact elect white Democrats, who turned around in the 2-weeks between the election and inauguration and became Republicans. Now, I am sure that the Republicans in Georgia are very fair folks, but those black voters have no influence in those districts.

The question about whether you can reduce the percentage of black or Latino voters in a district and still meet the retrogression standard is a red herring. Districts that were 80 percent after the 1970 round of redistricting are now 55 percent, and they are precleared consistently by the Department of Justice. So the ability-to-elect standard has always been a standard that works. And this idea of being locked in a model of the past, you know, to quote Faulkner, "The past is not dead, it's not even past." There are still people in the Georgia legislature who were found to have engaged in racist behavior by a Federal District Court in previous rounds of redistricting in Georgia. So the idea that we should start by looking at 2001, and ask how things are going there, seems to me deeply problematic.

Senator KENNEDY. Could you comment, Professor Karlan, about the concerns about over-coverage and under-coverage?

Ms. KARLAN. Let me give two answers to that question. One is about the law of the Voting Rights Act and the other is about the facts. In the law there is a bailout provision which has been available to jurisdictions since 1982, and jurisdictions that ought not be covered, but that are brought within the trigger, can get out.

On the other side there is what is called the pocket trigger, and I litigated one of the few cases that actually resulted in a pocket trigger. And that is when courts find pervasive intentional racial discrimination in jurisdictions that are not covered, they can order that those jurisdictions come under pre-clearance, and we actually did that in a part of Arkansas, which you heard from, I think, Professor Gaddie's testimony, is one of the worst States in the south because it wasn't brought within the Voting Rights Act in 1965.

As a factual matter, if you say, well, half of the examples of racial discrimination since 1982 occurred in covered jurisdictions and half occurred in non-covered jurisdictions, it is worth remembering the denominator there, which is, there are 9 fully covered States that are covered jurisdictions and there are 41 States that are not fully covered. So half of the discrimination is occurring in those 9 States. It suggests that there is actually more of a problem in the covered jurisdictions than in the non-covered ones.

Mr. PILDES. Senator Kennedy, can I just respond to at least that last point?

Senator KENNEDY. Yes.

Mr. PILDES. It seems to me that legally the right denominator would have to be the minority population in different jurisdictions. We are not going to have Voting Rights Act issues in Idaho, for example. So when we are comparing the covered and the non-covered parts of the country, the fact that 55 percent or so of African-Americans live in the south means that about half of African-Americans live in the south in covered areas, half do not. That is a very simple figure. And so the fact that the pattern shows about half of the problems are in covered States and half in non-covered States, does I think suggest something that is more general in the United

States. I think Professor Arrington's testimony went to exactly that point. You find racial polarization in Boston and Chicago, in Philadelphia, in Cicero. The cases of vote dilution under Section 2 are spread out across the country. It seems to me the right denominator has to be where the minority populations are, and how do those problems compare across different States that have similar minority populations? Number one.

Number 2. I am more worried than Professor Karlan is about the lack of evidence in the record about the differences between covered and non-covered States. I agree, the power of Congress in the area of voting rights is at its highest, but the Voting Rights Act in Section 5 is also an extremely unusual, indeed unique, provision, as you know, in Federal law. It singles out part of the country.

Now, the constitutional jurisprudence has changed greatly since the courts last looked at this singling out of one part of the country. And it seems to me it is one thing, with the Family Medical Leave Act and cases like *Hibbs*, to base national uniform law on evidence from a number of States, but not all the States. It seems to me, constitutionally, it is a very different question to base geographically selective national law, the only one we have, as far as I know, on evidence that does not today show that that targeting is congruent to the constitutional violations that are out there. That is what I am worried about with the evidence in the record so far.

Senator KENNEDY. I see others have a comment. And then I want to get into sort of this block voting.

But, Professor Arrington, did you want to comment?

Mr. ARRINGTON. Just that I wanted to point out that nobody says that racially polarized voting is in and of itself evidence of discrimination. The question is how that interacts with election procedures, with the traditions in the community, with a number of things, and so I think just to say that racially polarized voting exists everywhere and therefore there is no difference between the covered and uncovered jurisdictions, is simply not true.

That is all I wanted to add.

Senator KENNEDY. How do you distinguish this between other types of voting? I mean Italians vote for Italians, Greeks vote for Greeks, Irish vote for Irish, comment.

Mr. ARRINGTON. I don't distinguish it at all. I think it is exactly the same thing. The difference is that in some places that racially polarized voting has interacted with election procedures to create a situation in which minority voters do not have an opportunity to elect candidates of their choice. And I suspect that happened way back when to Irish voters when they were a minority in certain places. So I don't think it is different in that sense at all.

But we do have special obligations regarding race and the like because of the 15th Amendment.

Senator KENNEDY. Let me ask Anita Earls, doesn't the issue get at the deterrent effect of Section 5, and shouldn't we expect less discrimination in the covered States?

Ms. EARLS. Absolutely. Section 5 not only keeps there from being so much Section 2 litigation because it stops those changes from going into effect to begin with, but it also deters election officials

from enacting and putting in place discriminatory measures to being with.

But I would further suggest that the notion that the standards you have to meet is to show systematic differences between covered and non-covered jurisdictions is not the correct standard, and with all due respect, Professor Pildes is being very pessimistic about the evidence that is in the record before you, and in fact, what you have is evidence of sustained in transigence in the covered jurisdictions that you don't see in the non-covered jurisdictions.

So, for example, in North Carolina, we have recently a pattern of local governing bodies going back to at-large election systems, something that is not occurring in non-covered jurisdictions. So this pattern of continuing to try to either go back to discriminatory patterns or enact new discriminatory measures, is something that is unique to the covered jurisdictions.

Senator KENNEDY. Let me ask Professor Karlan, do you think that Section 2 is an adequate substitute for 5, and do you believe the presence of Section 2 makes it unnecessary for Congress to pass language clarifying the *Georgia* v. *Ashcroft*?

Ms. KARLAN. No, Senator Kennedy, I don't, for a reason that the Supreme Court got at as early as *South Carolina* v. *Katzenbach*, where there is that line that you read in your opening statement about shifting the burden of inertia to the perpetrators of discrimination and away from the victims.

I did a lot of Section 2 litigation in my prior life before I became an academic, and it is costly litigation. I would guess that this Committee is going to see in front of it most of the people in the country who do the litigation actually testifying. It is a very small bar of people who do Section 2 litigation and who have the expertise to do it.

When you get down to the local level, the national organizations often are not involved, they are not aware of what is going on. What Section 5 does is it shifts that burden to the Federal Government, which is far better able to bear it than either minority citizens in poor communities or the very small civil rights bar. So Section 2 is not an adequate substitute for Section 5 because it allows the changes to go into effect, and that means you can go through several election cycles while the litigation is going on where the discriminatory change is in effect. It requires the minority community to find a lawyer who will bring these cases. And let me tell you, from having litigated the cases and having litigated the attorneys' fees issues after the cases, this is not a way of getting rich. It is not even a way of making a living. And it requires that huge amounts of resources in the litigation process be used, both by the jurisdictions and by the individual citizens. So I don't think of it as an adequate substitute in any way.

Mr. PILDES. Senator Kennedy, I want to just say I agree with all of that. The point, though, is that *Georgia* v. *Ashcroft* is about redistricting, and statewide redistricting, as least in that case, so that is the one area in which there is litigation all over the country, not just under the Voting Rights Act, but in partisan gerrymandering and other cases too. This is not the low visibility issue of moving polling places or changing voting systems in some county. So while it is generally true that there is a very important dif-

ference between Section 2 and Section 5, the question that is relevant here, I think, with respect to Georgia, is whether that difference is significant enough that the south, the covered States, should not be able to make the same deals in the redistricting process that the north can where there are significant minority voting populations in the north. That is, I think, the focus.

Ms. KARLAN. But it is not just—

Mr. PILDES. Let me just respond to one or two other things. I agree also with Anita Earls, that if there are areas we can identify of real sustained intransigence and the like, absolutely those areas should be covered by Section 5. I simply am saying that in the record, where there is some comparison, it suggests more similarity than difference, and we ought to build a record that actually shows that the coverage that we end up with is congruent to what the record shows about where the violations are and where they are not.

The final thing I want to say just so I am not misunderstood—and I consider it important—I am not in any way saying the problems of race discrimination in the voting area are in the past. I do not mean to say that. What I mean to say is the Voting Rights Act in Section 5 was created in an era where Congress didn't believe it had power to regulate voting rights as such, but that it had to act under the 14th or 15th Amendments, particularly to deal with racial discrimination in voting.

Congress'ss powers now are clearly much broader, not only under Article I, Section 4, as Professor Karlan mentioned, but I believe, given that the Supreme Court has held that the right to vote is a fundamental right in all general elections, Federal, State and local, for general governmental bodies, I believe the Congress may well have a general power to enforce the right to vote, not just in Federal elections, but in all elections for political bodies that are exercising general governmental powers.

So what I mean is I want us not to stay locked in the mindset of the past, in which we think we can only deal with race discrimination in voting at the national level. We can deal with the right to vote as such at the national level, and HAVA and the NVRA reflect that.

Senator KENNEDY. Let me just ask you. Of course, we did, didn't we, in Congress, specifically on the right to vote on the poll tax, didn't we eliminate for the poll tax, which was an individual issue?

Mr. PILDES. And the literacy test.

Senator KENNEDY. And the literacy test.

Mr. PILDES. Yes, absolutely.

Senator KENNEDY. I want to give Professor Karlan must a response, and then I would like to ask Professor Gaddie and maybe Arrington, if they would talk a little bit about the Hispanic, you know, the disparity in terms of the registration, where we are in terms of that, and Professor Earls, if you have any kind of comment. And then we are going to be voting shortly, but this has been enormously interesting, and helpful.

Ms. KARLAN. The first point, Senator Kennedy, is that the *Georgia* v. *Ashcroft* standard doesn't just apply to statewide partisan redistricting, but it applies to all cases, and that is what worries me, because so much of the discrimination that goes on is under the

radar screen of the national political parties or the national groups. So when a school board comes in and says, "It's true we have some majority black districts right now, but we think black people would be better off, they'd have more influence if they were 30 percent of each of the districts, rather than actually electing anybody to the school board, than charging it against the *Ashcroft* standard," fine, States can pick among theories of representation.

And I think it is important to understand this is not mostly a bill about Congressional redistricting or a bill about State legislative redistricting. It is about what goes on at the local level, and that is a really critical place to think.

The second thing is I think all of us on the panel here would support Congress being more aggressive in protecting the right of every American to register, to cast a ballot and to have that ballot counted, but there are distinctive problems in the south with regard to the voting rights of blacks and of Latinos, which will not be dealt with solely by allowing people to register and vote. That is part of what you found out in the move from 1965 to 1970, which was, you know, in the 1965 Voting Rights Act you have provided for Federal registrars. They went down to the south and in 2 years they registered more black people in the south than had been registered in the previous hundred years. A fabulous achievement. And what did we see? Almost immediately, jurisdictions started changing the electoral rules to make sure that the blacks could register and vote and even have their ballots counted. Those ballots didn't count for very much. Their votes were diluted.

So I think it is important to recognize that there is both a general voting rights problem and there is a specific voting rights problem that deals with the issues of blacks and Latinos in the covered jurisdictions.

Mr. GADDIE. Senator Kennedy, I am learning today that I need to be a bit more assertive. I am used to having lawyers lead my questioning.

[Laughter.]

Mr. GADDIE. I can speak with firsthand experience about the application of the Ashcroft standard in pre-clearance, having the dubious distinction of having been involved in the Texas redistricting. At the time the Texas—if I may have a moment?

Senator KENNEDY. Yes.

Mr. GADDIE. As the Texas redistricting was going on, the *Ashcroft* decision came down. And I went to Glen Abbott, the Attorney General of Texas, went to his outside counsel, and said, "I have a strong suspicion that with this decision you'll see DOJ possibly applying a different retrogression standard, a different kind of baseline." And indeed what happened, both at trial, in front of Judge Higginbotham, down in the Fifth Circuit, and also in the pre-clearance process, the argument was made to include any district that appeared to look like a coalition district as part of the minority baseline in the initial assessment by the professional DOJ staff. There was disagreement between the DOJ staff and the political staff regarding which position should prevail. The political position prevailed.

When we get into this issue of baselining retrogression, the challenge for Professor Arrington and I is how do we treat these coali-

tion districts? How do we treat a 30 percent minority district where there is a 1 in 4 chance the minority voter gets their outcome of interest versus a 65 percent district where the outcome is certain. At the end of the day it is going to be politics that will guide how that standard is applied by the DOJ because they will apply their own theory of representation independent of the theory that the State chooses to apply.

Mr. ARRINGTON. I think you asked about the question of Latinos and Asians too?

Senator KENNEDY. Please.

Mr. ARRINGTON. Often, particularly in places where the African-American community has been very well organized for a long time, like some places in North Carolina, their rate of voting and turning out is pretty good, often not quite up to the same as whites, but pretty good. But the disparity between Latinos and Anglos is generally much greater. And in places where you have a mixed population, where you have Anglos and Blacks and Hispanics, the general pattern is that Anglos turn out and register at the highest rate, Blacks are close to that in many areas, and then Latinos far, far below that. So you have a much more serious problem there.

What that means in terms of districting is that if you want to create a district in which Latinos have a reasonable opportunity to elect a candidate of their choice, they have to be concentrated much more in that district than would black citizens. Often in States like North Carolina, for example, you can create a district in which African-Americans have a reasonable opportunity to win with less than 50 percent black population. That is not true generally for Latinos. It is a very different situation. It is a much more severely difficult situation to solve.

Mr. GADDIE. And the other challenge is that we can't count on homogeneity within the Latino population. There is tremendous variation of participation across Latino populations, even within a particular Latino ethnic group within a State. You look at South Texas, you see high rates of Latino participation in most of the South Valley, outside of the sweep between El Paso and San Antonio; very low Latino participation, relatively speaking, in Metro Dallas and Metro Houston. So, it becomes extremely contextual with regard to Latino participation throughout the United States.

Senator KENNEDY. Professor Earls?

Ms. EARLS. I would just make one final point about the record before you.

Senator KENNEDY. Yes.

Ms. EARLS. There are so many examples of recent discriminatory conduct, it is hard to summarize them in the time we have, but just two quick things.

Recently, 125,000 voters in predominantly African-American precincts, that is, targeting black voters in North Carolina, were sent postcards erroneously telling them that they could not vote on election day if they had moved, causing great confusion, discouraging them from voting.

Another example, in 2004, the sheriff of Alamance County in North Carolina, took a list of registered voters in his county that had Spanish surnames, and said publicly that he would send deputies to the homes of each of those voters to verify that they were

citizens. That type of discouraging of minority voting—those people are all registered, but they are still targeted by these types of campaigns. That is the atmosphere that we are dealing with, and those types of examples are found in numerous other States.

Senator KENNEDY. Let me ask you—and others can make a brief comment—in the *Bossier II* case, the Supreme Court ruled that Section 5 prohibits the voting changes only if they worsen or intend to worsen the position of minorities. In other words, under Section 5, voting change may not make minorities worse off, for instance, if they are already completely shut out of power, it is hard for a change to put them in a worse position, but it may still dilute their voting power, intentionally discriminate. Would you agree that under the *Bossier II* standard the Department of Justice and District Court for the District of Columbia must pre-clear even an illegal or an unconstitutional voting change so long as there is no backsliding in minority voting power? What is your view on the case?

Ms. EARLS. Yes, that is the impact of *Bossier II*. It is essentially a discrimination dividend. As long as you have excluded blacks or other minorities effectively, you can keep excluding them, and it has—it is a significant impact on the ability of—on the Section 5 pre-clearance process to truly keep discriminatory practices from being put in place.

Senator KENNEDY. OK. We are voting on a judge just in a few minutes, and Senator Feingold, I believe, wanted to come over. So we will have a brief recess, and then if it turns out that he is not going to, we will recess.

This has been enormously interesting, and we will ask the staffs to submit some questions. I was looking to see whether they had some questions because this is a great panel here. So there it is, so we will have a brief recess.

We thank you. Let me just ask you, if there are some areas—we gave you very short time and you have got some good written statements. All the written statements will be made a part of the record, and my colleagues, Senator Specter's, Senator Leahy's statements. They, I believe, passed out the House bill 33–1 last week in the markup.

But as a result of these questions, if you want to provide some additional information, we would welcome that, and we will ask our—I do not know what the rule of the Chair was—two, 3 days for questions? Seven. So we will recess at the call of the Chair.

Thank you very much.

[Recess.]

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

Senator FEINGOLD [presiding]. I am going to reconvene the hearing. I want to thank the Chairman for allowing me to continue and perhaps conclude the hearing after I have asked some questions, unless another colleague comes. Thank you to the panel. I am sorry that I was not able to hear your testimony.

First, I want to thank you for this important hearing on Section 5, the pre-clearance provision of the Voting Rights Act. Section 5 rightfully imposed heightened oversight on some of those jurisdic-

tions that were the very worst actors in discriminatory voting practices.

The advances in minority votes and representation in areas covered by Section 5 in the past 40 years have been profound. Although we have made significant advances as a result of the Voting Rights Act, there is still more work to do. The goal of the Voting Rights Act is not to reduce discriminatory voting practices, but to eradicate them entirely.

Section 5 has been instrumental in bringing about the dramatic improvements in voting rights and representation for minorities in covered areas. Keeping it in place with a reasonable bail-out provision is the best way to be sure that we don't lose the progress that has taken place.

Let me just say in response to some comments that were made at last week's hearing that all Members of Congress, regardless of whether they represent a covered or non-covered jurisdiction, and regardless of their political affiliation, have an interest in ensuring the continued effectiveness of the Voting Rights Act. As Federal legislators, we have a responsibility to address and eliminate discrimination wherever it is found. The integrity of our elections and our very democracy depends on it.

Now, let me turn to Professor Arrington. Can you talk a little bit about racially polarized voting in Section 5-covered jurisdictions? Do you have any recent evidence of the concern?

Mr. ARRINGTON. Senator Feingold, I have attached to my written testimony the decision of both the circuit court and also the district court on the Charleston County Commission case, and I think that is an interesting one because it shows the interaction of Section 2 and Section 5.

The United States brought a Section 2 action against the county council in Charleston County, and I found there the most extreme polarized voting I think I have ever seen, and I have been doing this work since 1985. So there was no evidence of any reduction in polarized voting, at least in Charleston.

The interesting thing to me was that the judge found, in accordance with my testimony, that there was legally and substantively polarized voting; that because of that and the at-large elections that they had there, African-Americans did not have a reasonable opportunity to elect candidates of their choice. But he also found that in the school board where the elections were non-partisan and, as I remember, were not in numbered posts, African-Americans did have a pretty good chance of winning.

Right after the judge's decision, the State legislature changed the school board so it would look like the county commission elections that the judge had just said violated Section 2. In turn, of course, the Justice Department would not pre-clear that change because it was clear from the judge's decision that that change was in violation of Section 2 and Section 5.

The racially polarized voting in the school board elections was only slightly less than the racially polarized voting in the county commission. They were extreme. We are talking about 90 percent of the blacks typically voting for black candidates and some similar number of whites voting for white candidates.

Senator FEINGOLD. Well, thank you, Professor, for that specific answer. I appreciate it.

Professor Karlan, I wondered if you could expand a bit on the point I understand you made earlier about federalism and the distinctive power of Congress in the voting rights area. Does the *Boerne* line of cases apply differently when we are talking about voting rights?

Ms. KARLAN. Yes, Senator Feingold, it does apply differently. The major concern in the *Boerne* line of cases was the sovereign immunity of the States to lawsuits brought by individuals against the State. Of course, that specific part of the concern in the *Boerne* line of cases, in cases like *Kimel* or *Garrett* or the *Florida Prepaid* cases, is totally absent here because Section 5 is not about lawsuits by private individuals against States for damages at all.

Indeed, the only place where private individuals are involved is either as defendant intervenors where the State has brought a lawsuit and has waived any sovereignty claim or in cases trying to force States actually just to comply with the obligation to seek preclearance.

Now, that being said, there are a couple of other things about the *Boerne* line of cases that I think are very helpful in explaining why I think Congress's power here is, if anything, at its absolute peak. One of them is even the post-*Boerne* cases all cite the Voting Rights Act of 1965 as the example of a statute that meets the *Boerne* test of being congruent and proportional.

That is true as late as *Lopez* v. *Monterey County*, the California partially covered State case, where Justice O'Connor wrote for the Court that the Voting Rights Act by its nature intrudes on State sovereignty, but the 15th Amendment permits that intrusion. Indeed, I think because the enforcement clauses of both the 14th and 15th Amendments tell Congress to enforce that, it almost demands that Congress intrude on State sovereignty when States are denying blacks or Latinos the right to vote.

Now, on top of that, as I suggested in my testimony this morning, the one concrete suggestion I would have for the Committee in the drafting of Section 5 is to make it clear that you are not just relying on the enforcement clauses of Section 5 of the 14th Amendment and Section 2 of the 15th Amendment, but that you are also relying on Article I, Section 4, of the Constitution, which is the so-called Time, Place and Manner, or Election Clause.

That is the clause that says, in the first instance, States decide how to conduct the time, place and manner of the elections for the House of Representatives, but Congress may override. And the Supreme Court has made clear since 1917 at the latest that that means Congress can override any determinations the States made about that.

In the *Foster* v. *Love* case, the Supreme Court says—and let me just quote a little bit here—"The clause gives Congress comprehensive authority to regulate the details of elections, including the power to impose the numerous requirements as to procedures and safeguards which experience suggests shows are necessary to enforce the fundamental right involved."

And in other cases, they have said that includes registration, day of election protection, protection against fraud. And since 1842, as

you probably know, Congress has required that States elect members of the House of Representatives by district. That is not something the Constitution requires. The Congress requires it, and that overrides.

So if a State said tomorrow, well, we want to elect our members of the House of Representatives at large, the answer would be you can't. There is no Tenth Amendment reserved power for the States at all when it comes to the regulation of Federal elections, and much of what the Voting Rights Act does is to regulate people's participation in Federal elections. And as Senator Kennedy was saying when he was here earlier, that includes mixed elections. So if you have any Federal candidate on the ballot, it counts as a Federal election for Article I, Section 4, purposes.

Senator FEINGOLD. Thank you very much, Professor.

Finally, Ms. Earls, what would happen in covered jurisdictions in the absence of Section 5?

Ms. EARLS. I think that actually the North Carolina experience is very instructive on that question because 40 of the State's counties are covered. There are 100 counties in the State as a whole, so we really have a basis for comparison. There are at least three examples I can give of current things that are happening in non-covered counties that are protected in the covered counties.

For example, several counties non-covered under Section 5 sued under Section 2, required by court order to put in place single and redistrict systems, are now passing laws to go back to at-large election systems. Under Section 5, that would be retrogression and it is prohibited. It is not happening in the covered counties.

Another example is the deterrent effect of Section 5. In preparation for the report that we prepared on North Carolina and Virginia, we had hearings and local residents came and talked about how in the covered counties local officials will consult with them if they want to move a polling place or when they are enacting new districting plans. That doesn't happen in the non-covered counties. So there is real evidence of a deterrent effect that currently means that minority voters have a greater involvement in decisions about election procedures as they are being made.

A third example is the whole question of annexations. We are dealing in North Carolina with a number of traditionally minority communities that are left out of town boundaries. They don't get public services and they don't have the right to vote.

In Rocky Mount, a covered city, in the late 1990's, that city annexed Battleboro, a predominately black neighborhood, because under Section 5 they couldn't continue to annex white areas and not annex that black neighborhood. In Pinehurst, not a covered jurisdiction, there are four or five African-American communities that are outside the town boundaries that still don't have water and sewer and still can't vote for local officials. So there is really a difference in the experiences of covered versus non-covered counties.

I would finally just say the impact of Section 5 being removed—in North Carolina, we have under cases decided in the past few years in the State courts a whole-county provision that requires legislative districts to be drawn from whole counties. If Section 5 is removed, we are at risk of losing from 5 to 11 of our current leg-

islative districts that elect candidates of choice of black voters. So we really will see a huge impact if Section 5 is lost.

Senator FEINGOLD. I thank you for all of your answers. I don't think there is any more important subject than the subject of voting rights, so we thank you.

I understand it is appropriate for me to adjourn the hearing. Thank you very much.

[Whereupon, at 11:12 a.m., the Committee was adjourned.]

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

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

QUESTIONS AND ANSWERS

Written Responses to Members of the United States Senate

Committee on the Judiciary

Regarding

"The Continuing Need for Section 5 Pre-Clearance"

Following the Hearing 16 May 2006

Theodore S. Arrington, Ph.D.
Professor and Chair
Department of Political Science
University of North Carolina at Charlotte

1 June 2006

The answers I can give to this series of questions are largely interrelated. I will try to avoid repetition, while answering fully. Some aspects of each answer are necessarily related to the answers given to previous questions. When I have not addressed a question it is because I do not have the expertise or the experience to deal with the topic. I am reluctant to testify about matters that I have not studied deeply.

From Senator Cornyn:

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

The inability of minority citizens to participate equally in the political process and to be equally able to elect representatives of their choice is related to racially or ethically polarized voting (RPV). However, RPV is a problem only when it interacts with electoral arrangements in such a fashion as to prevent minority citizens from having a reasonable opportunity to elect representatives of their choice, regardless of whether their choice is a member of their racial or ethnic group. If minority citizens do not have such reasonable opportunity, we say there is vote dilution. They are not denied the vote, but their vote doesn't count because it is diluted. At-large voting, numbered place or residency requirements, majority vote rules, or apportionments that "crack" minority populations are examples of the kinds of arrangements that can produce minority vote dilution where there is RPV.

Since RPV is widespread throughout the United States, we need to look for the incidence of the use of voting arrangements that interact with RPV to produce vote dilution. We should consider whether the current Section 5 coverage is useful to identify the

places where the use of such devices are most likely to be proposed. Concrete comparative statistics are not possible for two reasons. First, the areas covered by Section 5 have been significantly deterred from considering such devices because they know that such changes would not be pre-cleared. There are other instances where such changes were proposed and were not pre-cleared. This makes the covered jurisdiction much "cleaner" than they would have been without Section 5 coverage. Second, each jurisdiction is distinct and must be examined in light of the totality of the circumstances "on the ground." This is the way the courts and the Justice Department approach both Section 2 and Section 5 cases. The examination of specific cases cannot be dismissed as mere anecdotes. Social scientists sometimes joke that anecdote is the singular of data. Taken together, the findings of vote dilution in Section 5 covered jurisdictions by courts and the Justice Department provide a compelling basis for reauthorizing Section 5 in those jurisdictions.

I believe that the covered jurisdictions in the South are systematically different from the uncovered jurisdictions in the North and Midwest because of their different political histories. The North and Midwest experienced a long period of in-migration during which the political arrangements were modified to accommodate intense ethnic politics. Districts were drawn to reflect ethnic interests, and the balanced slate was invented to take account of ethnic and racial diversity for executive offices. These accommodations were by no means perfect. But the history of ethnic accommodation still echoes in these regions and can often be used to provide minority representation in the face of RPV. For example, single-member districts are the rule in these regions, and districting to take account of racial or ethnic concentrations is the tradition.

The European migrants of previous centuries avoided the South, and there was no similar history of accommodation. The major migration pattern in the South until after World War II was the out-migration of blacks. The political history in this region was one of efforts to prevent racial accommodation. This history still echoes in this region, as my experience indicates, even though things have changed greatly because of three factors: in-migration since World War II from the North and Midwest, return of blacks, and the VRA.

My CV (which was attached to my written testimony) indicates the broad range of my expert testimony in the South and in a few jurisdictions that are not covered by Section 5 such as Illinois, New York (including boroughs of the City that are covered and other parts of the State which are not), Montana, Connecticut, Maryland, and Counties not covered in Florida and North Carolina. Let me cite some examples of jurisdictions that should absolutely remain covered as indicated by their recent behavior.

The District Court's decision in *United States v. Charleston County Council* (2001) and the Circuit Court affirmation of that decision were attached to my original testimony. One interesting thing about this case is the extreme RPV that still exists in that county. The RPV existed in all kinds of elections in Charleston. But it was the interaction of RPV with the particular arrangement for election of County Council that deprived black citizens of their right to an equal opportunity to elect representatives to that body. The system was a partisan, countywide, numbered post system. My testimony and the Court's opinion clearly stated that blacks had a much greater (though not necessarily equal) opportunity to elect representatives to the Charleston School Board because it was structured differently. Soon after the Court's decision was final, the South Carolina legis-

lature passed a bill to restructure the Charleston School Board to be an exact replica of the old County Council structure that the Court had just declared was a violation of the VRA. Of course, the Attorney General refused to pre-clear. I cannot think of a clearer indication that Section 5 is needed.

In redistricting after the 2000 US Census, the Louisiana Legislature had to deal with population loss in the New Orleans region. This loss dictated that the City area would have one less State House district. The legislature chose to reduce the number of black districts and maintain the same number of white districts. When I say "black district" I merely mean a district in which African-American citizens have a reasonable opportunity to elect a representative of their choice. A "white district" simply means a district in which no such reasonable opportunity for black voters exists. The US Census for 2000 indicated that the loss of population in New Orleans was in the white population. Indeed, the number of blacks in the City had increased. I drew several district plans for the region that had lower population deviations, had more compact districts, and treated incumbents equally as well as the districts proposed by the State. Yet I maintained the same number of black districts and reduced the number of white districts by one. How could anyone justify reducing opportunities for blacks when it was the white population that was leaving the area? Of course, Louisiana could not justify their arrangement and the Attorney General did not pre-clear their original proposal. They finally adopted something similar to my district plans.

My experience in uncovered jurisdictions, especially in the North, has been different to a great extent. I have found a willingness to accommodate minority populations as part of the general pattern of representation, even though there is no Section 5 "club"

forcing immediate compliance with the VRA. In statewide redistricting in Connecticut, New York, and Illinois I found that provisions for representation for minorities was not considered to be anything out of the ordinary. Various interests fought over details, but within the context of understood needs for representation. In New York the battles were over how to provide representation for both Latinos and blacks. In Illinois the disputes had to do with arrangements that did or did not provide for minority representation separate from the Democratic Party Machine. When the Machine agreed not to run Anglo candidates in minority districts, the Court easily approved the district plan proposed by the State. I do not claim that the inhabitants of uncovered jurisdictions are racial liberals. I only claim that in my experience there is a lesser chance of such jurisdictions trying to change voting arrangements in such a fashion as to dilute minority votes in a context of RPV.

From Senator Coburn:

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

I agree with Professor Karlan. The African-Americans in those districts will have no (or at least vanishingly little) influence on the Republican representatives for two reasons. First, as I am sure the Senator knows, every electoral politician divides his or her constituency into three groups: Sinners, saints, and saveables. Republican politicians, especially in Georgia, must know from public surveys, private surveys for campaigns and

other public information that fewer than 10% of black voters vote for Republican candidates in general and a similar percentage might be considered independent voters (saveables). There is very little that a Republican candidate can do to get any appreciable percentage of the black vote other than to "arrange" to have an avowed racist nominated by the Democrats.

Second, any attempt by Republican politicians to court the black vote would suffer from a backlash from those who still harbor the racial animosity of the past and regularly vote Republican. It is doubtful that such voters would vote for a Democratic candidate, but they might be discouraged from turning out to vote especially in an off-year election. Attempts to bridge that gap between these "core" Republican voters and blacks, who are strongly opposed to Republicans, would be doomed from the start.

These two Georgia representatives, who have suddenly become Republicans, might take actions that help their black constituents, or at least oppose actions that are clearly racist. If they take such actions, however, it is because they think it is the right thing to do, not because black voters in their districts have influenced them. The best I can say about "influence" in these districts is that the representatives might be careful not to take the lead in actions that offend black voters in order to discourage black mobilization. While this is a kind of negative influence, it is not what the majority opinion of the US Supreme Court had in mind in *Georgia v. Ashcroft.*

From Senators Kennedy and Leahy:

1. Describe how racially polarized voting has changed over time in the South. In your response, explain how these changes have affected the demographic composition of districts necessary to provide minority voters with an equal opportunity to elect candidates of their choice in the following years: 1965; 1982, and 2006.

In the period since 1965 there has been enormous progress in registering African-American voters and getting them to the polls on election day. There has been little progress in reducing racially polarized voting (RPV). In a sense it has increased, since there was no polarized voting in some areas before 1965 because there were few or no black voters. In the 1980s there was a myth that a "majority-minority" district necessarily required a 65% black majority. The idea was that anything less than that did not provide minority voters with a reasonable opportunity to elect representatives of their choice even if their choice was a candidate of color because RPV was so extreme. This was never a "rule," as there were jurisdictions where careful analysis by experts would demonstrate that less or more than this level of minority concentration was necessary for a district to "perform."

The lack of change in RPV in some areas can be seen in my analysis of New Orleans for *The Louisiana House of Representatives v. Ashcroft.* In that Section 5 case (see some details on this case above) I had to determine the level of black concentration necessary to create a minority opportunity district. Because of the unusual two-stage open election process in Louisiana and the low rate of white crossover voting in New Orleans, that level is still above 60%, as I demonstrated in my declaration for the Justice Department in that case. On the other hand, in helping the Attorney General with pre-clearance of the North Carolina General Assembly Districts after the 2000 census, I found that a much lower threshold of minority concentration was necessary to form a minority opportunity district. Indeed the black turnout and voter cohesion is so good and the white crossover for black Democratic nominees so high that less than a majority of registered voters is required to permit an equal opportunity to elect a black candidate of choice.

Generally a higher threshold is necessary when one is dealing with Latinos or Indians, whose levels of registration and turnout are generally far lower than for blacks. For example, in *United States of American v. Blaine County, Montana* I found that the concentration of Indians had to be very high (well above 50%) in order to form a district that would perform. I found a similar pattern in New York City for the Latino districts there, but not for the black districts.

In short, there has been an increase in white crossover vote in some places, especially for minority candidates who can win the Democratic nomination. In other places the crossover is still minimal. If minority candidates are better off today, it is mostly because they have increased their levels of registration and turnout. But the degree of polarization in some areas covered by Section 5 remains as high as ever. This is certainly true in South Carolina and Louisiana.

2. How is racially polarized voting addressed by Section 5? What impact does the *Georgia v. Ashcroft* standard have on the ability of Section 5 to address racially polarized voting?

Section 5 is the first line of defense in preventing changes in election procedures that would interact with racially polarized voting (RPV) to prevent minority citizens from being equally able to elect representatives of their choice. See my analysis above on this subject.

Georgia v. Ashcroft could have a strongly negative impact on the ability of the Justice Department and the D.C. District Court to prevent retrogressions. In that case the narrow 5 to 4 majority seemed to support the notion that a jurisdiction could satisfy §5 (and perhaps by implication §2) by substituting what are called "influence districts" to provide "substantive representation" instead of creating or maintaining districts in which

minority voters have a reasonable opportunity to elect representatives of their choice. There are a number of problems with this. First, there are no clear guidelines for measuring influence districts or substantive representation. Like the Court's decisions about district shape in *Shaw v. Reno* and its progeny, we are left with no clear guidelines for drawing districts; no way to know how to comply with the Court's mandate. This is quite unlike the one-person-one-vote standard, which can be mathematically determined as the districts are being drawn. At what level of minority concentration, short of a reasonable opportunity to elect representatives of their choice, does a district provide "influence"? Do minority voters have influence over a representative they voted against and whose policies they oppose? How many influence districts are equal to one opportunity to elect district in providing equal participation?

Second, to the extent that I can imagine what measures would be used to determine whether substantive representation or influence has been enhanced to prevent retrogression, these measures amount to simply helping Democratic Party candidates. In virtually every state legislature, in the Congress, and in many local jurisdictions, minority representatives – especially African Americans – are strongly allied with the Democratic Party. Helping Democratic Party candidates would be argued to be equivalent to increasing minority voter influence and helping minority substantive representation. In other words, influence districts, if seen as a replacement for opportunities for minority voters to elect representatives of their choice, would become simply a rationale for creating Democratic Party gerrymanders. This takes us back to the situation before *Gingles* when minority voters did not participate equally in the political process and Republican voters were underrepresented.

Substantive representation is often contrasted with what is called "descriptive representation," which means that only a black person can represent African-American voters, only women can represent female voters, and so forth. Quite frankly, the concept of descriptive representation is a straw man. The Voting Rights Act does not require the election of minorities, and I know of no competent expert or voting rights lawyer who has argued that it does. But I believe that the Voting Rights Act should require that minority voters have an equal opportunity to elect representatives of their choice, regardless of their race or ethnicity. The fact derived from extensive analysis of voting patterns shows that minority voters, like the rest of us, usually prefer candidates who are like themselves in race, ethnicity, and partisanship. This is not descriptive representation, it is just giving minority voters the same opportunity that Anglo voters have to elect their choice. If minority voters are restricted to choosing among Anglo candidates, they cannot be said to be participating equally in the political process. Experts have developed procedures for determining whether a district offers minority voters a reasonable opportunity to elect representatives of their choice, and this can be known as the districts are drawn. The reauthorization of the Voting Rights Act should make it clear that influence districts and substantive representation are not acceptable substitutes for districts in which minority citizens have a reasonable opportunity to elect representatives of their choice.

3. Can politics be separated from race in examining evidence of polarized voting? Why or why not? Do you have specific examples that support your answer from cases in which you have been retained as an expert witness?

Race and politics have always been linked in American politics. This is our history, we cannot run from it and expect to formulate just policy in the area of election law. But I think your question really asks whether partisanship and race can be separated.

No, I do not believe that partisanship and race can be separated in any meaningful way. First, race and partisanship are so closely intertwined in many jurisdictions that there is no way to separate them in statistical analysis. In technical terms, there is the problem of multicollinearity. Second, they are intertwined in the minds of voters. Black citizens are strongly allied with the Democratic Party, and Latinos somewhat less so. The prevalence of racially (and ethnically) polarized voting (RPV) in partisan general elections is a clear indication that some white (or Anglo) voters are "polarized" or driven to the Republican Party, perhaps in part because they identify the G.O.P. with their interests seen to be in conflict with the interests of minority citizens. This was evident in my analysis in the Charleston County Council case (see discussion above). The degree of racial polarization was greater in partisan Council contests than in nonpartisan School Board elections held at the same time. Party and race complimented or reinforced each other when the party labels were on the ballot.

In my analysis of New Orleans elections I found that the two-stage election process with party labels attached to candidates names at both stages served to hinder the election of minority candidates. On the other hand, in closed primary states, such as North Carolina, blacks can form a majority within the Democratic electorate, obtain the Democratic nomination, and count on a somewhat larger crossover white vote from "yellow dog Democrats." This often enables them to form an effective voting majority in districts in which they are not a majority of the voters. These examples show that the way in which the election is structured in terms of partisanship interacts with RPV to dilute or to enhance the vote of minority citizens. This is why jurisdiction specific analysis is always required.

4. Kennedy: What can we infer from the fact that African American registration and turn-out numbers are similar in covered and non-covered jurisdictions? Does this mean that the VRA has done its job? Leahy: Professor Gaddie testified about his report. Have you reviewed that report and, if so, do you believe it includes all relevant evidence? Does his comparison of covered jurisdictions and non-covered jurisdictions take into account the widely recognized deterrent effect of Section 5?

The data on registration and turnout rates for African-Americans indicates that the VRA has accomplished miracles throughout the country, but especially in the South where black voting was largely or totally suppressed prior to 1965. The progress among Latinos, Indians, and other minority groups is not as great. These other racial and language minorities still lag behind Anglos in voter participation in many areas. In my work in Montana I found that Indian turnout was a mere fraction of that of their Anglo neighbors. I found similar problems with turnout among Latinos in New York City (in Section 5 covered jurisdictions there). Even when you take citizen voting age population into account, these other groups are seriously hampered in their attempts to mobilize eligible citizens to vote.

But the VRA is about more than just the mere ability to cast a vote. The Congress has always recognized that vote dilution can be a problem. The vote must be counted and must count. This job is far from over. Both Section 5 and Section 2 are very much needed to prevent or to remedy vote dilution for all kind of minority voters. My discussion above should demonstrate the continued necessity for both parts of the VRA.

In my analysis (above) I have indicated why comparisons of registration and turnout rates between covered and uncovered jurisdictions are not a reliable indicator of whether Section 5 is still needed. Nor are such comparisons a reliable indicator of whether the "trigger" needs to be revised. Dr. Gaddie's data is a good indicator of the

progress we have made in mobilizing black citizens in the covered jurisdictions. But it does not address the lagging turnout of other minorities nor does it deal with the question of vote dilution. In my discussion above, I addressed the deterrent effect and the way in which it makes such comparisons irrelevant.

From Senator Kohl:

1. We can all agree that the Voting Rights Act was one of the most significant civil rights laws ever enacted in this country. As we consider whether or not to renew the expiring provisions of the Act, we should bear in mind that the Assistant Attorney General for the Civil Rights Division testified last week that "our work is never complete" with regards to enforcing the Voting Rights Act. Would you agree with that more work remains to be done? Why or why not? And given that statement, would you agree that the Voting Rights Act should be extended?

In my discussion above, I think I make clear that the VRA is still needed, and definitely needs to be extended.

2. Some argue that the reason African Americans and Latinos are underrepresented in elective office in the South and Southwest has more to do with partisan politics than race. Based on your research in this area, is that right?

I address some aspects of the partisanship question above. But I think I can address this question more directly here. In doing so, let me emphasize that I am not lecturing the Committee on what the law is. I am not lawyer and many of you are. Instead, let me speak as a political scientist about what I think the law should be. After all, the Congress is making the law and should be concerned with what would be simple justice in this area.

There is no question that Latinos are mostly allied with the Democratic Party, although not as much so as African-Americans. There are those who argue that the voting rights of minorities should not be protected if they are part of the Democratic coalition.

Their argument runs this way: Minority voters prefer Democratic candidates; this jurisdiction only elects Republicans; therefore, there is no racial problem here, it all just partisanship. There are several problems with this analysis. First, we frequently find that nonpartisan elections are also racially polarized, and sometimes the RPV is greater for nonpartisan than for partisan offices. When it is possible to control statistically for partisanship, there is a residual ethnic or racial effect in the voting. Second, the argument essentially denies minority voters an equal opportunity to elect representatives of their choice because of the nature of that choice. The argument is that minority voters could elect their choice, if they would only choose Republicans. Third, the argument is based on the idea that a *de facto* partisan gerrymander is a justification for laying the VRA aside.

To illustrate the third point, I return again to the Charleston County Council case. In recent years the Council had been 100% Republican, although Democratic candidates regularly received more then 40% of the votes in all kinds of elections in Charleston County. The countywide numbered post arrangement was, therefore, a *de facto* Republican gerrymander. As to the legal question of whether at-large elections could be considered an illegal gerrymander, I refer the Senator to *Republican Party of North Carolina v. Hunt* (CA No. 88-263-CIV-5, E.D.N.C., 1996) in which the court found that statewide election of superior court judges in North Carolina was designed to and had the effect of being an illegal partisan gerrymander, because Republican candidates for judge could have won election in many judicial districts across the state. I was the Republican Party's expert in that case, which is to my knowledge, the only successful partisan gerrymandering case in American history, and certainly the only successful case meeting the rigors of the *Davis v. Bandemer* (1986) standard.

Since all the candidates supported by black voters in Charleston were Democrats, they were all defeated for County Council. A black Republican had been elected several times to the Council, but he was never a candidate of choice of black voters. Defendant's expert, Dr. Ronald Weber, argued that the system was not a violation of the VRA. He maintained that the loss of election by minority-supported candidates was the result of partisanship not racial bias. The district court and the circuit court saw the case as I did. Countywide numbered post elections for County Council had the effect of preventing minority voters from having an equal opportunity to elect representatives of their choice. I would add that it would be a strange legal situation if a partisan gerrymander were to be considered justification for racial discrimination.

The proof could be stated another way. If the partisan aspect of the Charleston County Council elections were changed but the countywide numbered post provisions remained in place, the black candidates would still have been usually defeated, as was clear from comparisons of the County Council elections with the nonpartisan Countywide School Board elections. Black preferred candidates had been more successful in elections for School Board, but were still usually defeated by white bloc voting. But the County Council members could be elected from districts with a partisan ballot and black voters would then have an equal opportunity to elect representatives of their choice. This proved that the partisan aspect of the election system was not the problem.

If partisanship were considered a justification for vote dilution, the situation would be illogical. This result would say that racially polarized voting (RPV) in Democratic primaries and nonpartisan elections that usually result in the defeat of the choice of minority voters could be a violation of the VRA. But RPV that usually results in the de-

feat of the choice of minority voters in partisan general elections is not a violation of the VRA. It creates a "catch-22." If the voting is not polarized in partisan general elections, then there is no violation of the VRA. If it is polarized in partisan general elections, then it is "just partisanship." Under this Alice in Wonderland interpretation of the VRA, minority vote dilution can never occur in partisan general elections unless white Democrats are elected and black Democrats defeated. This interpretation would make the race of the candidate rather than the choice of minority voters the key indicator of vote dilution. This is an approach that has generally been rejected by the Congress and the Courts. The purpose of the VRA is to protect minority voters, not minority candidates.

3. What can we infer from the fact that African American registration and turn-out numbers are similar in covered and non-covered jurisdictions? Does this mean that the Voting Rights Act has done its job?

See my discussion, above, of a similar question from Senators Kennedy and Leahy.

Response of Anita Earls, Director of Advocacy, Center for Civil Rights, University of North Carolina School of Law
To Written Questions from Senate Judiciary Committee Members
On "The Continuing Need for Section 5 Pre-Clearance"
June 16, 2006

Questions from Senator Coburn

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

It is appropriate for Section 5 to continue covering the jurisdictions that are currently covered. The trigger formula of Section 4 was designed to identify those jurisdictions where literacy tests or similar devices had been used to prevent blacks from participating in the electoral process.[1] The special remedial provisions that applied to jurisdictions so identified were "aimed at areas where voting discrimination has been most flagrant."[2] The purpose of Section 5 was to "insure that old devices for disenfranchisement would not simply be replaced by new ones."[3] Section 5 was not intended merely to increase minority registration rates, but rather to make sure that covered jurisdictions did not put in place at-large election systems, use their annexation powers in a discriminatory fashion, move polling places, enact majority vote requirements, or resort to a host of other practices that would negate or dilute the voting strength of newly enfranchised black voters. Current minority voter registration and turnout rates are not the right indicators of where in the country Section 5's non-retrogression principle is necessary to protect minority voting rights.

The Supreme Court previously rejected a constitutional challenge to the coverage formula and approved the application of Section 5 to the jurisdictions identified by the Section 4 trigger, holding that "Congress was therefore entitled to infer a significant danger of the evil in the few remaining States and political subdivisions covered by ... the Act. No more was required to justify the application to these areas of Congress' express powers under the Fifteenth Amendment."[4]

The relevant question today is whether the current coverage of Section 5 correctly identifies jurisdictions where there is a danger of new laws and practices being put in place that would have the purpose or effect of disenfranchising minority voters. There are two reasons why the current coverage is appropriate. First, the jurisdictions currently covered by Section 5 still enact laws that disadvantage minority voters. There is

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[1] S. REP. NO. 417, 97th Cong., 2d Sess. 5, *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 177, 182 [hereinafter "1982 SENATE REP."]
[2] *South Carolina v. Katzenbach,* 383 U.S. 301, 315 (1966).
[3] 1982 SENATE REP. at 6.
[4] *South Carolina v. Katzenbach,* 383 U.S. at 329.

significant evidence before Congress, particularly from objections, submissions that have been withdrawn or modified, and unsuccessful declaratory judgment actions, that the covered jurisdictions in fact do continue to enact changes affecting voting that would have the purpose or effect of making minority voters worse off.[5] Second, the current coverage is appropriate because self-correcting measures in the law allow for expanded or contracted coverage if it becomes apparent that additional jurisdictions need to be covered in order to prevent continuing racial discrimination in voting, or that covered jurisdictions no longer pose a risk of enacting discriminatory measures.

When the Section 4 trigger was originally passed, it faced criticism for being under-inclusive.[6] Attorney General Nicholas Katzenbach noted that the provision could miss some districts that should have been included under Section 5 coverage. However, the Voting Rights Act [hereinafter "VRA"] also gives a court the power to initiate Section 5 coverage by court order in any proceeding instituted by the Attorney General or an aggrieved person where the court finds that violations of the fourteenth or fifteenth amendment justify equitable relief.[7] In fact, some jurisdictions have been brought under Section 5 coverage as a result of such litigation.[8] Thus, coverage can be expanded to include jurisdictions where there are serious constitutional violations and the risk is great of continued barriers to minority political participation.

Any worry about the Section 4 trigger being over-inclusive is negated by the more than ample "bailout" provisions of the VRA, created in Section 4 and amended in 1982. According to voting rights attorney J. Gerald Hebert, these provisions are "easily proven" for jurisdictions that do not have discriminatory voting practices.[9] The fact that a majority of jurisdictions have failed to bailout on an individual basis illustrates that Section 5 is still necessary in those jurisdictions.

Altering the Section 4 trigger for Section 5 coverage is thus both unwise and unnecessary, as the bailout provisions already in place provide suitable means for the termination of Section 5 coverage for jurisdictions without discriminatory voting

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[5] In addition, a recent analysis of reported opinions in Section 2 litigation revealed that courts in covered jurisdictions have found more acts of official discrimination that impact voting rights, the use of devices that enhance opportunities for discrimination against minority voters, the use of racial appeals in campaigns, more extreme racially polarized voting, and other factors disadvantaging minority voters, than courts in non-covered jurisdictions. *See* Ellen D. Katz, *Not Like the South? Regional Variation and Political Participation Through the Lens of Section 2,* June 19,2006, at page 4; publication forthcoming, available at: http://www.sitemaker.umich.edu/votingrights/files/notlikethesouth.pdf. This further demonstrates that Congress is justified in continuing coverage for the currently covered jurisdictions.

[6] Protecting Minority Voters: The Voting Rights Act at Work 1982-2005, The National Commission on the Voting Rights Act. 28. Feb 2006.

[7] *See* 42 U.S.C. § 1973a(c).

[8] *See Jeffers v. Clinton,* 740 F.Supp. 585 (E.D. Ark 1990), *appeal dismissed* 498 U.S. 1129 (1991);*McMillan v. Excambia County,* 559 F. Supp. 720, 727 (N.D. Fla. 1983) *cert. denied* 464 U.S. 830 (1983). *See also Sanchez v. Anaya,* Civ. No. 82-67M (D.N.M. 1984) (requiring preclearance of redistricting plans for ten year period); 1982 SENATE REP. at 15 (Thurston County, Nebraska covered by the preclearance provisions of Section 3(c) as the result of a court order).

[9] CivilRights.org, Hearings to Examine the Impact and Effectiveness of the Voting Rights Act, http://www.civilrights.org/issues/voting/details.cfm?id=37137&currentpage=1 (last visited June 14, 2006).

practices. The bailout provision is more appropriate than a change in the Section 4 trigger because it deals with jurisdictions on a case by case basis rather than trying to find a proxy that applies to all jurisdictions, regardless of their current voting practices.

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

It is appropriate to extend coverage for 25 years because the current evidence of continuing voting rights violations in covered jurisdictions supports the judgment that it will take at least that long to afford minority voters a level playing field for political participation. Moreover, extending coverage for 25 years is appropriate because the bailout provisions allow jurisdictions that have complied with the law for ten years to no longer be covered.

The current trigger, however, is not based only on the 1972 presidential election participation. It is important to understand how the Section 4 trigger was amended in 1970 and 1975. The 1970 Amendments did not replace the initial trigger, but rather added to it.[10] Thus, coverage included all jurisdictions previously covered along with any political subdivisions that used a literacy test as of November 1, 1968 and where less than 50% of the voting age population were registered as of that date, or less than 50% of such persons voted in the presidential election of November 1968. The new jurisdictions covered by the additional 1968 trigger included counties and towns in Arizona, California, Connecticut, Maine, Massacuhsetts, New York, New Hampshire and Wyoming.[11] In addition, several jurisdictions in Alaska, Arizona and Idaho that had successfully bailed out from coverage were re-covered.[12]

Likewise, the 1975 Amendments added to the prior covered jurisdictions rather than replaced the existing triggers.[13] In addition to those jurisdictions covered by the 1965 and 1970 triggers, the 1975 Amendments added any jurisdiction using a literacy test in 1972 and meeting one of the two 50% criteria. The 1975 legislation also brought language minority groups within the Act's special remedial provisions, and expanded the definition of "test or device" to include any practice of conducting elections only in English where more than five percent of the citizens of voting age residing in the jurisdiction are members of a single language minority group.[14] Thus, if a jurisdiction conducted elections only in English, had a five percent citizen voting age population of a single language minority group, and had less than 50% of the voting age population registered or voting in the 1972 election, they would be covered by Section 5 and required to comply with the preclearance provision. The 1975 coverage formula resulted in the entire states of Texas, Arizona and Alaska being covered by Section 5, as well as

[10] Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, § 4, 84 Stat. 373.
[11] *See* 39 Fed. Reg. 16, 912 (1974); 36 Fed. Reg. 5809 (1971).
[12] *See* 36 Fed. Reg. 5809 (1971).
[13] Voting Rights Act of 1965 – Extension, Pub. L. No. 94-73, tit. II, §202.
[14] Id., § 203.

local jurisdictions in California, Colorado, Florida, Michigan, New Mexico, North Carolina, Oklahoma, and South Dakota.[15]

There was no change in coverage under Section 4 in the 1982 Amendments. However, the current trigger is a combination of jurisdictions that meet the standards based on 1962, 1968 and 1972 registration and turnout data, not simply the 1972 participation. The current bill to reauthorize Section 5, like the 1982 legislation, does not alter the coverage of Section 5. The fact that it was considered appropriate, in 1982, to extend Section 5 for 25 years without altering the trigger at that time illustrates that the measure of the need for Section 5 preclearance is whether or not the jurisdictions it covers are likely to continue to try to dilute minority voting strength.

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

I am not aware of any new trigger formula using registered voter data or turnout that would better capture jurisdictions that are likely to enact new voting laws that disadvantage minority voters. In past reauthorizations, when the trigger was updated, Congress added new covered jurisdictions without removing any of the existing covered jurisdictions. At a minimum, any such alternative conceptualization of the trigger should be applied in addition to the existing covered jurisdictions rather than to replace or remove any currently covered areas.

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

No. Changing the trigger will not make a 25 year reauthorization of the expiring provisions of the Voting Rights Act more likely to be upheld as a constitutional exercise of Congress' power. Since the current coverage best corresponds to the jurisdictions most likely to pass laws that make minority voters worse off, as further explained in the answer to Question 1 above, the reauthorization bill as drafted satisfies the constitutional requirement that there be "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[16]

If the goal of changing the trigger is to add new jurisdictions that should be covered but are not, while desirable to enhance the effectiveness of Section 5, the failure to do so cannot make the reauthorization unconstitutional. Congress has the authority under Section 5 of the Fourteenth Amendment and Section 2 of the Fifteenth Amendment to enforce the voting rights of racial minorities but the fact that its measures do not reach every corner of the country where such discrimination may occur does not invalidate those measures. Thus, the only constitutional concern is if the failure to change the

[15] See 41 Fed. Reg. 783-84, 34,329 (1976); 40 Fed. Reg. 43,746, 49,422 (1975).
[16] *City of Boerne v. Flores,* 521 U.S. 507, 520 (1997).

trigger results in jurisdictions being covered that should not be covered because there is no history of unconstitutional conduct or no likelihood of "backsliding" in the future. This problem of over-inclusiveness is readily resolved by several observations. First, the Supreme Court previously has found the coverage to be congruent and proportional, and re-affirmed that finding in the *City of Boerne* case itself as well as in post-*Boerne* cases.[17] The issue at this stage is not whether these jurisdictions can be covered at all, but whether continuing coverage is justified, which should be a lower burden. Second, over-inclusiveness can be corrected by jurisdictions making use of the bailout procedures, which allow them to withdraw from coverage once they have established a relatively short history of full compliance with the Act. Thus, leaving the trigger unchanged does not jeopardize the constitutionality of the Act's reauthorization.

Question 5: Please discuss how a possible broad-based "bailout" of covered jurisdictions might be implemented?

During the last reauthorization in 1982, there were extensive discussions of whether to change the bailout procedures and consideration of various revisions that ultimately resulted in substantial changes in the bailout procedures.[18] Proposed changes at that time ranged from measures that would have been a virtual automatic termination of Section 5, to changes that might have made it even more difficult for jurisdictions to bailout. The record at this time does not justify instituting a broad-based bailout. As Congress concluded in 1982, "if we turn the bailout into a sieve, it would make the extension of Section 5 an exercise in futility and a cruel hoax on millions of black and brown Americans."[19]

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

Certainly there are ways to modify the bailout provision that would make it easier for jurisdictions to meet the requirements. The important question is whether termination of Section 5 coverage in those circumstances will result in new laws and practices that disadvantage minority voters and make it more difficult for them to participate equally in the political process. The current bailout requirements are reasonable and strike the right balance between allowing jurisdictions that comply with the law to bailout while keeping Section 5 in place where it is still needed to protect minority voting rights.

Question 7: In the Unofficial Transcript of the hearing on May 16, 2006, page 35-36, Professor Pam Karlan said in reference to Georgia's redistricting plan at issue in Georgia v. Ashcroft, that the Department of Justice "got it right" because two of the

[17] *See Lopez v. Monterey County*, 525 U.S. 266 (1999) (upholding constitutionality of Section 5 preclearance requirement).
[18] *See* 1982 SENATE REP. 43-62.
[19] *Id.*, at 44.

white Democrats elected under the new plan switched party affiliation and became Republicans. She said "Now I am sure that the Republicans in Georgia are very fair folks, but those black voters have no influence in those districts." Do you agree with Professor Karlan's assertion that minority voters in Republican districts "have no influence"?

From the question itself, it appears to me that Professor Karlan did not assert that minority voters in Republican districts have no influence but rather, that she asserted that black voters had no influence in the particular districts at issue in the *Georgia v. Ashcroft* case. To the degree that influence may be measured at all, that is an empirical question that I would answer by looking at the degree to which voting in the districts in the new plan is racially polarized, and by examining the voting records and positions on issues of the legislators who were elected in those districts. I do not have that information.

However, I do agree with the Justices who dissented in the *Georgia v. Ashcroft* case that generally, measuring influence is extraordinarily difficult and cannot be done simply by looking at the percentage of the identifiable minority group in a district, whereas measuring the ability to elect is more manageable. Justice Souter, writing for himself, and Justices Stevens, Ginsberg and Breyer, explained:

> 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.[20]

Finally, I would add that if the black voters in the districts at issue in the statement quoted above are Democrats, and the candidates who were elected are now Republicans, it seems a fair conclusion that the black Democratic voters in those circumstances have no influence over the Republican elected official.

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[20] *Georgia v. Ashcroft*, 539 U.S. 461, 495 (2003).