

**Supplemental Testimony  
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**On the Reauthorization of Section 5 of the Voting Rights Act**

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

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

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

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

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

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<sup>1</sup> 521 U.S. 507 (1997).

<sup>2</sup> 538 U.S. 721 (2003).

<sup>3</sup> 525 U.S. 255 (1999).

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

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

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

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<sup>4</sup> 539 U.S. 306 (2003).

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

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

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

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

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

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

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

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<sup>5</sup> *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966).

### *3. Alterations of the bailout provisions.*

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

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

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

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

### *4. The length of the extension.*

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

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

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

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

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

As I noted in my previous testimony, the remoteness in time between the 1964 coverage trigger and the proposed next end date of Section 5 is a source of constitutional concern. Rather than pick new dates and risk introducing some arbitrariness into coverage, I think the Congress would be better off accepting the coverage formula for the present and then easing both the bailout provisions and the possibility of new jurisdictions being covered as a result of actual contemporaneous misconduct.

6. *Georgia v. Ashcroft.*

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

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

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

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<sup>6</sup> 425 U.S. 130 (1976).

reelected from slightly altered districts. This included the two black incumbents, though presumably these districts were now deemed to be on a shakier, more of an “influence” coalition basis than would have been the case with a greater concentration of minority voters. The end result is that all the incumbents win handily, black and white, and it is unlikely that the marginal differences in the plan the DOJ objected to would have made any difference. Yet, the House Report endorses the claim that, “if left unaddressed, the *Georgia* standard ‘threatens the Nation’s commitment to representative democracy . . . .’ The Committee agrees.” Report at 71-72 (footnote omitted). This is a disturbingly broad claim. But it is difficult to see how the creation of influence districts both threatens representative democracy and is the subject of protection under the proposed amendments to the Act.