

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

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I. Introduction

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

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

### A. Legal changes

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

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

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

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

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

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

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

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

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

#### B. Related political changes

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## B. The Proposed Standard

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

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

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

#### 1. Threshold considerations

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

b. The incumbency status of the district

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

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

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

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

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

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

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

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

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

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

e. The potential for coalitions among minority groups

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

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

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

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

##### A. Threshold Issues

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

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

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

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

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

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

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

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

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

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

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

With that said, the record contains notable examples of DOJ denials of preclearance, requests for more information (MIRs) that are often followed by a change in voting laws, as well as numerous successful and settled section 2 lawsuits in the covered jurisdictions. As mentioned in my original testimony, I think all agree that the greatest effect of section 5 can be felt at the local level, where elections are usually nonpartisan and the stakes as viewed by the national parties and interest groups are seen as relatively low. The overwhelming majority of preclearance submissions concern changes at the local level. *See* U.S. Department of Justice, Civil Rights Division, Voting Section Home Page, “Section 5 Changes by Type and Year,” available at [http://www.usdoj.gov/crt/voting/sec\\_5/changes.htm](http://www.usdoj.gov/crt/voting/sec_5/changes.htm) . By themselves, annexations, precinct redefinitions, and polling place moves constitute the majority of the total number of preclearance submissions, and when added to the number of local redistrictings and other miscellaneous local voting changes, the number of such submissions dwarfs those at the statewide level.

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

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

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

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

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

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

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

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

### C. Evidence presented in support of renewal

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

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

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

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

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

#### D. Evaluating proposed reforms

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

## 1. Reforming the coverage formula

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

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

## 2. Reforming bailout

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

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

### 3. Reforming the duration for the proposed bill

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

### V. Conclusion

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