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MODERN ENFORCEMENT OF THE VOTING RIGHTS ACT

HEARING

BEFORE THE

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UNITED STATES SENATE

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WEDNESDAY, MAY 10, 2006

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

The Committee met, pursuant to notice, at 9:30 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Arlen Specter, Chairman of the Committee, presiding.

Present: Senators Specter, Hatch, DeWine, Sessions, Cornyn, Leahy, and Kennedy.

OPENING STATEMENT OF HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Chairman SPECTER. Good morning, ladies and gentlemen. It is 9:30 and the Judiciary Committee will now proceed on the third in a series of hearings on the renewal of the temporary provisions of the Voting Rights Act. Yesterday, we examined the legal issues surrounding reauthorization, and today we will focus on how the Voting Rights Act is enforced.

Just reading the statute does not get one very far until we probe on how the Act is enforced. For example, Section 5 provides that a voting practice must "not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color," or a voter's English proficiency. That provision, a very important one, has been subject to significantly different interpretations.

Beginning in 1976, the Supreme Court applied a thoroughly mechanical formula in evaluating district plans under Section 5. If the plan decreased the number of majority/minority districts, the Court would strike it down. Then in the 1990's, the Justice Department went a step further and followed a policy of rejecting any districting plan that did not create the maximum number of majority/minority districts possible. In *Georgia* v. *Ashcroft* in 2003, the Court rejected both its own approach and that of the Justice Department and held that districting plans can pass Section 5 even if they decreased the number of majority/minority districts.

It is likewise important to understand the enforcement of Section 203, which requires bilingual election materials in certain jurisdictions. That section says nothing about how those jurisdictions should distribute bilingual election materials. It only requires a jurisdiction to "provide them." It is enough that the materials be available on request. Must a State locate voters and ensure they receive them? What criteria should the States use to develop its

programs? How the Department of Justice and local jurisdictions answer these questions has a great impact on how effective Section 203 will be.

These are all complicated issues. We all recognize the overwhelming importance of the Act in securing fair treatment for minority voters, and the right to vote and the exercise of the right to vote is obviously the basic protection of a citizenry and a democracy. To help us examine these issues today, we have the head of the Department of Justice Civil Rights Division, Assistant Attorney General Wan Kim. We also have five distinguished attorneys with extensive experience litigating and responding to the Voting Rights Act.

I thank Senator Kennedy for his leadership on this important subject going over—let's see, the 1960's, the 1970's, the 1980's, the 1990's—five decades, Senator Kennedy. You are recognized for your opening statement.

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

Senator KENNEDY. Thank you, Mr. Chairman, again, for the breadth and depth of these hearings that will clearly establish a record on this very important and fundamental piece of legislation, perhaps the most important legislation we will consider in the Congress.

As we know, the Voting Rights Act was adopted to address the systematic and egregious discrimination endured for over a hundred years in the country, and we heard testimony yesterday regarding the unfortunate fact that in numerous ways this discrimination still endures today. Laughlin McDonald, the Director of the ACLU's Voting Rights Project, provided very recent examples, and he testified about a TRO that was just issued last month on potentially discriminatory voting changes made in Randolph County, Georgia, that were not submitted for preclearance.

Regrettably, it is not surprising that it may take more than 40 years to eliminate the blight of racial discrimination in voting. The Voting Rights Act combats the ills that are at the core of the 14th and 15th Amendments—racial prejudice. And while the remedy is strong, it is appropriate, given the fundamental importance of the right to vote and participate in the political process. And as the Supreme Court has held, the electoral franchise is a fundamental right that is preservative of all other rights. So we cannot discard lightly the safeguards adopted in the Voting Rights Act, particularly in Section 5 of the Act. The progress we have made has been great, but it is not complete, and we cannot allow it to be jeopardized or diminished.

Today we will be hearing about the Justice Department's efforts to enforce the Voting Rights Act, and while I have some concern about the Justice Department's recent approach to implementing the Act, today we will hear from the Assistant Attorney General about the Justice Department's efforts and the continuing need for vigorous enforcement. Section 5 has been the Federal Government's most effective tool against voting discrimination. And even after the Act was passed, there was real and substantial danger that discriminatory decisions by jurisdictions covered by Section 5 would

deny or abridge the right to vote. In fact, jurisdictions did adopt a host of voting devices and changes, some subtle and some overt, with the intent to shut minorities out of voting power. And some of those decisions had a discriminatory purpose. Some had a discriminatory effect. Others had both. It was because of the work of the Justice Department under Section 5 of the Act that those invidious voting changes were not implemented and that any progress in political participation was not undone.

Taking a long view, historically the Justice Department has vigorously carried out its Section 5 responsibilities precisely as Congress intended it to. The record we will be examining, which the House hearings examined closely, indicates that there is a continuing problem with discriminatory decisionmaking with respect to voting by jurisdictions covered by Section 5.

Today we will also hear from witnesses who will describe in more detail the concerns about continuing discrimination in some of the jurisdictions covered by Section 5 and Section 203, the minority language sections of the Voting Rights Act. As we have noted, compiling this record is one of the most important purposes of the hearings and will provide a sturdy foundation for our actions in this most important piece of legislation.

We have a number of communities in my own State that are covered by Section 203, including Boston and Chelsea and Lawrence, Southbridge and Springfield as well.

So, in addition, we will specifically be hearing about the role that Section 203 has played in ensuring the right to vote and having that vote count fully and fairly. Section 203 requires that certain jurisdictions provide for language assistance to American citizens who are limited in their English proficiency. Section 203 directly addresses barriers to voting for Asian Americans, Latinos, and Native Americans, and it, too, as a provision should not be allowed to expire.

So I thank the Chair and look forward to the testimony.

Chairman SPECTER. Thank you, Senator Kennedy.

Senator Cornyn, would you care to make an opening statement?

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

Senator CORNYN. Just briefly, Mr. Chairman. Thank you again for this series of hearings. I look forward to hearing from the witnesses along the lines that we previously inquired of other witnesses, trying to ascertain what sort of empirical evidence exists of changes in voting practices and whether some of the stereotypes that certainly were validated by the facts years ago in terms of precluding minorities from fully participating in the process, whether those stereotypes are still valid today in light of some of the dramatically improved changes that we have seen. And so I look forward to inquiring of the witnesses and hearing from them on those issues.

Thank you very much.

Chairman SPECTER. Thank you, Senator Cornyn.

Senator DeWine, an opening statement?

Senator DEWINE. Mr. Chairman, I just thank you for holding this hearing, and I look forward to the testimony.

Chairman SPECTER. Thank you very much.

Assistant Attorney General Wan J. Kim became the holder of that position on November 9th of 2005. Born in South Korea, Mr. Kim is the first immigrant to serve as Assistant Attorney General of the Civil Rights Division and is the first Korean American ever to become an Assistant Attorney General, so you have two very distinguished firsts, Mr. Kim.

He has experience in the Department before becoming the Assistant AG, having been the Deputy Assistant, spent most of his career at the Department of Justice, was in the Attorney General's Honors Program, was Assistant United States Attorney for the District of Columbia, served on the staff of Senator Hatch here, and was a law clerk to Senator Buckley; an honors graduate from both Johns Hopkins University and the University of Chicago Law School. He has served as an enlisted soldier and a rifle platoon leader in the Army Reserve.

Thank you for joining us, Mr. Kim. Our practice is to allocate 5 minutes for statements and then 5-minute rounds for questions by the Senators on the panel. You may proceed.

STATEMENT OF WAN J. KIM, ASSISTANT ATTORNEY GENERAL, CIVIL RIGHTS DIVISION, DEPARTMENT OF JUSTICE, WASHINGTON, D.C.

Mr. KIM. Thank you very much, Mr. Chairman, and thank you for holding these hearings. It is my privilege to appear before you and before the other distinguished members of the Committee.

It is my privilege to appear in this hearing on the modern enforcement of the Voting Rights Act. As you know, certain provisions of the Voting Rights Act are due to expire next year. The administration supports reauthorizing these provisions of the Voting Rights Act, as the President and the Attorney General have made clear. We also support the legislative intent of S. 2703 and H.R. 9 to overrule the Supreme Court's 2003 decisions in *Georgia* v. *Ashcroft* and the 2000 decision in *Reno* v. *Bossier Parish School Board*.

While the Department of Justice has not yet completed our review of this bill's language, we look forward to working with Congress to ensure that this legislation is consistent with these purposes.

I am pleased to provide you with an overview of the Justice Department's enforcement of three important provisions of the Voting Rights Act: Section 5, which involves the Act's preclearance mechanism, and Sections 203 and 4(f)(4), which contain the Act's language-minority provisions. I am also pleased to provide you with an explanation of the Department's use of two other provisions of the Act—Sections 6 and 8—which pertain to Federal examiners and observers.

Let me begin with Section 5. The Voting Section of the Civil Rights Division receives roughly 4,000 to 6,000 Section 5 submissions annually, although each submission may contain numerous voting changes that each must be reviewed. Our function in evaluating Section 5 submissions is, in the words of the Supreme Court, "to insure that no voting-procedure changes [are] made that would

lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise."

Impressively, the outstanding career attorneys in our Voting Section undertake this often highly complex examination in a brief 60-day period of time, as is required under the statute. Employing this standard over the last 40 years, we have found retrogression in an extremely small number of cases. Since 1965, out of the 125,885 total Section 5 submissions received by the Department of Justice, the Attorney General has interposed an objection to 1,402. And in the last 10 years, there have been 92 objections. In other words, the overall objection rate since 1965 is only slightly above 1 percent while the annual objection rate since the mid-1990's has declined even more, now averaging less than two-tenths of a percent. This tiny objection rate reflects the overwhelming compliance with the Voting Rights Act by covered jurisdictions.

In addition to our Section 5 enforcement efforts under this administration, the Justice Department has undertaken the most extensive Sections 203 and 4(f)(4) enforcement activities in its history. The initiative began immediately following the Census Bureau's 2002 determinations as to which jurisdictions are covered under Section 203. The Civil Rights Division not only mailed formal notices and detailed information on Section 203 compliance to each of the 296 covered jurisdictions, but we also initiated face-to-face meetings with State and local officials and minority community members in the 80 newly covered jurisdictions to explain the law, to answer questions, and to foster the implementation of effective legal compliance programs.

These efforts have borne abundant fruit. Since 2001, this administration has filed more language-minority cases under Sections 203 and 4(f)(4) than in the entire previous 26-year history of these provisions. The lawsuits filed in 2004 alone provided comprehensive language-minority programs to more citizens than all previous 203 and 4(f)(4) suits combined. Our lawsuits have significantly narrowed gaps in electoral participation. In Yakima County, Washington, for example, Hispanic voter registration went up by over 24 percent in less than 6 months after resolution of our Section 203 lawsuit. In San Diego County, California, Spanish and Filipino registration were up by over 21 percent, and Vietnamese registration was up over 37 percent, within 6 months following our enforcement efforts.

Finally, the Department of Justice has taken full advantage of the Federal observer provisions of the Voting Rights Act. In 2004, for example, the Civil Rights Division worked with the Office of Personnel Management to send nearly 1,500 observers to cover 55 elections in 30 jurisdictions in 14 different States. Additionally, in 2005, 640 Federal observers were sent to cover 22 elections in 17 jurisdictions in 10 different States.

Let me say in conclusion that the Civil Rights Division has made the vigorous enforcement of voting rights a primary objective. The Department of Justice is proud of the role that it plays in enforcing the statute, and we look forward to working with Congress during these reauthorization hearings.

At this point, I would like to submit the text of my prepared statement for the record, and I will be pleased to answer any questions that the members of the Committee may have.

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

Chairman SPECTER. Well, thank you very much, Mr. Kim. Without objection, your full statement will be made a part of the record.

As you know, the record basis has to include recent and continuing violations. Over the past 10 years, are you in a position to say how many jurisdictions have refused to comply with Department of Justice enforcement orders and court orders?

Mr. KIM. Senator, it is my understanding that no jurisdiction has refused to comply with our determinations made under Section 5. It is the case, however, that some jurisdictions have failed to make preclearance submissions under Section 5, as is required by the statute, and in those jurisdictions we will followup by bringing appropriate remedies, if necessary.

Chairman SPECTER. How many such cases are there where they do not comply with the provisions you just mentioned?

Mr. KIM. Senator, I would have to get the detailed statistics to you, and I will make those statistics available—

Chairman SPECTER. Would you make those available to us for the record so that we know the extent of that problem and also how current it is?

Mr. KIM. Yes, sir.

Chairman SPECTER. Can you give us some examples over the past 10 years of States committing unconstitutional voting discrimination?

Mr. KIM. Yes, sir. Certainly with respect to some of our Section 203 lawsuits, we have found voters who have been denied other protections either by statute or by the Constitution. For example, in a recent lawsuit we brought against the city of Boston under Section 203 and Section 2 of the Voting Rights Act, we found instances where ballots presented to certain voters who did not understand English very well were taken from those voters and marked out against those voters' will. And certainly in instances in San Diego County, for example, we found examples where election officials would ask for additional information about citizenship from people who seemed to be Hispanic. And those kinds of violations are often found in the kinds of cases that we bring under the Voting Rights Act.

Chairman SPECTER. Would you supply for the record the details or as much information as you have on unconstitutional behavior by a State or jurisdiction to give us as comprehensive a record as possible on this important question?

Mr. KIM. Of course, Mr. Chairman. In fact, we have made available and submitted for the House record and we will make available and submit for the Senate record all of the objection letters that we have submitted under Section 5 in history, which number more than 2,000 pages. We will also make available all the lawsuits that we have brought in recent years that allege constitutional violations.

Chairman SPECTER. Mr. Kim, as you know, Federal regulations require that jurisdictions covered under Section 203 provide bilin-

gual materials to all voters or to develop "an effective targeting system" to identify "persons who are likely to need them." Recently, the House Subcommittee on the Constitution found that an elected official from Orange County, California, claimed that the Department of Justice requires States to send bilingual materials to any voter with a Spanish-sounding surname. That has an overtone of racial profiling, assuming that anyone with a foreign-sounding surname cannot speak the language, regardless of how long they have lived here.

Does the Department of Justice enforce such a policy? Why doesn't the Department of Justice simply require States to send bilingual ballots to those voters the census lists as needing assistance? Or is the census adequate to pinpoint the need for that kind of assistance?

Mr. KIM. Mr. Chairman, to answer the first part of your question, no, the Department of Justice does not make such a requirement. The Department of Justice is charged with enforcing Congressional intent in Section 203, and we do so vigorously. And part of that intent is to make sure that people who need the bilingual provisions obtain them and no more than that. If we required the jurisdiction that was covered to provide bilingual materials to everyone in that jurisdiction, obviously that would be a burden that is not commensurate to the harm.

The Census Bureau data only provides information with respect to the entire jurisdiction and does not break out those individuals in the jurisdiction who actually need the bilingual services. And so in each individual jurisdiction, the Department of Justice takes a comprehensive view of the facts and circumstances in that jurisdiction to determine the best method for obtaining compliance.

Chairman SPECTER. Mr. Kim, I want to interrupt you because I have time for one more question. What are the key reasons, the best reasons in your mind about the need for the reauthorization of the Voting Rights Act? What currently is happening which leads you to believe the Act should be reauthorized?

Mr. KIM. Well, Senator, as you know, the administration strongly supports reauthorization of the Voting Rights Act, and we have a proud history of enforcing the Voting Rights Act since its inception at the Department of Justice. The Act has a continuing vitality. We file objections under Section 5 every year. We have brought numerous lawsuits in the past 5 years to enforce the language-minority provisions, and these are the provisions that are due to expire, and we do believe that these provisions serve a continuing need.

Chairman SPECTER. Thank you very much, Mr. Kim.

Senator DeWine has graciously consented to chair the balance of the hearing, so at this point I turn the gavel over to Senator DeWine. Thank you.

Senator DEWINE [presiding]. Senator Kennedy?

Senator KENNEDY. Thank you very much.

Could you just continue on your answer about Section 203? We had a situation in Boston, as you mentioned, and it was settled very expeditiously, and the people—the mayor feels that the interaction with the Department has been enormously constructive and positive. So it is one of those circumstances where those that were

pointed out where there had been alleged kinds of problems benefited significantly from working with the Department.

But besides the 203, in response to the Chairman's question, I mean, we have seen the growth of the terms of the Hispanic community and a number of different communities, so that Section 203 is going to be out there and applicable in places where I suppose we did not think were much of a problem, but we obviously have to watch these situations. But in Section 5, if you could—you mentioned that you have been bringing cases. Maybe you could just expand on that briefly about what has been the record in the period of the last—I don't know. I guess you have been in there now for a period, but could you give us sort of a rundown of the recent history, say for 5 or 7 years?

Mr. KIM. Certainly, Senator. First of all, it cannot be overstated that the Voting Rights Act has widely been recognized as one of the most successful pieces of civil rights legislation ever passed by Congress, if not the most successful. It has, during its course of history, significantly narrowed gaps in electoral participation by all Americans, and that is certainly a proud history and one that we are proud to enforce.

Over the history of the Voting Rights Act, the covered jurisdictions are required, of course, to submit for preclearance any changes in its voting procedures, and that submission by itself creates a deterrent effect. So I think it is important, when one thinks about Section 5 and preclearance, to recognize that the very fact of submission is an important detail that prevents retrogression and prevents harming minority voting strength and prevents backsliding, the very types of evils that Congress sought to prevent in passing Section 5.

And even with the submission procedures, it is true that the number of objections filed by the Department of Justice has declined in the past 10 years to approximately two-tenths of 1 percent. The need for objections, however, is real, and we do make those objections every year. And so the fact of the matter is, in the past 5 years, we have raised approximately something shy of 50 objections. Stated differently, those are 50 cases that we have prevented in terms of allowing a voting change to take place that may have had a retrogressive effect or a retrogressive purpose. And we think that that is enormously important to the work of promoting the very goals that Congress sought to promote in the Voting Rights Act.

Senator KENNEDY. Explain to me a little bit the value of observers. How do you make the judgment when you are going to have observers? And how important have they been in these recent cases, recent elections?

Mr. KIM. Well, Senator, we think that sending observers and monitors to help assist local election officials conduct the elections is enormously important because they help to prevent problems before there is a real problem, and they help to make sure that no one at the polls is denied access to the polls consistent with Federal law and constitutional law.

The decision on when to appoint observers and monitors is one based upon the facts and circumstances on the ground with respect to any particular election.

Senator KENNEDY. Give us some examples about the extent, how many different sort of polling areas that you have provided—

Mr. KIM. Well, Senator, those numbers are in my prepared statement, and certainly with respect to—in 2004, for example, the Presidential election, we sent out nearly 1,500 observers to monitor 55 elections in 30 jurisdictions in 14 States. That is in addition to Civil Rights and Department of Justice personnel—an additional 400 people to monitor 100 elections in 80 jurisdictions in 27 different States. That was the most extensive observer and monitor coverage in history.

Senator KENNEDY. What do you anticipate in this election here in 2006?

Mr. KIM. Senator, we have not reached firm numbers yet. Clearly, Presidential elections are different in terms of magnitude and scale, and we need to step up our enforcement efforts and our monitoring efforts commensurately. But, you know, the commitment that I have as the head of the Civil Rights Division is to make sure that whatever the need is, we will accommodate it.

Senator KENNEDY. Just finally, could you tell us—I understand the Department of Justice has offered assistance to jurisdictions on ways to reduce costs of compliance with Section 203. Could you describe for us some of the outreach the Department has done in this regard?

Mr. KIM. Absolutely, Senator. One of the important things, I think, with Section 203 is communication and technical assistance because many jurisdictions who are covered do not realize exactly that they are covered, nor do they know how to comply with the Act in a cost-effective way. Our folks are experts in doing so, and we have made contact by mailing letters to every covered jurisdiction shortly after the Census Bureau made the determination in 2002, having face-to-face meetings, and under the facts and circumstances of each particular case, designing a targeting method to reach the voters to whom the provisions are directed in a manner that is cost-effective to the jurisdiction to ensure compliance.

Senator KENNEDY. My time is up. Thank you, Mr. Chairman.

Mr. KIM. Thank you, Senator.

Senator DEWINE. Mr. Kim, thanks for joining us. You mentioned that the Department supports the efforts this bill is making to overturn the results of some recent Supreme Court jurisprudence, certainly including the case of *Georgia* v. *Ashcroft*. Could you share with us the practical effect of that case and how that has changed how you do business, how the Department investigates and prosecutes cases under the Voting Rights Act?

Mr. KIM. Yes, Senator. Certainly, *Georgia* v. *Ashcroft* has changed the analysis that the United States employs when reviewing Section 5 submissions by covered jurisdictions. And, of course, the Government's position in *Georgia* v. *Ashcroft* was the one rejected by the Supreme Court and adopted by only four members of the Court.

I will say at the outset, of course, that the Department of Justice will act pursuant to the laws passed by Congress as interpreted by the Supreme Court, and we have been faithful in our application of *Georgia* v. *Ashcroft*. That said, we do support what we under-

stand the intent of S. 2703 and H.R. 9 to be in terms of overruling legislatively the Supreme Court's decision in *Georgia* v. *Ashcroft*.

What *Georgia* v. *Ashcroft* did was adopt a totality of the circumstances approach to redistricting standards, and since *Georgia* v. *Ashcroft* was decided in 2003, we have not had occasion to review many redistricting submissions employing its standard. Clearly, a small proportion of redistricting happens after the decennial census. Most of it occurred and was evaluated prior to the standards enunciated by *Georgia* v. *Ashcroft* because, again, we obtain most of our redistricting submissions about 2 years after the census, so about 2002.

We have tried to faithfully employ, and we have, I submit, faithfully employed the standard enunciated by *Georgia* v. *Ashcroft*, but the totality of the circumstances standard involves a much more nuanced approach to retrogression. It requires not only looking at minority-controlled districts, but also influence districts where minorities may not control the outcome of elections but influence the outcome of elections. And the totality of the circumstances approach is one that is in many respects more nuanced and more difficult to administer because it requires a greater look at everything that is going on rather than focused areas.

Senator DEWINE. You do not have a specific example you could cite for me?

Mr. KIM. With respect to a problem caused by *Georgia* v. *Ashcroft*, Senator?

Senator DEWINE. Problem or a case where you could show me the actual difference in the application of the law.

Mr. KIM. No, Senator, I do not—

Senator DEWINE. Pre-*Georgia* v. *Ashcroft*. In other words, compare and contrast how you would approach it. Or if you cannot do that, give me a hypothetical.

Mr. KIM. Sure.

Senator DEWINE. Make up a hypothetical for me.

Mr. KIM. Absolutely. Well, Senator, I mean, the facts of *Georgia* v. *Ashcroft* themselves would probably be the best hypothetical because that was a plan to which we objected, and that was a plan—

Senator DEWINE. What were the facts?

Mr. KIM. Well, Senator, the facts were—and I am not going to do justice to the facts right now, but the facts generally were that there was a decrease in the number of minority citizens of voting age population in, I believe, three legislative districts in the State of Georgia. And the benchmark plan had approximately a 55- to 60-percent level of minority populations in those covered districts, and the plan that Georgia submitted under Section 5 reduced that minority population in, I believe, those three districts to closer to 50 percent, making those districts much more of a toss-up.

The United States interposed an objection to those districts, and I believe it was three, but do not quote me on that, and I will get back to you certainly with more specific and finely honed details.

The Supreme Court ruled that that legislative judgment was appropriate under Section 5 of the Voting Rights Act and not retrogressive because the decreases of minority voting strength in those districts was compensated by increases in minority voting strength in other districts. Those districts where minority strength in-

creased could not be characterized and were not characterized as majority-minority districts but sufficiently increased the minority voting strength in those districts so it transformed them into what was called influence districts. And based upon that totality of the circumstances, the Supreme Court ruled that under Section 5 that was a legitimate decision and choice for the States to make. And consistent with our previous practices prior to *Georgia* v. *Ashcroft*, we thought that that was retrogressive under pre-*Georgia* v. *Ashcroft* law.

Senator DEWINE. Thank you very much.

Senator Cornyn?

Senator CORNYN. Mr. Kim, let me ask you, first of all, you said the record today in terms of the Voting Rights Act is one that demonstrates overwhelming compliance with the law. Is that correct?

Mr. KIM. Yes, sir.

Senator CORNYN. Let me ask you if you agree with this following statement: And today in the American South—in 1965, there were less than 100 elected black officials. Today there are several thousand. So there has been a transformation. Georgia is a different State. It is a different political climate. It is a different political environment. It is a different world that we live in, really. The State is not the same State it was. It is not the same State it was in 1965 or in 1975 or even 1980 or 1990. We have changed. We have come a great distance. It is not just in Georgia but in the American South. I think people are preparing to lay down the burden of race.

Do you agree with that statement?

Mr. KIM. Senator, I have no reason to disagree with that statement, and I certainly agree that the Voting Rights Act has effected a great change, and America has changed much over the past 40 years.

Senator CORNYN. That statement is part of sworn deposition testimony, as you know—you probably recognize it—in *Georgia* v. *Ashcroft* by Representative John Lewis.

I want to ask, in light of this record of overwhelming compliance, first of all, I would ask, Mr. Chairman, to make a part of the record at the end of my questions and Mr. Kim's answers a document that I believe is part of the DOJ testimony entitled "Administrative Review of Voting Changes from 1965 to 2006."

Senator DEWINE. Without objection.

Senator CORNYN. Mr. Kim, this document appears to demonstrate that, first of all, as you pointed out, that the number of objections to preclearance requests by those jurisdictions covered by Section 5 have dropped dramatically. I think you mentioned two-tenths of 1 percent?

Mr. KIM. Yes, sir. That is correct.

Senator CORNYN. And, in fact, in 2006, according to this document, there was one out of 4,094 submitted; out of 4,734 in 2006, there was one; the previous year, 5,211, and there were three objections. Is that indicative of what you have testified to earlier, a record of overwhelming compliance obviating the necessity of the Department objecting to those plans that are submitted for preclearance?

Mr. KIM. Yes, Senator. There is almost near universal compliance with the Voting Rights Act, in Section 5 of the Voting Rights Act specifically.

Senator CORNYN. And as you know, the preclearance requirements under Section 5 are regarded by some of the political subdivisions that are covered as expensive and time-consuming and to some extent an onerous requirement. They cover only, I guess, nine States and parts of other States, but the vast majority of the United States is not covered at all by those preclearance requirements.

Could you cite for the Committee empirical evidence that would indicate that the outcomes, in terms of protection of minority voting rights, are significantly different in those sections that are covered versus those that are not covered?

Mr. KIM. Senator, I am afraid I do not have a record with respect to non-covered jurisdictions in the context of Section 5 because, of course, we do not receive submissions under Section 5 from non-covered jurisdictions. Certainly you are correct to note that the Voting Rights Act has a trigger formula for coverage, which turns on various factors that existed in 1964, 1968, and 1972, leading to approximately 17 States that are covered either entirely or in part.

I would also note that there is a bailout mechanism employed in the Act that allows covered jurisdictions to bail out of coverage under Section 5.

Senator CORNYN. You are certainly correct the bailout provisions exist, but we are being asked to reauthorize expiring provisions, and so I would submit that is a slightly different issue. But when I ask for the empirical evidence and you say that you do not have it for those areas that are not covered, is that because you are of the opinion that such empirical evidence does not exist or you just do not happen to have it?

Mr. KIM. Senator, I just do not have the evidence. I mean, certainly I have statistics with regard to the number of submissions that we receive, the number of submissions that we evaluate, and the number of submissions that we raise objections to under Section 5. But that data only exists because of history and because of Congress and the laws that it has passed with respect to the covered jurisdictions.

Senator CORNYN. Would you agree with me that that is an important question for Congress to consider in determining how to go about reauthorizing the Voting Rights Act, particularly the preclearance requirements, whether, in fact, that Federal intervention into the practices of local and State political subdivisions covered by the preclearance actually produces better outcomes in those areas than it would under the Voting Rights Act generally?

Mr. KIM. Senator, certainly the administration supports reauthorization of the Voting Rights Act, and it is Congress' role, and I think duty in many respects, to make sure that it is a policy decision that is consistent with the goals of Congress and the facts on the ground. And I think that a wide-ranging inquiry is something that Congress has always undertaken, and I know that the record is still open. I know that these hearings are still ongoing, and certainly we will act at the Department of Justice consistent with what Congress legislates.

Senator CORNYN. Thank you.

Senator DEWINE. Senator Kennedy?

Senator KENNEDY. Just a question to followup on this. Could you relate then—Section 2, which covers the country—how that would relate to these areas that are not covered under Section 5, wouldn't that still be available in those jurisdictions?

Mr. KIM. Yes, Senator. Section 2 has nationwide application. It always has had nationwide application. It does not expire, and we certainly enforce the provisions of Section 2 where the cases present themselves.

Senator KENNEDY. Is it your sense from looking at Section 2, in looking at these other areas that are not covered that the Senator mentions, is there anything you want to tell us about whether there are Section 2 cases in those areas? Are there a good number in some areas? Do you form any opinion about the number of Section 2 cases, that maybe there should be greater coverage?

Mr. KIM. Senator, I can give you some information with regard to the number of Section 2 cases that we have brought in the past 10 years or so. I will say that with respect to the Section 2 cases the Department of Justice has brought in the past 10 years, more of them have been brought in non-covered jurisdictions than covered jurisdictions, which suggests many things, but it certainly could suggest that the preclearance mechanisms in Section 5 do have an effect in the covered jurisdictions in tamping down abuses of the Voting Rights Act.

Senator KENNEDY. I think if you can provide, you know, just some information on that, it would be helpful.

Mr. KIM. We would be happy to do so, Senator.

Senator KENNEDY. Thank you very much.

Thank you, Mr. Chairman.

Senator DEWINE. Senator Hatch?

Senator HATCH. Well, Mr. Kim, we are so proud to have you back here again. We appreciate the work you are doing down there. Sorry I have not been able to get here before now, but I just want everybody to know that I have considered the Voting Rights Act the most important civil rights bill in history, and there are a lot of important bills. So we are very concerned about making sure that we follow through and do what is right here. But I appreciate you being here.

Is there anybody else who wants to question?

Senator DEWINE. It is down to you, Senator.

Senator HATCH. Well, then we are going to let you go. How is that?

[Laughter.]

Mr. KIM. Thank you, Senator Hatch. It is always good to see you.

Senator HATCH. Well, thank you. Good to see you. We are proud of you.

Senator DEWINE. Mr. Kim, thank you very much. We appreciate your testimony and look forward to continuing to work with you.

Mr. KIM. Thank you, Mr. Chairman.

Senator CORNYN. Mr. Chairman I have a letter written by the Department of Justice Office of Legislative Affairs dated April 12, 2006, to Hon. F. James Sensenbrenner, Chairman of the Committee on the Judiciary. This letter speaks for itself, but it address-

es the Department's response to Chairman Sensenbrenner's request for those cases where the Department has been either admonished or been required to pay attorney's fees in connection with Section 5 of the Voting Rights Act. I would ask unanimous consent that it be made part of the record.

Senator DEWINE. That will be made a part of the record.

Senator CORNYN. Thank you.

Senator DEWINE. Let me invite our second panel to start coming up right now, and I will begin to introduce all of you.

Robert McDuff is a civil rights and criminal defense attorney practicing in Jackson, Mississippi. He is currently Vice Chair of the Board of Directors of the Mississippi Center for Justice and serves on the Board of Lawyers' Committee for Civil Rights Under Law. Prior to opening his own practice, in 1992 he was a faculty member of the University of Mississippi Law School.

Gregory Coleman is a partner in the Litigation Department. He has an appellate litigation practice in a variety of areas and has argued and won four cases before the U.S. Supreme Court. He previously served as the Solicitor General for the State of Texas from 1999 to the year 2001.

Natalie Landreth is a staff attorney for the Native American Rights Fund. Ms. Landreth has worked with the Native American Rights Fund since July 2003 and currently practices entirely in the area of Federal and State American Indian and Alaska Native Law. Most recently, she authored a report entitled "Voting Rights in Alaska 1982–2006." Prior to joining the Native American Rights Fund, she worked in the first Office of Tribal Justice in the United States Department of Justice.

Frank Strickland is a partner in the Atlanta law firm of Strickland Brockington Lewis and a regular speaker on the topic of election law. During the 1990's, he served as redistricting counsel to the Georgia Republican Party and represented two voters in *Jones* v. *Miller*, the 1992 case arising from Georgia's 1991 redistricting. He has been the attorney on a number of other high-profile election cases, as well.

Juan Cartagena is a civil rights attorney who serves as a general counsel at the Community Service Society of New York, where he litigates voting rights cases on behalf of poor communities. He has held previous positions with the Puerto Rican Legal Defense and Education Fund and was the Commonwealth of Puerto Rico's Department of Puerto Rican Community Affairs. Since 1991, he has represented Latino and African-American communities in voting rights litigation in a number of States, including Pennsylvania, New York, Illinois, New Jersey, and New Hampshire. He also currently serves as co-chair of the New York Voting Rights Consortium, a collection of major legal defense funds that protects the voting rights of racial and language minorities.

We welcome all of you here today. We will start on my right. Mr. Cartagena, thank you for joining us. You are first.

STATEMENT OF JUAN CARTAGENA, GENERAL COUNSEL, COMMUNITY SERVICE SOCIETY, NEW YORK, NEW YORK

Mr. CARTAGENA. Thank you, Mr. Chairman, members of the Committee. Thank you for the invitation to appear before this dis-

tinguished Committee and testify on S. 2703, the Voting Rights Act Reauthorization and Amendments Act of 2006. In particular, I want to focus on the provisions that provide for language assistance for American citizens who speak English as a second language. I have been a voting rights attorney since 1981 who has used the promises of equal opportunity and full political access established in the VRA to assist racial and language minorities in a number of States.

The Community Service Society, where I work, is an independent, nonprofit organization that for more than 160 years has engaged in social science research, advocacy, policy analysis, direct service, and volunteerism to address the problems of poverty and strengthen community life for all. Since 1989, we have used the Voting Rights Act and other legal norms to benefit these most marginalized communities by ensuring full and fair representation, especially of African-American and Latino voters.

I will limit my remarks this morning in light of previous work that I have submitted to the record on the reauthorization debate before the House Subcommittee on the Constitution as it considered the reauthorization of the Voting Rights Act. I have attached those documents to my statement as appendices. These include the testimony I gave in November, which highlighted the reauthorization of Section 203 of the Voting Rights Act in New York City as well as in New Jersey, with a special emphasis on the voting rights of Puerto Rican voters; a report that I drafted called "Voting Rights in New York 1982–2006" for the Leadership Conference on Civil Rights, which summarizes the state of compliance with the three expiring provisions of the VRA in New York; and an article I drafted for the National Black Law Journal at Columbia Law School, "Latinos and Section 5: Beyond Black and White," which addresses important issues for Puerto Rican voters under Section 4(e).

I just want to emphasize a few points for you.

One, we applaud the bipartisan efforts that this Congress has used to address the critical issues of political participation for racial and language minorities. The VRA has consistently received bipartisan support since its inception and its amendments, and we welcome the manner in which these important debates have been held.

Two, the right to vote, the very right that is "preservative of all rights," is just too important a right to delay, impede, or otherwise fail to make fully and meaningfully available to American citizens who speak English as a second language. Regardless of the concerns that some opponents of the VRARA may have about the primacy of English in our country, democracy is too precious and voting is too fundamental to condition on full mastery of English for American citizens in certain areas of the country who have yet to master English. In saying this, we echo the U.S. Supreme Court in *Katzenbach* v. *Morgan*, which upheld the language assistance provisions of Section 4(e) for Puerto Rican voters in the original Act of 1965 as a valid exercise of Congressional enforcement powers under the 14th and 15th Amendments by noting that Congress may have questioned at that time "whether the denial of a right deemed so precious and fundamental in our society was a necessary or appropriate means of encouraging persons to learn

English, or of furthering the goal of an intelligent exercise of the franchise."

Three, we cannot emphasize enough that the rights we are advocating for today this morning are the rights of citizens of this country to full and fair access to the franchise. With the equally important and pressing matters before the Senate regarding immigration policy, we cannot conflate these issues. The Voting Rights Act Reauthorization and Amendments Act, as currently proposed, addresses the rights of American citizens who speak English as a second language. Recent research by the Arizona State University has documented that three-quarters of all voters who depend on language assistance are native-born. Section 203 of the Act was created to address concerns of access to the ballot and under significant educational disparities as highlighted by higher than average illiteracy rates for certain language minorities in the U.S. More severe forms of exclusion for language minority citizens led to the adoption of Section 4(f)(4) in 1975. Both provisions still operate today to benefit native-born citizens. Puerto Rican voters would be a case in point: All of them are U.S. citizens by operation of law, significant numbers of them are either monolingual in Spanish on the island or because of educational disparities in the U.S. have still not mastered English proficiently here, and circular migration patterns between both of those points—the U.S. and Puerto Rico—are still present today.

Four, the major factors which led to Sections 203 and 4(f)(4) are still present today for Latino citizens. Educational Attainment still lags far behind white or black counterparts. Illiteracy rates are far higher than national averages; 75 percent, compared to 18 percent nationwide, speak a language other than English at home, and Latino registration rates are lower than either black or white registration rates nationally.

Finally, Section 203 is self-maintaining. It adjusts itself depending on changing demographic patterns, even more so with the amendments in the proposed Act for using ACS data in 5-year cycles, and contains a bailout provision that is hinged on improving illiteracy rates for these language minority groups. All of it demonstrates, consistent with *Katzenbach* v. *Morgan*, that it is a proper exercise of Congressional authority in furtherance of Congress' enforcement powers under the 14th and 15th Amendments where Congressional power, I would submit, is at its zenith, even under the current case law of the U.S. Supreme Court.

I will gladly accept any questions at the appropriate time. Thank you very much.

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

Senator DEWINE. Thank you very much.

Mr. Strickland?

STATEMENT OF FRANK B. STRICKLAND, STRICKLAND BROCKINGTON LEWIS, LLP, ATLANTA, GEORGIA

Mr. Strickland. Good morning, Mr. Chairman and members of the Committee, and thank you for the opportunity to provide testimony regarding the important issue of the renewal of certain provisions of the Voting Rights Act. Although I have been involved in

a number of redistricting cases, as you mentioned in my resume, I want to talk to you today in a different capacity, and I am not here in an official capacity, but I am one of five members of the Fulton County Board of Registration and Elections, which is a bipartisan board in Fulton County which has general supervision of all voter registration and election processes in Georgia's largest county.

First, I would raise a question: Should Georgia continue to be a covered jurisdiction? The election results in Georgia over the years, not only in Fulton County but statewide, suggest that the answer is no. In 1969, there were 30 African-American office holders, 14 of whom served in the legislature. By 2001, this number had increased to 611. And the makeup of Georgia's Congressional delegation is even more revealing. Four of 13 Members of Congress are African-American, and that share of the Georgia House seats, 31 percent, exceeds the African-American population in the State. And at the State level, there is a significant number of African-American elected officials, 9 of 34, including our Attorney General, and members of the Supreme Court and court of appeals.

The experience in Fulton County is similar. The Board of Commissioners of Fulton County has a 4–3 African-American majority. The mayor of Atlanta has been an African-American since 1972. The Fulton County legislative delegation to the Georgia General Assembly includes a majority of African-American representatives.

In addition, an examination of the people who run the elections in Fulton County is illuminating. Approximately 95 percent of the Election Department staff is African-American. In primary and general elections, more than half of the paid poll workers in the 356 voting precincts in Fulton County are African-American.

Some might suggest that rather than trying to escape coverage in renewal legislation, Georgia, and particularly Fulton County, should pursue the bailout mechanism under Section 4. That section allows a jurisdiction to bail out of the preclearance requirements of the Act if it has had no objections interposed by the Justice Department for a period of 10 years; in other words, it has to have a perfect record. That might appear to be the obvious choice for Fulton County, but there is a catch. Here is how it works. Because there are 11 cities within Fulton County, if any one of those cities has had a single objection interposed by the Department during the 10-year period, Fulton County is automatically prevented from seeking to bail out of the preclearance requirements, even if its own 10-year record is flawless.

A recent example that stopped Fulton County from pursuing the bailout provision resulted from the failure of one of those cities to obtain timely preclearance of one or more annexations into the city in an area where the African-American population is probably less than 5 percent. This means that Fulton County has to start over and achieve a new 10-year record of perfection in its own preclearance procedures and hope that all the cities in the county will also achieve perfection. There has got to be a better way to do that, and I see no reason why Fulton County's perfect record should not stand alone and that the time period for compliance should not be shortened.

Even if these jurisdictions remain covered, Congress should still examine what changes should remain covered. As another example, the Fulton County Election Board spends considerable staff and board time reviewing and approving simple changes in the location of a polling place from one public building to another. In many instances, the polling place is in a church and is being moved to another church because the current location is no longer available for use as a polling place.

Similarly, the simple task of setting a date for a special election must also be precleared, despite the fact that the requirements for special elections are a matter of Georgia law which cannot be varied by any action of the Election Board.

I think I am about to run out of time, so I will conclude by saying thank you for your consideration of my comments, and I would ask that my written testimony be made a part of the record and I be allowed to revise and extend my remarks where appropriate.

Thank you very much.

Senator DEWINE. It will be made a part of the record.

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

Senator DEWINE. Ms. Landreth?

STATEMENT OF NATALIE A. LANDRETH, STAFF ATTORNEY, NATIVE AMERICAN RIGHTS FUND, ANCHORAGE, ALASKA

Ms. LANDRETH. Good morning. I would like to thank the Committee for allowing me to speak today. It is a true honor to be here. My name is Natalie Landreth, and I am a staff attorney at the Native American Rights Fund in Anchorage. I am an enrolled member of the Chickasaw Nation of Oklahoma and a descendent of the Imatobby family, who survived the Trail of Tears.

I am here to discuss the impact of the Voting Rights Act in Alaska and the need for reauthorization and enforcement of the Act. Alaska is subject to Section 4(f)(4) and 203—the minority language provisions—as well as Section 5, the preclearance requirement. Under the auspices of the Lawyers Committee for Civil Rights and the Native American Rights Fund, I prepared a report detailing the Alaska Native experience under the Act. The evidence gathered in preparation of the report shows that there is still a very real need for minority language assistance and Federal oversight in the form of preclearance. To our surprise, however, we also discovered, one, that, with all due respect to the State of Alaska, it has been out of compliance with the VRA for more than 30 years and, two, that the Act has largely not been enforced in Alaska.

First, however, I must give you a small picture of the Alaska Native population to enable you to understand the reality on the ground. It is naturally very different than the previous two scenarios described. Alaska has the single largest indigenous population in the United States at 19 percent. Most of these people reside in rural Alaska, which is largely inaccessible by road; all supplies must be flown in. It consists of about 200 Native villages with no services, hotels, roads of any kind. Only 70 to 75 percent of these homes even have sanitation systems, and the rest use well water. They live off subsistence, literally fishing and hunting off the land. In places like this, a ballot box often has to move up and

down the river on Election Day in order to hit all of the polling places, and you have half an hour to vote. In November, this is no mean feat. On Election Day in 2004, 24 of these villages did not even have polling places.

Today, an Alaska Native is likely to be unemployed—fewer than 50 percent have jobs—and when he does get a job, he will earn just 50 to 60 percent of what non-Natives earn in Alaska. As a result, they are 3 times more likely than other Alaskans to be poor. They also have the lowest level of education. At the time the VRA was extended to Alaska in 1975, only 2,400 Natives had graduated high school at all. This is incredibly important because this is now your elder population that are having a very hard time understanding the English ballot.

Seventy-five percent of all Alaska Natives have now graduated from high school. There have been gains, but at the same time, our dropout rate is actually increasing. The 2005 standardized test results reveal that 80.5 percent of the new Alaska Native voters, graduating seniors, did not pass reading comprehension in English—80.5 percent.

This enduring but disadvantaged population speaks about 20 different indigenous languages. Yet it is a well-known fact that Alaska does not provide ballots or election materials in any languages other than English and Tagalog out in Kodiak Island. Yet all of Alaska is covered by 4(f)(4), and 14 census areas are also covered by 203. The Native population still meets or exceeds all the population and illiteracy benchmarks set forth in the VRA. Yet Alaska provides nothing more than intermittent oral assistance upon request.

In addition to this clear noncompliance with the letter of the law, we know there is a real need for language assistance. In the Bethel census area, a Yup'ik-speaking region, 21 percent of the population is limited English proficient, and there are 17 villages in which Yup'ik is the only language that is spoken. It is one of the oldest written languages in North America. Signs are Yup'ik, school is taught in Yup'ik, and the Pledge of Allegiance is recited in Yup'ik. They consider it their first language.

We now know also that the English ballot is interfering with the exercise of the right to vote. For example, in 1995, 18 non-English-speaking Inupiat sued the city of Barrow claiming that the absence of written materials in Inupiaq and the absence of a standardized oral translation led them to vote the wrong way. A class of elders wanted to vote to institute an alcohol ban to protect the children being born in the village, and because they did not understand a single-sentence ballot measure in English, they accidentally voted to repeal that measure.

Alaska is also subject to preclearance, and there has only been one objection in Alaska's history. But it is hard to overstate the importance of that objection.

While the Alaska Supreme Court approved the redistricting plan put together after the 1990 Census, the astute staff of the Department of Justice caught a retrogressive district called District 36 that showed evidence in racially polarized voting that actually reduced the Native voting-age population. What the court had not objected to and what would have been permissible under Alaska was

only prevented by the intervention of the DOJ. Without it, Alaska may have been subject to retrogressive policies throughout the 1990's until the next census.

I see that I have, unfortunately, run out of time, so I would like to—I apologize. I would like to submit the entire text of my comments for the record, if I may.

[The prepared statement of Ms. Landreth appears as submissions for the record.]

Senator DEWINE. Thank you very much.

Mr. Coleman?

STATEMENT OF GREGORY S. COLEMAN, WEIL GOTSHALL AND MANGES, AUSTIN, TEXAS

Mr. COLEMAN. Thank you, Mr. Chairman. I appreciate the opportunity to come and visit with the Committee today. As I noted in my written remarks, I would like to address the issue of the reauthorization of the preclearance provisions of Section 5. I believe that preclearance should not be reauthorized. I believe that it is unnecessary, unfair and that it would probably be unconstitutional.

With respect to the necessity of Section 5, there is a lot of data that has been put before the Congress, both in the hearings on the House side and now on this side. But that data, in my view, does not amount to a justification for the reauthorization of Section 5. It is largely anecdotal. It does not establish a need for preclearance provisions at all, and it certainly does not establish a need for preclearance provisions in the States only and political subdivisions that have historically been subjected to preclearance. This is not 1965. This is not 1975.

The bill that has been introduced notes that the original problems that the Voting Rights Act sought to remedy have in fact largely been remedied and moves the focus toward, I think, what it calls secondary barriers. There are no findings in the record, and there cannot be any findings that those secondary barriers, to the extent that they really do exist, exist only in the jurisdictions that were pegged to be covered under Section 5 in the 1960's and 1970's.

Most of the significant litigation in the Voting Rights Act area in the past 10 years has been Shaw-based, suggesting a need to get rid of preclearance. An analogy that one might make is another very successful statute and that is the Americans with Disabilities Act. Enforcement of that Act has been very successful, and yet, Congress did not require every company, every city, every State to submit its building plans to the Department of Justice for review before they have been approved, but has relied on enforcement mechanisms. Those enforcement mechanisms have been extremely successful, and as noted by those who have testified today, as well as in prior hearings, Section 2 and other provisions of the Voting Rights Act have been extremely successful, and they remain a very potent force to remedy any voting rights issues that may exist today or that may come up in the future.

There is, as noted today by Mr. Kim, more Section 2 litigation outside the covered jurisdictions. Perhaps Congress might want to consider freeing all the covered jurisdictions from Section 5 and putting all of the remaining States and political subdivisions under

coverage for a period of time, so that they can remedy the problems that they appear to have.

It is also unfair—I note in my written remarks that the preclearance provisions, while very effective in the early years of the Voting Rights Act, have become largely rote and ineffective. In the tens of thousands of submissions in recent years, the objection rate has moved to where it has become infinitesimally small. Even among those objections, there are many that are withdrawn or that are simply not good objections, and ultimately shown to be so. But there is no case today when you have a team of lawyers that are essentially costing States and political subdivisions within those States tens or hundreds of millions of dollars in the preparation of Section 5 preclearance submissions, when you have an objection rate that is in the single digits per 10,000 submissions. That type of enforcement, I think, is costly and no longer effective.

The coverage formula, too, is not changing, and yet none of the evidence that is before the Congress contains any connection to the coverage formulas that the Congress initially put in place.

Finally, I would like to just say a word that the Supreme Court has increasingly recognized the federalism concerns that Section 5 implicates, and there is a strong possibility that if reauthorized, that Section 5 would very shortly be struck down as an unconstitutional exercise of Congress's power.

I am available for questions at the Committee's bidding.

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

Senator HATCH [presiding]. Thank you.

Mr. McDuff?

STATEMENT OF ROBERT B. MCDUFF, ATTORNEY, JACKSON, MISSISSIPPI

Mr. MCDUFF. Thank you, Mr. Chairman. As a native of Mississippi, who lives there and has spent most of his life there, and as a lawyer who has represented black voters in a number of voting rights cases in Mississippi and elsewhere, I want to urge you to renew Section 5, and I want to talk a little bit about the experience in Mississippi.

After the Civil War and the passage of the 14th and 15th Amendments, some progress was made in the racial integration of public life in the south, but when the Federal Government lost interest after Reconstruction, it was all nullified by actions like those taken at the Mississippi Constitutional Convention of 1890, and the south was plunged into decades of horrific racial discrimination. It was only after Congress passed the 1964 Civil Rights Act and the 1965 Voting Rights Act that the promise of those amendments began to be restored. But in Mississippi, as in some other States, Government officials continued to try to nullify and minimize the vote of black citizens, leading the Department of Justice to object to voting changes in Mississippi 169 times since the passage of the Act, 112 of those since the Act was reauthorized in 1982.

Now, Section 5 has led to a great deal of progress in Mississippi and elsewhere. In absolute numbers, Mississippi has the highest number of black elected officials among any of the 50 States. But

despite the fact that it also has the highest percentage of black population among the 50 States, no black citizen has been elected to office in a statewide election in Mississippi in the 20th century, and at every level of government, viewed from a statewide perspective, the percentage of black officeholders is lower than the black voting-age population percentage in the State, and the percentage of white officeholders is higher than the percentage of white voting-age population, and we continue to see disturbing signs of the destructive role that race plays in public life.

In the second most recent legislative redistricting process in Mississippi, the one in 1991 and 1992, the legislature defeated a proposed redistricting plan that would have increased the number of black majority districts with legislators repeatedly referring to it on the floor as the "black plan," and some privately calling it the "nigger plan," even though it was supported by a biracial coalition of 20 black legislators and 38 whites.

The legislature passed a plan that created fewer majority black districts than this proposal, but fortunately, the Department of Justice objected to it on racial purpose grounds, citing as part of the evidence these racial characterizations.

In 2001, the all-white city council of Kilmichael, Mississippi, canceled city elections 3 weeks before they were to be held, after new data showed the town's voting population had become majority black and after, for the first time in the city's history, a number of black citizens qualified to run for office. Fortunately, the Department of Justice objected to that cancellation.

In 2003, in the most recent statewide election in Mississippi, a 46-year-old black candidate for State treasurer, who had served as the State's Director of Finance Administration, who had a wealth of public finance and private sector experience, was defeated in an election marked by racially polarized voting by a 29-year-old white candidate, whose only experience was that he had worked as a mid-level bank employee, demonstrating that it is still difficult for a black person, no matter how qualified, to be elected to statewide office in Mississippi.

In 2004, a sitting white trial court judge, running against the only black supreme court justice in the State, used the slogan "one of us" when referring to himself, implying that there is a them, and his opponent is one of them, a throwback to a slogan condemned as a racial appeal 20 years earlier by a three-judge Federal District Court in Mississippi, when it was used by a white congressional candidate, who defeated a black candidate trying to become Mississippi's first black Member of Congress in the 20th century.

And finally, in 2005, a three-judge Federal District Court had to enjoin the city of McComb, Mississippi, from changing the qualification requirements and removing a black city council member without seeking preclearance of the change.

These examples show that, unfortunately, some of those in power still fall back on old ways and old prejudices. William Faulkner said "the past isn't dead, it isn't dead, it isn't even past." And certainly that is not always true. Some things have certainly changed and some of the past is in the past. But we have to recognize the echoes and the vestiges that still exist, and if the protections of section 5 are withdrawn, I think we will see some elected officials

changing the rules and changing the districts to take advantage of the racially polarized voting that still exists—this is not anecdotal, this is systemic—to diminish the racial integration that has been achieved in Government.

And so I join with many Mississippians, black and white, to urge you to renew the Voting Rights Act and help us build on the progress that has already been made.

Thank you.

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

Senator HATCH. Thank you.

Senator Cornyn, you were here before me. Would you care to start?

Senator CORNYN. Thank you, Mr. Chairman. I have a few questions.

I think at the outset of these hearings, members of the Committee on both sides of the aisle stated one of our goals is to pass a reauthorization of the Voting Rights Act that would be sustained, and congressional will sustained, in the face of any litigation that might reasonably be successful to overturn it. So it is for that reason I want to focus some of my comments on the preclearance requirements, and ask Mr. Coleman to start with, what has the Supreme Court said about how they will regard Section 5 preclearance requirements? In other words, what sort of burden is there on Congress to demonstrate the necessity for those preclearance requirements, which are admittedly intrusive, into local electoral affairs in those jurisdictions covered? What sort of burden is required on Congress?

Mr. COLEMAN. Well, the Supreme Court, in *South Carolina* v. *Katzenbach*, one of the earliest voting rights cases, upheld Section 5, and the Court did it so again on the *Rome* litigation.

In more recent years, in *Monterey County* v. *Lopez*, members of the Court began to recognize more the federalism concerns. Justice Thomas himself indicated that there was a strong likelihood that it was becoming unconstitutional.

Many scholars have spoken on this issue and have looked to the case of *City of Boerne* v. *Flores*, where the Court said, in the 14th Amendment context, that Congress, in acting, under Section 5 of the 14th Amendment, needs to ensure that its legislation is congruent and proportional to the problems that it seeks to fix. The Court has never specifically said that that would apply to Section 2 of the 15th Amendment, although in the early litigation over the Voting Rights Act in the *Katzenbach* v. *Morgan* case, the Court did rely strongly on the 14th Amendment.

In other courts, cases have suggested that the 14th and 15th Amendments would be considered together.

So the congruence and proportionality analysis that the Court set out suggests that there has to be a strong evidentiary link between the data that is presented and a very real and cognizable systemic violation of constitutional rights or threatened violation of those rights. I do not believe that the record before Congress today suggests that there continues to be a systemic violation or a threatened systemic violation of those rights.

Senator CORNYN. Mr. Coleman, when looking at the empirical evidence that does exist—and I hope we get that evidence in front of us so we can take a hard look at it and understand it better—are we talking about an all or nothing proposition, in other words, or will it be on the basis of individual political subdivisions that that analysis would have to be made, whether there is sufficient justification based on the evidence of maintaining the preclearance requirements in Section 5?

Mr. COLEMAN. Congress could, if it desired, make specific findings that relate to individual States or individual political subdivisions. Thus far, to my knowledge, there has been no attempt to do that. There has simply been a proposal to reauthorize the coverage as it exists and has existed since the 1970's.

Senator CORNYN. Mr. Strickland, you talked about the intrusiveness and the burdens on political subdivisions when it comes to the preclearance requirements, and then also about the bailout provision. Some might say, well, you have a bailout provision, so why shouldn't we just maintain the preclearance requirements? Those seem to me to be apples and oranges. But could you talk about the financial and other burdens on political subdivisions to comply with the preclearance requirements?

Mr. STRICKLAND. Well, the example that I gave in my testimony was a pretty simple process of changing a polling place from one location to another. It is essentially a ministerial function. It is not normally a public building. But what is required as a practical matter is election department staff has to produce a map of that area, and it has to locate the old polling place, the new polling place, and the election board will just get a sheaf of papers about—suppose they are changing a dozen or 15 or 20 polling places—we would just get a sheaf of papers that show Point A and Point B. There is never an issue about it, and to my knowledge—I served on the election board in the '70's and I am now serving again—I do not remember a single instance when there has ever been a problem with any of these, what I call ministerial functions, in relocating a polling place from one place to another.

So it seems to be an unnecessary consumption of time, energy and expense by the election department staff in complying with that aspect of preclearance.

Senator CORNYN. If I can ask just one final question of any member of the panel. Are any of you familiar with any studies or empirical evidence that indicates that there are significant differences and outcomes, in other words, of minority voting participation in those jurisdictions that are covered by the preclearance requirements of Section 5 versus those that are not?

Mr. MCDUFF. Senator, I am certainly not aware of any. I do not know that anyone has undertaken that sort of study, and I am not quite sure how one would do it. What I think we do know is that the formula that was created by Congress in 1965 and has been modified several times, has been repeatedly upheld by the Supreme Court as a constitutional exercise.

I do think that a record is being built, both in the House and here, about the problems that still exist in the jurisdictions that are presently covered.

Now, one, I guess, could attempt to build a similar record in other jurisdictions that are not covered. I do not know if anyone has tried to do that, but I think the more you expand the scope of Section 5, the more of a record you need to build, and the greater risk you take that it might be held unconstitutional.

Mr. COLEMAN. Very briefly, Senator. I believe the Gaddie-Bullock studies that are in the record very systematically show that there are, in fact, no differences.

Senator CORNYN. Anyone else?

Mr. CARTAGENA. Yes. If I may, Senator. The effectiveness of Section 5 cannot only be measured by the number of objections issued by the Department of Justice. There is a significant deterrent effect, a prophylactic effect upon these jurisdictions that are covered by Section 5. In many ways, we really cannot speak about Section 5 without also speaking about what are called more information request letters, MIRs, that are issued by the Department of Justice to numerous jurisdictions. MIRs get responded to. They basically are simply, do you have more information that allows us to make a determination? Some States withdraw the changes. Some States supersede them. Some States ignore it. In all those three cases I just cited, it demonstrates the effectiveness, as well, of Section 5 objections above and beyond the number of objections issued.

I cited a study by Fraga and Ocampo out of Stanford University in my materials appended to my statement, in which they have researched the MIRs that were issued in 1989 through 2004. And their study demonstrates that it doubles the amount of objections—excuse me—submissions that would have otherwise received a denial of preclearance just because many jurisdictions withdraw the request upon receiving a more information request letter from the Department of Justice.

Ms. LANDRETH. Senator, I would like to add one thing to respond to some of the comments that were made that would hopefully also help answer your question. One of the aspects that has been discussed is the burdensome requirement of having to submit paperwork for preclearance for simple things such as a polling change. In Alaska, that is an incredibly big deal because, if you move a polling station in a community that does not have cars and operates by snow machines or walking in 10-below weather in November, you may actually disenfranchise an entire community.

We have had some of that situation in Anchorage, where they move polling places out of very poor places in Anchorage, and most of the folks could not get time off of work to go to the new polling station, so there are examples of even something like that that another jurisdiction with adequate transportation and adequate systems established would be very ministerial and seem unimportant. In Alaska, it is actually an incredibly important aspect of preclearance.

Senator HATCH. Senator Leahy.

Senator LEAHY. Thank you, Mr. Chairman.

Mr. McDuff, I had watched some of this before I came over here. You heard from the hearing yesterday, and others have said, that Section 5 is so successful we do not need it any longer. You practice in a covered jurisdiction. I would assume you have seen some significant progress in minority participation over the decades. If we

did away with Section 5, if that is no longer operational, does that really provide any kind of deterrent, or would it be your position that we should keep Section 5 as a deterrent?

Mr. MCDUFF. Yes. It does provide a tremendous deterrent. I cannot tell you how many times I have talked to legislators, city council members, lawyers in the State Attorney General's Office, or lawyers for localities who have really now internalized sort of the goals of Section 5, and who, when voting changes are being made, assess the impact on all groups, all racial groups, and reach out to all groups, to try to determine if a solution can be developed that satisfies everyone's concerns in light of the very deep racial fault line that still exists in the south and in other parts of the country due to the history of discrimination.

We have a persistence, I know in Mississippi, and I think in a number of other places, of racially polarized voting. I gave an example a minute ago that clearly the best qualified candidate for State treasurer in Mississippi lost as a result of racially polarized voting. That is a systemic problem that still exists.

And the problem is that if you withdraw the protection of Section 5, two things can happen. No. 1, the sorts of officials who canceled the elections in Kilmichael, Mississippi, when it looked like black candidates would be elected—those sorts of people will take advantage of the absence of those protections and will change the rules and will change the district lines.

Senator LEAHY. Conversely, is it a protection for those people who want to do what is right?

Mr. MCDUFF. Oh, yeah, exactly, because everyone knows that the law has to be satisfied and that retrogression is illegal, and it has become a part of people's thinking and of the process of local government to make sure that doesn't happen. I think this is—

Senator LEAHY. So you would not change the existing coverage formula requiring preclearance of changes?

Mr. MCDUFF. No, I wouldn't. I think it has worked very successfully, and I think there is still a need for it.

Senator LEAHY. Thank you.

Ms. Landreth, I listened to what you were saying about Alaska. A majority of the actions brought to enforce Section 203 have been in the last 3 years, 4 years; am I correct?

Ms. LANDRETH. In general we have had no enforcement actions under 203 in Alaska.

Senator LEAHY. Was there insufficient enforcement of Section 203 previously?

Ms. LANDRETH. It has never been complied with in Alaska, and it has never been enforced in Alaska, so, yes, in my opinion, there is insufficient enforcement of Section 203.

Senator LEAHY. So you wouldn't do away with it?

Ms. LANDRETH. Absolutely not. I think Alaska is the perfect example of a climate where people are discussing immigration, and I have seen in some articles, confusing the Voting Rights Act and the bilingual ballot with the Voting Rights Act. And the fact is that these are indigenous American citizens, who don't understand the English ballot to such a degree—and here is a perfect example—they didn't understand to such a degree that they actually voted for an English-only law in Alaska, that was then subsequently

struck down by our Supreme Court because they had no written translation, and the poll workers simply told them, "Just vote yes."

Senator LEAHY. I will go to you, Mr. Cartagena. How will the bill provision—before we get into the language—how about the bill's provision permitting recovery of expert witness fees? How does that allow the enforcement of the Voting Rights Act language assistance provisions?

Mr. CARTAGENA. It is a very important point, Senator.

Section 203 enforcement actions really have not, from what I can see in the case law, have not come to judgment. Many times these actions are settled well before judgment.

But we have—and the cases that I have worked on indicated to me to need either historians or other experts to allow us to present a full picture of both Section 203 noncompliance and potentially Section 2 violations. In those kind of situations, recovery of expert attorney fees—excuse me—expert fees in a successful action that does come to judgment, would be a very, very important tool to use. We are, as you can imagine, private attorneys general. The Department of Justice has done incredible work under Section 203 enforcement in the last several years. But there is so much work to do, and there is just too much noncompliance.

And the state of noncompliance is what it is, as I have indicated in the report, particularly like in New York and New Jersey, that we don't have the person power to get to all of these jurisdictions. The ability to collect expert fees would be an incredible assistance in that regard.

Senator LEAHY. And you would want to maintain the preclearance provisions of—

Mr. CARTAGENA. Yes, I do, and I think the preclearance provisions, Senator, are important on various levels. And I have indicated the deterrence value already to the panel. I also would indicate—and this is where I differ with Mr. Coleman—Section 5 is a model of the constitutional exercise of both the 14th and 15th Amendment power of the Congress, in large part because it is time limited, it is geographically focused, and because it has bailout provisions. All of those elements, I mean, where Mr. Coleman cited the *Lopez* case, I think I cited on my last footnote of my testimony, on page 285, that the Supreme Court noted that in short the Voting Rights Act, by its nature, intrudes on State sovereignty. The 15th Amendment permits this intrusion, however, and a holding today adds nothing of constitutional moment to the burdens the Act imposes, close quote. And it said that when it talked favorably about the constitutionality of Section 5.

Senator LEAHY. My time has expired. I have other questions, especially of Mr. Coleman and others, and I will submit those for the record.

I understand Senator Biden is on his way over here.

Senator CORNYN [presiding]. Thank you, Senator Leahy.

I just have a very few more questions myself. Just out of curiosity, Mr. McDuff, you indicated that clearly the best candidate for State treasurer lost in Mississippi. That was an African-American candidate, I take it. What is the percentage of black voters in Mississippi?

Mr. MCDUFF. The black—

Senator CORNYN. At the time of that election.

Mr. MCDUFF. The black voting age population, under the 2000 Census, is 33 percent.

Senator CORNYN. Was that candidate a Democrat, or Republican, insurance Independent?

Mr. MCDUFF. He was a Democrat. He did lose. There was another white Democrat running for an open seat on a down-ticket race, the Attorney General, who won with 66 percent of the vote. So this was not a situation where Republicans swept all statewide seats during the election.

Senator CORNYN. That was Michael Moore?

Mr. MCDUFF. It was actually his successor, Jim Hood, right.

Senator CORNYN. His successor, all right.

Mr. MCDUFF. Mike Moore had retired at the end of his prior term.

Senator CORNYN. OK. Now, the Governor and the two United States Senators from Mississippi are Republicans, are they not?

Mr. MCDUFF. That's true.

Senator CORNYN. I just wanted to probe a little bit about your confidence level that this candidate lost because he was an African-American, when 31 percent of the voting population is African-American, and when other high-level statewide officials elected are Republicans, how can you state with such confidence that that demonstrates the nature of polarized voting, or that this candidate lost because he was an African-American?

Mr. MCDUFF. The polarized voting is clear from some statistics I have set out in my written testimony. Of the 25 majority black counties of Mississippi, Mr. Anderson, the 46-year-old black candidate who had this history of public finance and private sector experience, won 24 of the 25. Of the majority white counties, he won 18 and lost 39. It was very clear that he was treated differently in white areas as compared to black areas. Again, it was not a Republican sweep. In fact, most of the statewide offices were won by Democrats that year, in 2003. The Governor was Republican. I believe every other—the Lieutenant Governor was Republican. I believe every other down-ticket race was won by a Democrat.

But here is what is important, to me. The treasurer's office and the Attorney General's office were both open seats. In the Attorney General's race, the white candidate won with nearly two-thirds of the vote, in a down-ticket ballot with an open seat. The black candidate, 46-years-old with a wealth of experience, lost to a 29-year-old white candidate who had very little experience. In the Attorney General's race, the white Democrat won. In the treasurer's race the white Democrat lost. I have no doubt in my mind that if the two treasurer candidates had been of the same race, Gary Anderson, the 46-year-old Democrat with a wealth of experience, would have won over the 29-year-old candidate who had no relevant experience.

Senator CORNYN. I do not question the sincerity of your statement. I just would note from my experience—and I think shared by other people who run for statewide office—the elections are usually multifactorial and not—it is hard, even though sometimes people tend to point to a single cause, it is hard I think to justify it.

Mr. MCDUFF. And I don't disagree with the multiplicity factors—

Senator CORNYN. Since my time is limited—

Mr. MCDUFF. I'm sorry.

Senator CORNYN.—let me, please, go to ask one other question. This has to do with the legal standard. Mr. Cartagena made I think a good point talking about the legal standard that has been applied, and Mr. Coleman has talked about that too, for maintaining the preclearance requirements in those jurisdictions that are covered. But I would like to know—and maybe we will start with you, Mr. Coleman—in terms of the ultimate protection for minority voting rights, what additional protections, if any, are provided by the preclearance requirements under Section 5? In other words, if a lawsuit is filed by the Department of Justice for violating the Voting Rights Act, will they look to the standard vote in Section 2 and Section 5, or is there somehow, are minorities disadvantaged in those areas where the preclearance requirement no longer exists?

Mr. COLEMAN. A Section 5 lawsuit would largely simply determine whether he should have precleared something. If the U.S. is filing a lawsuit alleging a violation of voting rights, it would ordinarily be brought under a substantive provision, Section 2 or Section 203 that has been talked about. So that the Section 5 litigation tends to be really very little of the law suits given the Department's lack of recent activity in the Section 5 area. So those lawsuits would generally be under the substantive provisions. The Department of Justice has been active in those areas. Private lawyers have been very active in those areas. In my view, Section 5 adds very little to the mix.

Ms. Landreth has talked at length about violations that continue to exist in Alaska. My understanding is the Department of Justice hasn't interposed an objection in Alaska since 1994 or something like that. There are bad people, but by and large, the covered jurisdictions are in compliance as much as or more than jurisdictions who are not covered under the provision. At this day and age there is simply no added protection or use that comes from the continuation of Section 5.

Senator CORNYN. Ms. Landreth, I thought you gave a good sort of an example of how different parts of the country perhaps should be regarded differently based on geography and history and experience, as opposed to what Congress is especially good at as the one-size-fits-all, but I thought the point you made was an interesting one.

If, as Mr. Coleman says, that there have not been objections interposed in Alaska by the Justice Department, can you explain the lack of private litigation or other litigation involving the sorts of violations that you have alleged?

Ms. LANDRETH. I am glad that you asked that question, because that is what sticks out like a sore thumb to us as well. I have been practicing in Alaska for only a few years. There has only been one case brought about Section 203 violations. It was settled, so there is no written decision. It is only available at the clerk's office. But it is indicative of other situations that have happened. In a situation where almost half the children are born with fetal alcohol spectrum disorder, the elders tried to pass a ballot measure to ban alcohol in the village, and then the "young 'uns", who didn't want

them to do that, would translate the ballot for them, conveniently telling them to vote against it, and, of course, defeat their own ability to participate in their own democracy.

And one of the interesting aspects of that—it is unfortunate there is no written decision—but we have found, when I tell other folks in Alaska this story, other villages have said, that happened to us too. Kasigluk, Akiachak, Akiak, all those communities had the same issue, and people have not brought enforcement. I think—

Senator CORNYN. Why not?

Ms. LANDRETH. That is a very good question. I wish that I had the answer to that. One part of the answer to that question may be that although I won't claim that our study that we have recently done is comprehensive, it is the first of its kind to actually study what Alaska is doing versus what it was supposed to have been doing. I think this is the first time it has been widely known that Alaska has not complied with these aspects of the Act.

Senator CORNYN. And you say widely known. Is that because of the reports that you have recited to us here?

Ms. LANDRETH. Yes. I believe our 50 or so page report has been distributed fairly widely, both within the State Government, to our representatives here in Congress, and to communities in rural Alaska, who—several of those that I vetted it through to make sure I was portraying their communities accurately, had no changes to make.

Senator CORNYN. Thank you.

I think the presentations have been very helpful to the Committee. Obviously, I am the only one left here, but that is not for lack of interest I assure you. The Senators and the Senate, usually we have to multi-task and have a lot of conflicting hearings and requirements, including floor activity.

What I would do is to say thanks to each of you for your testimony. Of course, your written testimony is going to be made a part of the record in addition to your oral comments.

Customarily we leave the record open for a period of time, for 1 week in this case, for members of the Committee who were not able to come to ask written questions, or of those who were able to come to followup with written questions. So I would just ask you when you get those, if you get those, please respond to those as promptly as you can so we can have a complete record for our further consideration.

Thank you very much, and the hearing is now adjourned.

[Whereupon, at 11:07 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

Answers by Juan Cartagena, General Counsel, Community Service Society To Written Questions From Members of the Senate Judiciary Committee 8 June 2006

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

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

Answer: I respectfully submit that the question before Congress presently is whether the record supports reauthorization in the states that are covered; comparisons between minorities and non-minorities in the covered jurisdictions are part of such an inquiry. Please see my answer to Question 2(a) and (b), below.

2. Currently, the Voting Rights Act identifies those jurisdictions subject to additional oversight by looking at voter turnout in the presidential elections of 1964, 1968, and 1972. Re-authorization of the Act in its current form would preserve these dates as the "triggers."

    a. Would you support updating the coverage formula to refer to the Presidential elections of 2000 and 2004, instead of 1964, 1968, and 1972? Why or why not?

    b. Would you support adding the Presidential election of 2000 and/or 2004 as well as any political subdivisions that have been subject to section 2 litigation say, in the last 5 years, to this formula in order to pick up jurisdictions that have begun discriminating since the 1970s? Why or why not?

Answer: The purpose of the hearings on the reauthorization of the VRA to date has been to focus, in part, on the covered jurisdictions: What has been the state of compliance with Section 5 in those jurisdictions? How will findings of voter discrimination under other provisions of the Act inform Congress about the full picture of compliance with VRA guarantees? And whether, given their history of voter discrimination, those jurisdictions should continue to be monitored in their implementation of new voting laws, policies and procedures. For Section 5 purposes, my focus in these hearings has been on only one covered jurisdiction: New York City – specifically the 3 counties covered for Section 5 and 2 counties additionally covered under Section 4(f)(4) of the VRA. These jurisdictions were covered as a result of the presidential elections of 1972. But more importantly, as I've outlined in my report "Voting Rights in New York, 1982-2006," New York continued to violate Section 5 (and other sections of the Act as well) in the relevant period covered. The history of voter discrimination in New York (outlined in Appendix E to my report) that led to its coverage for Section 5 purposes is premised on the discriminatory use of New York's English literacy requirement for voting and outlined in the seminal case, Katzenbach v. Morgan. Accordingly, that history, coupled with a documented record of noncompliance with VRA guarantees, supports our position that Section 5 coverage is still necessary in New York City.

Additionally, I would add that in previous amendments to the VRA, Congress has sought to add elections to the triggering formulae; not substitute one for another. The question posed herein about adding elections, presupposes that jurisdictions newly covered have a history of voter related discrimination or other indicia of voter discrimination that would warrant federal intervention. Such a record has not been developed to date for any jurisdiction that may fall under any newly devised triggering formula – but clearly exists for New York City, in my opinion.

In *City of Boerne v. Flores*, the Supreme Court indicated that Congress may not rely on data over forty years old as a basis for legislating under the Fourteenth and Fifteenth Amendments. *City of Boerne v. Flores*, 521 U.S. 507, 530 (1997). In striking down the Religious Freedom Restoration Act, the Court observed, "RFRA's legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry."

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

Answer: Please refer to my answer to Question 2 (a) and (b), above.

4. While I am still reviewing the record, it seems to me the arguments thus far focus mostly on anecdotes regarding specific covered jurisdictions – yet, for the period 1996 through 2005, the Department of Justice reviewed 54,090 Section 5 submissions and objected to 72, or 0.153 percent. What percentage of objections

below 0.153 do covered jurisdictions need to achieve before Congress can let Section 5 expire? Last year, according to DOJ data, there was only 1 objection out of 4734 submissions. Is that sufficient to warrant Section 5 coverage? Why or why not?

Answer: I am not entirely clear on what Senator Cornyn means by "anecdotes." If the Senator means that the record to date contains mostly stories about voting rights abuses that are unsubstantiated, I would strongly disagree. There is documented evidence of voter discrimination in the record that warrants reauthorization. The matters I cite in the report "Voting Rights in New York, 1982-2006" contain: a) specific findings of racially polarized voting in New York that work in conjunction with voting structures and procedures to fence out, or minimize the ability of racial and language minorities to have an equal opportunity to elect candidates of their choice (see, pp. 20–26 of the Report); b) detailed summaries of the denials of preclearance that stopped the implementation of specific, discriminatory measures proposed by New York authorities in the relevant time period (pp. 4-6); c) descriptions of specific cases that settled or resulted in findings of voter discrimination in related areas to the VRA (pp. 18-20); and d) numerous occasions where language assistance was not fully provided that speak to the issues of Section 4(f)(4) compliance .

In addition, and as I indicated to the Senator in my testimony on May 10, 2006, the effectiveness of the administrative preclearance provisions of Section 5 cannot be evaluated by merely looking at the number of objections issued compared to the number of submissions made. The administrative preclearance process also impedes the implementation of discriminatory measures under Section 5 through the use of More Information Requests from the Department of Justice in ways that exceed the number of objections interposed by the Attorney General. In the data analyzed by researchers from Stanford University (cited in my report on pp. 10-12), New York's three covered counties rank 6th out of 19 jurisdictions studied, with the highest number of changes prevented by the issuance of More Information Requests letters.

Finally, it is important to consider how Section 5 preclearance stops discriminatory measures outright in light of the magnitude of the number of voters protected in a jurisdiction as large as New York City. Section 5's prophylactic reach is enormous in the city this size. Thus, in 1994 when the Attorney General interposed an objection because the City failed to translate candidate's names and instructions on voter machines into the Chinese language, it protected language minority voters in the city with the largest number of Asian Americans in the country. In 1999 when the city sought to switch the method of counting votes cast in community school board elections, the Attorney General interposed an objection on behalf of all African-American, Latino, and Asian-American voter, numbering in the millions. Given the numbers at stake, and the preventative nature of the Section 5 process, the low number of objections demonstrates that the provision is effective – not that it's somehow obsolete, or unnecessary.

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

Answer: We would support an extension for the full 25 year period. The bailout provisions of the VRA are more than sufficient to allay any concerns about the constitutional reach of Congress in an area of fundamental rights under both the 14th and 15th Amendments. These bailout provisions are fully available to jurisdictions that can demonstrate full compliance and the need to avoid Section 5 review well in advance of the 25 year extension period. I would also add that the record before Congress in the 1982 VRA amendments fully supported a 25 year extension at that time and was cited favorably by the U.S. Supreme Court for that proposition. See, Borne v. Flores, 521 U.S. 507; Lopez v. Monterrey, 525 U.S. 266. The record before this Congress today, with hundreds of cases cited, voluminous documentation of voter discrimination, and specific evidence of voter discrimination, exceeds, in all likelihood, the record before Congress in 1982.

6. Putting aside the constitutional questions with regard to overturning *Georgia v. Ashcroft* – I want to better understand some of the practical implications.

   Assuming the new language in the re-authorization is adopted, would it be your view that even districts that are "influence" districts, with relatively low numbers of minority voters, should be protected under the plan? Why or why not?

Answer: The proper focus of Section 5 where redistricting is concerned, should be on minority opportunities to elect candidates of choice wherever those opportunities exist. This is the purpose of the VRA reauthorization proposal to address the interpretation of Section 5 in the Georgia v. Ashcroft case. The point at which the ability-to-elect exists varies and must be determined on a case-by-case, locality-by-locality basis. The levels of racially polarized voting are critical in this regard – and those too, by their nature, are case specific. The proposed language re-establishes the pre-Georgia v. Ashcroft standard that focused on reductions in the ability-to-elect opportunities and clarifies that, in the Section 5 context, jurisdictions will not be free to trade the ability-to-elect for influence – defined by the Supreme Court as something that less than ability to elect. In general, and again in the absence of case-specific conditions, the pre-Georgia v. Ashcroft standard proposed herein, and which I support, would not account for influence districts.

Ability-to-elect districts are critical to the Latino community at this time. Indeed, as I and other writers have noted, the bulk of the Georgia v. Ashcroft debate going on nationally fails to account for how the new Supreme Court interpretation affects Latino voting strength; indeed it appears to threaten the very gains that have been made over the years. See, Cartagena, J. "Latinos and Section 5 of the Voting Rights Act: Beyond Black and White," 18 National Black Law Journal (No. 2) 201 (2005)(appended to my testimony before this Committee.); Alvaro Bedoya, "The Unforseen Effects of Georgia v. Ashcroft on the Latino Community," 115 Yale Law Journal 2112 (2006). Latinos are rarely elected outside Latino-majority districts (where they clearly have an ability to elect), such that these districts are critical to their ability to integrate the halls of

legislative power, as opposed to the unsubstantiated and purported benefits to Latinos of coalitional or influence districts. Bedoya, A., supra, 115 Yale Law Journal at 2136. Moreover, Latinos residing in Section 5 covered jurisdictions, 11.2 million, are quickly approaching the number of African-Americans living in covered jurisdictions (12.7 million) signifying that Section 5 – its reauthorization and restoration – is not merely a black-white issue. Id. at 2121-2128, tbl. 1. This provides additional justification for the proposed section to restore Section 5 review to a pre-Georgia v. Ashcroft standard.

Questions from Senator Tom Coburn
VRA Hearing May 10, 2006

For Cartagena

1. Can you each give one example of a covered jurisdiction denying a minority the right to vote over the last ten years?

Answer: As the Senator is aware, vote denial is only one aspect of the protections guaranteed to racial and language minorities under the VRA. Vote dilution, and its multiple manifestations, has made up the bulk of voter discrimination examples in the only covered jurisdiction that I have studied in depth for my testimony: New York City. Nonetheless, there are significant numbers of vote denial examples in the covered counties of New York City when it comes to language assistance – or more accurately the failure to fully provide for language assistance in voting for language minority citizens. In particular, there are specific examples of how Asian American voters were turned away from the polls because of the failure to comply with the VRA and/or intimidation tactics on Election Day. I respectfully refer the Senator to pages 13-17 of my report "Voting Rights in New York, 1982-2006," (along with Appendix A of the report) which was attached to my testimony to this Committee.

2. Would you support creating a de minimis exception to pre-clearance to focus enforcement efforts where they are needed most? For example, if a polling place is moved less than one-tenth of a mile, DOJ will not review the move unless a voter complains.

Answer: I would not. Section 5 preclearance review is ultimately a fact intensive endeavor into numerous factors that may lead to a proper determination that the submitting jurisdiction has failed to carry its burden that a polling site change is free of discriminatory purpose or effect. In cities like New York with high residential segregation, buildings that house polling sites may very well have negative connotations associated with them, or are viewed in the minority community as places that cater only, or primarily, to whites. The multiple examples of racial violence in New York City, or police brutality, speak to areas of the City where minorities may not be welcomed. When those factors are present, changes in polling sites may result in unequal opportunities to participate – a circumstance that I would

never consider "de minimis." My own experience is that the Department of Justice will contact my office for information on changes – including polling site changes. When I cannot offer any further information about potential problems, they invariably preclear. Accordingly, the burden should still remain on the submitting authority – and that burden is not insurmountable.

Hearing on S.2703, the Voting Rights Acts Reauthorization and Amendments
Questions for Juan Cartagena
Submitted by Senator Patrick Leahy
May 17, 2006

1. You are the author of a report, "Voting Rights in New York, 1982-2006: A Report of RenewtheVRA.org," which was included in the record in the House of Representatives. What impact does enforcement of Section 203 of the Voting Rights Act have on language minority participation in elections? Can you point to specific examples from New York or elsewhere?

Answer: Enforcement of the guarantees of Section 203 have, only until recently, been relegated to a small cadre of private attorneys general who must attend to a host of multiple voter discrimination problems for citizens of this country for whom English is a second language. It is clear that enforcement and monitoring are critical to full compliance with the VRA. In New Jersey (cited in my testimony before the House in November 2005) enforcement was critical to establishing access to the voting booth during Election Day challenge procedures (in the Vargas v. Calabrese litigation) and to providing translated written materials for voters in Passaic County (as per the U.S. v. Passaic City litigation). The latter resulted in the deployment of 454 federal observers to ensure compliance and prevent intimidation against voters who merely sought access to materials and assistance in a language they could understand.

In New York enforcement of the language assistance guarantees resides in the leverage granted language minority citizens in the Section 5 preclearance process, in the request to the Attorney General for the deployment of federal observers, and in lawsuits alleging violations of either Section 203 of Section 4(f)(4) of the Act. Thus, the Attorney General interposed objections under Section 5 against efforts by New York City that: a) Inadequately provided language assistance to Chinese-American voters (Aug. 9, 1993); and b) Failed to translate candidate's names and machine operating instructions for the benefit of Chinese-American voters (May 13, 1994). Requests to the Attorney General to deploy federal observers for VRA compliance resulted in the deployment of 881 observers from 1985 to 2004 to monitor elections in Bronx, Kings, New York, Queens, and Suffolk counties. Specifically, observers were necessary to force compliance with Section 203 guarantees on multiple occasions in the same time period including: ten instances for Chinese language compliance alone; seven instances for both Spanish and Chinese language compliance; and two instances for Spanish and Korean language compliance. For citizens in need of Spanish language assistance, the following elections were also the subject of federal intervention: September 2001 (Kings & New York); October 2001 (Bronx) and September 2004 (Queens). See, "Voting Rights in New York, 1982-2006," pp. 12-18. Litigation in New York by the Department of Justice was required in both Suffolk and Westchester counties. See, U.S. v. Suffolk County; U.S. v. Westchester County; U.S. v. Brentwood Union Free District ("Voting Rights in New York, 1982-2006, pp. 17-18). Finally, private attorneys general in New York have used the courts to enforce these protections for American citizens. See, Campaign For A Progressive Bronx v. Black and Chinatown Voter Education Alliance v. Ravitz (pending) ("Voting Rights in New York, 1982-2006, pp. 19-20, 15).

Finally, there is documented evidence that language assistance for Latino and Asian-American citizens in six counties in New York have salutary effects – namely the positive correlation between language assistance and increased voter registration in these counties. The study (cited in my Report on p. 14) indicates that even after controlling for other factors that influence registration, the use of ballots and registration materials in the covered language was significantly correlated to increased registration levels for both Spanish and Chinese-speaking voters. This corresponds to the numerous examples cited in Appendix A of the Report where Asian American voters surveyed consistently pointed to the need to have language assistance on Election Day.

2. What voting practice, procedures, and educational barriers demonstrate the continued need for Section 203?

Answer: There is significant evidence of disparities and barriers to the full participation of American citizens for whom English is a second language throughout the record before this Congress. I rely, for the purposes of this answer, on the testimony I gave to the House Committee on the Judiciary in November 2005, the report I authored ("Voting Rights in New York, 1982-2006"), the important report on practices of election authorities subject to Sections 203 and 4(f)(4) by Professors James Tucker and Rodolfo Espino ("Minority Language Assistance Practices in Public Elections" March 2006) and the testimony of Prof. Tucker before the House Committee on the Judiciary in May 2006 on this very issue. For Latino citizens in the U.S. the factors that led to the passage of Sections 203 and 4(f)(4) are still present today: educational attainment still lags far behind their white or black counterparts; illiteracy rates are far above national averages; 75% of them (compared to 18% nationwide) speak a language other than English at home; and Latino voter registration rates are significantly lower than black or white registration rates nationally (in the November 2004 elections, using Citizenship Voting Age Population data, Latinos are registered to vote at a rate of 57.9% or 17.3 points below whites (75.1%) and 10.7 points below blacks (68.6%)). Of the population 25 years and older, 80% are high school graduates and 24% have bachelor's degrees – the corresponding rates for Latinos in this country are 52% and 10%. As recently as 2001 elections in New York, the City Board of Elections was short 33% of the Spanish interpreters it needed. Similar and more egregious barriers to full access to the voting booth for Latino voters in New York outside of New York City, Passaic County, New Jersey and Becks County, Pennsylvania have been documented and litigated by the Voting Rights Section of the Department of Justice, at length.

This evidence of persistent disparities and barriers is clearly present when one conflates all language minority citizens protected by the VRA together. Thus, (1) there are very high LEP rates among voting-age citizens in the covered jurisdictions as high as 13.1% of the citizens of voting age population, as per the Tucker/Espino report; (2) according to the July 2002 Census determination, reported in the Tucker/Espino report, these LEP voting-age citizens suffer from very high illiteracy rates: on average, it is 18.8 percent, nearly fourteen times the national rate, for all of the group and highest among elderly Alaskan Natives and American Indians; (3) these high LEP and illiteracy rates have resulted from unequal educational opportunities, as documented by the courts in findings of educational discrimination as per the testimony of Prof. Tucker before the House in May of this year. Equally important is the documented record of flagrant noncompliance with Sections 203

and 4(f)(4) – perpetuating barriers that Congress sought to eradicate years ago. Thus, the Tucker / Espino report shows that 19.4 of the jurisdictions surveyed, self-reported that they provide no language assistance and 14% of all jurisdictions admitted to providing only bilingual written materials.

3. We have heard testimony that a minority of actions brought to enforce Section 203 have been in the last three years. Was there insufficient enforcement of Section 203 prior to that time? If so, how does the lack of enforcement demonstrate the continuing need for Section 203?

Answer: In my opinion, there was insufficient enforcement of Section 203 requirements in the period of time in which the Department of Justice became actively engaged. Indeed, given the need, the breadth of coverage, and the empirical evidence on non-compliance generally (see, Tucker & Espino and their Arizona State University study cited above and in my testimony to this Committee), there is even insufficient enforcement right now. To allow Section 203 to lapse would, in effect, reward jurisdictions who have yet to fully comply with its mandates – all to the detriment of Latino and other language minority citizens. Finally, lack of enforcement contributes to the lower voter registration rates by Latino citizens of the U.S. for whom English is a second language – as cited above in my answer to question 2.

4. Why does Section 203 remain necessary in states with parallel laws that require language assistance, such as California, New Mexico, and New Jersey?

Answer: In my years of litigating VRA cases since 1981, I am unaware of any actions taken by either the New Jersey or New York Attorney General's office to force compliance with any equivalent state election code mandate for language assistance. Indeed, the office of the New Jersey State Attorney General has been designated as the Chief Election Office of the state for both National Voter Registration Act and Help America Vote Act purposes – meaning that it must police itself. Section 203 is necessary because it allows private attorneys general to force compliance to the extent their limited resources allow. Parallel state laws are either antiquated (as in New Jersey) or simply ignored by county election authorities. Moreover, in 1975 when Section 203 was enacted in 1975, only seven states required that bilingual materials and/or language assistance be provided to limited-English proficient voters: California; Connecticut; Florida; Massachusetts; New Mexico; New Jersey; and Pennsylvania. [Source: S. REP. NO. 94-295, 94th Cong., 1st Sess. 33 n.35 (1975), reprinted in 1975 U.S.C.C.A.N. 799-800 n.35]. Nonetheless, six of the seven states have been sued repeatedly to force compliance with 203 – effectively admitting noncompliance or having been found to violate the VRA. These include: ***California:*** *United States v. City of Azusa, CA (C.D. Cal. 2005); United States v. City of Paramount, CA (C.D. Cal. 2005); United States v. City of Rosemead, CA (C.D. Cal. 2005); United States v. San Benito County (N.D. Cal. 2004); United States v. San Diego County (S.D. Cal. 2004); United States v. Ventura County (C.D. Cal. 2004); United States v. Alameda County (N.D. Cal. 1995); United States v. City and County of San Francisco (N.D. Cal. 1978).* ***Florida:*** *United States v. Orange County (M.D. Fla. 2002); United States v. Metropolitan Dade County (S.D. Fla. 1993).* ***Massachusetts:*** *United States v. City of Boston, MA (D. Mass. 2005); United States v. City of*

Lawrence (D. Mass. 1998). ***New Jersey:*** *United States v. Passaic City and Passaic County (D.N.J. 1999); Vargas v. Calabrese (D.N.J. 1990); Marquez v. Falcey (D.N.J. 1973).* ***New Mexico:*** *United States v. Bernalillo County (D. N.M. 1998); United States v. Socorro County (D. N.M. 1993); United States v. Cibola County (D. N.M. 1993); United States v. State of New Mexico and Sandoval County (D. N.M. 1988); United States v. McKinley County (D. N.M. 1986); United States v. San Juan County (D. N.M. 1979).* ***Pennsylvania:*** *United States v. Berks County, 277 F. Supp.2d 570 (E.D. Pa. 2003); Arroyo v. Tucker, 372 F. Supp. 764 (E.D. Pa. 1974).*

5. What evidence supports extension of Section 4(f) (4) coverage in the three states covered in whole and the six states covered in part by that Section? Why is coverage under Section 5 necessary in those states?

Answer: Congress enacted Section 4(f)(4) in 1975 by amending the triggering mechanisms for Section 5 coverage to include within its definition of "test or device" the use of English only election materials under certain circumstances. Those limited jurisdictions (2 of the 3 Section 5 counties in New York are also covered under Section 4(f)(4), had a record of demonstrating more severe forms of voter discrimination. In addition to providing language assistance for the applicable language minority group, these jurisdictions were also separately covered for Section 5 preclearance and also subject to the federal observer provisions.

I respectfully refer the Senator to my Report for the 4(f)(4) jurisdictions located in New York. The numerous objections interposed by the Attorney General on behalf of Latino voters (along with withdrawals occasioned by the issuance of More Information Request letters) speak to the continued need for 4(f)(4) coverage in that jurisdiction. Indeed, in New York alone over 881 federal observers were deployed from 1985 to 2004 in large part to address language minority accesss.

Additional evidence of the need for Section 4(f)(4) coverage exists in the report of the National Commission on the Voting Rights Act "Protecting Minority Rights: The Voting Rights Act at Work, 1982-2005 (February 2006) (available at www.votingrightsact.org).

6. I would like to better understand the relationship between Section 203 and Section5 of the Voting Rights Act. How does Section 5 pre-clearance protect language minority citizens from discriminatory voting changes? Why does pre-clearance need to be applied to certain jurisdictions with language minority populations?

Answer: In some ways the preclearance experience in New York speaks to this very issue. Asian-American voters primarily (though not exclusively) have benefited from the interplay of Section 203 monitoring and enforcement measures in the Section 5 preclearance process. The dynamics between compliance with these two distinct provisions, along with the tools inherent in federal observer coverage, has resulted in a better understanding of the relationship of these provisions in New York City. As an example, I respectfully refer the Senator to the May 13, 1994 denial of preclearance cited on page 6 of my Report.

7. How does the "pocket trigger" in Section 3(a) of the Act ensure that Section 5 pre-clearance applies to jurisdiction where it is needed?

Answer: Section 3(a) authorizes federal courts as part of a voting rights action to certify a jurisdiction for examiner and observer coverage to prevent unconstitutional racial vote discrimination. Section 3(c)—a permanent provision—allows a court which has found a voting rights violation under the Fourteenth or Fifteenth Amendment to require a jurisdiction not subject to Section 5 to submit certain future election changes to the Attorney General for preclearance for an "appropriate" period of time. Violations of the 14th and 15th Amendments, as the Senator is aware, are premised on a finding of intentional discrimination. This so-called "pocket trigger" of preclearance coverage has been applied to the state of New Mexico and has resulted in the Attorney General interposing an objection under this court-ordered authority, during this limited period.. The pocket trigger has also been applied in the state of Arkansas; Escambia County, Florida; Buffalo County, South Dakota; and Cicero, Illinois. The provision provides an important deterrent to voter discrimination, appropriately limited to court order and supervision, and capable of addressing egregious violations of the Act in limited, specific jurisdictions.

Senator Kennedy
Voting Rights Act
Written Question for May 9 and May 10 Witnesses

Juan Cartagena

1. When most people talk about the Voting Rights Act and Section 5, they're referring to the impact of the Act on the South. Please describe how the expiring provisions of the Act have affected political participation in New York City, and whether these provisions are still needed in the city?

Answer: The Senator from Massachusetts poses an interesting question that has been the subject of my scholarship for some time now. Stemming directly from the efforts of New York

Senators Robert Kennedy and Jacob Javits, a bipartisan effort in the Senate in 1965, clearly evidenced the need to consider voter discrimination issues outside the Deep South. The result was Section 4(e) of the Voting Rights Act of 1965 – a permanent provision directly aimed to cure voting discrimination against certain Latino citizens (i.e., Puerto Ricans) and the precursor to the panoply of language assistance provisions for language minority citizens ten years later in 1975. As a result, Section 4(e) specifically tailored to fulfill the guarantees of equality for Puerto Rican voters in the United States, set the stage for both Section 5 coverage, Section 4(f)(4) coverage and Section 203 coverage in New York. (I respectfully refer the Senator to my article "Latinos and Section 5 of the Voting Rights Act: Beyond Black and White," 18 National Black Law Journal (No. 2) 201 (2005) appended to my testimony before this Committee.)

The impact of the expiring provisions of the VRA on the fair and full representation of racial and language minorities in New York is the subject of the Report I submitted to the House Committee on the Judiciary. I conclude in that report that this impact is enormously important for African-American, Latino, and Asian-American voters of the City measured in many ways, not the least of which is the ability of the expiring provisions to overcome racially polarized voting in the City and measured as well by the breadth of preclearance denials and submission withdrawals made by election authorities therein. The expiring provisions on language assistance are also critical for Asian-American and Latino voters even today, as documented in the Report. And the provisions on deploying federal observers – 881 observers were required to ensure compliance and stop voter intimidation from 1985 to 2004 alone! – are also critically important to enforce the guarantees of the 14th and 15th Amendments to the Constitution. In a City with over 5,700 election districts, 6,400 voting machines and 25,000 poll workers on any given Election Day, the task of ensuring fairness and non-discrimination cannot be left to the resources of a limited cadre of private attorneys general – only the weight of federal interventions, still needed today, can assist us in securing the promise of democracy.

2. Some critics of reauthorizing the Voting Rights Act have suggested that recent increase in voter registration for minority voters indicated that the expiring provisions of the

Voting Rights Act are no longer needed. Does that argument apply to Latino voters especially in New York City?

Answer: Nationally, citizenship voting age population data from the November 2004 elections reveal that Latinos are registered to vote at a rate of 57.9% or 17.3 points below whites (75.1%) and 10.7 points below blacks (68.6%). In New York these patterns are similarly reflected in the voting participation of Latino citizens. As documented in my testimony to the House Committee on the Judiciary in November 2005, there are depressed levels of political participation overall, with 1.5 million voting age Latinos but only 700,000 registered to vote and a turnout of approximately 455,000. Indeed the same report cited notes that turnout is low in concentrated Latino neighborhoods where political campaigning in English does not reach their intended targets. At the same time (as noted in my report to Congress "Voting Rights in New York, 1982-2006, p. 14), there is statistical evidence that in 6 counties in New York covered for language assistance in Spanish (and Asian languages), there is a positive correlation between providing assistance under Section 203 and increased voter registration, even when controlling for other factors that influence registration (like education level, nativity, mobility, etc.). It would be a setback for the burgeoning Latino community in New York to withdraw some of the very protections that enhance their ability to have equal access to the vote, by failing to renew the expiring provisions of the VRA.

3. Has the provisions of language assistance under Section 203 had an impact on voter registration of language minority voters?

Answer: As noted above in my answer to Question 2, my Report documents numerous examples of noncompliance with Section 203 mandates in New York. And I have also cited a study by Michael Jones-Correa and Karthick Ramakrishnan (p. 14 of the Report) where after studying six Section 203 counties in New York they conclude that coverage is positively correlated with voter registration, even after controlling for other variables that affect voting, such as, education levels, nativity, residential mobility and the like.

Moreover, the Department of Justice has provided important testimony to Congress in this regard, summarizing the salutary effects of their Section 203 litigation: "Hispanic voter registration is up over 24 percent since the Division's Section 203 lawsuit. In San Diego

County, California, Spanish and Filipino registration rates are up over 21 percent, and Vietnamese registration is up over 37 percent since the Division's enforcement action." [Source: Statement of Bradley J. Schlozman, Acting Assistant Attorney General, before the House Judiciary Committee, at p. 4 (Nov. 8, 2005)]. Equally important is their recognition of the beneficial effects of Section 203 compliance in New Jersey and Texas: "A Section 203 lawsuit in Passaic, New Jersey, was so successful for Hispanic voters that a Section 2 challenge to the at-large election system was subsequently withdrawn. A Memorandum of Agreement in Harris County, Texas helped double Vietnamese turnout, and the first Vietnamese candidate in history was elected to the Texas legislature – defeating the incumbent chair of the Appropriations Committee by 16 votes out of over 40,000 cast." [Source: Statement of Bradley J. Schlozman, Acting Assistant Attorney General, before the House Judiciary Committee, at p. 4 (Nov. 8, 2005)]. For Native Americans, the evidence points the same way: As a result of language assistance and outreach efforts pursuant to Section 203, turnout in Navajo precincts in Apache County, Arizona increased 26 percent in four years. In 2004, 17,955 registered voters cast ballots in the 33 Navajo precincts, compared to 14,277 voters in 2000. [Source: Testimony of Penny Pew, Election Director of Apache County, Arizona, before the Subcomm. on the Const. of the House Judiciary Committee (Nov. 15, 2005)].

Answers by Juan Cartagena, General Counsel, Community Service Society To Written Questions From Senator Schumer Of The Senate Judiciary Committee 23 June 2006

1. The proposed reauthorization bill, S.2703, addresses the Supreme Court's decision in *Reno v. Bossier Parish Scholl Board*, 528 U.S.320(2000) *(Bossier Parish II)* by clarifying that a voting rule change motivated by *any* discriminatory purpose cannot be precleared under Section 5 of the Voting Rights Act.

    a. Do you support this change? Why or Why not?

    b. In your views, is the Supreme Court's decision in *Bossier II* consistent with Congress's original intent in enacting Section 5?

    c. Please provide two or three examples of voting changes that could not have been precleared before *Bossier II* but were required to be precleared after *Bossier II.*

    d. What impact has Bossier II had on minority voting rights and the ability of the Department of Justice to object to discriminatory voting changes under Section 5?

    e. Would restoring the pre-Bossier II standard to Section 5 be constitutional?

Answer: I make only a few points with regard to the proposed changes addressing the decision in Reno v. Bossier Parish School Board because other witnesses in these hearings have provided excellent analysis which I fully support. See, Testimony of Brenda Wright before the House Subcommittee on the Constitution, November 1, 2005; Testimony of Professor Pamela Karlan before the Senate Judiciary Committee, May 16, 2006. In New York the difficulties created by the narrow Supreme Court interpretation in Reno have not been realized as far as I know. I say that without the benefit of any Section 5 conclusions mad since the decision in 2000 – that is, without the benefit of any information that would inform the Committee of decisions not to interpose an objection because of the narrow interpretation of discriminatory intent embodied in the Reno decision. However, it is difficult to understand how purposeful discrimination against racial and language minorities cannot violate Section 5, only retrogressive intent can violate that section of the VRA under Reno. Where jurisdictions have purposefully taken actions to lock out racial and language minorities from political power those acts – no matter where they occur in the U.S. – are an affront to the very goals of the VRA – irrespective of whether there was "retrogressive intent." Moreover, there can be no constitutional difficulties in prohibiting under Section5 all unconstitutional discrimination touching upon the right to vote –

discrimination which would also violate the 14th and 15th Amendments to the Constitution. Restoring Section 5 preclearance review to a pre-Reno standard would make Section 5 consistent with the prohibitions in these Constitutional amendments.

2. The proposed bill also addresses the Supreme Court's decision *Georgia v. Ashcroft*, 539 U.S. 461 (2003), by clarifying that the purpose of Section 5 of the Voting Rights Act is to protect the ability of minority citizens to elect their preferred candidates of choice.

    a. Do you support this change? Why or Why not?

    b. In your view, is the Supreme Court's decision in *Georgia v. Ashcroft,* consistent with Congress's original intent in enacting Section 5?

    c. Does the bill, as drafted, adequately restore the pre-*Georgia v Ashcroft* standard?

    d. What are the problems both substantively and logistically, with allowing covered jurisdictions to substitute "influences districts" for districts which preserve minority voters' ability to elect their preferred candidates of choice?

    e. What would be the consequences for minority voters in covered jurisdiction if the bill did not address *Georgia v. Ashcroft* in the way that it currently does?

    f. Some law professors argue that restoring Section 5 to its pre-*Georgia v. Ashcroft* standard would make it harder for the bill to pass constitutional muster under the *City of Boerne v. Flores* lines of cases. Do you agree? What are the best arguments in defense of this change?

    g. Others have suggested that the pre-*Georgia v. Ashcroft* standard requires covered jurisdictions to pack minority voters into fewer districts. Do you agree that the bill, as drafted, requires packing? Under the current bill, could districts that are not majority-minority still be considered districts in which minority voters have the ability to elect their preferred candidates of choice? If so, please give an example.

Answer: We support the proposed change to restore Section 5 review in redistricting matters to its pre-Georgia v. Ashcroft standard for essentially two reasons: The "ability to elect" standard in place before the opinion was rendered is administrable and workable in both the courts and in the administrative preclearance review. Secondly, for Latino voters in particular, the nebulous "influence" standard poses more substantial risks that endanger their ability to elect candidates of choice.

Specifically, trading the straightforward, "ability to elect" non-retrogressive test for an "influence" standard that requires under Georgia v. Ashcroft, an assessment of what "influence" means in post-election governance, results in trading a bright-line test for an as yet undefined test. The "ability to elect" standard, as well as the existence of racially polarized voting, already requires case-specific analysis. An "influence" standard equally requires a case-specific inquiry but it may also be used to disguise purposefully discriminatory or retrogressive actions by the submitting authority. Ultimately, as the Supreme Court noted, the new "influence" standard responds to a need to provide flexibility to the States to choose among theories of effective representation. Georgia v. Ashcroft, 539 U.S. 461, 482 (2003). In this regard, I urge the Committee to follow the conclusions reached by Professor Pamela Karlan in her testimony before this Committee on May 16, 2006, in which she noted that if the choice is among theories of effective representation, Congress clearly has the constitutional power to make the choice, citing previous examples in the past of how Congress made similar choices. That choice should be in favor of an "ability to elect" standard, rather than the unformed "influence" standard.

Equally important, however, are the comments I made previously in response to Senator Cornyn's written questions: that is, that Section 5's "ability to elect" standard is critical for providing full and fair access for Latino voters to elect candidates of choice. I respectfully set forth a portion of that previous response:

"Ability-to-elect districts are critical to the Latino community at this time. Indeed, as I and other writers have noted, the bulk of the Georgia v. Ashcroft debate going on nationally fails to account for how the new Supreme Court interpretation affects Latino voting strength; indeed it appears to threaten the very gains that have been made over the years. See, Cartagena, J. "Latinos and Section 5 of the Voting Rights Act: Beyond Black and White," 18 National Black Law Journal (No. 2) 201 (2005)(appended to my testimony before this Committee.); Alvaro Bedoya, "The Unforseen Effects of Georgia v. Ashcroft on the Latino Community," 115 Yale Law Journal 2112 (2006). Latinos are rarely elected outside Latino-majority districts (where they clearly have an ability to elect), such that these districts are critical to their ability to integrate the halls of legislative power, as opposed to the unsubstantiated and purported benefits to Latinos of coalitional or influence districts. Bedoya, A., supra, 115 Yale Law Journal at 2136. Moreover, Latinos residing in Section 5 covered jurisdictions, 11.2 million, are quickly approaching the number of African-Americans living in covered jurisdictions (12.7 million) signifying that Section 5 – its reauthorization and restoration – is not merely a black-white issue. Id. at 2121-2128, tbl. 1. This provides additional justification for the proposed section to restore Section 5 review to a pre-Georgia v. Ashcroft standard."

3. The proposed bill would amend Section 14 of the Voting Rights Act allow prevailing parties to recover "reasonable expert fees" and "other reasonable litigation expenses" in addition to reasonable attorneys' fees.

    a. Do you support this change? Why or why not?

b. Please explain the importance of expert testimony in voting rights litigation.

c. What are the costs associated with expert testimony and what impact do they have on victims of voting discrimination?

d. Are you familiar with provision of expert witness fees in other civil rights statues and if so, are there any constitutional issues that we should be aware of?

Answer: We support the change to allow the recovery of expert fees along with attorneys' fees in Voting Rights Act cases. The role of private attorneys general is a necessary element in the enforcement of the VRA – unfortunately few organizations (or law firms) are in the position to advance the funds necessary to litigate these cases. The Community Service Society, an independent, non-profit advocacy and research organization is one of the few that can do so and we have used the VRA to ensure fair and nondiscriminatory election practices in New York since 1989 as part of our mission to increase the opportunities for political participation of poor, marginalized communities. Recovery of attorneys' fees, and expert fees as proposed by this change, would allow nonprofit organizations like CSS to use the proceeds to continue to launch new cases where necessary. As part of our engagement in Section 2 litigation (e.g., United Parents Associations v. New York City Board of Elections challenging New York's nonvoting purge laws) and Section 5 preclearance review (e.g. CSS's comments urging denial of preclearance for the initial New York City Council redistricting plan of 1992), we have relied upon experts in a few general areas: Political Scientists (or equivalent social scientists) capable of conducting ecological regressions of voting data for the purposes of demonstrating the existence of racially polarized voting or demonstrating the racially discriminatory effects of institutional barriers to the vote; Historians capable of documenting New York State constitutional and legislative history touching upon the right to vote; Demographers capable of mapping out alternative redistricting scenarios; and Criminal Justice experts capable of addressing the intersection between race and the criminal justice system and its impact on voting eligibility. There is no question that expert testimony is an indispensable part of litigation in all challenges to redistricting plans, at-large election structures, or proportional representation schemes. Indeed, the seminal case of Thornberg v. Gingles, 478 U.S. 30 (1986) clearly indicates how courts must rely upon social science expert data to establish critical components of racially polarized voting for the purposes of proving Section 2 violations. Our experience in cases raising other challenges under Section 2 also evidences the need to use expert testimony in related areas as well given the broad scope of relevant Section 2 evidence. The Supreme Court in Thornberg v. Gingles identified this broad inquiry when it noted that "[T]he essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." (Id. at 47). In general, CSS will budget expert fees at $15,000 per expert,

depending on the circumstances of the case. I am unaware of any constitutional issues that would preclude the changes to the VRA proposed by this provision, since recouping litigation costs is part of Congress' overall goal to rely upon private attorneys general to enforce essential civil and constitutional rights in the U.S.

4. The proposed bill would amend Section 203 to reflect the fact that after 2010, the American Community Survey (ACS), which will be administered annually, will replace the long form census. The bill provides that, consistent with this change, coverage under Section 203 shall be determined based upon information compiled by the ACS on a rolling five-year average.

    a. Do you support this change? Why or why not?

    Answer: We would support the change to include more recent Census data to update the list of covered jurisdictions under Section 203. The right to vote is too important a right to delay impede or otherwise fail to make meaningfully available to American citizens who speak English as a second language. Using ACS data would allow jurisdictions to respond to changing demographics in a way to ensure full access to the voting booth for these American citizens.

    b. In your view, does this change bolster or weaken the constitutionality of Section 203?

    Answer: As I noted in my testimony before this Committee in May, Section 203 is already self-maintaining because it adjusts itself to changing demographic patterns. Using the ACS data only enhances this important feature of Section 203. In effect, conditioning coverage on the existence of objective data, which now will be available sooner, makes Section 203 more narrowly tailored to the harm it seeks to remedy, therefore, bolstering its constitutionality. Along with the current bailout provisions of Section 203 (see Section 203(d)), this provision is proportional and congruent with the need that Congress has identified. In Katzenbach v. Morgan, 384 U.S. 641 (1966), the Supreme Court upheld the constitutionality of a similar provision requiring language assistance to American citizens for whom English is a second language by noting that it is a proper use of Congressional power under the Civil War Amendments. Shortening the time frame in which the Attorney General can either add or omit covered jurisdictions can only ease any federalism concerns that may exist, especially considering the Supreme Court's subsequent announcement that "the Voting Rights Act, by its nature, intrudes on state sovereignty." Lopez v. Monterey, 525 U.S. 266, 285 (1999).

Answers to Questions from Senator Tom Coburn
VRA Hearing May 10, 2006

Coleman:

1. What type of information must a jurisdiction submit when applying for pre-clearance of a redistricting plan?

I have not had direct experience with preparing preclearance submissions to the Department of Justice, so my knowledge in this area is limited to what the federal regulations say is required and my review of some submissions that others have made, which comply with the DOJ's instructions.

   a. How costly is a Section 5 pre-clearance?

The cost of a preclearance submission will vary greatly with the complexity of the change(s) being precleared and the amount of detail required. Based on my limited exposure to the preclearance submissions of a small number of political subdivisions, I estimate that a simple preclearance submission by a small political subdivision will generally cost on average somewhere in the thousands of dollars. More complex submissions may easily run into the tens of thousands of dollars.

   b. If you cannot estimate the cost, how many lawyers are hired to work on an average submission?

Generally, I would say that one or two lawyers work on most submissions. Only the larger, more complex submissions will require a larger legal team.

2. Do you find that States and counties are deterred from discriminating against minorities by the Voting Rights Act? If so, can you give examples of this deterrence?

The substantive provisions of the Voting Rights Act are an effective deterrent to discrimination in voting against minorities. Deterrence would be a relevant factor in discussing §5 only if there were some evidence that States and counties continued to systematically discriminate against minorities in a way that violated their constitutional rights. I do not believe that the congressional record contains any such evidence. Importantly, to the extent that §5 could be said to provide a deterrent effect, there is absolutely no evidence that ties that effect to the jurisdictions that were covered in the 1960s and 1970s, but not other, noncovered jurisdictions. The proponents of reauthorization of §5 have continued to point to anecdotal occurrences and §2 or §203

litigation, neither of which support a finding of a deterrent effect. To the extent that anecdotal occurrences can be verified, there is no evidence that shows that anecdotal occurrences are either systematic or that noncovered jurisdictions do not have similar experiences with anecdotal occurrences. Information regarding litigation under §2 or §203 also fails to show any deterrent effect or that it is unique to covered jurisdictions. The fact that the substantive voting rights provisions are independently effective in remedying claimed violations shows that there is no need for preclearance as a prophylactic remedy, and also shows that keeping the original distinction between covered and noncovered jurisdictions cannot be sustained.

3. In the May 9th, VRA hearing, Prof. Issacharoff suggested that pre-clearance requirements should apply to counties in order to more accurately target those that are still having problems with discrimination (rather than whole states). Do you think that there is an equal need for the VRA throughout the whole state of Georgia, for instance, or do you think that it is only useful in certain counties?

In my view, Professor Issacharoff recognizes at some core level the inequity and impermissibility of simply reauthorizing §5 as it currently exists. The suggestion to target counties that still have problems with discrimination, to the extent any exist, must be viewed more generally: (1) as an acknowledgement that §5 cannot fairly be reauthorized with the current coverage formula; and (2) as an acknowledgement that the coverage formula would have to be changed if §5 is to be reauthorized. I certainly agree that, given the data that has been accumulated, there is no possible justification for continuing the preclearance requirement for the entire State of Georgia. As I have previously noted, I do not believe that preclearance should be reauthorized at all, but if it is, I strongly encourage Congress to redefine the coverage mechanism in a narrow way that burdens states and political subdivisions only when there is substantial evidence of purposeful discrimination against minority voters.

Coleman Responses to
Questions for Witnesses for ALL Voting Rights Act Hearings
May – June 2006

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

I do not believe that any data would substantiate that conclusion, for either covered or noncovered jurisdictions. To the contrary, I believe that all of the reliable data demonstrates that minorities are fully able to participate in the electoral process and that there are no material differences in ability to participate between covered and noncovered jurisdictions.

2. Currently, the Voting Rights Act identifies those jurisdictions subject to additional oversight by looking at voter turnout in the presidential elections of 1964, 1968, and 1972. Re-authorization of the Act in its current form would preserve these dates as the "triggers."

    a. Would you support updating the coverage formula to refer to the Presidential elections of 2000 and 2004, instead of 1964, 1968, and 1972? Why or why not?

Assuming that the preclearance provision is to be reenacted, then there is no rational basis for Congress to refuse to adopt a modern, relevant coverage formula. It is undisputed that several states and political subdivisions are covered solely as a result of a condition that existed only in 1968 or 1972, was immediately changed, and has not existed for more than 30 years. Why, for example, continue to require preclearance in a jurisdiction that was covered solely because of a test that was discontinued right after the passage of the Voting Rights Act? Or why require preclearance in counties that are covered solely because they had too many soldiers serving in Vietnam at the time of a general election?

    b. Would you support adding the Presidential election of 2000 and/or 2004 as well as any political subdivisions that have been subject to section 2 litigation say, in the last 5 years, to this formula in order to pick up jurisdictions that have begun discriminating since the 1970s? Why or why not?

Both are sensible, limited alternatives to the current formula. By tying the determination to very recent performance in the states, that kind of arrangement at least would carry some semblance of proportionality. I would further ensure that the bail-out provisions are not so limiting as they currently are, prohibiting most jurisdictions from seeking to opt out.

In *City of Boerne v. Flores*, the Supreme Court indicated that Congress may not rely on data over forty years old as a basis for legislating under the Fourteenth and Fifteenth Amendments. *City of Boerne v. Flores*, 521 U.S. 507, 530 (1997). In striking down the Religious Freedom Restoration

Act, the Court observed, "RFRA's legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry."

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

   Yes, for the reasons just stated.

4. While I am still reviewing the record, it seems to me the arguments thus far focus mostly on anecdotes regarding specific covered jurisdictions – yet, for the period 1996 through 2005, the Department of Justice reviewed 54,090 Section 5 submissions and objected to 72, or 0.153 percent. What percentage of objections below 0.153 do covered jurisdictions need to achieve before Congress can let Section 5 expire? Last year, according to DOJ data, there was only 1 objection out of 4734 submissions. Is that sufficient to warrant Section 5 coverage? Why or why not?

I do not believe there is a particular percentage that must be met in order to justify what Congress is doing, but there must be a substantial rationale for interfering with the traditional prerogatives of the State, and the percentage of objections or requests for more information comes nowhere near what it would need to be to justify reenacting preclearance. Comparing the huge burden that preclearance imposes to the complete lack of any evidence of recent benefits being achieved strongly refutes any attempted justification for reauthorizing §5.

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

I do not believe that §5 should be reenacted at all. Accepting a five or ten-year term can only be justified as a compromise solution.

6. Putting aside the constitutional questions with regard to overturning *Georgia v. Ashcroft* – I want to better understand some of the practical implications.

   Assuming the new language in the re-authorization is adopted, would it be your view that even districts that are "influence" districts, with relatively low numbers of minority voters, should be protected under the plan? Why or why not?

While I understand that the language can change, the proposed language, as I understand it, may not fully protect minority influence districts.

For Coleman and Strickland

1. The burden of section 5 compliance often times falls on jurisdictions other than states – who have the significant staff and resources to rely upon – such as municipal utility districts or school

districts who face difficulty complying with the requirements of section 5. Can you expand on these burdens from your perspective?

These are often small political subdivisions whose budgets are frequently largely committed to the purpose for which they were formed, and with very little discretionary spending available to them.

2. Can you explain the problems with overturning Georgia v. Ashcroft? Bossier I? Bossier II?

My testimony has not focused on this particular aspect of the preclearance process, so others will speak more definitively on this question. In a nutshell, though, the trouble with overturning these decisions is that it further isolates the Voting Rights Act, and §5 in particular, from the constitutional anchor to which they are supposed to be moored. If it cannot be said that the provision is directly securing a party's Fourteenth and Fifteenth Amendments rights, then there is no basis for Congress to interfere with the sovereignty rights of the states.

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

June 14, 2006

The Honorable Arlen Specter
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Please find attached responses to questions arising from the May 10, 2006, appearance of Assistant Attorney General Wan Kim before the Committee concerning modern enforcement of the Voting Rights Act. We hope that this information is useful to the Committee.

Thank you for the opportunity to present our views. Please do not hesitate to call upon us if we may be of additional assistance. The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,

William E. Moschella
Assistant Attorney General

Attachment

cc: The Honorable Patrick J. Leahy
Ranking Minority Member

Hearing Before the Senate Committee on the Judiciary
Modern Enforcement of the Voting Rights Act
Questions from Chairman Specter

1) How many times have covered States or jurisdictions failed to submit pre-clearance changes?

We have attached a list of instances where the Department has written to State and local authorities to request that they submit an unprecleared voting change for Section 5 review. This list, of course, may not be comprehensive of every covered State's or jurisdiction's failure to submit changes for preclearance under Section 5 of the Voting Rights Act.

2) Before Congress may enact preventive legislation under the Fourteenth and Fifteenth Amendments, it must establish a record of State misconduct that violates the Constitution. See *City of Boerne v. Flores*, 521 U.S. 507, 530 (1997); *Fla. Prepaid Postsecondary Education Expense Bd. v. College Savings Bank*, 527 U.S. 627, 644-46 (1999); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 64-65 (2000). Please provide all instances in which the Department of Justice found that a State or covered jurisdiction acted unconstitutionally?

We have attached a list of the cases in which the Voting Section of the Civil Rights Division has participated since 1976, as well as a disk containing copies of selected complaints and final orders in cases brought by the Voting Section under Sections 2 and 208 of the Voting Rights Act. This list includes many cases in which the Department did not allege intentional discrimination, and cases in which courts ultimately found that the State or covered jurisdiction had acted constitutionally.

In a number of the cases under Section 2 of the Voting Rights Act, the Department has alleged that States or covered jurisdictions have engaged in intentional discrimination in a manner that could violate the Fifteenth Amendment. Examples include the following:

U.S. v. Conecuh County	*S.D. Ala.*	*10/21/83*
U.S. v. City of Bessemer	*N.D. Ala.*	*04/10/84*
U.S. v. Pike County	*M.D. Ala.*	*05/11/84*
U.S. v. Tallapoosa County	*M.D. Ala.*	*11/12/93*
U.S. v. City of Newport News	*E.D. Va.*	*10/26/94*
U.S. v. City of Baton Rouge	*M.D. La.*	*01/24/96*
U.S. v. City of Cambridge	*D. Md.*	*12/05/84*
U.S. v. Los Angeles County	*C.D. Cal.*	*09/08/88*
U.S. v. City of Memphis	*W.D. Tenn.*	*02/15/91*
U.S. v. City of Baton Rouge	*M.D. La.*	*01/24/96*
U.S. v. Day County and Enemy Swim Sanitary Dist.	*D.S.D.*	*05/10/99*
U.S. v. Town of Cicero	*N.D. Ill.*	*03/13/00*

U.S. v. City of Hamtramck E.D. Mich. 08/04/00

The failure to allege intentional discrimination of course does not necessarily mean that such intentional discrimination was not present. In some instances, additional information may become available after filing that establishes that the discrimination was intentional.

A number of cases filed under under Section 203 of the Voting Rights Act also have been brought in circumstances involving a allegations of intentional discrimination. These include:

U.S. v. State of New Mexico and Sandoval County, NM	*D.N.M.*	*12/5/88*
U.S. v. Cibola County	*D.N.M.*	*09/27/93*
U.S. v. Socorro County	*D.N.M.*	*10/22/93*
U.S. v. Alameda County	*N.D. Cal.*	*04/13/95*
US v. Passaic County, NJ	*D.N.J.*	*06/02/99*

Other Section 203 cases, while not including such allegations of intentional discrimination, have involved conduct that violates the Constitution. See, e.g., United States v. City of Boston, (D.Mass.2005); United States v. Berks County, (E.D. Pa. 2003). We have attached a disk containing letters to local election officials that describe more fully the nature of conduct documented by the United States in its Section 203 investigations.

3) On May 10, 2006, I had the following exchange with you:

Chairman Specter: Mr. Kim, as you know, Federal regulations require that jurisdictions covered under Section 203 provide bilingual materials to all voters or to develop "an effective targeting system" to identify "persons who are likely to need them." Recently, the House Subcommittee on the Constitution found that an elected official from Orange County, California, claimed that the Department of Justice requires States to send bilingual materials to any voter with a Spanish-sounding surname. That has an overtone of racial profiling, assuming that anyone with a foreign-sounding surname cannot speak the language, regardless of how long they have lived here. Does the Department of Justice enforce such a policy? Why doesn't the Department of Justice simply require States to send bilingual ballots to those voters the census lists as needing assistance? Or is the census adequate to pinpoint the need for that kind of assistance?

Mr. Kim. Mr. Chairman, to answer the first part of your question, no, the Department of Justice does not make such a requirement."

On May 4, 2006, however, the Department of Justice submitted testimony to the House Subcommittee on the Constitution stating:

"We fully recognize that comparing voter registration lists to the Census Bureau's Spanish surname list, place of birth data, or other data are imperfect measures of the language need in a precinct. We use such data as a first cut to simply raise "red flags" for follow-up in our investigations. We also suggest it as a convenient starting point for local election officials in trying to determine how and where best to meet the needs of their voters. We encourage them to further refine their plans from this starting point based on their knowledge of their jurisdiction and on conversations with local minority community members." Rena J. Comisac, Principal Deputy Assistant Attorney General of the Civil Rights Division, United States Department of Justice (May 4, 2006).

Please explain what use the Department of Justice makes of Spanish surnames in enforcing section 203's provisions regarding bilingual election materials.

The Department of Justice did not require Orange County to send election materials in Spanish to voters with Spanish surnames. The Department did not require Orange County to send a mailing to each voter with respect to minority language materials. Nor did the Department require or support sending copies of materials to each registered voter in five languages.

Section 203(c) requires covered jurisdictions to provide election materials "in the language of the applicable minority group as well as in the English language." To avoid burdening covered jurisdictions with the unnecessary expense of providing bilingual election materials to all voters, the Department recommends targeting minority language materials and information to those who need them in a practical, efficient and effective manner. In this regard, Spanish (and other minority) surname lists can be a useful tool. The Department supports – but does not require – using them in a careful and appropriate manner.

The Census Bureau does not identify those persons in covered jurisdictions with limited English proficiency and a consequent need for minority language materials. Rather, the Census Bureau only provides local jurisdictions with the total number of voting age citizens within the jurisdiction who are of a particular language group and who meet the statutory test of limited English proficiency. In Orange County, for example, the Census Bureau reported the following totals:

Hispanic	*64,385*
Vietnamese	*45,730*
Chinese	*14,805*
Korean	*12,240*

The Census Bureau did not tell the County where these people reside. Determining the location of these persons among the 2.8 million residents of Orange County fell to the County, and a similar task fell to other similarly situated counties.

Voter registration data at the precinct level is the best starting point for election officials; it excludes non-citizens and other non-voters, and is the fundamental building block of election administration. Registration lists also may include self-reported ethnicity data, as in Florida, and may include voters' place of birth, as in parts of California. Along with this data, surname lists offer a means of locating those precincts that are likely to include voters who speak a particular minority language and do not speak English well enough to participate in the political process. While a particular surname tells a county nothing about the language skills of a particular voter, a county that seeks to locate registered voters who speak Vietnamese logically could most effectively look among those precincts with substantial numbers of Vietnamese-surnamed voters. From that starting point, the local election officials can efficiently conduct further inquiry to determine the actual needs of the voters in those particular precincts. The surname - or ethnicity or place of birth analysis – is a tool that may help election officials comply with Sections 203 and 4(f)(4).

Surname analysis is used by many local officials. The Secretary of State for the State of Texas, for example, provides Spanish surname analysis to each county elections office in the State to assist local officials in compliance with State law, which requires a bilingual poll worker where five percent or more of registered voters have Spanish surnames

The Department of Justice uses surname lists and other data in the same manner. The Department does not rely on assumptions, but rather, upon reliable evidence that is admissible in a federal court. We fully recognize that comparing voter registration lists to the Census Bureau's Spanish surname list, place of birth data, or other data are imperfect measures of the language need in a precinct. Like local officials, we use it as a convenient starting point in trying to determine how and where best to meet the needs of their voters. Further investigation as to the language needs of a given precinct and the treatment of minority language voters in that precinct permit us to calibrate the requirements of the Voting Rights Act as necessary.

Hearing Before the Senate Committee on the Judiciary
Modern Enforcement of the Voting Rights Act
Questions from Senator Sessions

Questions for Assistant Attorney General Kim:

1. It is well known, as you testified, that nine States are covered as a whole by the section 5 preclearance requirement and seven States are covered in part. *See* 28 C.F.R. pt. 51 app. (2005). How many counties, parishes, cities, towns, and other distinct governmental units are covered in each of the States covered in whole or in part by the section 5 preclearance requirement? Please categorize your response to identify the numbers of counties, cities, towns, etc., separately for each State.

The number of jurisdictions covered by Section 5 is:

Alabama	*67 Counties*
Alaska	*16 Boroughs*
Arizona	*15 Counties*
California	*4 Counties*
Florida	*5 Counties*
Georgia	*159 Counties*
Louisiana	*64 Parishes*
Michigan	*2 Townships*
Mississippi	*82 Counties*
New Hampshire	*8 Towns, 1 Township, 1Grant*
New York	*3 Counties*
North Carolina	*40 Counties*
South Carolina	*46 Counties*
South Dakota	*2 Counties*
Texas	*254 Counties*
Virginia	*87 Counties*
	38 Independent Cities

The Virginia figures account for the 8 counties and 3 independent cities that have filed successful bailout actions.

The Department does not maintain statistics on the number of cities and other political subdivisions within the covered counties. The number of such subdivisions varies considerably from State to State. This is a matter of State and local law; and in some States, may include elective special purpose districts (e.g., utility districts, fire districts, water districts, and the like) in addition to the more common municipal and school system elected bodies.

2. I am aware that certain counties and cities in Virginia have "bailed out" under section 4(a) of the Voting Rights Act, while the Commonwealth of Virginia itself remains a covered jurisdiction. So, it is correct, is it not, that a county that meets the bailout criteria can

bail out under section 4(a) although the covered State in which the county is located is not seeking bailout, and although the State itself might not qualify for bailout? Is the same true for a town within a county? In other words, could a town bail out even though the covered county in which it is located could not?

Under the Act, a county within a covered State can file a successful bailout action separate from the State. Current law, however, does not permit a city and other political subdivisions within a covered county to separately bailout of coverage. Section 4(a)(1) of the statute allows bailout by a "political subdivision" of the State, which is defined in section 14(c)(2) as a "county or parish, except where registration and voting is not conducted under the supervision of a county or parish" -- as, for example, in certain States in which counties do not have a role in election administration.

3. There has been testimony in the House of Representatives regarding "bailout" under section 4(a). In particular, there was testimony that, in most of the successful bailout proceedings so far, the jurisdiction had some voting changes that had not been precleared, and had to submit them as part of the bailout process.

It appears that the Department of Justice has, consistent with congressional intent, taken a commonsense approach to satisfying the bailout criteria by agreeing to allow cities and counties to bail out although there had been some oversights in compliance, provided those oversights were cured before bailout was granted. *See* S. Rep. No. 97-417, at 48 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 226 ("Courts and the Department of Justice have used, and would continue to use, common sense on changes that are really *de minimis*."). Will the Department continue to take this approach if section 4(a) is reauthorized?

The Department of Justice has approached the bailout provisions in a manner consistent with its text and congressional intent. The Department will continue to do so with respect to all provisions of the Act, including Section 4(a).

Hearing Before the Senate Committee on the Judiciary
Modern Enforcement of the Voting Rights Act
Questions 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.

(1) The Department of Justice, as a law enforcement agency, deals with specific matters on a case by case basis, with a focus on compliance or non-compliance in a particular jurisdiction based on particular facts. While we lack information regarding voting changes in non-covered jurisdictions, as compared to those submitted under Section 5 by covered jurisdictions, we have attached a list of all lawsuits in which the Voting Section of the Civil Rights Division has participated since 1976.

2. Currently, the Voting Rights Act identifies those jurisdictions subject to additional oversight by looking at voter turnout in the presidential elections of 1964, 1968, and 1972. Re-authorization of the Act in its current form would preserve these dates as the "triggers."

    a. Would you support updating the coverage formula to refer to the Presidential elections of 2000 and 2004, instead of 1964, 1968, and 1972? Why or why not?

    b. Would you support adding the Presidential election of 2000 and/or 2004 as well as any political subdivisions that have been subject to section 2 litigation say, in the last 5 years, to this formula in order to pick up jurisdictions that have begun discriminating since the 1970s? Why or why not?

In *City of Boerne v. Flores*, the Supreme Court indicated that Congress may not rely on data over forty years old as a basis for legislating under the Fourteenth and Fifteenth Amendments. *City of Boerne v. Flores*, 521 U.S. 507, 530 (1997). In striking down the Religious Freedom Restoration Act, the Court observed, "RFRA's legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry."

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

(2) & (3) The Department of Justice supports reauthorization of the expiring provisions of the Voting Rights Act. In this instance, the crafting of legislation and the related policy decisions are for the Congress. Ultimately, the Department of Justice's objective is to vigorously enforce the statute as enacted.

4. While I am still reviewing the record, it seems to me the arguments thus far focus mostly on anecdotes regarding specific covered jurisdictions – yet, for the period 1996 through 2005, the

Department of Justice reviewed 54,090 Section 5 submissions and objected to 72, or 0.153 percent. What percentage of objections below 0.153 do covered jurisdictions need to achieve before Congress can let Section 5 expire? Last year, according to DOJ data, there was only 1 objection out of 4734 submissions. Is that sufficient to warrant Section 5 coverage? Why or why not?

(4) The Department of Justice supports reauthorization of the expiring provisions of the Voting Rights Act. In this instance, the crafting of legislation and the related policy decisions are for the Congress. Ultimately, the Department of Justice's objective is to vigorously enforce the statute as enacted.

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

(5) The Department of Justice supports reauthorization of the expiring provisions of the Voting Rights Act. Section 5 of the Voting Rights Act was originally enacted for five years; and extended for five, seven and twenty-five years in 1970, 1975 and 1982, respectively. In this instance, the crafting of legislation and the related policy decisions are for the Congress. Ultimately, the Department of Justice's objective is to vigorously enforce the statute as enacted.

6. Putting aside the constitutional questions with regard to overturning *Georgia v. Ashcroft* – I want to better understand some of the practical implications.

> Assuming the new language in the re-authorization is adopted, would it be your view that even districts that are "influence" districts, with relatively low numbers of minority voters, should be protected under the plan? Why or why not?

(6) The Department of Justice will look to the final language of the statute as enacted in enforcing the Act, as well as to any relevant legislative history and judicial decisions. Ultimately, the Department of Justice's objective is to vigorously enforce the statute as enacted.

Hearing Before the Senate Committee on the Judiciary
Modern Enforcement of the Voting Rights Act
Questions from Senator Coburn

Section 5: Pre-clearance

1. On October 25, Acting AAG Brad Schlozman testified that DOJ reviews 4,000 to 6,000 pre-clearance submissions each year but objects to only a handful. For example, in 2004, your division reviewed 5,211 submissions and objected to only 3 – less than .0006%.
    a. Do you think it might make sense for the Division to review fewer voting changes?
    b. Do you think it would be wise to only review a voting change if a voter lodges a complaint?
    c. Alternatively, should we create certain de minimis exceptions? For example, if a polling place is moved less than one-tenth of a mile, DOJ will not review the move unless a voter complains,

The Department of Justice supports reauthorization of the expiring provisions of the Voting Rights Act. In this instance, the crafting of legislation and the related policy decisions are for the Congress. Ultimately, the Department of Justice's objective is to vigorously enforce the statute as enacted.

2. What percentage of the DOJ objections over the past 10 years involved *unconstitutional* behavior by a State or jurisdiction?

We have attached a list of the cases in which the Voting Section of the Civil Rights Division has participated since 1976, as well as a disk containing copies of selected complaints and final orders in cases brought by the Voting Section under Sections 2 and 208 of the Act. This list includes many cases in which the Department did not allege intentional discrimination, and cases in which courts ultimately found that the State or covered jurisdiction had acted constitutionally.

In a number of the cases under Section 2 of the Voting Rights Act, the Department has alleged that States or covered jurisdictions have engaged in intentional discrimination in a manner that could violate the Fifteenth Amendment. Examples include the following:

U.S. v. Conecuh County	*S.D. Ala.*	*10/21/83*
U.S. v. City of Bessemer	*N.D. Ala.*	*04/10/84*
U.S. v. Pike County	*M.D. Ala.*	*05/11/84*
U.S. v. City of Cambridge	*D. Md.*	*12/05/84*
U.S. v. Tallapoosa County	*M.D. Ala.*	*11/12/93*
U.S. v. City of Newport News	*E.D. Va.*	*10/26/94*

U.S. v. City of Baton Rouge	*M.D. La.*	*01/24/96*
U.S. v. City of Cambridge	*D. Md.*	*12/05/84*
U.S. v. Los Angeles County	*C.D. Cal.*	*09/08/88*
U.S. v. City of Memphis	*W.D. Tenn.*	*02/15/91*
U.S. v. City of Baton Rouge	*M.D. La.*	*01/24/96*
U.S. v. Day County and Enemy Swim Sanitary Dist.	*D.S.D.*	*05/10/99*
U.S. v. Town of Cicero	*N.D. Ill.*	*03/13/00*
U.S. v. City of Hamtramck	*E.D. Mich.*	*08/04/00*

The failure to allege intentional discrimination of course does not necessarily mean that such intentional discrimination was not present. In some instances, additional information may become available after filing that establishes that the discrimination was intentional.

A number of cases filed under under Section 203 of the Voting Rights Act also have been brought in circumstances involving a allegations of intentional discrimination. These include:

U.S. v. State of New Mexico and Sandoval County, NM	*D.N.M.*	*12/5/88*
U.S. v. Cibola County	*D.N.M.*	*09/27/93*
U.S. v. Socorro County	*D.N.M.*	*10/22/93*
U.S. v. Alameda County	*N.D. Cal.*	*04/13/95*
US v. Passaic County, NJ	*D.N.J.*	*06/02/99*

Other Section 203 cases, while not including such allegations of intentional discrimination, have involved conduct that violates the Constitution. See, e.g., United States v. City of Boston, (D.Mass.2005); United States v. Berks County, (E.D. Pa. 2003). We have attached a disk containing letters to local election officials that describe more fully the nature of conduct documented by the United States in its Section 203 investigations.

Section 2: Permanent Provisions

3. How do DOJ prosecutions under Section 2 and other voting laws compare across the country? Are there significantly more in the covered jurisdictions than in the non-covered ones?

Attached is a list of all lawsuits in which the Voting Section of the Civil Rights Division has participated since 1976. The list reflects that most of the cases brought under the Voting Rights Act have been involved jurisdictions that are covered under Section 5; however, in recent years most of the cases have been brought in jurisdictions that are not covered under Section 5.

Section 203: Multi-lingual Ballots

4. Working with the Census Bureau, how do you determine how many people in a jurisdiction are of the same language minority? How do you determine that those people are also illiterate? Also, if the people do not read English well enough to vote, how do they complete the census?

The minority language determinations under the Voting Rights Act are made by the Census Bureau, and are based on its studies and its special expertise. Consistent with the plain language of the Act, the Department of Justice enforces the law based on those determinations. The Census Bureau is the best source for information on how it performs its statutory functions.

5. According to the 1986 GAO study: **46% of respondents** to the GAO's request for estimates on the use of oral minority language assistance said NO ONE used the assistance ("Bilingual Voting Assistance: Costs of and Use During the November 1984 General Election," GAO, pp.32, 1986). Based on that information can you suggest a better way to meet the need for ballots in languages other than English?

The Department of Justice encourages jurisdictions to use channels of communication that are both effective and efficient. In our experience, a significant gap between the Census Bureau's determination of language need and the utilization of minority language materials stems from a failure to make such materials reasonably available to minority language voters.

6. What do you think would happen if ballot determinations were left to each local jurisdiction as is currently done in areas with less than 10,000 people or 5% of the population who are of the same language minority?

The Department of Justice cannot predict such matters with any certainty. While we have observed some jurisdictions that provide minority language materials even though they are not required to do so under the Voting Rights Act, we also have brought more lawsuits to enforce the language minority provisions of the Voting Rights Act in the past five years than in all previous years combined.

7. Have you received complaints of disenfranchisement because of language obstacles from jurisdictions not covered by Section 203?

Yes. In appropriate circumstances, such a complaint may give rise to a lawsuit under Section 2 of the Voting Rights Act. See, e.g., United States v. Osceola County, Florida (M.D. Fl. 2002); United States v. Berks County, Pennsylvania (E.D. Pa. 2003); United States v. City of Boston, Massachusetts (D. Mass. 2005).

8. During the May 10th hearing you told Chairman Specter that DOJ does not require surname analysis. However, on May 4th, DOJ submitted testimony to the House Judiciary Subcommittee on the Constitution recognizing that its use of surname analysis is imperfect.
    a. What is surname analysis used for?
    b. Is it true that DOJ assumes that 25% of those with foreign surnames need voting assistance?
    c. If the answer to "b" is yes, how do you determine which individuals need assistance and what type of assistance is provided?

(a) Section 203(c) requires covered jurisdictions to provide election materials "in the language of the applicable minority group as well as in the English language." To avoid burdening covered jurisdictions with the unnecessary expense of providing bilingual election materials to all voters, the Department recommends targeting minority language materials and information to those who need them in a practical, efficient and effective manner. In this regard, Spanish (and other minority) surname lists can be a useful tool. The Department supports – but does not require – using them in a careful and appropriate manner.

The Census Bureau does not identify those persons in covered jurisdictions with limited English proficiency and a consequent need for minority language materials. Rather, the Census Bureau only provides local jurisdictions with the total number of voting age citizens within the jurisdiction who are of a particular language group and who meet the statutory test of limited English proficiency. In Orange County, for example, the Census Bureau reported the following totals:

Hispanic	*64,385*
Vietnamese	*45,730*
Chinese	*14,805*
Korean	*12,240*

The Census Bureau did not tell the County where these people reside. Determining the location of these persons among the 2.8 million residents of Orange County fell to the County, and a similar task fell to other similarly situated counties.

Voter registration data at the precinct level is the best starting point for election officials; it excludes non-citizens and other non-voters, and is the fundamental building block of election administration. Registration lists also may include self-reported ethnicity data, as in Florida, and may include voters' place of birth, as in parts of California. Along with this data, surname lists offer a means of locating those precincts that are likely to include voters who speak a particular minority language and do not speak English well enough to participate in the political process. While a particular surname tells a county nothing about the language skills of a particular voter, a county that seeks to locate registered voters who speak Vietnamese logically could most effectively look among those precincts with substantial numbers of Vietnamese-surnamed voters. From that starting point, the local election officials can efficiently conduct further inquiry to

determine the actual needs of the voters in those particular precincts. The surname - or ethnicity or place of birth analysis – is a tool that may help election officials comply with Sections 203 and 4(f)(4).

Surname analysis is used by many local officials. The Secretary of State for the State of Texas, for example, provides Spanish surname analysis to each county elections office in the State to assist local officials in compliance with State law, which requires a bilingual poll worker where five percent or more of registered voters have Spanish surnames

The Department of Justice uses surname lists and other data in the same manner. The Department does not rely on assumptions, but rather, upon reliable evidence that is admissible in a federal court. We fully recognize that comparing voter registration lists to the Census Bureau's Spanish surname list, place of birth data, or other data are imperfect measures of the language need in a precinct. Like local officials, we use it as a convenient starting point in trying to determine how and where best to meet the needs of their voters. Further investigation as to the language needs of a given precinct and the treatment of minority language voters in that precinct permit us to calibrate the requirements of the Voting Rights Act as necessary.

(b) *The Department does not assume that 25 percent of those with surnames indicating their membership in a covered language minority group need assistance in their native language to participate in the political process. The proportion of citizens who lack limited English proficiency varies considerably from jurisdiction to jurisdiction and among the various minority language populations.*

9. How many covered jurisdictions have successfully "opted out" of the multilingual election requirements of the Voting Rights Act under Section 203(d)?
    a. What were reasons for denying applicants?
    b. How many jurisdictions have applied to be removed from Section 203 coverage?
    c. Why might a jurisdiction not apply, even if their multi-lingual services are rarely used?

One jurisdiction has successfully "opted out" of the minority language requirements of the Act under Section 203(d). In Doi v. Bell, 449 F. Supp. 267 (D. Hawaii 1978), the State of Hawaii conducted its own population survey in 1976 and was able to show, and the United States conceded, that the illiteracy rate of Japanese Americans in Maui County was lower than the national illiteracy rate. In its declaratory judgment action, Hawaii had sought bailout from Section 203 requirements for all coverage, but was able to satisfy the bailout standard only with respect to Japanese Americans in Maui County.

Three jurisdictions -- Roosevelt County, Montana in 1976; Passamaquoddy Pleasant Point Indian Reservation, Maine in 1977; and Placer County, California in 1980 -- were unsuccessful in their bailout efforts because they were unable to prove that the illiteracy

rate of the covered group was equal to or lower than the national illiteracy rate. None of the jurisdictions is covered under the current statutory formula.

The Department of Justice is not in a position to speculate as to why a jurisdiction may not be seeking to bailout of coverage under Section 203(d).

Hearing Before the Senate Committee on the Judiciary
Modern Enforcement of the Voting Rights Act
Questions from Senator Leahy

1. You testified on May 10, 2006 before the Senate Judiciary Committee about the Justice Department's increased outreach to jurisdictions covered by the sections protecting language minorities.

    a. Have those covered jurisdictions been responsive to your outreach and are all jurisdictions covered by Sections 203 and 4(f)(4) complying with the Voting Rights Act?

    b. The Senate Judiciary Committee heard testimony on May 10, 2006 that Section 203 has never been enforced in Alaska. Has the Department of Justice reached out to Alaska to help them comply with Section 203? Has Section 203 been enforced in Alaska?

(a) Many jurisdictions covered under Sections 203 and 4(f)(4) have been very responsive to the Department of Justice's outreach efforts. There has been a dramatic increase in these jurisdictions' voluntary compliance with the requirements that election information be made available through practical means, as well as the technical assistance offered by the Civil Rights Division's Voting Section. Following outreach by the Division, for example, the County of Los Angeles voluntarily added over 2,200 bilingual poll workers, for a 62 percent increase in their bilingual election-day staffing. In Texas, to cite another example, the Secretary of State was particularly helpful in providing a forum for the Department's outreach to election officials and voters in that State.

Not all covered jurisdictions, however, have been as responsive. Having placed every jurisdiction on direct and formal notice of its obligations under Sections 203 and 4(f)(4), the Department has still brought a record number of lawsuits since 2002 to obtain full compliance with these sections of the Voting Rights Act. The Department also has a number of active investigations, and continues both outreach and enforcement at unprecedented levels.

(b) The Department of Justice contacted election officials and members of minority language communities in the State of Alaska with respect to Section 203 both in the period immediately after the July 26, 2002 Census determinations of Section 203 coverage, as well as in other communications. The Civil Rights Division also monitored elections in one subdivision of the State of Alaska in November of 2004. To date, the Department has not brought a formal Section 203 enforcement action in that State. We remain vigilant to investigating, and where appropriate prosecuting, Section 203 violations wherever they are found to exist.

2. We have received testimony that only about a dozen jurisdictions have taken advantage of the "bail out" provisions in Section 4. It is interesting to note that

not one of the jurisdictions that have applied for bail out has been rejected. I understand that the Justice Department has issued guidelines and works closely with covered jurisdictions to help them comply with the pre-clearance process.

a. Can you please describe what outreach, if any, the Department has conducted to inform jurisdictions about the mechanics and procedures for seeking bail out?

b. Has the Justice Department considered issuing regulations to clarify how jurisdictions can bail out from coverage to make that process more user-friendly? Please explain why or why not.

(a) Since the Voting Rights Act was enacted in 1965, the Department of Justice's principal focus has been to enforce its requirements, and to work with state and local officials to make compliance as easy as possible. The Department of Justice has not conducted any coordinated outreach program targeted to inform local authorities of their option to seek a bailout.

(b) The Department of Justice has worked closely with each individual jurisdiction that has expressed an interest in obtaining a bailout. Our assistance has focused on helping the jurisdiction to fully develop a factual record on which a bailout could be based. As the Act vests responsibility upon the movant jurisdiction to seek and obtain a declaratory judgment from a federal court, and sets forth the requirements for a bailout, the Department has never issued regulations or advisory guidelines on that bailout procedure.

Hearing Before the Senate Committee on the Judiciary
Modern Enforcement of the Voting Rights Act
Questions from Senator Kennedy

Assistant Attorney General Wan Kim

1. Has the Supreme Court decision in Reno v. Bossier Parish School Board (Bossier II), which held that the Justice Department should not object to voting changes that have a discriminatory purpose, unless that purpose was an intent to "retrogress," had an impact on the number of Justice Department objections raised since 2000?

The Supreme Court's 2000 decision in Bossier II narrowed the grounds on which the Attorney General could interpose an objection to a voting change under Section 5. After Bossier II, the Attorney General could not interpose an objection to a voting change having no retrogressive effect and a non-retrogressive purpose. The Department of Justice has never maintained statistics on whether a different Section 5 preclearance determination would have been made under an alternative legal standard.

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June 15, 2006

Arlen Specter, Chairman
United States Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

Attention: Barr Huefner (Barr_Huefner@judiciary.senate.gov)

Re: Responses to Written Questions from Committee Members

Dear Chairman Specter:

On behalf of the Native American Rights Fund, I would once again like to thank you for the opportunity to provide testimony regarding the status of the Voting Rights Act in the State of Alaska during the United States Senate Judiciary Committee Hearing held on May 10, 2006, regarding "Modern Enforcement of the Voting Rights Act."

Below are my responses to the written questions from Committee members for inclusion in the legislative record for renewal of certain provisions of the Voting Rights Act. If you, or the Committee, have any further questions regarding this matter, please do not hesitate to contact me.

Respectfully,

/s/ Natalie Landreth

Natalie Landreth, Staff Attrorney

United States Senate Committee on the Judiciary
"Modern Enforcement of the Voting Rights Act"

Questions from Senator John Cornyn:

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

   All of Alaska is covered by Section 4(f)(4) of the VRA; thus, we do not have non-covered jurisdictions in order to make a comparison.

2. *Currently, the VRA identifies those jurisdictions subject to additional oversight by looking at voter turnout in the presidential elections of 1964, 1968, and 1972. Re-authorization of the Act in its current form would preserve these dates as the "triggers."*

   (a) Would you support updating the coverage formula to refer to the Presidential elections of 2000 and 2004, instead of 1964, 1968, and 1972? Why or why not?

   I would not support replacing the earlier triggers entirely with the two most recent elections. The reason is that generally change comes slowly. Discriminatory practices are based on deep-seated ideologies and take a long time to adapt. Alaska is the perfect example. It has never in the thirty years it has been a covered jurisdiction fully complied with the VRA. In addition, Alaska is still trying to implement an "English-only" policy that would prevent many Native speakers from interacting with the State. In other words, Alaska still acts like it is 1972. This shows that discriminatory practices do not simply stop when a law is passed. The phrasing of the question also suggests that discrimination which existed in 1964, 1968 or 1972 must be over and done by now and thus we should not rely on those years as triggers, but when one looks at Alaska, one can see that that is not correct. Discrimination is an insidious, evolving disease whose effects linger through generations; it cannot be cured in one or two election cycles. Jurisdictions currently covered are covered because they discriminated against their minority populations. They should not be released from oversight simply because time has passed; they should be released if they can demonstrate that they are no longer discriminating, such as through bailout. That, I think, should be the only test.

   As a larger matter, I do not necessarily support relying on voter turnout as the only or even a critical trigger for coverage because, while Alaska measures general voter turnout, it is extremely difficult to accurately measure Alaska Native turnout. As the population most likely to be affected by discriminatory laws and practices, their participation is critical, and yet Alaska does not collect the data that would allow Alaska Natives to be measured. As a result, we have no way to measure accurately Alaska Native turnout. I can state, however, that during the preparation of our report we did attempt to measure

the turnout of rural Alaska Native villages. We found that there was a wide disparity among them—from 12% turnout in some places to 80% in others. This skews statewide turnout to be an average of around 50%. Therefore, any consideration of the use of a turnout trigger for coverage should not be limited to statewide voter turnout but also voter turnout broken down by census or other districts in order to truly focus coverage on the areas where it is needed most.

Moreover, I do not think turnout is the best or most accurate measure of discrimination that may be occurring because what we found in our report is that voters may come to the poll but they do not understand the English ballot and thus tend to vote in ways they did not intend. That means they may still have high turnout and be totally disenfranchised at the same time.

(b) *Would you support adding the Presidential election of 2000 and/or 2004 as well as any political subdivisions that have been subject to Section 2 litigation say, in the last 5 years, to this formula in order to pick up jurisdictions that have begun discriminating since the 1970s? Why or why not?*

I sense that this question is designed to include the 2000 and 2004 elections because those years experienced higher than average turnout for U.S. elections, and thus it would help raise the overall turnout of jurisdictions and remove some from coverage. While I do not oppose generally including more recent triggers such as turnout in the 2000 or 2004 elections in addition to the older ones, I would oppose removing jurisdictions if they met the turnout requirement for one or both of those elections. That is, I would oppose a trigger requiring jurisdictions meet the turnout mark for all elections; they should just have to qualify in one of the listed years as is currently done. I reiterate that I do not think that turnout should be the main focus of coverage under the VRA for the reasons described above. I would, for all elections, emphasize the use of a test or device because, as we have seen, turnout can be adequate and yet a significant part of the citizenry can be completely disenfranchised.

3. *In City of Boerne v. Flores, the Supreme Court indicated that Congress may not rely on data over 40 years old as a basis for legislating under the Fourteenth and Fifteenth amendments. City of Boerne v. Flores, 521 U.S. 507, 530 (1997). In striking down the Religious Freedom Restoration Act, the Court observed, "RFRA's legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry."*

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

The question suggests that evidence of discriminatory voting practices from the 1964 election would be impermissible for Congress to consider given the Supreme Court's statement in *Boerne v. Flores*. I do not believe, however, that the holding of *Boerne* can

be made quite so broad. Rather, the Supreme Court stated that "[t]he appropriateness of remedial measures must be considered in light of the evil presented," and that in the case of RFRA, the information presented at the hearing mentioned "no episodes occurring in the past 40 years." *Boerne, 521 U.S. at 530.* The Supreme Court did not draw a bright-line rule that Congress may not rely on data that is over 40 years old as a basis for legislating under the Fourteenth and Fifteenth amendments, but they held that a complete lack of evidence from the past 40 years rendered the sweeping remedial measure incongruent to the evil presented. Thus, I do not agree with the fundamental premise of the question.

Moreover, I think the holding of *Boerne* supports the argument to maintain the year 1964 as a trigger year. Voting is the most fundamental of all rights in a democracy. Therefore, to interfere with it would be a significant "evil" under the Court's reasoning. Indeed, in *Boerne*, the Court holds up the VRA as an example of proper congruence. I could see that there would be a problem if the only trigger year were 1964 and no evidence of discriminatory practices were presented in the past 40 years, but that is clearly not the case. The record of discriminatory practices is composed of objections, litigation, and eyewitness testimony within the past 40 years, and much of it even during the last general election. Therefore, maintaining the earlier trigger years such as 1964 is appropriate because it demonstrates the length and severity of the problem and enables the Court to weigh remedial measures imposed.

4. *While I am still reviewing the record, it seems to me the arguments thus far focus mostly on anecdotes regarding specific covered jurisdictions—yet, for the period 1996 through 2005, the Department of Justice reviewed 54,090 Section 5 submissions and objected to 72, or 0.153 percent. What percentage of objections below 0.153 do covered jurisdictions need to achieve before Congress can let Section 5 expire? Last year, according to DOJ data, there was only one objection out of 4,734 submissions. Is that sufficient to warrant Section 5 coverage? Why or why not?*

The question implies that because the DOJ has not objected, there must not be a significant problem with discrimination. I respectfully disagree with that assumption. From our perspective, the DOJ has clearly underenforced the VRA and that includes not objecting when it was appropriate and not bringing lawsuits where necessary. Again, Alaska is an ideal example. It has failed to comply with the basic mandate of providing election materials and ballots in Native languages for 30 years, and yet the DOJ has never intervened, nor even sent formal observers. Thus the lack of objections is not empirical evidence of the lack of a problem.

It is also critical to point out that objections are not the only indicator of a problem because the DOJ itself relies on many more informal mechanisms to resolve problems such as a simple phone call and "more information requested" letters. Often these less formal measures give the jurisdiction notice that its activities are being monitored and thus deter that jurisdiction from proceeding in an inappropriate manner. The DOJ does

not send objection letters as a knee jerk reaction and therefore they cannot serve as the only indicator. Section 5 coverage should be continued where the jurisdiction meets the triggers, regardless of whether or not the DOJ is enforcing these laws.

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

We would not support a re-authorization term of five or even 10 years because it is a Herculean effort to mobilize the various communities in numerous states to prepare for reauthorization and it takes a significant amount of Congressional time to gather the record for and then pass the bill. To be blunt, American citizens should not have to lobby continually to maintain their right to vote. The jurisdictions covered are so designated because the wrongs they have committed are the most serious kind in a democracy—interference with the franchise. Once a jurisdiction is covered under the VRA, the burden should be on the jurisdiction to show it has come into compliance with the law, not on the citizens to constantly show otherwise. I would also like to reiterate what I stated above in response to question 2, that the passage of time does not absolve jurisdictions; they must show change, such as through bailout.

6. *Putting aside the constitutional questions with regard to overturning Georgia v. Ashcroft—I want to better understand some of the practical implications. Assuming the new language in the re-authorization is adopted, would it be your view that even districts that are "influence" districts, with relatively low numbers of minority voters, should be protected under the plan? Why or why not?*

We did not cover this issue in the preparation of the Alaska report and therefore I have no comment to make on this issue.

* * * * *

Questions from Senator Tom Coburn:

1. *Can you each give one example of a covered jurisdiction denying a minority the right to vote over the last ten years?*

Alaska is a covered jurisdiction (both by sections 4(f)(4) and 203) and it is supposed to provide ballots and elections materials in the minority language of the area. Alaska does not do this and has not done this in the 30 years since the VRA was extended in 1975. As a result, the more than 10,000 Yup'ik-speaking Alaska Natives who are American citizens are faced with elections held only in English. There are numerous instances where citizens have actually voted in ways they did not intend because they did not understand the proposition on the ballot. In these cases, the right to vote is almost meaningless. Conducting English-only elections in places where English is not spoken is

denying that minority population the right to vote. It is an old-fashioned literacy test. In its effect, it is no different from actually closing the door to the poll.

2. *Would you support creating a de minimis exception to pre-clearance to focus enforcement efforts where they are needed most? For example, if a polling place is moved less than one-tenth of a mile, DOJ will not review the move unless a voter complains.*

I am not sure there is a change that can be considered *de minimis* across the board. The example presented – moving a polling place one-tenth of a mile – is not even one that can always be considered unobjectionable since the new polling place may present problems other than distance, such as features of the place itself (i.e., not being handicapped-accessible) or whether notice of the move has been given to the voters. As for only reviewing the move if a voter complains, this would not really protect the voters because they almost never hear of such changes until Election Day, when of course it would be too late.

* * * * *

Questions from Senator Patrick Leahy:

1. *What voting practices, procedures, and educational barriers demonstrate the continued need for Section 203?*

The voting practices and procedures that demonstrate the continued need for Section 203 are that English-only elections are being conducted in places where the citizens do not speak English. I have detailed this practice in the Alaska Report, but it can easily be summed up: There are 20 different Native languages spoken in Alaska, the largest of which are Inupiaq and Yup'ik (with more than 10,000 speakers). These languages are written and are still spoken at home. There are 17 villages that are almost entirely Yup'ik-speaking. This is particularly true of the elder Native population. According to the census, which notoriously undercounts minorities and minority language speakers, the percentage of the voting age population who are limited-English proficient is 12–21%. It is clear that there are people in this population who do not speak and read English well enough to understand an English election pamphlet or an English ballot. They are thus unable to choose on a ballot what is best for them and their community; they are completely disenfranchised.

Although they have received less attention, the educational barriers faced by the Alaska Native population are equally as striking. Before the 1970s, there were few high schools in rural Alaska. Young Natives had to choose between BIA boarding schools and a diploma or staying with their families. Thus, in 1970 there were only 2,400 Alaska Natives total who had graduated high school. This group is now the elder population. The general illiteracy rate in Yup'ik-speaking areas is 10–14%. Currently, Alaska

Natives fare better in terms of actual graduation, but they still lag far behind their non-Native counterparts. For example, the statewide high school graduation qualifying exam results showed that 80.5% of Alaska Natives are not proficient in reading comprehension. This means that only 19.5% of new Alaska Native voters may be able to understand the English ballot. These indicators, combined with the fact that many Alaska Natives speak another language at home, demonstrate that they are significantly disadvantaged in voting. These American citizens – the earliest Americans – show there is still a marked need for Section 203.

2. *Why does Section 203 remain necessary in states with parallel laws that require language assistance, such as California, New Mexico, and New Jersey?*

Section 203 remains necessary because state laws often do not go far enough. Alaska, for example, provides that voters may ask for assistance if they need it (Alaska Stat. 15.15.240). As a result, minority voters in Alaska may ask for oral assistance with translation of English ballot measures, and assistance may or may not be available at the time. This is the extent of the state's language assistance law. In contrast, the VRA provides that oral and written assistance must be provided for all applicable minority languages in each covered jurisdiction at each polling place. Needless to say, there is no comparison between the two as many citizens remain disenfranchised even under the state law.

3. *What evidence supports extension of 4(f)(4) coverage in the three states covered in whole and the six states covered in part by that section? Why is coverage under Section 5 necessary in those states?*

There is evidence that the states covered by sections 4(f)(4), and Alaska in particular, continue to discriminate against their citizens. In addition, as I mentioned in response to question number 2 from Senator Cornyn, change comes slowly and states that were found to have discriminatory practices in 1975 still retain vestiges of those acts.

Section 4(f)(4) was meant to address jurisdictions that had used any kind of "test or device" that resulted in a lower voter registration or turnout. Alaska has never implemented the mandate placed upon it in 1975 and has changed little since that time; thus, it is no less deserving of coverage today than it was in 1975. The evidence detailing that discrimination is contained in the Alaska Report, but it can be summarized this way: We know that there are large populations of Yup'ik- and Inupiaq-speaking Native Americans in parts of Alaska, and that many people in these communities (especially the senior citizens) do not understand written or spoken English, and yet they are subject to English-only elections. As a result, they cannot understand the ballots, and they cannot make choices in their own governance. Clearly, an English-only election is the same as an English literacy test and thus constitutes a "test or device" under Section 4(f)(4). It is the clearest example from the record of discrimination against a sector of the American

population. It shows that voting rights have not been fully realized and that many of the concerns present in 1975 are still present.

This question also asks why Section 5 coverage is necessary for the same jurisdictions covered by 4(f)(4). The answer is twofold. First, the VRA focuses its remedial sanctions on those jurisdictions where it is needed most, and jurisdictions that have employed tests on their own voter populations should be the focus of federal oversight in the form of preclearance. Jurisdictions that have engaged in these practices have impeded or interfered with the most fundamental right in a democracy. Simply put, the use of a test or device means they need to be monitored. Thus, there is a logical link between the two sections. The second reason is that the Supreme Court requires that in remedying discrimination, there must be congruence between the "evil presented" and the remedial measures. Oversight under Section 5, therefore, is probably required to be paired with the jurisdictions that have committed discriminatory acts and practices.

4. *I would like to better understand the relationship between Section 203 and Section 5 of the VRA. How does Section 5 pre-clearance protect language minority citizens from discriminatory voting changes? Why does pre-clearance need to be applied to certain jurisdictions with language minority populations?*

Although they have different formulas that trigger coverage, both sections 4(f)(4) and 203 require assistance for language minority voters. Jurisdictions that fall under 4(f)(4) are also subject to preclearance under Section 5. Section 203 is more of a stand-alone section and does not automatically trigger Section 5 coverage. While Section 4(f)(4) is based on the use of a test or device and the electoral turnout, Section 203 is based in the number or percentage of minority language speakers within a jurisdiction. Thus, Section 4(f)(4) captures all tests or devices that may discourage or prevent would-be voters from voting, whereas Section 203 is specifically tailored to protect the right of minority language speakers. The former is of course much broader than the latter. However, there is still a logical relationship between Section 203 and preclearance. The reason is that minority language populations are entitled under this section to ballots and election materials in their own language, and preclearance ensures that mandate is honored. For example, jurisdictions subject to Section 203 which are also subject to preclearance would have to submit their proposed new laws for review and the DOJ would ensure that ballots and election materials are being provided in the minority language. Section 203 ensures that the minority language population in a jurisdiction is able to vote. Preclearance ensures that the states follow the law before the election.

* * * * *

Questions from Senator Kennedy:

1. *Do you believe that Section 5 has a deterrent effect on discrimination by covered jurisdictions? If so, please give us a specific example of that deterrence.*

Section 5 has clearly had a deterrent effect in Alaska. The DOJ has only objected once to a proposed election law change in Alaska, but that single objection has had a dramatic impact on the political landscape of Alaska. In 1990, the DOJ objected to a retrogressive district which would have prevented the Alaska Natives in District 36 from electing a candidate of their choice. It is critical to point out that the district at issue was the largest in Alaska and in fact that it represented most of the Native communities in the interior of Alaska. It was a crucial district for the Native community and yet the redistricting plan had reduced the Native voting strength in this district from 55% to 50%, thus removing their ability to elect a candidate of their choice. This district had passed state court review. Only the intervention and objection of the DOJ corrected the situation.

This one objection was felt statewide and continues to have an impact today. Not only did it immediately impact the makeup of the state legislature and the representation of rural Alaska, but also, 10 years later, when Alaska was redistricting after the 2000 census, it took an entirely different approach to the process. This time, it hired a national voting rights expert to ensure that its proposed plan did not violate the VRA or reduce the ability of Alaska Natives to elect candidates of their choice. It was extraordinarily careful in this respect. Moreover, to ensure that Alaska Natives participated in the entire redistricting process this time, the State appointed an Alaska Native to head the Redistricting Board. This is a 180-degree turn from the 1990 redistricting that prompted the objection. It is safe to say that Alaska took the objection to heart and completely changed course; this demonstrates that even a single objection can have a significant impact on the political landscape and that the mere prospect of another objection can ensure compliance with the law.

* * * * *

Response of Robert McDuff to Written Questions from Senator Tom Coburn
May 10, 2006 Hearing on Renewal of the Voting Rights Act

Question 1.

Can you each give one example of a covered jurisdiction denying a minority the right to vote over the last ten years?

As an initial matter, the question omits a broad class of conduct that falls within the reach of Section 5 – voting changes that result in *abridgement* of the right to vote on account of race or color.[1] Voting changes that result in vote denial or those that abridge minority voting rights may be denied preclerance if those changes place minority voters in a worse position. Further, those changes that are precleared under Section 5 may later be subject to challenge under constitutional or other statutory grounds.

While there are many examples of vote denial within the covered jurisdictions over the last ten years, I will highlight one recent occurrence in the State of Mississippi. In 2001, the Town of Kilmichael, Mississippi, cancelled their local elections for aldermen and mayor after a unanimous vote from the town's board. No public notice of the meeting was provided to the community. After the 2000 census, African Americans constituted a majority of the town's population and registered voters for the first time.[2] African Americans qualified for office in Kilmichael in unprecedented numbers for the mayoral and aldermanic seats. Specifically, one African American qualified to run for mayor and four African Americans qualified for five Aldermanic seats. Prior to 2001, no African American had ever run for mayor, and only four African Americans had run for the position of alderman (only one was elected).

The opportunity for African Americans to elect candidates of choice led the town to cancel the election and adopt a single-member ward system. The Department of Justice objected to the cancellation thus, requiring that elections proceed as scheduled. DOJ found that "[h]ad the election been held, blacks would have exercised the opportunity to attempt to elect candidates of their choice to the mayoral and board seats. The cancellation of this election leaves black citizens worse off because of the denial of that opportunity." This was an unequivocal attempted denial of the right to vote that was remedied only because of Section 5.

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[1] U.S. Const., Amend. XIV, § I; 42 U.S.C. § 1973.

[2] Letter from Ralph Boyd, Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, to J. Lane Greenlee, Esq. (December 11, 2001).

Question 2.

Would you support creating a de minimus exception to pre-clearance to focus enforcement efforts where they are needed most? For example, if a polling place is moved less than one-tenth of a mile, DOJ will not review the move unless a voter complains.

I would not be in favor of any move that shifts the burden of proof in the Section 5 preclearance process from a state or political subdivision to potential victims of discrimination. This revision of the scope of Section 5 would undermine four decades of expertise that has been developed on the part of the Department of Justice. Indeed, DOJ has developed a fact-intensive process to review, examine and analyze submissions and usually issue preclearance determinations within 60 days. In making its determinations under Section 5, depending on the type and complexity of the voting change, DOJ looks to factors such as the extent to which a reasonable and legitimate justification for the change exists; the extent to which the jurisdiction followed objective guidelines and fair and conventional procedures in adopting the change; the extent to which the jurisdiction afforded members of racial and language minority groups an opportunity to participate in the decision to make the change; and the extent to which the jurisdiction took the concerns of members of racial and language minority groups into account in making the change.[3] In addition, DOJ does not always utilize the entire 60 day statutory period, and expedited requests for preclearance are entertained. Shifting the burden of proof to voters ignores the complexity of the Section 5 review process and underestimates the amount of time and resources that would be required for a citizen to develop and lodge a viable complaint that would likely trigger DOJ action.

Moreover, the imposition of a subject matter exception to the Section 5 review process likely lead to the adoption of voting changes that place minority voters in a worse position. Since implementation of Voting Rights Act, DOJ has issued objections to a wide variety of voting changes including proposed redistricting plans, annexations, changes in the manner of voting; changes in candidacy requirements and qualifications; changes in the composition of the electorate that may vote for candidates for a given office; changes affecting the creation or abolition of an elective office; polling place changes; and various other types of changes. When examining polling place changes, DOJ investigates procedural aspects of the change such as distance from the pre-existing site and proximity to the minority community. However, DOJ also examines substantive aspects of the proposed polling place change such as the historical or social significance of the proposed site, if any. For instance, in 1997, the Department of Justice objected to a polling place change in St. Landry Parish, Louisiana, because the African-American community perceived the site to be "rooted in a history of past discrimination."[4] Just last month, in May 2006, DOJ objected to a plan that eliminated 86 percent of the polling places in a Texas Community College district, in part, because minority voters had to

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[3] 28 C.F.R. Part 51.57 (relevant factors)

[4] Letter from Isabelle Katz Pinzler, Acting Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, to Kathy Moreau, Secretary, St. Landry Parish Police Jury (Section 5 Objection Letter)(October 21, 1997).

travel a greater distance to cast their ballot than under the preexisting system. In addition, DOJ found that polling sites with the smallest proportion of minority voters served relatively few voters (6,500) voters, while polling sites in majority Latino areas served a far larger number of voters (67,000).[5] Both of these objections illustrate that polling place changes can be retrogressive and should not be dismissed as *per se de minimus*. Wiith Section 5 preclearance requests the context is critical and DOJ has an expertise in assessing the context.

[5] Letter from Wan J. Kim, Assistant Attorney General, Civil Rights Division, U.S. Department of Justice to Ms. Renee Smith Byas, Vice Chancellor and General Counsel, North Harris Montgomery Community College District (Section 5 Objection Letter)(May 5, 2006).

Response of Robert McDuff to Written Questions from Senator John Cornyn

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

The appropriate inquiry looks to evidence of a history of discrimination that, in part, gave rise to the coverage formula, and the evidence of persisting forms of discrimination in those covered jurisdictions subject to the special requirements of Section 5 of the Voting Rights Act (VRA).[1] This analysis can only be conducted by comparing the status of minorities and non-minorities within the covered jurisdictions themselves. On a number of occasions, the Supreme Court has acknowledged that this selective geographic reach of Section 5 was justified by the exceptional history of voting discrimination within the covered jurisdictions.[2] Now Congress must look to see whether discrimination continues in those covered jurisdictions in renewing the expiring provisions of the Act.

As I testified, I have not conducted a study of non-Section 5 jurisdictions, but I do know the Supreme Court has held that Congress had a basis for the coverage formula it created, and I believe the record demonstrates the need to continue the operation of Section 5 in the covered jurisdictions, including Mississippi.

In looking specifically at the State of Mississippi, we see that there is substantial evidence of continuing voting discrimination that warrants the renewal of Section 5. The Department of Justice (DOJ) has interposed 112 objections since the Act was reauthorized in 1982. 86 of these objections relate to redistricting. Other objections were imposed because of changes involving at-large elections, annexations of territory, numbered post requirements, majority vote requirements, candidate qualification requirements, changes from election to appointment of certain public officials, drawing of precinct lines, polling place relocations, open primary laws, repeal of assistance to illiterate and disabled voters, and a variety of other measures. In the context of racial bloc voting, which is the pernicious legacy of segregation, many of these retrogressive voting changes, if implemented, would have severely worsened the position of minority voters throughout the state.

Seventy-nine objections were interposed to voting changes involving Mississippi's counties -- these objections covered the vast majority of Mississippi's 82 counties, a number of which were repeat offenders. At various times, black voters had to return to the courts to force state and local officials to fulfill the basic requirement of

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[1] 42 U.S.C. § 1973b (1982).

[2] South Carolina v. Katzenbach, 383 U.S. 301, 333-34; *See also* An Introduction to the Expiring Provisions of the Voting Rights Act and Legal Issues Relating to Reauthorization Before the S. Comm. on the Judiciary, 109th Cong. (May 2006) (Statement of Laughlin McDonald, Director ACLU Voting Rights Project).

submitting voting changes for Section 5 review. The evidence shows that Section 5 has worked to ferret out a number of retrogressive voting changes that would have otherwise worsened the position of minority voters, relative to non-minority voters, in the State of Mississippi.

2. Currently, the Voting Rights Act identifies those jurisdictions subject to additional oversight by looking at voter turnout in the presidential elections of 1964, 1968, and 1972. Re-authorization of the Act in its current form would preserve these dates as the "triggers."

a. Would you support updating the coverage formula to refer to the Presidential elections of 2000 and 2004, instead of 1964, 1968, and 1972? Why or why not?

b. *Would you support adding the Presidential election of 2000 and/or 2004 as well as any political subdivisions that have been subject to section 2 litigation say, in the last 5 years, to this formula in order to pick up jurisdictions that have begun discriminating since the 1970s? Why or why not?*

There are mechanisms within the Act that work to ensure that the coverage formula is appropriately revised and retailored. For example, the bail-out mechanism described in Section 4(a) and the bail-in mechanism outlined in Section 3(c) of the Act work to ensure that the scope of Section 5 is appropriately expanded or restricted. Together, these two features of the Act provide a mechanism for jurisdictions and courts to expand or reduce the scope and reach of Section 5.

Also, it is my understanding that turnout data for presidential elections in the 1960s and 1970s were not the only pieces of information used to determine which states would subject to coverage under the Act. Congress also looked to those jurisdictions that simultaneously "engaged in the use of tests or devices for the purpose or with the effect of denying or abridging the rights to vote on account of race or color."[3] Together, these data point to jurisdictions that have long histories of discrimination and are relevant to developing a record that illustrates what gave rise to the designation of covered jurisdictions.

I believe that Congress has compiled a thorough and extensive record of continuing discrimination in the covered jurisdictions that warrants renewal of Section 5 of the Act.

In City of Boerne v. Flores, *the Supreme Court indicated that Congress may not rely on data over forty years old as a basis for legislating under the Fourteenth and Fifteenth Amendments.*[4] *In striking down the Religious Freedom Restoration Act, the Court observed, "RFRA's*

[3] 42 U.S.C §1973b(d) (1982).
[4] City of Boerne v. Flores, 521 U.S. 507, 530 (1997).

legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry."

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

It is my understanding that the legislation at issue in *Boerne* was struck down by the Supreme Court, in part, because the legislative record lacked any recent examples of modern instances of discrimination and because the history of persecution described in the hearings took place more than 40 years ago.[5] I do not believe that the *Boerne* ruling calls for the wholesale exclusion of historical data, such as the 1964 presidential election turn-out figures that led to the construction of the coverage formula, particularly where this data is accompanied by more recent and contemporary evidence of persisting voting discrimination in the covered jurisdictions.[6] Congress has compiled an extensive record of this continuing discrimination. Above, I note that the Department of Justice (DOJ) has interposed 112 objections in Mississippi since the Act was reauthorized in 1982, and that these objections relate to a variety of voting changes. Given this record, I believe that there is no need in law or fact to revise the existing coverage formula.

4. While I am still reviewing the record, it seems to me the arguments thus far focus mostly on anecdotes regarding specific covered jurisdictions – yet, for the period 1996 through 2005, the Department of Justice reviewed 54,090 Section 5 submissions and objected to 72, or 0.153 percent. What percentage of objections below 0.153 do covered jurisdictions need to achieve before Congress can let Section 5 expire? Last year, according to DOJ data, there was only 1 objection out of 4734 submissions. Is that sufficient to warrant Section 5 coverage? Why or why not?

Objection rates only tell part of the story of Section 5's success. These statistics do not account for enforcement actions that have been filed to force jurisdictions to submit their voting changes as required under the Act. Also, these statistics do not account for the strong deterrent effect of Section 5 in helping ensure that retrogressive voting changes are not put in place. As I testified, the existence of the Section 5 review process often discourages jurisdictions from adopting voting changes that may place minority voters in a worse position.

In addition, objection rates do not account for the large number of jurisdictions that have withdrawn submissions made to the Department of Justice after the jurisdiction received more information requests (MIR) from DOJ. A study completed by Professors Luis Ricardo Fraga and Maria Lizet Ocampo examined the impact of letters issued by the

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[5] *Boerne* 521 U.S. 507 (1997).

[6] Moreover, in *Lopez v. Monterey Cty.*, the only case involving a post-*Boerne* challenge to § 5, the Supreme Court upheld the constitutionality of the § 5 preclearance provisions in the context of the substantial "federalism costs" of preclearance. 525 U.S. 266, at 269.

Justice Department requesting more information (MIRs) about pending Section 5 submissions. Although MIRs are among several mechanisms used by the DOJ to help facilitate analysis of a pending change, these letters can also serve as an indicator that DOJ has concerns regarding the potentially retrogressive effect or purpose of a particular proposed change. In many instances, jurisdictions that received an MIR withdrew the proposed change, submitted a superseding change, or made no timely response which effectively terminates a pending submission. In Mississippi, MIRs have played a significant role helping bar the implementation of dozens of potentially retrogressive voting changes. In Mississippi, for example, DOJ issued 874 MIRs between 1982 and 2005 which prevented the implementation of a total of 93 changes. Overall, Fraga and Ocampo conclude that MIRS enhanced the deterrent effect of Section 5 by 51%.[7]

Finally, some of the decrease in the number of objections may also be attributable to several recent Supreme Court cases that restricted the scope and reach of Section 5 including the *Bossier II* and *Georgia v. Ashcroft* rulings.

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

In my view, there is a distinction between covered and non-covered jurisdictions and this Congress has compiled an extensive record of discrimination in those areas that remain subject to the special requirements of Section 5 of the Act. This discrimination has been particularly severe in Mississippi where jurisdictions continue to adopt retrogressive redistricting plans and other voting changes; where there is evidence of racial appeals in campaigns; and where racially polarized voting remains part of the state's political reality.

While Section 5 has made, and continues to make, an important difference in Mississippi, there is still a long way to go. Enormous gaps exist between the socio-economic and political standing of whites and blacks. Despite the highest black population percentage of any of the 50 states, none of Mississippi's statewide elected officials are black. Many elections are still driven by racially polarized voting, and most white voters do not vote for black candidates in black-white elections despite their qualifications. In the most recent statewide elections, held in 2003, the state's 46 year-old director of the Department of Finance and Administration, a black man named Gary Anderson, was defeated in the state treasurer's race by a 29 year-old white bank employee who had no experience in governmental finance. Racial campaign appeals still surface in elections in the state. In a recent contest for a state Supreme Court seat in

[7] Luis Ricardo Fraga and Maria Lizet Ocampo, More Information Requests and the Deterrent Effect of Section 5 of the Voting Rights Act, Stanford University (June 7, 2006) at 4.

2004, the white candidate in a black-white election adopted the campaign slogan, "one of us," which had been characterized as a racial appeal by a federal court when it was used by a white candidate in a black-white congressional race over twenty years earlier. I attach a copy of the palm cards of the two Supreme Court candidates for the record and to illustrate that the use of race in electoral contests, not to mention electoral arrangements, within Mississippi persist even in the face of progress. In recent times, discriminatory measures such as dual registration requirements have been resurrected years after they were abolished. Moreover, officials routinely fail to submit voting changes for preclearance leading to enforcement actions around the state.

Given the degree of ongoing discrimination in Mississippi, I believe that Section 5 should be renewed for an additional 25 years. As long as jurisdictions continue to ignore the requirements of the law, and as long as race plays a significant role in electoral voting patterns, there is a grave potential for backsliding that must be avoided at all costs.

6. Putting aside the constitutional questions with regard to overturning Georgia v. Ashcroft – I want to better understand some of the practical implications.

Assuming the new language in the re-authorization is adopted, would it be your view that even districts that are "influence" districts, with relatively low numbers of minority voters, should be protected under the plan? Why or why not?

I do not view the drafted bill as overturning the Supreme Court's ruling in *Georgia v. Ashcroft*. Rather, I believe that the bill represents Congress' efforts to clarify its intent with respect to the reach and scope of Section 5. The *Georgia* ruling has essentially rendered Section 5 unworkable. The ruling offers an intangible definition of an influence district that is difficult to measure. The drafted bill corrects this very important aspect of the Section 5 retrogression analysis, which has long helped ensure that jurisdictions would be barred from enacting voting changes that eliminate or reduce the opportunity for minority voters' to elect candidates of their choice. I think that the bill's focus on the ability to elect requires case by case assessments, making it difficult to answer in advance a given arrangement without knowing the specific circumstances.

Response of Robert McDuff to Written Questions from Senator Edward Kennedy

Question 1.

Your Mississippi Report describes the 1991 statewide redistricting plans for the State Senate and House of Representatives. Both of these plans were objected to by the Department of Justice, because there was significant evidence that they had a racially discriminatory purpose, even though the plans did not have a retrogressive effect. Given the Supreme Court's decision in* Bossier II, *a voting change today that had a similar invidious purpose would be precleared. Please describe for us what evidence there was for that objection, and also your view as to whether the change in the Section 5 standards after* Bossier II *has reduced the number of Justice Department objections since 2000. Please give us your perspective on the fact that the number of Justice Department objections has gone down in recent years. What should that tell us about the continuing need for Section 5 today?

Mississippi's 1991 House and Senate plans are examples of redistricting plans that were adopted despite evidence of discriminatory purpose underlying the change. Today, these plans would fall beyond the scope of Section 5 because of the *Bossier II* decision.[1]

The DOJ has historically relied upon the *Arlington Heights* test to ferret out those voting changes infected with discriminatory purpose. In *United States v. Bossier Parish School Board*[2], the Supreme Court confirmed that *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*[3], provides the appropriate analytical framework for weighing circumstantial evidence and determining whether invidious discriminatory purpose infected the adoption of a particular voting change. The *Arlington Heights* framework requires careful consideration of whether the "the impact of the official action" "bears more heavily on one race than another," the historical background of the jurisdiction's decision, the sequence of events leading to the challenged action, legislative history and departures from normal procedural sequences and contemporary statements by members of the decision making body.[4] Numerous cases arising under Section 5 have approved of or adapted this standard to help ferret out discriminatory intent in the Section 5 process.[5]

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[1] Reno v. Bossier Parish School Board, 528 U.S. 320 (2000).
[2] 520 U.S. 471 (1998)
[3] 429 U.S. 252 (1977)
[4] *Arlington Heights*, 429 U.S. at 266-68.
[5] See, e.g., Reno v. Bossier Parish Sch. Bd., 520 U.S. 471, 472 (1997) (applying the *Arlington Heights* test to assess whether a voting system was enacted for a discriminatory purpose); City of Pleasant Grove v. U.S., 479 U.S. 462, 478 (1987) (approving use of *Arlington Heights* as tool to prove purposeful discrimination in the voting context); United Jewish Organizations of Williamsburgh v. Carey, 430 U.S. 144, 177 n.6 (1977) (noting that the *Arlington Heights* factors are probative evidence of purposeful discrimination).

Using the *Arlington Heights* framework, the DOJ interposed an objection to the redistricting plans after uncovering evidence of discriminatory purpose in the adoption of the changes. Specifically, DOJ determined that although the proposed plan lacked retrogressive effect, there was significant evidence of a racially discriminatory purpose at play. These indications included the fact that the legislature had turned away an alternative plan and that some referred to this plan as the "Black plan" on the House Floor even though supported by a biracial coalition,[6] and even as as the "nigger plan" behind closed doors.[7] These overt racial appeals used by officials who played a central role in the redistricting process demonstrated the discriminatory purpose underlying the changes that led to the DOJ objection.

In my view, the decline of Section 5 objections can be attributed, in part, to the Supreme Court's recent decision in *Bossier II* which eliminated DOJ ability to ferret out discriminatory purpose in the administrative preclearance process. Redistricting plans such as that adopted for the state legislature during the 1990s would likely have been precleared but for the pre-*Bossier II* Section 5 review process. While Section 5 is certainly working well as a deterrent, the records makes clear that race still plays too much of a role in elections in Mississippi and elsewhere, and there is continuing need for the expiring provisions of the Voting Rights Act.

Question 2.

In the Mississippi Report, you also describe a voting change that the City of McComb tried to implement last November, without any attempt to obtain preclearance. The change would have removed a black member of the city's Board of Selectmen, by changing the requirements for holding office. November 2005 was not 40 years ago. Does this suggest that the need for Section 5 remains strong today?

Ultimately, a three-judge federal court ordered the black selectman restored to his office and enjoined the city from enforcing the change unless preclearance was obtained.[8] *This 2005 Section 5 enforcement matter demonstrates that 1) jurisdictions continue to evade the requirements of the Act by failing to submit changes for preclearance and 2) jurisdictions continue to adopt retrogressive voting changes that, if implemented, can worsen the position of minority voters and erode gains in minority voting strength. As I pointed out in my testimony, this is one of the examples that shows the continuing need for Section 5 and the importance of renewing it.*

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[6] Letter from U.S. Department of Justice, Civil Rights Division, Voting Section to State of Mississippi (July 2, 1991 (Section 5 Objection Letter (March 30, 1992).

[7] Jay Eubank, Racial Slurs Mar Work on Voting Lines, *The Clarion Ledger*, July 14, 1991 at 1A.

[8] Myers v. City of McComb, No. 3:05 BN, Slip Op. at 481 (S.D. Miss. Nov. 23, 2005) (three-judge court) (unpublished order).

Question 3.

Testimony at the May 10 hearing suggested that Section 5 be allowed to expire, because it imposes too high of a burden on local officials and puts a stigma on them. Please comment of your experience in dealing with city attorneys and local election officials, and whether Section 5 of the Voting Rights Act places too high of a burden on these officials?

Section 5 certainly imposes costs on local officials, but these costs do not outweigh the greater benefits associated with protection of a fundamental civil right. During my experience litigating and handling voting rights matters in Mississippi, I have encountered officials who indicated that the Section 5 process helped ensure that they gave proper consideration to the impact that particular voting changes had on minority voting rights. Indeed, many jurisdictions view the Section 5 process as one that encourages diligence in enacting non-retrogressive, non-discriminatory voting changes. Given this experience, I do not think that Section 5 coverage stigmatizes public officials who work within the covered jurisdictions – instead, it serves as a check to ensure that jurisdictions enact changes that lack both retrogressive effect and purpose. Moreover, Section 5 is concerned not simply with intentional discrimination, but changes that are unintentionally retrogressive. So the Section 5 review process does not presume the existence of intentional discrimination on the part of particular officials.

However, the persistence of racial polarized voting and other legacies of the past can have a stigmatizing effect, and it is important that Section 5 remain in place to prevent the implementation of voting changes that exploit those legacies and discriminate against minority voters.

Question 4

In your view, what would Mississippi look like without Section 5?

Mississippi remains one of the poorest states in the union with a population that is 36 percent black, the highest of any of the 50 states. State and local officials frequently erected obstacles to prevent black people from voting, and those obstacles were a centerpiece of the evidence presented to Congress to support passage of the Voting Rights Act of 1965. Although Mississippi has come a long way in its enforcement of minority voting rights, there are still contemporary examples of discrimination in voting. The impact of this is evidenced by the inability of African Americans to win statewide office since Reconstruction, the use of racial appeals in campaigns, and the number of DOJ objections interposed to retrogressive voting changes.

With much to be done, Section 5 remains an important factor in Mississippi's quest toward full equality for all of its citizens. Without Section 5, I fear backsliding would result. In the 19th century, many of the gains of Reconstruction were eliminated when the federal government stopped enforcing civil rights.. The protections of Section 5 should not be withdrawn now.

After the Act was passed, Mississippi's government worked hard to undermine it. In its 1966 session, the state legislature changed a number of the voting laws to limit the influence of the newly enfranchised black voters, and Mississippi officials refused to submit those changes for preclearance as required by Section 5 of the Act. Black citizens filed a court challenge to several of those provisions, leading to the U.S. Supreme Court's watershed 1969 decision in *Allen v. State Board of Elections*, holding that the state could not implement the provisions unless they were approved under Section 5.[9]

Without Section 5, Mississippi would not have achieved the progress that it has. As a result of the Voting Rights Act, one of the state's four members in the U.S. House of Representatives is black. Twenty-seven percent of the members of the state legislature are black. Many of the local governmental bodies are integrated, and 31 percent of the members of the county governing boards (known as boards of supervisors) are black. These changes would not have come to pass without Section 5 of the Voting Rights Act and court orders obtained after extensive litigation. Since its first objection in 1969, DOJ has objected to Mississippi voting changes 169 times -- 112 since Section 5 was reauthorized in 1982. These changes involved election districts for Congress, the state legislature, most of the county governing boards in the state, and many of the cities and school boards. In addition, federal observers have been sent to particular locations in Mississippi to observe elections pursuant to provisions of the Act on 548 separate occasions since 1966, far more than any other state. Two hundred and fifty of those have been since the 1982 reauthorization.

All of this means that in Mississippi, as in the other covered states, the full protections of the 1965 Voting Rights Act must remain in place. As long as people are willing to ignore the law, and as long as race plays an excessive role in political life, there is potential for backsliding that must be avoided at all costs. The problem of race stemming from slavery and its legacy has been Mississippi's greatest burden. Important changes have occurred since the passage of the Act. But if those changes are to live on, and if Mississippi is to move forward in the coming years, the structure of legal protections that the Section 5 preclearance process has provided must not be dismantled or diminished.

[9] 393 U.S. 544 (1969).

Response of Robert McDuff to Written Questions from Senator Patrick Leahy

1) Assistant Attorney General Wan Kim testified last week that the percentage of voting changes leading to DOJ objections under Section 5 has declined. Some have cited this declining percentage as evidence that Section 5 is no longer needed. In your opinion, what explains this declining percentage? Is the declining percentage of objections relevant to the question of whether Section 5 should be extended?

Section 5 of the Voting Rights Act should be extended because it provides an effective mechanism to eradicate both purposeful voting discrimination and its continuing effects. Section 5 has been the primary catalyst for significant increases in minority political representation and participation throughout the State of Mississippi and beyond. By preventing backsliding and ensuring that jurisdictions do not retrogress minority voting strength, Section 5 has operated as an important safeguard to shield minority voting rights.

Some witnesses who testified during the hearings have made note of the declining number of DOJ objections in recent years. However, the effectiveness of Section 5 cannot be measured by objection rates alone because these statistics do not reveal the various ways that the preclearance process operates. For example, these statistics do not account for the deterrent effect of Section 5, which prevents man jurisdictions from adopting discriminatory changes in the first place.

They also do not account for those voting changes that were withdrawn after the Department of Justice made formal more information requests (MIRs) by mail.[1] A study completed by Professors Luis Ricardo Fraga and Maria Lizet Ocampo examined the impact of letters issued by the Justice Department requesting more information (MIRs) about pending Section 5 submissions. Generally, these letters may signal to a submitting jurisdiction that DOJ has concerns regarding the potentially retrogressive effect or purpose of a particular proposed change. In many instances, jurisdictions that received an MIR withdrew the proposed change, submitted a superseding change, or made no timely response which effectively terminates a pending submission. In Mississippi, for example, DOJ issued 874 MIRs between 1982 and 2005 which led to the effective withdrawal of a total of 93 changes. Overall, Fraga and Ocampo conclude that MIRS enhanced the deterrent effect of Section 5 by 51%.[2]

Finally, some of the decrease in the number of objections may also be attributable to recent Supreme Court cases that severely restricted the effectiveness of Section 5

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[1] *See* Luis Ricardo Fraga, et al., *More Information Requests and the Deterrent Effect of Section 5* (May 23, 2006) (assessing the deterrent effect of Section 5 through an examination of the issuance of more information requests (MIRs) from the Justice Department).

[2] *Id.* at 4.

including the *Reno v. Bossier Parish School Board*, 528 U.S. 320 (2000)(*Bossier II*) and *Georgia v. Ashcroft*, 539 U.S. 461 (2003) rulings. Specifically, *Bossier II* restricted the Justice Department from objecting to voting changes enacted with discriminatory purpose[3] while the *Georgia v. Ashcroft* ruling allows for the elimination of viable opportunity districts when they are replaced with amorphous "influence districts."[4] A recent study revealed that discriminatory purpose served as the basis for 43 percent of all objections made in the administrative preclearance process prior to the *Bossier II* ruling.[5]

2) You prepared a report on the operation of the Voting Rights Act in Mississippi and the importance of Section 5 to that State. Does that report contain recent examples of the use of discriminatory tactics which abridged or denied the right to vote of minority citizens and, if so, can you describe them?

The Mississippi State Report is replete with recent examples of persisting discrimination at all levels of local, state and federal government. In addition to overt racial appeals, Mississippi's officials have employed the classic arsenal of discriminatory tactics, including creating redistricting plans that purposefully dilute Black voting strength (as was the case in the 1991 State House and Senate plans), switches to at-large elections, and discriminatory annexations. These voting changes would have had adverse effects on African-American voters had they not been met with objections under Section 5.

The 1991 redistricting plans for the state legislature were denied preclearance by DOJ, in part, because there was evidence of discriminatory purpose underlying the adoption of the plans.[6] Analysis of the legislative history leading up to the adoption of the plan revealed the racist and hostile attitudes of some legislators. Indeed, certain alternative plans were labeled "nigger plans" by white legislators behind closed doors.[7]

Although not in my report, I mentioned in my testimony that in 2001, the Town of Kilmichael, Mississippi, cancelled its general election for alderman and mayor, after the all-White Board of Aldermen realized that, given 2000 census data, African-Americans comprised a majority of both the town's total population and registered voters. The cancellation prompted an objection from the Justice Department on the grounds that the voting change prevented African-Americans from electing candidates of their choice (since several African-Americans had already qualified for the town's elections).[8]

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[3] *Bossier*, 528 U.S. at 328.
[4] *Georgia*, 539 U.S. at 498.
[5] *See* Peyton McCrary, Christopher Seaman, and Richard Valelly, *The End of Preclearance as We Knew It: How the Supreme Court transformed Section 5 of the Voting Rights Act*, 11 Mich. J. Race. & L. (forthcoming Spring 2006).
[6] Letter from US Department of Justice, Civil Rights Division, Voting Section to Town of Kilmichael, Mississippi (Section 5 Objection Letter) (March 30, 1992).
[7] Jay Eubank, "Racial Slurs Mar Work on Voting Lines," *The Clarion-Ledger* July 14, 1991 at 1A.
[8] Letter from Ralph Boyd, Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, to J. Lane Greenlee, Esq., December 11, 2001.

These examples are by no means an exhaustive list of the various discriminatory tactics used by jurisdictions to retrogress minority voting strength. Rather, they illustrate a pattern of voting discrimination in the State of Mississippi, and the tactics that some officials may attempt to employ in their desires to maintain a stranglehold on political power at various levels of government. These examples also reflect the continued importance of Section 5 in prohibiting retrogressive changes that would otherwise have worsened the status and position of minority voters in jurisdictions throughout the state.

3) For any examples you provided in response to question 2, what would have happened in these cases if Section 5 did not exist? How much more difficult would it have been for minority voter to invalidate these changes if Section 5 did not exist? Why wouldn't a Section 2 action work just as well?

In my experience, litigation under Section 2 will not be sufficient to prevent the discriminatory voting changes that would likely reemerge in the absence of the Section 5 preclearance requirement. Adequate legal, financial and human resources did not exist in Mississippi in the past 40 years to bring a lawsuit in lieu of every one of the 169 objections that have been issued. Those resources do not exist today, and given persistent socio-economic disparities between Blacks and whites, I have little hope that this reality will change in the near future.

Voting rights is intensely complex litigation that is both costly and time-consuming. To be appropriately presented, these cases require costly experts including historians, social scientists and statisticians, among others. Having litigated a great number of voting rights matters in the State of Mississippi, I know that there are not enough lawyers who specialize in this area to carry the load. I also know that it is incredibly difficult for minority voters to pull together the resources needed to push private challenges under the Act. Without the mechanism of Section 5 in place to bar retrogressive voting changes from implementation, we will likely witness the resurgence of discriminatory voting changes that will not be adequately or evenly addressed by private litigation under Section 2.

4) Assistant Attorney General Wan Kim testified last week that covered jurisdictions have overwhelmingly complied with Section 5 of the VRA. Yet we have heard suggestions that Section 5 has been so successful it is no longer needed. Why would overwhelming compliance with a law become a reason for doing away with it? Shouldn't we continue to do what works?

I do not believe that we have seen "overwhelming compliance" with Section 5. Since the 1982 renewal, DOJ has interposed 112 objections to various types of proposed voting changes in the State of Mississippi. In addition, there have also been a number of enforcement actions to ensure that jurisdictions do not seek to evade the requirements of the Act by failing to submit their voting changes for preclearance. As recently as November 2005, a three-judge federal court enjoined the City of McComb from

enforcing a state court order it had obtained that removed a black member of that city's Board of Selectmen from his seat by changing the eligibility requirements for holding that office. The three-judge court noted that the state court clearly altered the pre-existing practice, yet the city failed to submit the change for preclearance. The court ordered the Black selectman restored to his office and enjoined the city from enforcing the change unless preclearance was obtained.[9]

In addition, the state failed to submit a number of laws that were passed adding new state trial court judgeships elected under a numbered post system. In 1986, the federal district court in *Kirksey v. Allain* was required to step in and enjoin further elections for those seats until preclearance was obtained.[10] State officials then submitted the changes to DOJ. Ultimately, DOJ interposed an objection to the numbered post requirement for many of the judgeships finding the changes retrogressive in effect.[11]

In 1997, the U.S. Supreme Court revisited the issue of Section 5 non-compliance when state officials refused to submit for Section 5 review a number of changes in state law made to conform to the National Voter Registration Act. The Court unanimously held, in *Young v. Fordice*, that state officials had violated Section 5 and could not go forward with the changes until preclearance was obtained.[12]

Nonetheless, Section 5 has been tremendously effective in barring voting changes that are retrogressive in effect and purpose. Section 5 has also helped remove barriers to voting for minority voters throughout the State of Mississippi and helped lead to significant increases in the number of minority elected officials at the local, state and federal level. Its success in this regard should not be used as a reason to amend or end Section 5.

5) We have heard arguments that Section 5 is no longer needed because of its success in not only preventing, but deterring, discriminatory voting practices. You practice in a covered jurisdiction and have no doubt witnessed significant progress in minority participation and representation over the decades. I wonder if you have an opinion on the deterrent effect of Section 5 pre-clearance. Can a successful deterrent still be a success if it is no longer operational? Won't softening or removing this successful deterrent risk the emergence of new abuses?

Given my experience litigating voting rights cases during the last 20 years, I believe that the gains of the past can be quickly undone without the Voting Rights Act. Voting in black-white elections is still racially polarized. Although thirty-six percent of

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[9] Myers v. City of McComb, No. 3:05-cv-00481 (S.D. Miss. Nov. 23, 2005) (three-judge court) (unpublished order)

[10] 635 F. Supp. 347 (S.D. Miss. 1986) (three-judge court).

[11] Letter from US Department of Justice, Civil Rights Division, Voting Section to the State of Mississippi (Section 5 Objection Letter (July 1, 1986).

[12] 520 U.S. 273 (1997).

Mississippi's population is Black, the highest percentage of the fifty states, no Black person has been elected to a statewide office in Mississippi since Reconstruction. The vast majority of Black elected officials in Mississippi were elected from majority Black districts, and most of those districts were created as a result of the provisions of the Voting Rights Act. Moreover, elections are still driven by racially polarized voting, as most white voters are unwilling to support black candidates in black-white contests regardless of their qualifications. If Section 5 expires, there is a serious potential for this racial division to be exploited by those who wish to return to the some of the worst features of the days of the past.

6) Professor Gaddie has testified about his report in the House of Representatives' hearings. Have you reviewed his report and, if so, do you believe it includes relevant evidence? Doesn't his comparison of the record of discrimination in covered jurisdictions compared to non-covered jurisdictions ignore the widely recognized deterrent effect of Section 5?

I understand that Professor Gaddie seeks to challenge the constitutionality of the coverage formula and suggests that a comparison of the record of discrimination between covered and non-covered jurisdictions is the relevant inquiry. In assessing the viability of the coverage formula, the appropriate focus should be on its demonstrable deterrent effect, the history of discrimination that gave rise to the designation of covered jurisdictions and the evidence that has been presented of persistent forms of discrimination in those areas.[13] The coverage formula, which determines which jurisdictions are subject to the special requirements of Section 5, has withstood constitutional scrutiny on several occasions.[14] In addition, the Supreme Court has acknowledged that the selective geographic reach of Section 5 was justified by the exceptional history of voting discrimination within the covered jurisdictions.[15] Section 5 of Voting Rights Act represents carefully tailored legislation that falls within the broad sweep of Congressional authority under the Fourteenth and Fifteenth Amendments, and protects the constitutional rights of citizens living in states such as Mississippi and others with both historical and contemporary evidence of persistent voting discrimination.

7) In your professional opinion, does the existing coverage formula requiring pre-clearance of voting changes need to be altered?

The existing coverage formula that determines which jurisdictions are subject to coverage under Section 5 does not need to be altered given the inherent structure of the Act. In particular, the bail-out provision outlined in Section 4(a) and the bail-in

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[13] 42 U.S.C. § 1973b (1982).

[14] *See* South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966); City of Rome v. United States, 446 U.S. 156, 180 (1980)(rejecting a Section 5 constitutional challenge); Lopez v. Monterrey, 525 U.S. 266 (1999)(same); County Council of Sumter County, S.C. v. United States, 555 F. Supp. 694, 707 (D.D.C. 1983).

[15] *Katzenbach* at 334. *See also* An Introduction to the Opening Provisions of the Voting Rights Act and Legal Issues Relations to Reauthorization Before the S. Comm. on the Judiciary, 109th Cong. (2006) (Statement of Laughlin McDonald, Director ACLU Voting Rights Project (May 2006).

mechanism outlined in Section 3(c) of the Act work to ensure that the scope of Section 5 is appropriately revised. Section 4(a) establishes a bailout process that is extremely liberal and achievable for those jurisdictions that enjoy full minority participation in the electoral process. It is my understanding that all jurisdictions that have sought to opt out from coverage under Section 5 have been able to do so. Section 3(c) of the Act, the "bail-in" mechanism, allows a court to order a non-covered jurisdiction to submit its voting changes in accordance with the requirements of Section 5.[16] As these two features of the Act provide a mechanism for jurisdictions and courts to expand or reduce the scope and reach of Section 5, I believe that there is no need to revise the coverage formula.

Moreover, in 1982, Congress did not alter the coverage formula given the record that was developed about historical and persisting discrimination that persisted in the covered jurisdictions. An extensive record has been developed before this Congress that demonstrates that voting discrimination continues to impair minority electoral opportunity within covered jurisdictions such as Mississippi. Given this, I believe that Congress has the authority to renew Section 5 with the same coverage formula intact.

8) Mr. McDuff, you have worked on voting rights cases for decades in the State of Mississippi. In your experience, does coverage under the Voting Rights Act stigmatize the public officials you work with in the covered jurisdictions?

In my experience, Section 5 coverage does not stigmatize public officials who work within the covered jurisdictions. I have dealt with many of them, and I believe most accept Section 5 as a proper way of insuring that the concerns of all groups are considered and as a legitimate means of avoiding voting changes that intentionally or unintentionally turn the clock back on racial progress. However, ongoing discrimination in the political process, particularly racially polarized voting, continues to have a stigmatizing effect on minority voters. The reality of racially polarized voting has been documented by a long litany of court decisions and has manifested itself in recent elections as discussed more fully in my report and my written testimony.

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[16] *See* Jeffers v. Clinton, 740 F. Supp. 585 (E.D. Ark. 1990), *aff'd*, 498 U.S. 1019 (1991); Sanchez v. Anaya, Civ. No. 82-0067M (D.N.M. 1984) (three-judge panel)(authorizing preclearance of redistricting plans over a ten year period); The Continuing Need for Section 5 Preclearance Before S. Comm. On the Judiciary, 109th Cong. (2006) (Statement of Pamela S. Karlan, Kenneth and Marie Montgomery Professor of Public Interest, Stanford University School of Law)(May 16, 2006).

Mr. Frank Strickland
Questions from Senator Tom Coburn
VRA Hearing May 10, 2006

For Strickland

1. What type of information must a jurisdiction submit when applying for pre-clearance of a redistricting plan?
   a. How costly is a Section 5 pre-clearance?
   b. If you cannot estimate the cost, how many lawyers are hired to work on an average submission?

The information that a jurisdiction must submit is specified in the federal regulations. Submitting jurisdictions need to make certain to identify the change with specificity; if they are not sufficiently clear, a Section 5 litigant may be able to block the State from moving forward. Worse, because section 5 does not sleep, a submission can be challenged and second-guessed well after a preclearance letter has been received and relied on.

For example, the neighboring state of Alabama was involved the case of Boxx v. Bennett, 50 F.Supp. 2d 1219 (M.D. Ala. 1999) (three-judge court), in which the State's attempt to conduct a recount in a very tight election for sheriff of Jefferson County was blocked because the State was held not to have described a change with sufficient specificity in two submissions, the first in 1984. The court said that the State's 1984 submission "would not put the Attorney general on notice that the submission included a provision creating a pre-election contest recount which could serve as a new basis for an election contest under Alabama law." Id., at 1227.

Note, in Boxx, the concurring opinion's reliance on a state trial court ruling is misplaced. See id. at 1232. That state court ruling was reversed by the Supreme Court of Alabama, which questioned the trial judge's ability to count the ballots.

a. The cost of a preclearance submission depends on the submission. A de minimis change may generate a letter that is less than 30 pages long, including attachments. The submission of a new redistricting plan can take several volumes of paper.

b. In most covered states, an assistant attorney general has primary responsibility for reviewing new legislation and preparing the Section 5 submission. That attorney usually has a number of statutes to review and a number of

submissions to make. In addition, other attorneys may make or assist in the making of submissions or represent the State in Section 5 litigation.

2. Do you find that States and counties are deterred from discriminating against minorities by the Voting Rights Act? If so, can you give examples of this deterrence?

   After more than 40 years of direct experience, covered States and counties have changed their ways and no longer discriminate on the basis of race with respect to voting. I do not think it is Section 5 that restrains them. Rather, the evidence indicates that minority voters participate in elections to the same degree that majority voters do. The ban on devices and tests in Section 4 is the more significant provision because it takes away the tools that were used to discriminate; that ban is not up for renewal.

3. In the May 9th, VRA hearing, Prof. Issacaroff suggested that pre-clearance requirements should apply to counties in order to more accurately target those that are still having problems with discrimination (rather than whole states). Do you think that there is an equal need for the VRA throughout the whole state of Georgia, for instance, or do you think that it is only useful in certain counties?

   The scope of Section 5 should be trimmed so that it no longer applies to de minimis changes and the criteria for bailout should be relaxed. A perfect ten year record is too long. Further, most current issues do not involve deliberate violations, but even one requires a jurisdiction to begin a new ten year perfect record. The potential result is many more years of Justice Department supervision. Renewing Section 5 without thoughtful and sensible amendments for another 25 years will mean that a state such as Georgia which has achieved remarkable success since the original Act was adopted will ultimately have had more than **65 years** of federal supervision. The State of Georgia probably cannot bail out even though it has changed its ways, but not every county and municipality needs to be covered. In addition, the setting of special elections and the movement of polling places are changes that should not require the blessing of the Department of Justice. At its regular monthly meeting on June 13, 2006, the Fulton County Board of Registration and Elections routinely approved the relocation of four polling places from one public building to another and two resolutions setting elections regarding the creation of two new cities pursuant to acts adopted by the Georgia General Assembly (which acts have already been precleared by DOJ), all subject to DOJ approval. This is absolute nonsense and a waste of time both for the election department staff and DOJ. This is 2006, not 1964 or 1968.

One problem with bailout is the requirement for perfection--ten years with no objections. In Fulton County, Georgia (substantially all of Atlanta) for example, there are several other municipalities over which Fulton County has no control. If any one of those cities has a DOJ objection, Fulton County must start anew for another ten years of perfection. This makes no sense and is fundamentally unfair to Fulton County. **It is conceivable that Fulton County could never be able to bail out.** Further, the staff of the election department in Fulton County is 95 percent African American. It defies common sense to perpetuate the fiction that the Fulton County election department staff will discriminate against black voters. Continued VRA coverage for Fulton County ignores reality, makes no sense and is insulting to the citizens of Fulton County.

Frank B. Strickland
June 14, 2006

SUBMISSIONS FOR THE RECORD

Testimony of Juan Cartagena
General Counsel, Community Service Society
Before the Committee on the Judiciary
of the
United States Senate

10 May 2006
Washington, D.C.

Chairman Specter, Ranking Member Leahy, and members of the Committee, I thank you for your invitation to appear before this distinguished Committee and testify on S. 2703, the Voting Rights Act Reauthorization and Amendments Act of 2006 ("VRARA"), in particular the provisions that provide for language assistance for American citizens who speak English as a second language. I am a voting rights lawyer since 1981who has used the promises of equal opportunity and full political access established in the Voting Rights Act to assist racial and language minorities in a number of states.

The Community Service Society is an independent, nonprofit organization that for more than 160 years engages in social science research, advocacy, policy analysis, direct service and volunteerism to address the problems of poverty and strengthen community life for all. Since 1989 CSS has used the Voting Rights Act and other legal norms to benefit our most marginalized communities by ensuring the full and fair representation of

the City's poorest neighborhoods, especially African American and Latino voters.[1]

I will limit my remarks this morning in light of the previous work that I have submitted to the House Subcommittee on the Constitution as it considered the reauthorization of the Voting Rights Act. This includes 1) testimony on behalf of CSS in November 2005 before the House Subcommittee[2] which highlighted the need to reauthorize Section 203 of the VRA in New York City as well as New Jersey with a special emphasis on the voting rights of Puerto Rican voters; 2) The report "Voting Rights in New York 1982-2006"[3] for the Leadership Conference on Civil Rights and submitted for the record in March 2006 which summarizes the state of compliance with all three expiring provisions of the VRA in New York; and 3) the article "Latinos and Section 5 of the Voting Rights Act: Beyond Black and White"[4] published in 2005 by the National Black Law Journal at Columbia Law School which also addresses important issues for Puerto Rican voters under Section 4(e) of the VRA.

Accordingly, I emphasize the following points this morning:

One: CSS applauds the bipartisan efforts in this Congress to address the critical issues of political participation for racial and language minorities. The VRA has consistently received bipartisan support since its inception, and throughout its prior amendments, and we welcome the manner in which these important debates have been held.

Two: The right to vote in this country, the very right that is "preservative of all rights," is too important a right to delay, impede or otherwise fail to make fully and

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[1] I respectfully refer the Committee to my testimony before the House Subcommittee on the Constitution (attached hereto as Exhibit A) for a full description of CSS's voting rights work.
[2] Attached hereto as Exhibit A.
[3] Attached hereto as Exhibit B.
[4] Attached hereto as Exhibit C.

meaningfully available to American citizens who speak English as a second language. Regardless, of the concerns that some opponents to the VRARA may have about the primacy of English in our country, we recognize that voting is fundamental, and democracy is too precious, to condition on full mastery of English for American citizens in certain areas of the country. In saying this we echo the U.S. Supreme Court in *Katzenbach v. Morgan*, which upheld the language assistance provisions of Section 4(e) for Puerto Rican voters in the original Act of 1965 as a valid exercise of congressional enforcement powers under the 14th and 15th Amendments by noting that Congress in 1965 may have "questioned whether the denial of a right deemed so precious and fundamental in our society was a necessary or appropriate means of encouraging persons to learn English, or of furthering the goal of an intelligent exercise of the franchise."[5]

Three: We can not emphasize enough that the rights we are advocating for today are the rights of citizens of this country to full and fair access to the franchise. With the equally important and pressing matters before the Senate concerning immigration policy we cannot conflate the issues. The VRARA, as currently proposed, addresses the rights of American citizens who speak English as a second language. Moreover, as recent research from Arizona State University[6] has documented, three-quarters of all voters who depend on language assistance to vote and enjoy the benefits of Sections 203 and 4(f)(4) of the VRA, are native born. Language assistance in voting embodied in Section 203 of VRA was created to address the concerns of access to the ballot for populations that suffered under significant educational disparities as demonstrated in higher than average literacy rates for certain language minorities in the U.S. Similarly, more severe forms of

[5] *Katzenbach v. Morgan*, 384 U.S. 641, 658 (1966).
[6] Tucker, James Thomas & Espino, Rodolfo, "Minority Language Assistance Practices in Public Elections," March 2006.

exclusion of language minority citizens led to the adoption of Section 4(f)(4) of the VRA in 1975. Both provisions still operate today to benefit native born citizens. Puerto Rican voters are a case in point: all of them are U.S. citizens by operation of law, significant numbers of them are either monolingual in Spanish on the Island or due to educational disparities in the U.S., are still not fully proficient here, and finally, circular migration patterns between both points is still present.[7]

Four: The major factors that led to the passage of Sections 203 and 4(f)(4) are still present today for Latino citizens. Educational attainment still lags far behind their white or black counterparts;[8] illiteracy rates are far above national averages;[9] 75% of them (compared to 18% nationwide) speak a language other than English at home;[10] and, Latino voter registration rates are significantly lower that black or white registration rates nationally.[11] Today, the prevalence of ballot referenda where 11th or 12th grade proficiency is required to understand its text and the advent of new election machinery under the Help America Vote Act, counsels for renewed language assistance.

Finally: Section 203 is self-maintaining, adjusts itself depending on changing demographic patterns – and even more so with the amendments to use more frequently available American Community Survey data from the Census in five year cycles – and

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[7] For a full discussion of the issues facing Puerto Rican voters in the U.S. given their unique legal relationship to the U.S., see Exhibit A and Exhibit C.

[8] See Exhibit A documenting significantly lower high school and college degree rates for Latinos using 2000 Census data.

[9] For example, in Cook County, Illinois, Spanish language Section 203 coverage is premised on an illiteracy rate for Spanish speaking citizens that is 9 times the national rate; in Kane County, Illinois the corresponding rate is 10 times the national rate; and in the 6 Section 203 covered counties in Kansas, the corresponding rate is on average 12 times the national rate.

[10] See Exhibit A.

[11] See Exhibit A citing Pew Hispanic Center survey data show 47% turnout rates in 2005 for Hispanics of all eligible voters (compared to 67% for whites and 60% for blacks). Data from the 2004 November elections reveals that based on Citizenship Voting Age Population data, Hispanics are registered to vote at a rate of 57.9%, or 17.3 points below whites (75.1%) and 7.9 points below blacks (68.6%).

contains a bailout provision hinged on improving illiteracy rates.[12] All of it demonstrates, consistent with *Katzenbach v. Morgan* that it is a proper exercise of Congressional authority in furtherance of Congress' enforcement powers under the 14th and 15th amendments where Congress' power is at its zenith, even under the current case law from the U.S. Supreme Court.[13]

[12] Section 203(d) of the VRA.
[13] See, *Boerne v. Flores*, 521 U.S. 507 (1997) where the court noted that the VRA is the model of proper exercise of Congressional power; Lopez v. Monterey, 525 U.S. 266, 285 (1999) where the Court noted approvingly that the "Voting Rights Act, by its nature, intrudes on state sovereignty."

Statement of Gregory S. Coleman
May 10, 2006

Chairman Specter, Ranking Member Leahy, and members of the committee, I appear today to urge the Senate not to reauthorize the preclearance provision known as section 5 of the Voting Rights Act because the reimposition of that provision is unnecessary in light of the historical success of the Voting Rights Act, unfair to the vast majority of states and political subdivisions to which it would apply, and ultimately probably unconstitutional.

In 1965, Congress found that, after a "century of systematic resistance to the Fifteenth Amendment," "case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting, because of the inordinate amount of time and energy required to overcome the obstructionist tactics invariably encountered." *South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966). Preclearance became a way "to shift the advantage of time and inertia from the perpetrators of the evil to its victims." *Id.* Congress chose to limit the applicability of preclearance requirements to a relatively small number of "geographic areas where immediate action seemed necessary," *id.*, almost entirely areas in which Congress had amassed "reliable evidence of actual voting discrimination" in the years immediately before the enactment of the Voting Rights Act. *Id.* at 329.

What a difference forty years makes. The tests and devices that formed part of the coverage threshold in the 1960s and 1970s have long since been banned, and minority registration and turnout rates in covered jurisdictions are comparable to those in noncovered jurisdictions. Neither the voluminous record accumulated in the House Judiciary Committee nor the record placed before this committee adduces evidence of

any systematic violations or threatened violations of constitutionally protected voting rights in covered jurisdictions. If anything, the evidence demonstrates that voting rights are as fully protected in covered jurisdictions as in noncovered jurisdictions.

Anecdotal accounts of generalized voting problems and studies of §2 litigation do not contain even a hint of systematic purposeful voting discrimination by any covered jurisdiction. At best the data shows continuing anecdotal occurrences of voting problems and §2 litigation throughout the country; it is not peculiar to covered jurisdictions. The availability and efficacy of §2 litigation is precisely the opposite of the ineffectiveness that Congress found in 1965 and tends to demonstrate that §5 does not serve as an independent deterrent to voting discrimination and is no longer needed. In short, no factor on which Congress based its preclearance and coverage decisions in the 1960s and 1970s is even remotely applicable today.

One can hardly wonder that preclearance has become a largely useless exercise in shuffling paperwork and a bitter source of resentment to the states, counties, cities, school boards, municipal utility districts, and other political subdivisions forced to continue to bear the expense and burden of the preclearance process. In the past decade, more than 150,000 preclearance submissions from covered jurisdictions have produced barely 100 objections, a rate of less than 7 in 10,000 (and which has become vanishingly small in more recent years)—hardly a systematic concern about the protection of voting rights and more indicative of extremely isolated events that may or may not have resulted from a threat of voting discrimination, particularly given DOJ's position for several years that it could object to changes that admittedly constitutional.

The cost, however, is substantial. Without any measurable benefit, preclearance compliance has over the past decade required the commitment of state and local resources easily valued at over a billion dollars. Thousands of small, local governmental units in Texas and other covered jurisdictions making insignificant changes are forced to spend thousands of dollars having the changes analyzed by counsel and submitted for preclearance while their neighbors in Texarkana, Arkansas, or Clovis, New Mexico, make the same kinds of changes without the added cost, delay, and intrusion into their governmental sovereignty.

Although the Supreme Court has previously upheld §5 against constitutional challenge, Congress should keep in mind that a reauthorized §5 is essentially new legislation that will have to be constitutionally justified. Preclearance is a significant intrusion into the sovereignty of governmental units, which is guaranteed by the Constitution, except as authorized to effectuate the mandates of other constitutional protections, including those in the Fourteenth and Fifteenth Amendments. Circumstances today are radically different than those that led Congress to enact the original preclearance provision and to reauthorize it in the periods prior to and including 1982, and scholars have expressed concern or have outright concluded that reauthorization of preclearance cannot be justified under either §5 of the Fourteenth Amendment or §2 of the Fifteenth Amendment.

The Supreme Court in *City of Boerne v. Flores* and more recent cases has required a real evidentiary link between the constitutional protection that Congress seeks to enforce and the method by which it acts to enforce it. The record before the House Judiciary Committee on reauthorization of preclearance, while voluminous, does not

make that link. Assertions of anecdotal occurrences, most of which have no connection to state and local changes in voting procedures or to the preclearance process, do not establish any kind of pattern of purposeful state discrimination against voting rights.

The evidentiary utility of the record before Congress is further weakened by the fact that the preclearance reauthorization amendments essentially ignore the record in its entirety. While witnesses have piled up their various studies concerning the current status of voting rights in covered and noncovered jurisdictions alike, the proposed amendments leave in place a coverage formula based on voter turnout or registration and the prior use of a voting test or device, based on data from the 1964, 1968, or 1972 elections—more than three decades in the rear view mirror.

Although the proposed amendments recite the existence of "second generation barriers," the record neither links those recitations to any systematic pattern of purposeful state discrimination, nor provides a way to connect those proposed findings to the decision to leave preclearance as it existed in 1975. The Voting Rights Act has been perhaps the most successful piece of civil rights legislation in American history. That success, though, necessarily has real consequences for the continuing justifiability of temporary, prophylactic measures like preclearance.

from the office of

Senator Edward M. Kennedy

of Massachusetts

FOR IMMEDIATE RELEASE
May 10, 2006

CONTACT: Laura Capps/Melissa Wagoner
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STATEMENT BY SENATOR EDWARD M. KENNEDY AT JUDICIARY COMMITTEE HEARING ON VOTING RIGHTS ACT ENFORCEMENT

(AS PREPARED FOR DELIVERY)

The Voting Rights Act was adopted to address systematic and egregious discrimination that endured for over 100 years. We heard testimony yesterday regarding the unfortunate fact that in numerous ways, this discrimination still endures today. Laughlin McDonald, the director of the ACLU's Voting Rights Project provided very recent examples. He testified about a TRO that was just issued last month to potentially discriminatory voting changes made in Randolph County, Georgia, that were not submitted for preclearance. Regrettably, it is not surprising that it may take more than 40 years to eliminate the "blight of racial discrimination in voting."

The Voting Rights Act combats the ills that are at the core of the 14th and 15th Amendment – racial prejudice. While the remedy is strong, it is appropriate, given the fundamental importance of the right to vote and participate in the political process. As the Supreme Court has held, the electoral franchise is a fundamental right that is "preservative of all other rights." We cannot discard lightly the safeguards adopted in the Voting Rights Act, particularly in Section 5 of the Act. The progress we have made has been great, but it has not been complete, and we cannot allow it to be jeopardized or diminished.

Today we will be hearing about the Justice Department's efforts to enforce the Voting Rights Act. While I have some concerns about the Justice Department's recent approach to implementing the Act, today we will hear from the Assistant Attorney General about the Justice Department's efforts, and the continuing need for vigorous enforcement. Section 5 has been the Federal Government's most effective tool against voting discrimination. Even after the Act was passed, there was a real and substantial danger that discriminatory decisions by jurisdictions covered by Section 5 would deny or abridge the right to vote. And in fact jurisdictions did adopt a host of voting devices and changes, some subtle and some overt, with the intent to shut minorities out of voting power. Some of those decisions had a discriminatory purpose, some had a discriminatory effect, and others had both. It was because of the work of the Justice Department under

Section 5 of the Act that those invidious voting changes were not implemented, and that any progress in political participation was not undone.

Taking a long view, historically, the Justice Department has vigorously carried out its Section 5 responsibilities precisely as Congress intended it to. The record we will be examining, and which the House hearings examined closely, indicates that there is a continuing problem with discriminatory decision-making with respect to voting by jurisdictions covered by Section 5.

Today we will also hear from witnesses who will describe in more detail the concerns about continuing discrimination in some of the jurisdictions covered by Section 5 and Section 203 – the minority language sections of the Voting Rights Act. As we have noted, compiling this record is one of the most important purposes of these hearings, and will provide a sturdy foundation for our actions in this most important piece of legislation.

In addition, we will specifically be hearing about the role that Section 203 has played in ensuring the right to vote and having that vote counted fully and fairly. Section 203 requires that certain jurisdictions provide for language assistance to American citizens who are limited in their English proficiency. Section 203 directly addresses barriers to voting for Asian Americans, Latinos and Native Americans, and it too is a provision that should not be allowed to expire.

I thank the Chairman, and I look forward to hearing today's testimony.

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Department of Justice

STATEMENT

OF

WAN J. KIM
ASSISTANT ATTORNEY GENERAL
CIVIL RIGHTS DIVISION
DEPARTMENT OF JUSTICE

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

CONCERNING

ENFORCEMENT OF THE VOTING RIGHTS ACT

PRESENTED ON

MAY 10, 2006

Statement of
Wan J. Kim
Assistant Attorney General
Civil Rights Division
United States Department of Justice

Before the Committee on the Judiciary
United States Senate

Concerning
Enforcement of the Voting Rights Act

May 10, 2006

Chairman Specter, Ranking Member Leahy, distinguished members of the Committee:

On behalf of the Department of Justice, I want to thank you for the opportunity to appear before you today. The President and the Attorney General have directed the Justice Department to bring all of its resources to bear in enforcing the Voting Rights Act and preserving the integrity of our voting process. The President also has called upon Congress to renew the Voting Rights Act and his Administration appreciates this opportunity to work with Congress on reauthorizing this landmark legislation.

It is my privilege this morning to provide you with an overview of the Justice Department's enforcement of three important provisions of the Voting Rights Act – section 5, which involves the Act's pre-clearance mechanisms, and sections 203 and 4(f)(4), which contain the Act's language minority provisions. I am also pleased to provide you today with an explanation of the Department's use of two other provisions of the Act – sections 6 and 8, which pertain to Federal examiners and observers. As you know, all of these provisions of the Voting Rights Act are due to expire in 2007.

Let me begin with the Justice Department's enforcement of section 5. Section 5 mandates that all covered jurisdictions seek pre-clearance of any new "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting." This approval can be sought administratively from the Attorney General or through the judicial route by filing a declaratory judgment action in the United States District Court for the District of Columbia. In the latter case, the Attorney General litigates the declaratory action and either supports or opposes the court's approval of the voting change at issue. However, under both approaches, the voting change – whether it be a new law, ordinance, regulation, or procedure – cannot be implemented until the administrative or judicial approval is secured.

In determining which jurisdictions are subject to the section 5 pre-clearance requirements, the Voting Rights Act contains a formula that is predicated on historical voter

turnout as well as the presence of certain discriminatory voting tests or devices.[1] There are 16 States – 9 in whole and 7 others in part – that meet this formula. The entire States of Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia are covered, although 10 counties and cities in Virginia have "bailed out"[2] of coverage in recent years. Meanwhile, certain counties and townships are covered in the States of California, Florida, Michigan, New Hampshire, New York, North Carolina, and South Dakota.[3]

For reasons of expense and timing, the vast majority of voting changes by covered jurisdictions are submitted to the Attorney General for administrative review. The Voting Section of the Civil Rights Division receives roughly 4,000-6,000 submissions annually, although each submission may contain numerous voting changes that must be reviewed.[4] Redistricting plans are only a small portion of those submissions. For example, in Calendar Year 2004, we received 5,211 submissions, 242 of which involved redistricting plans. In Calendar Year 2005, we received a total of 4,734 submissions, 125 of which involved redistricting plans. In Calendar Year 2006, we already have received 4,094 submissions (as of May 5), 19 of which have been redistricting plans. Perhaps not surprisingly, the number of section 5 submissions sent to the Department of Justice tends to reach its apex two years after the decennial Census, the point at which jurisdictions have the demographic data necessary to redraw their political districts. For example, in 2002 we received 5,910 submissions, of which 1,138 were redistricting plans. Similarly, in 1992, we received 5,307 submissions, 974 of which involved redistricting plans.

Our function in evaluating section 5 submissions is, in the words of the Supreme Court, "to insure that no voting-procedure changes [are] made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Miller v. Johnson*, 515 U.S. 900, 926 (1995) (quoting *Beer v. United States*, 425 U.S. 130, 141 (1976)). Stated differently, we examine whether the purpose or effect of a voting change is to

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[1]Specifically, a jurisdiction is covered under section 5 if (i) less than 50% of a jurisdiction's voting age population either was registered to vote *or* actually voted in November 1964, November 1968, or November 1972; and (ii) the Attorney General determines that the jurisdiction maintained certain "tests or devices," as defined by subsection 4(c) of the Act, in November 1964, November 1968, or November 1972. 42 U.S.C. 1973b.

[2]Subparagraph 4(a)(1) of the Voting Rights Act, 42 U.S.C. 1973b(a)(1), contains detailed procedures by which a covered jurisdiction may secure a declaratory judgment excusing the jurisdiction from further compliance with section 5. This procedure frequently is referred to as the "bail out" provision.

[3]28 C.F.R. Appendix to Part 51 – Jurisdictions Covered Under Section 4(b) of the Voting Rights Act, as amended.

[4]A chart denoting the number of annual submissions received by the Civil Rights Division pursuant to section 5 each year is attached hereto.

put racial minorities in a position inferior to the one they occupy under the status quo, as compared to non-minorities, *vis a vis* their ability to elect their candidates of choice. Impressively, the outstanding career attorneys in our Voting Section undertake this often highly complex examination in a brief, sixty-day period of time, as is required under the statute.

Employing this standard over the last 40 years, we have found retrogression in an extremely small number of cases. Since 1965, out of the 125,885 total section 5 submissions received by the Department of Justice, the Attorney General has interposed an objection to just 1,402. And in the last ten years, there have been only 92 objections. In other words, the overall objection rate since 1965 is only slightly above 1%, while the annual objection rate since the mid-1990s has declined even more, now averaging less than 0.2%. This tiny objection rate reflects the overwhelming – indeed, near universal – compliance with the Voting Rights Act by covered jurisdictions.

Recently, the Supreme Court revised the standard applicable in section 5 retrogression inquiries. See *Georgia v. Ashcroft*, 539 U.S. 461 (2003). The Court in that decision expanded the factors to be considered in the retrogression determination by examining all the relevant circumstances, which include a review of the minority voters' ability to elect candidates of their choice, the feasibility of devising a non-retrogressive alternative plan, and the extent of minority voters' opportunity to participate in and "influence" the political process. In implementing that opinion, the attorneys and analysts in the Division's Voting Section continue to conduct wide-ranging investigations into all of the circumstances surrounding voting changes, including soliciting comments and opinions from the affected community, and undertaking complex statistical analyses.

In addition to our Section 5 work, I'd also like to explain the Justice Department's enforcement efforts regarding two other important provisions of the Voting Rights Act: sections 203 and 4(f)(4), which are the Act's language minority provisions. These provisions, which have been in effect since 1975, mandate that any covered jurisdiction that "provides any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots" must provide such materials and information "in the language of the applicable minority group as well as in the English language."[5]

In determining which States or political subdivisions are subject to the requirements of sections 203 and 4(f)(4), the Voting Rights Act contains a formula that uses Census Bureau data regarding ethnicity figures, citizenship, English proficiency rates, and literacy rates.[6] Currently,

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[5]Section 203(c), 42 U.S.C. 1973aa-1a(c).

[6]For example, Section 203 is triggered if, in a particular jurisdiction: (i) more than 5% of the citizen voting age population, or more than 10,000 citizens of voting age, are members of a single language minority, and (ii) the illiteracy rate of the citizens in the language minority group is higher than the national illiteracy rate. Section 203(b)(2)(A), 42 U.S.C. 1973aa-1a(b)(2)(A).

there are a total of 496 jurisdictions that are subject to the requirements of either section 203 or section 4(f)(4).[7] The only language minority groups covered under sections 203 and 4(f)(4) are American Indians, Asian Americans, Alaskan Natives, and citizens of Spanish heritage.[8]

Under this Administration, the Justice Department's Civil Rights Division has undertaken the most extensive section 203 and section 4(f)(4) enforcement activities in its history. The initiative began immediately following the Census Bureau's July 2002 determinations (using 2000 Census data) as to which jurisdictions were covered under section 203. The Civil Rights Division not only mailed formal notice and detailed information on section 203 compliance to each of the 296 covered section 203 jurisdictions across the United States, but it also initiated face-to-face meetings with State and local election officials and minority community members in the 80 newly covered jurisdictions to explain the law, answer questions, and work to foster the implementation of effective legal compliance programs. That effort has been a continuing one. Division attorneys speak regularly before gatherings of State and local election officials, community and advocacy groups to explain the law, answer questions, and encourage voluntary compliance.

In August 2004, the Assistant Attorney General mailed letters to the 496 jurisdictions covered by sections 203 and/or 4(f)(4), reminding them of their obligations to provide language minority assistance in the November 2004 general election and offering them guidance on how to achieve compliance. The 2004 mailing to the section 4(f)(4) counties was the first blanket mailing to these political subdivisions since shortly after their original designations as covered jurisdictions in 1975.

In addition, the Division's Voting Section has been systematically requesting voter registration lists and bilingual poll official assignment data from all covered jurisdictions, beginning with the largest in terms of population. This information is then reviewed in order to identify polling places with a large number of language minority voters and to ascertain whether

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With respect to section 4(f)(4), a jurisdiction is subject to the translation obligations if: (i) less than 50% of the citizen voting age population was either registered to vote, or actually voted, in the November 1972 presidential election, (ii) the jurisdiction provided certain specified election materials exclusively in English in November 1972, and (iii) more than 5% of the citizen voting age population in November 1972, as determined by the then-latest available Census Bureau figures, were members of a single language minority. Section 4(f)(3)-(4), 42 U.S.C. 1973b(f)(3)-(4). Essentially, section 4(f)(4) applies the 1972 section 5 coverage trigger to language translation obligations.

[7]There are 296 jurisdictions throughout the United States covered by section 203. There are approximately 298 jurisdictions covered by section 4(f)(4). Some coverage overlaps, most notably in Texas and Arizona, which explains the 496 figure in the text above.

[8]Section 203(e), 42 U.S.C. 1973aa-1a(e).

the polling places are served by a sufficient number of bilingual poll officials who can provide assistance to voters.

The Division also is systematically looking at the full range of information provided by covered jurisdictions to voters in English – including, among other things, ballots and election pamphlets, newspaper notices required by State law, and web site information – and determining whether: (i) the same information is being made available to each language minority community in an effective manner, and (ii) necessary translated materials, such as ballots and signage, are actually provided in polling places.

Not surprisingly, the extraordinary efforts undertaken by the Civil Rights Division in this area have been extremely successful. Since 2001, this Administration has filed more language minority cases under sections 203 and 4(f)(4) than in the entire previous 26 years in which those provisions have been applicable.[9] Each and every case has been successfully resolved with comprehensive relief for affected voters. And the pace is accelerating, with more cases filed and resolved in 2005 than in any previous year, breaking the previous record set in 2004. The lawsuits filed in 2004 alone provided comprehensive language minority programs to more citizens than all previous sections 203 and 4(f)(4) suits combined. The enforcement actions include cases in Florida, California, Massachusetts, New York, Pennsylvania, Texas, and Washington. Among these cases were the first suits ever filed under section 203 to protect Filipino and Vietnamese voters.

These lawsuits have significantly narrowed gaps in electoral participation. In Yakima County, Washington, for example, Hispanic voter registration went up over 24% in less than six months after resolution of the Division's section 203 lawsuit. In San Diego County, California, Spanish and Filipino registration were up over 21%, and Vietnamese registration was up over 37%, within six months following the Division's enforcement action.

The Division's language minority enforcement efforts likewise have made a tremendous difference in enhancing minority representation in the politically elected ranks. A section 203 lawsuit in Passaic, New Jersey, was so successful for Hispanic voters that a section 2 challenge to the at-large election system was subsequently withdrawn. A Memorandum of Agreement in Harris County, Texas, helped double Vietnamese voter turnout, and the first Vietnamese candidate in history was elected to the Texas legislature – defeating the incumbent chair of the appropriations committee by 16 votes out of over 40,000 cast.

Although there is much more that I could say about the important work the Justice Department is doing with regard to the language minority provisions of the Voting Rights Act,

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[9]Fifteen of the 28 language minority cases filed by the Department of Justice since the adoption of sections 203 and 4(f)(4) have been commenced since 2001.

there is one final area that I would like to cover with you today: the Justice Department's use of Federal examiners and observers pursuant to sections 6 and 8 of the Voting Right Act.[10]

Under the Voting Rights Act, Federal examiners are essentially officials assigned to a particular political subdivision to whom certain complaints of voting discrimination can be made. Governed by section 6 of the Act, the authority to appoint Federal examiners was first designed as a congressional response to the racially discriminatory voter registration practices that existed throughout the South at the time of the Act's original passage in 1965. Examiners are charged with processing (or "examining") applicants for voter registration and making a list of those applicants who meet State eligibility rules; the list is then given to the local county registrar, who is required to put those names on the county's voter registration rolls. Those on the examiner's list are commonly called "federally registered voters." The Voting Rights Act also requires the examiners to be available during each of the jurisdiction's elections, and for two days afterward, to take complaints about problems from anyone.

Federal examiners can be appointed in two separate ways. The first route is through section 6's authorization for the Attorney General to "certify" for the appointment of Federal examiners any jurisdiction falling within the coverage of the Voting Rights Act in which there is reason to believe that voters have been denied the right to vote on account of their race or status as a language minority. In particular, the Attorney General must certify that either: (i) he has received complaints in writing from twenty or more residents alleging that they have been denied the right to vote under color of law on account of race or color or because they are a member of a language minority and he believes such complaints to be meritorious; or (ii) in his judgment, the appointment of examiners is necessary to enforce the guarantees of the Fourteenth or Fifteenth Amendments. The second method by which Federal examiners may be appointed is for a Federal court to do so pursuant to section 3(a) as part of an order of equitable relief in a voting rights lawsuit to remedy violations of the Fourteenth or Fifteenth Amendment. Judicial certifications, unlike those of the Attorney General, are not restricted to those political subdivisions covered by section 4 of the Voting Rights Act. Regardless of who makes the formal certification, once the determination is made, the actual selection of the examiner is undertaken by the Director of the Office of Personnel Management (OPM), who then oversees the examiner's activities.

The Voting Rights Act's ban on literacy tests and other discriminatory practices has mitigated many of the voter registration problems that made examiners so important. As a result, the need for, and role of, Federal examiners has greatly diminished over time. Although there are still 148 counties and parishes in nine States that the Attorney General has certified for Federal examiners,[11] nearly all of these certifications were certified shortly after the Voting

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[10]42 U.S.C. 1973d, 1973f.

[11]There are also 19 political subdivisions in 12 States currently certified by court order. With two exceptions, all of these certifications pertain to language-minority issues. An

Rights Act was passed in 1965 when conditions were radically different from today.[12] Moreover, many of the counties/parishes have not been the source of any race-based voting registration complaints for decades.

According to OPM, there have been no new "federally registered voters" (*i.e.*, voters registered by Federal examiners) added in any jurisdiction throughout the country since 1983. Nor has the Department of Justice received any complaints about covered jurisdictions refusing to register Federal voters in decades.

In addition to the great advances in minority access to the franchise today as compared to thirty to forty years ago, the decline in registration-related complaints is also attributable to the passage of the National Voter Registration Act of 1993 (NVRA), which made voter registration dramatically more accessible.[13] Prior to this 1993 Act, there were few Federal standards for voter registration. Through the NVRA, however, Congress established specific, uniform requirements for voter registration and State maintenance of voter registration lists. All of these requirements are applicable across the United States, not just in those jurisdictions certified for Federal examiners or otherwise covered by the Voting Rights Act. The reality today is that the only real importance of the Federal examiner provision from a practical standpoint is its function as a statutory prerequisite to the Attorney General's ability to call upon OPM to assign Federal observers to monitor particular elections in certified jurisdictions.

At any time after a Federal examiner has been appointed to a particular jurisdiction, the Attorney General may request under section 8 that the Director of OPM assign Federal observers to monitor elections in that jurisdiction.[14] These observers are full-time or intermittent Federal employees who are recruited and supervised by OPM. They are authorized by statute to enter polling places and vote-tabulation rooms in order to observe whether eligible voters are being permitted to vote and whether votes casts by eligible voters are being properly counted.

The OPM observers work in conjunction with attorneys from the Justice Department's Civil Rights Division. Department of Justice attorneys assist OPM with the observers' training, brief the observers on relevant issues prior to the election, and work closely with them on election day. Federal observers are instructed to watch, listen, and take careful notes of everything that happens inside the polling place/vote-tabulation room during an election. They

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additional 14 jurisdictions in eight States previously were certified for Federal examiners by Federal courts under section 3(a), but the designations have since expired.

[12]The complete list of counties certified by the Attorney General, along with dates of certification, can be found on the website of the Department of Justice's Voting Section. See http://www.usdoj.gov/crt/voting/examine/activ_exam.htm.

[13]42 U.S.C. 1973gg *et seq.*

[14]42 U.S.C. 1973f.

are also trained not to interfere with the election in any way. After the election, Justice Department attorneys debrief the observers, and the observers complete written reports on their observations. These reports are sent on to the Civil Rights Division and can be used in court if necessary.

While most Federal observers have reported fewer irregularities than in the 1960s, problems still occur. Over at least the last decade, most of these have related to compliance with the language minority requirements of section 203.[15] Where problems are discovered, a variety of actions may be taken depending on the relevant circumstances. On occasion, Justice Department personnel will assess the situation and work with county/parish officials on election day to clarify Federal legal requirements and immediately resolve the identified problem. Other times, the Department will send a letter to the jurisdiction following the election in which we identify certain incidents or practices that should be addressed or improved in the future (*e.g.*, removal of certain poll workers, additional training for election-day officials, etc.). Department attorneys likewise may recommend further investigation. If no Federal issues are identified, the matter may be referred to State authorities. If necessary, the Department will commence a civil action (or contempt motion if applicable) to enforce the protections of the Voting Rights Act.

Notwithstanding the general overall compliance with the Voting Rights Act, the Department of Justice has taken full advantage of the Federal observer provisions to help avoid slippage or complacency by covered jurisdictions. In 2004, for example, the Civil Rights Division worked with OPM to send 1,463 observers to cover 55 elections in 30 jurisdictions in 14 different States. In 2005, 640 Federal observers were sent to cover 22 elections in 17 jurisdictions in 10 different States. Meanwhile, already in 2006 (as of May 5, 2006), 30 Federal observers have been dispatched to cover 2 elections in 3 jurisdictions in 2 different States. Moreover, since 2004, the Justice Department has sent more than 200 Department personnel to assist the Federal observers with their work.

In addition to Federal observers, the Civil Rights Division will send Justice Department personnel, in cooperation with State and local election officials, to monitor elections if it has received complaints or has uncovered credible evidence of possible violations of the Voting Rights Act. In fact, the great bulk of our recent enforcement cases since approximately 1993 have involved jurisdictions (*e.g.*, Massachusetts, California, New York, New Jersey, Florida, Washington, and Pennsylvania) where there is no statutory authority to send Federal observers. We have expended substantial resources in this endeavor. For example, in 2004, the Department of Justice sent 393 departmental personnel to monitor 108 elections in 80 jurisdictions in 27 different States. In 2005, we sent 122 departmental personnel to monitor 25 elections in 21 jurisdictions in 10 different States. So far in 2006, the Department has sent 48 personnel to cover 5 elections in 6 jurisdictions in 3 different States. Those monitors helped account for the record-setting work we have done in enforcing the Voting Rights Act in recent years.

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[15] 42 U.S.C. 1973aa-1a.

Let me say in conclusion that the Civil Rights Division has made the vigorous enforcement of voting rights a primary objective. The fruits of our efforts in enforcing the Voting Rights Act have been dramatic. Indeed, at the time the Voting Rights Act was first passed in 1965, only one-third of all African-American citizens of voting age were on the registration rolls in the jurisdictions covered by Section 5 of the Act, while two-thirds of eligible whites were registered. Today, African-American voter registration rates not only are approaching parity with that of whites, but actually have exceeded that of whites in some areas, and Hispanic voters are not far behind. Forty years ago, the gap in voter registration rates between African-Americans and whites in Mississippi and Alabama ranged from 63.2 to 49.9 percentage points. For example, only 6.7% of African-Americans in Mississippi were registered, in comparison with 69.9% of whites.[16] Yet by the 2004 general election, the Census Bureau reported that in Mississippi a higher percentage of African-Americans were registered to vote than whites (over 76% versus under 74%). In the same year the Census Bureau reported that 73% of African-Americans in Alabama were registered, as compared with under 75% of whites (a difference of less than 2 percentage points). Moreover, the Census Bureau also recorded an increase in minority turnout in the South from 44% for all non-whites in 1964 to 53.9% for African-Americans alone in 2000.[17]

Enforcement of the Voting Rights Act also has helped to increase the opportunity of minority voters to elect representatives of their choice. Virtually excluded from all public offices in the South in 1965, minority elected officials are now substantially present in State legislatures and local governing bodies throughout the region. For example, the number of African-American elected officials has increased dramatically during the life of the Voting Rights Act, from only 1,469 in 1970 to 9,101 in 2001.[18] In fact, many covered States, such as Georgia and Alabama, have more elected African-American officials today than most that are not covered by section 5.

But our work is never complete. The Department of Justice is proud of the role it plays in enforcing this statute, and we look forward to working with Congress during these reauthorization hearings.

At this point, I would be happy to answer any additional questions from the Committee.

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[16]*The Voting Rights Act: Ten Years After*, U.S. Civil Rights Commission, January 1975, page 43.

[17]U.S. Bureau of the Census, *I. Current Population Survey*, Table 4a (2004), and *IV. Historical Time Series*, Table A-9.

[18]*Black Elected Officials – A Statistical Summary 2001,* Joint Center for Political and Economic Studies, Table 1, page 13.

Testimony of Natalie A. Landreth
Staff Attorney, Native American Rights Fund, Anchorage, Alaska
and Author, "Voting Rights Act in Alaska 1982-2006"

before the
Senate Committee on the Judiciary
Wednesday, May 10, 2006

Good morning. I would like to thank the Committee for allowing me to speak today. My name is Natalie Landreth and I am a staff attorney at Native American Rights Fund in Anchorage, Alaska. I am an enrolled tribal member of the Chickasaw Nation of Oklahoma and a descendent of the Imatobby family who survived the Trail of Tears.

I am here to discuss the impact of the Voting Rights Act in Alaska and the need for reauthorization and enforcement of the Act. Alaska is subject to sections 4(f)(4) and 203 – the minority language provisions – as well as section 5, the preclearance requirement. Under the auspices of the Lawyers Committee for Civil Rights and the Native American Rights Fund, I prepared a report detailing the Alaska Native experience under the Act. The evidence gathered in preparation of the report shows that there is still a very real need for minority language assistance and federal oversight in the form of preclearance. To our surprise, however, we also discovered (1) that Alaska has been out of compliance with the VRA for thirty years and (2) that the Act has largely not been enforced in Alaska.

First, however, I must give you a picture of the Alaska Native population to enable you to understand the reality on the ground. Alaska has the single largest indigenous population in the United States at 19%. Most of these people reside in rural Alaska, which is largely inaccessible by road; all supplies must be flown in. Rural Alaska consists of about 200 small Native villages with tribal council offices, homes, a school and a church; there are no services or hotels of any kind. Only 70-75% of rural Alaska Native homes have sanitation systems. Those without sanitation pull water from wells and use what are called "honeybuckets" to haul out waste. Rural Alaska also has the slowest police response time in the western world. This population largely practices an ancient way of life called subsistence which means that they literally live off the land by fishing, hunting and berry picking. In places like this, a ballot box often has to be shared between villages or sides of a river. Places like Kasigluk move their voting machine from one side of the river to the other by way of a four-wheeler and boat; in November, this is no mean feat. On Election Day 2004, twenty four of these villages did not even have polling places.

Today, an Alaska Native is likely to be unemployed (less than half have jobs), and when he or she does get a job he or she will earn just 50-60% of what a non-Native earns. As a result, Alaska Natives are three times as likely as other Alaskans to be poor. In addition, Alaska Natives have the lowest level of education. At the time the VRA was extended to Alaska in 1975, only 2,400 Alaska Natives had graduated from high school *at all.* This is an incredibly important fact because these people are now the elder population that is having the most difficult time understanding the ballot and exercising their right to vote. Although education has improved now that Alaska Natives are no longer forced to choose between not having an

education or going away to boarding school, they still lag far behind non-Natives. This is evidenced by the fact that 75% of all Alaska Natives have graduated from high school (compared to 90% for non-Natives). At the same time, the dropout rate is increasing; in 2004, less than half of all Alaska Native students meant to graduate actually made it to graduation. More shocking, the results of the 2005 standardized tests reveal that only 19.5% of graduating seniors were proficient in reading comprehension; that means that 80.5% percent of new Alaska Native voters may not be able to read and understand the English ballot.

This enduring but disadvantaged population still speaks about 20 different indigenous languages. The VRA, which provides for ballots and election materials in the minority languages where the population meets certain benchmarks, has had little impact in Alaska because the state simply has not complied with the minority language provisions. It is a well known fact that Alaska does not provide ballots or election materials in any languages other than English and Filipino. Yet, all of Alaska is covered by 4(f)(4) and 14 census areas are also covered by 203. The Native population still meets or exceeds the VRA's limited English proficient (LEP) and illiteracy rate benchmarks. The Census Bureau has even set forth which Native languages are covered in which area. Yet Alaska still provides nothing more than intermittent oral assistance upon request.

In addition to this clear non-compliance with the letter of the law, we know there is still a real need for language assistance. In the Bethel census area, a Yup'ik speaking region, 21% of the population is LEP and more than 10% are illiterate. There are about 17 villages in which Yup'ik is the only or primary language spoken. Yup'ik is also one of the oldest written Native languages in North America. Signs are in Yup'ik, schools are taught in Yup'ik, and in the morning, the pledge of allegiance is recited in Yup'ik. Here, Yup'ik is spoken by more than 10,000 people. Here, Yup'ik is the first language. Yet this community will be subject to an English-only election.

Not only does the statistical evidence show a need for language assistance, we now know that the English ballot is actually interfering with the exercise of the right to vote. This is evidenced by the fact that many people have stated that because they did not understand the English ballot, they voted in a way they did not intend. In 1995, 18 non English-speaking Inupiat sued the City of Barrow claiming that the absence of written materials in Inupiaq led them to ask for assistance; the poll workers allegedly offered incorrect personal explanations, advice about how to vote, and differing interpretations of the initiatives. As a result, these individuals who had intended to vote to ban alcohol in the city unintentionally voted to lift the ban on alcohol. While this was the only lawsuit brought, this has happened elsewhere as well. Ironically, it also occurred during the referendum on an "English only" constitutional amendment, and it led many Native language speakers to vote for an amendment requiring them to use only English. Thus, oral assistance is not only insufficient under the law but it is also insufficient in fact. Yet there has been no enforcement of the minority language provisions in Alaska.

Alaska is also subject to another important component of the VRA, preclearance. There has only been one objection to an election law in Alaska in the past twenty years. This one objection however is critical to the political landscape of Alaska. In the redistricting that took place after the 1990 census, the Alaska Supreme Court struck down 11 proposed districts because they

violated the "compact and contiguous" requirement of the Alaska Constitution. The astute staff at the Department of Justice caught something entirely different; District 36, the DOJ noticed, showed evidence of racially polarized voting and the proposed plan actually reduced the Alaska Native voting age population from 55.7% to 50%. This district is the single largest in Alaska and it covers most of the land mass of rural Alaska. Here, what the court had not objected to was prevented by the intervention of the DOJ. Without it, Alaska may have been subject to regtrogressive policies throughout the 1990s until the next census.

The objection that followed the 1990 redistricting continued to have a significant impact in the 2000 redistricting. It could be said that in 2000 the VRA had a deterrent or spillover effect. This time the mere existence of DOJ oversight under section 5 led to: (1) the State deliberately creating districts with the VRA and the Native population in mind; and (2) the State hiring a voting rights expert to study whether Alaska still had polarized voting (the answer was yes); and (3) the State actually placing two members of the Alaska Native community on the redistricting board.

Alaska may have been subject to only one objection, but it had a significant halo effect in that it changed the entire redistricting process in Alaska, but Alaska has also received its fair share of subtle enforcement in the form of more information request letters and withdrawals. Alaska overhauled its election laws – including absentee ballot rules, acceptable forms of identification, and polling places – right before the 2000 and 2004 elections, and with respect to the 2000 election, Alaska had to withdraw ten of its proposed changes but it did so only after the election. It is critical to note here that a simple polling place change can pose a significant hardship for voters in Alaska. Moving a ballot box one mile away or upstream to the next village can disenfranchise entire communities. This fact may merit continuing oversight in the form of preclearance. In a climate and landscape as harsh as this, such a change is not routine.

In conclusion, although Alaska finally abolished the English literacy requirement for voting in 1970, it still provides English-only elections; this is the functional equivalent of a literacy test. Yet a significant segment of Alaska's population speaks an indigenous language and does not understand the ballot. In other words, because of Alaska's non compliance with the minority language provisions, a non English-speaking indigenous population is subject to English-only elections. Furthermore, Alaska Natives are the poorest group in Alaska, with the highest unemployment and the lowest level of education. Given the vulnerability of the population and the landscape in which they live, it is critical to continue preclearance to assure that Alaska Natives maintain their right to vote. The VRA should not only be renewed, but it also should be enforced.

STATEMENT OF SENATOR PATRICK LEAHY
RANKING MEMBER, COMMITTEE ON THE JUDICIARY
HEARING ON THE MODERN ENFORCEMENT OF THE VOTING RIGHTS ACT
MAY 10, 2006

Yesterday, we held our second in a series of hearings on reauthorizing the Voting Rights Act, and today the Committee proceeds with our third hearing. It was one week ago that we joined in the bipartisan introduction of S.2703, which was cosponsored by both the Majority Leader and the Democratic Leader of the Senate. The bill already has 34 cosponsors, including a majority of the Members of this Committee. This exemplifies the widespread support in Congress for reauthorizing the most successful civil rights legislation in our Nation's history.

This week our counterparts in the House Judiciary Committee are proceeding to markup on the companion legislation, H.R.9, which was introduced last Tuesday by Chairman Sensenbrenner and Representative Conyers and which has 95 House cosponsors. There are reports that some will attempt to undercut our bicameral, bipartisan efforts. In particular, I worry that some will detrimentally seek to undermine the remedial provisions in Section 203 that help language minorities achieve full participation in our democracy. We will hear today from a representative of the Bush Administration's Justice Department about how valuable those provisions are and about the Administration's endorsement of their renewal and extension.

Recently President Bush said publicly that he wants "to make sure the Voting Rights Act is strong and capable" and that "it ought to be extended." Attorney General Gonzales listed extending the Voting Rights Act as one of the Department of Justice's 2006 priorities and said "we will push for reauthorization of the Voting Rights Act, one of the most significant pieces of civil rights legislation in our history." When testifying before the House, Acting Assistant Attorney General Schlozman noted that "the Department of Justice is proud of the role it plays in enforcing this statute" and that the "Bush Administration is very supportive of reauthorization."

This is an important matter on which there is bipartisan agreement. I look forward to our concluding our supplemental hearings next week and proceeding to report our Voting Rights Act reauthorization bill before Memorial Day.

There are few things as critical to the fabric of our Nation, and to American citizenship, as voting. The right to vote and to have your vote count is a foundational right because it secures the effectiveness of other protections. The legitimacy of our government is dependent on the access all Americans have to the political process.

Yesterday, we heard testimony about the importance of the expiring provisions of the Act. The Voting Rights Act has made substantial strides in preventing overt discrimination but our work is far from complete. We heard yesterday about a Section 5 case decided by the Eighth Circuit just last week. There are still too many examples in

which covered jurisdictions would have enacted retrogressive voting procedures if not for the preclearance provisions in Section 5 of the Voting Rights Act.

In addition, recent Section 203 lawsuits have contributed to considerable voter turnout and voter registration increases among language minorities. The continuing need for the expiring provisions cannot be overstated. Although there is sharp disagreement on the other side of the aisle concerning immigration reform legislation, I hope that we can all agree to reauthorize Section 203 to continue progress and inclusion of citizens from our language minorities who add so much to American life. Their rights as American citizens – including the right to vote – are no less precious than anyone else's rights.

We welcome Assistant Attorney General Wan Kim. I regret that the Attorney General chose not to appear before us on the important matter of renewing the Voting Rights Act, but we welcome Mr. Kim back to the Committee, where he staffed Republican Senators.

Today we also welcome the testimony of several civil rights practitioners. I am especially glad that we will be able to hear from the authors of three state reports that cover the far reaches of this country. Robert McDuff is a well-respected civil rights attorney in Jackson, Mississippi. He has argued several times before the Supreme Court, the most recent case involving a Mississippi redistricting plan. Juan Cartagena has been the General Counsel for the Community Service Society for the past 15 years where he has directed public interest litigation on issues including voting rights, housing and environmental issues. Finally, we are pleased to have Natalie Landreth, an attorney for the Native American Rights Fund, who is working on developing tribal education departments and tribal codes in two Alaskan localities. We thank you all for traveling to be with us today on short notice and look forward to your testimony.

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Testimony of Robert B. McDuff
Jackson, Mississippi

Before the United States Senate Judiciary Committee

Hearing on "Modern Enforcement of the Voting Rights Act"

Dirksen Senate Office Building Room 226
Wednesday, May 10, 2006
9:30 a.m.

As a native of Mississippi, who lives there and was born and grew up there, and a person who has spent much of his 25 years as a lawyer representing African-American voters in voting rights cases in Mississippi and elsewhere, I have seen the dramatic changes in that state and I also see how far we have to go in order to achieve true equality of opportunity among the races. I am one of many people in that state, black and white, who understand the indispensable role the Voting Rights Act has played in the progress that has taken place, and who strongly believes that the provisions of the Act must be renewed in order to maintain and build upon that progress.

A great deal of progress also occurred in Mississippi and the South in the decade after the Civil War. But when federal protections were withdrawn at the end of Reconstruction, the promises of the Fourteenth and Fifteenth Amendments were extinguished as black citizens were excluded from public life by the Mississippi constitutional convention of 1890 and similar actions in state after state. It took Congress, with the passage of the 1964 Civil Rights Act and the 1965 Voting Rights Act, to begin restoring the promises of the Civil War amendments after the decades of segregation and brutal discrimination that characterized the latter part of the nineteenth century and the better part of the twentieth.

These are different times. But it is important to remember the fragility of progress. The record of the Voting Rights Act in Mississippi demonstrates that we would not be where we are without it, that we still have a long way to go, and that we still encounter sobering reminders of the destructive

role that race continues to play in public life. Now is not the time to withdraw the protections of Section 5 of the Act. I am one of many who believe that if we do withdraw those protections, some of the hard-earned gains of the past will be lost once again. This is a crucial time in the history of Mississippi and many other states, and the role of this provision in the ongoing progress in these states is too important to abandon it now.

Attached is a report I have prepared on the operation of the Voting Rights Act in Mississippi and the importance of Section 5 to that state.

VOTING RIGHTS IN MISSISSIPPI
1982-2006

A REPORT OF RENEWTHEVRA.ORG
PREPARED BY ROBERT MCDUFF

APRIL 2006

VOTING RIGHTS IN MISSISSIPPI, 1982-2006

ROBERT MCDUFF [1]

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INTRODUCTION & EXECUTIVE SUMMARY

Mississippi is the poorest state in the union. Its population is 36 percent black, the highest of any of the 50 states. Resistance to the civil rights movement was as bitter and violent there as anywhere. State and local officials frequently erected obstacles to prevent black people from voting, and those obstacles were a centerpiece of the evidence presented to Congress to support passage of the Voting Rights Act of 1965. After the Act was passed, Mississippi's government worked hard to undermine it. In its 1966 session, the state legislature changed a number of the voting laws to limit the influence of the newly enfranchised black voters, and Mississippi officials refused to submit those changes for preclearance as required by Section 5 of the Act. Black citizens filed a court challenge to several of those provisions, leading to the U.S. Supreme Court's watershed 1969 decision in *Allen v. State Board of Elections*, holding that the state could not implement the provisions unless they were approved under Section 5.[2]

Dramatic changes have occurred since then. Mississippi has the highest number of black elected officials in the country. One of its four members in the U.S. House of Representatives is black. Twenty-seven percent of the members of the state legislature are black. Many of the local governmental bodies are integrated, and 31 percent of the members of the county governing boards (known as boards of supervisors) are black.

These changes would not have come to pass without the Voting Rights Act. Even after the Act was signed, many of them were a long time in the making, and most came about through Section 5 objections imposed by the U.S. Department of Justice (DOJ) and court orders obtained after extensive litigation. Since its first objection in 1969, DOJ has objected to Mississippi voting changes 169 times - 112 since Section 5 was reauthorized in 1982. These changes involved election districts for Congress, the state legislature, most of the county governing boards in the state, and many of the cities and school boards. In addition, federal observers have been sent to particular locations in Mississippi to observe elections pursuant to provisions of the Act on 548 separate occasions since 1966, far more than any other state. Two hundred and fifty of those have been since the 1982 reauthorization.

While the progress since 1965 has made an important difference in the state, there is still a long way to go. Enormous gaps exist between whites and blacks in terms of both economic and political power. On average, a black citizen of Mississippi is likely to have half the income of a white person. Black citizens are under-represented at all levels of government. Despite the highest black population percentage of any of the 50 states, none of Mississippi's statewide elected officials is black. Elections are still driven by racially polarized voting, and most white voters do not vote for black candidates in black-white elections no matter their qualifications. In the most recent statewide elections, held in 2003, the state's 46- year-old director of the Department of Finance and Administration, a black man named Gary Anderson, was defeated in the state treasurer's race by a 29-year-old white bank employee who had no experience in governmental finance. Racial campaign appeals still surface in elections in the state. In the race

[2] 393 U.S. 544 (1969).

for a state Supreme Court seat in 2004, the white candidate in a black-white election adopted the campaign slogan, "one of us," which had been characterized as a racist appeal by a federal court when it was used by a white candidate in a black-white congressional race over twenty years earlier. In recent times, discriminatory measures such as dual registration have been resurrected years after they were abolished, and officials have failed to submit voting changes for preclearance, requiring courts to step in and force them to comply with Section 5 decades after it was passed.

All of this means that in Mississippi, as in several states, the full protections of the 1965 Voting Rights Act must remain in place. As long as people are willing to ignore the law, and as long as race plays an excessive role in political life, there is potential for backsliding that must be avoided at all costs. The problem of race stemming from slavery and its legacy has been Mississippi's greatest burden. Important changes have occurred since the passage of the Act. But if those changes are to live on, and if Mississippi is to move forward in the coming years, the bulwark of legal protections from which they grew must not be dismantled or diminished.

I. The Voting Rights Act of 1965

Although Congress, through the Civil Rights Act of 1964, outlawed racial discrimination in employment, public accommodations and a number of other areas, that Act did not address the persistent problems of discrimination in voting that existed in a number of parts of the country, particularly the South. In 1965, President Lyndon Johnson asked Congress to pass a voting rights bill against a backdrop of dramatic protests throughout the South, particularly those in Selma, Alabama in March of 1965. In August of that year, Congress passed the Voting Rights Act of 1965 with bipartisan majorities of both houses.

The Act is designed not only to ensure the right of minority citizens to register and cast a vote, but to prohibit discriminatory measures passed by state and local governments that minimize the power of that vote. Both permanent and nonpermanent provisions are in the Act. One of the more important permanent provisions is Section 2. It applies throughout the nation and outlaws any voting practice that results in the denial or abridgement of voting rights on the basis of a person's race, color, or membership in a language-minority group.

The nonpermanent provisions that are relevant to Mississippi at the present time are Section 5, which is the preclearance section, and Section 8, which permits DOJ to send federal observers to polling places in certain jurisdictions. These nonpermanent provisions apply only to certain jurisdictions in the country. The formula that resulted in the coverage of these particular areas is set out in Section 4 of the Act. Mississippi is a covered state for purposes of these provisions.

Section 5 is the most important of the nonpermanent sections. It requires covered jurisdictions to submit all proposed changes relating to voting to the attorney general or the U.S. District Court for the District of Columbia. Unless a change is approved by the Attorney General, acting through the United States Department of Justice, or the District of Columbia federal court, it may not be implemented. This approval is known as preclearance. Under the Act, the covered

jurisdiction must demonstrate that the voting change does not have the purpose or effect of discriminating on the basis of race or language minority. If DOJ or the federal court determines the jurisdiction did not carry that burden, then an objection should be issued to the change. If an objection is issued, the change cannot be put into operation. This provision has been of vital importance because it has ensured review of new voting measures to determine in advance whether they discriminate on the basis of race, and has not required minority citizens to undertake the enormous expense and time-consuming burden of pursuing litigation every time a state or local government institutes a new measure to dilute their voting strength.

II. Implementation of Section 5 in Mississippi

Although the Act was passed in 1965, delays by Mississippi officials in complying with their obligations under Section 5 postponed for several years any meaningful review of voting changes. After the Supreme Court's 1969 decision in *Allen*, the state finally submitted the three 1966 laws that were the subject of that case, leading to the first Section 5 objection in the state. It came on May 21, 1969, when DOJ objected to all three of those laws - one changing the method of selecting county superintendents of education in eleven counties from election to appointment; one giving counties the right to elect their boards of supervisors at-large rather than by districts; and one adding burdensome new qualification requirements for independent candidates in general elections.[3] This was the first of 169 objections to voting changes in Mississippi. Nearly two-thirds of those (112) came after Section 5 was reauthorized in 1982.[4]

This lengthy list of objections covers a wide range of voting practices - most involving redistricting plans. Of the 169 objections since enforcement of the Act began, 104 relate to redistricting. Of the 112 objections since the Act was reauthorized in 1982, 86 relate to redistricting. Other objections were imposed because of changes involving at-large elections, annexations of territory, numbered post requirements, majority vote requirements, candidate qualification requirements, changes from election to appointment of certain public officials, drawing of precinct lines, polling place relocations, open primary laws, repeal of assistance to illiterate and disabled voters, and a variety of other measures.

Most of these are classic weapons in the arsenal of racial discrimination. The ones most frequently used are those that affect the racial composition of the electorate for particular offices — redistricting, at-large elections and annexations of territory. In the context of racial bloc voting, which is the pernicious legacy of segregation in many parts of this country, these tools can be used to dilute the natural voting strength of minority citizens by creating a disproportionately high number of offices chosen from majority white electorates. If white and black voters generally vote for different candidates, this means white voters will have more power to choose candidates, and black voters less, than their numbers normally would allow.

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[3] Section 5 objection letter, May 21, 1969.

[4] The list of objections can be found at http://www.usdoj.gov/crt.voting/sec_5/ms_obj2.htm.

And, given the unfortunate fact that white voters in these areas generally vote only for white candidates and not black candidates, the result is that whites occupy a disproportionately high number of elected positions. This means, of course, that black citizens are limited to a lesser role in government than would be the case in the absence of these discriminatory electoral mechanisms.

Changes other than those affecting the makeup for the electorate also carry the potential for discrimination. For example, polling places can be moved and precinct lines redrawn to require minority voters, who are disproportionately poorer and less likely to have automobiles than whites, to travel greater distances to vote. This can discourage people from voting and make a difference in the outcome, particularly in close elections. Similarly, elected positions can be changed to appointed ones at the very time the voting population in an area becomes majority-black as a means of keeping black citizens from electing a candidate to the particular office. Indeed, each of the changes that led to an objection involved some type of tool that could be used to discriminate against minority citizens who were secured the right to cast a ballot through the Voting Rights Act but were subject to a variety of tricks designed to minimize the effectiveness of that ballot.

Some of the 169 objections in Mississippi involved voting changes --- such as the open primary law, qualifications for independent candidates and restrictions on the ability of illiterate and disabled voters to seek assistance --- that governed all elections in the state. Others were targeted at specific types of elections, including those for Congress, the state legislature, state court judges, county boards of supervisors, county superintendents of education, city council members, city clerks, and county and city school board members.

Acts passed by the state legislature that had a statewide impact drew 21 objections - 10 of them since the Act was reauthorized in 1982. In addition, the legislature passed five laws, each of which affected a specific group of localities, which also drew objections, all of them prior to the reauthorization.

Ninety-nine objections were interposed to voting changes involving Mississippi's counties - 79 of them since the Act was reauthorized in 1982. These objections covered 48 of Mississippi's 82 counties. Twenty-five of the 48 counties were repeat offenders, drawing two or more objections. Sunflower and Tate Counties had six each, Bolivar County had five, and Grenada, Leflore, Monroe, and Yazoo Counties had four each.[5] Objections were imposed 36 times to actions affecting Mississippi municipalities - 18 of those since reauthorization of the Act. The 36 objections involved 28 different municipalities.

Most of the remaining objections involve local school districts throughout the state.

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[5] These figures only deal with objections involving the counties themselves. They do not include objections to changes involving elections for officials of county school boards, which are separate entities from the counties themselves, or municipalities located within counties.

As the above figures show, Section 5 is important both at the state and local levels. Some of the discriminatory measures instituted in the context of statewide redistricting plans are discussed later in this paper, but it is important to note that efforts to perpetuate the discrimination of the past are also manifest in local elections. The Mississippi legislature's 1966 backlash against the Voting Rights Act included a law giving counties the option of electing their governing boards (known as boards of supervisors) at-large rather than by single-member districts as required under pre-existing state law. This would have allowed white majority counties to ensure that all five members of the county board of supervisors would be chosen by the majority-white electorate, thus preventing integration in county government. That was one of the laws that the Supreme Court in *Allen* said could not be enforced absent preclearance, and one in the first group to draw an objection from DOJ under Section 5. But the efforts did not stop there. The 1971 legislature passed an act authorizing counties to convert to at-large elections with residency districts, a slight variation on the nullified 1966 law. Once again, DOJ objected.[6]

Two counties, Grenada and Attala, adopted at-large elections anyway, each drawing an objection in 1971.[7] After those efforts failed, both Grenada and Attala Counties designed redistricting plans that caused DOJ to again object (in 1973 and 1974 respectively).[8] Grenada County then concocted another plan that led to still another objection in 1976.[9] Eleven years later, DOJ was once more compelled to object to yet another Grenada County redistricting plan.[10]

Many other counties also designed discriminatory redistricting plans. Since enforcement of the Act began, Section 5 objections were interposed against 87 different county redistricting plans in Mississippi - 75 of those occurring after the 1982 reauthorization. Many counties incurred multiple objections. Those objections, along with litigation brought under Section 2 of the Act and the Fourteenth Amendment, forced counties to return to the drawing board and create more equitable redistricting plans.

One example where this occurred is Chickasaw County. Even though it was 36 percent black in total population, according to the 1980 Census, the county drew its supervisors' districts so that all were majority-white. A federal district court in 1989 held that this configuration violated Section 2 and ordered the county to adopt a new plan.[11] The county then passed three different plans over the next six years, all of which led to Section 5 objections.[12] In the wake of this abject

[6] Section 5 objection letter, September 10, 1971.

[7] Section 5 objection letters, both June 30, 1971.

[8] Section 5 objection letters, August 9, 1973 and September 3, 1974.

[9] Section 5 objection letter, March 30, 1976.

[10] Section 5 objection letter, June 2, 1987.

[11] *Gunn v. Chickasaw County*, 705 F. Supp. 315 (N.D. Miss. 1989).

[12] Section 5 objection letters, February 27, 1990, March 26, 1993, and April 11, 1995.

failure to comply with the Act, the federal court drew its own plan for the 1995 elections containing two of five majority black districts to reflect the county's 38.6 percent black population, which had increased under the 1990 Census.[13] Only after that, did the county adopt a lawful plan that was precleared by the DOJ.

These are just some of the many examples of the widespread violations of the Act that led DOJ to object to so many voting changes since the initial passage of the Act in 1965, and again since its reauthorization in 1982.

III. The Reluctant Compliance with Section 5

As mentioned earlier, Mississippi officials refused to comply with their obligations under Section 5 in the wake of the passage of the Voting Rights Act, leading to the Supreme Court's 1969 decision in *Allen*. Two years later, in its next major Section 5 enforcement decision, *Perkins v. Matthews*, the Supreme Court held that the city of Canton, Mississippi violated Section 5 when it attempted to enforce a change from ward to at-large elections for the city council, a change in polling place locations and an alteration of the city's voting population through annexation.[14]

Unfortunately, these decisions did not end the problem of noncompliance. At various times, black voters had to return to the courts to force state and local officials to fulfill the basic requirement of submitting voting changes for Section 5 review. For example, the state failed to submit a number of laws passed over a period of several years adding new state trial court judgeships elected under a numbered post system. In 1986, the federal district court in *Kirksey v. Allain* was required to step in and enjoin further elections for those seats until preclearance was obtained.[15] State officials then submitted the changes to DOJ, which later that year entered an objection to the numbered post requirement for many of the judgeships.[16]

The U.S. Supreme Court revisited the issue of Section 5 non-compliance in 1997 when state officials refused to submit for Section 5 review a number of changes in state law made to conform to the National Voter Registration Act. The Court unanimously held, in *Young v. Fordice*, that the officials had violated Section 5 and could not go forward with the changes until

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[13] *Gunn v. Chickasaw County*, No. 1:87cv165-D-D, 1995 U.S. Dist. LEXIS 21583 (N.D. Miss. April 21, 1995).

[14] 400 U.S. 379 (1971). *Allen, Perkins*, and the other cases discussed in this particular section of this paper are known as Section 5 enforcement actions. These are cases that can be brought by any voter in a Section 5 jurisdiction to prevent implementation of any unprecleared voting change in that jurisdiction. If the new procedure affects voting and is therefore subject to Section 5, and has not been precleared, the court hearing the case must issue an order preventing the use of the procedure.

[15] 635 F. Supp. 347 (S.D. Miss. 1986) (three-judge court).

[16] Section 5 objection letter, July 1, 1986.

preclearance was obtained.[17]

As recently as November 2005, forty years after the Act was passed, a three-judge federal court enjoined the city of McComb from enforcing a state court order it had obtained that removed a black member of that city's Board of Selectmen from his seat by changing the requirements for holding that office. As the three-judge court pointed out, the order clearly altered the pre-existing practice, yet the city had done nothing to preclear it. The court ordered the black selectman restored to his office and enjoined the city from enforcing the change unless preclearance was obtained.[18]

IV. Black Elected Officials and the Impact of the Voting Rights Act

Thirty-six percent of Mississippi's population is black, the highest percentage of the fifty states. Thirty-three percent of the voting age population is black. Despite that, no black person has been elected to a statewide office in Mississippi since Reconstruction. In 2001, the last year covered by its study of black elected officials, the Joint Center for Political and Economic Studies reported that Mississippi had 892 black elected officials. The vast majority of the black officials were elected from black-majority districts, and most of those districts were created as a result of the Voting Rights Act.

A. Congress

Mississippi has never elected a black U.S. senator. Two served during Reconstruction as the result of appointment by the legislature prior to passage of the Seventeenth Amendment, which provides for the direct election of senators.

No black person served in the U.S. House of Representatives from Mississippi between 1883 and 1986.[19] During much of this time, the majority-black area of the Mississippi Delta was contained within a single congressional district in the northwest part of the state. That district was almost 60 percent black as of 1962. But, in 1966, less than a year after passage of the Voting Rights Act, the Mississippi legislature carved the Delta up among three of the state's five congressional districts, resulting in no districts with a black majority. This basic configuration was adopted again in 1971 and 1981.[20] When the 1981 plan was submitted under Section 5, DOJ imposed an objection.[21] Black citizens filed a lawsuit seeking to hold the 1982 elections from a

[17] 520 U.S. 273 (1997).

[18] *Myers v. City of McComb*, No. 3:05-cv-00481 (S.D. Miss. Nov. 23, 2005) (three-judge court) (unpublished order)

[19] Congressional Research Service, Black Members of the United States Congress: 1870-2004, pp. 38-41.

[20] Frank R. Parker, *Black Votes Count: Political Empowerment In Mississippi After 1965 (Univ. of North Carolina Press*, 1990), pp. 41-51; *Jordan v. Winter*, 541 F. Supp. 1135, 1137-1139 (N.D. Miss. 1982) (three-judge court), *vacated, Brooks v. Winter*, 461 U.S. 921 (1983).

[21] Section 5 objection letter, March 30, 1982.

court-ordered plan, and the federal district court responded by drawing a district centered in the Delta that was 53 percent black in total population and 48 percent black in VAP.[22] This was insufficient to elect a black candidate in that polarized and poverty-stricken region of the state and the Mississippi delegation remained all white following the 1982 election. However, the black plaintiffs appealed to the U.S. Supreme Court, which remanded the case for reconsideration in light of the 1982 amendment to Section 2 of the Act.[23] In 1984, the federal court held that its prior plan did not comply with Section 2 and drew a new plan, this one with a black VAP majority of 52.83 percent.[24] Although a white candidate won again in 1984, things changed two years later when Mike Espy was elected, becoming the first black member of Congress from Mississippi in more than 100 years. Since that time, Mississippi's House delegation (which fell from five representatives to four after the state lost a seat in the 2000 Census) has included one black member.

B. The State Legislature

Significant integration came to Mississippi's legislature even later than in other states. No black citizen was elected to the state's legislature in the twentieth century until 1967. In that year, Robert Clark of Holmes County won election to the state House of Representatives. He remained the only black member of the 122-seat House until 1975, when DOJ objected to the legislature's redistricting plan of that year and a court-ordered plan creating single-member districts in some of the urban areas in the state led to the election of three more black House members. In 1979, after the state adopted plans dividing the entire legislature into single-member districts, 15 black members were elected to the House and two to the previously all-white Senate. A new plan was adopted and precleared in 1982. Three additional black members were elected to the House in the 1983 elections and two more in 1987. As the 1990s approached, black citizens remained woefully underrepresented, with black candidates elected to only 20 of 152 House seats (13 percent) and only two of 52 Senate seats (4 percent) in a state that was 32 percent black VAP at the time.[25]

New House and Senate plans were adopted by the legislature in 1991 but DOJ denied preclearance. According to the objection letter, even though the plans did not decrease the number of black-majority districts from the 1982 plan and, therefore, had no retrogressive effect, DOJ concluded that there were significant indications that a racially discriminatory purpose was at play. These indications included the fact that the legislature had turned away alternatives under which, according to DOJ, "reasonably compact and contiguous districts could be drawn in a number of additional areas of the State in which black voters usually would be able to elect

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[22] *Jordan v. Winter*, 541 F. Supp. 1135 (N.D. Miss. 1982) (three-judge court).

[23] *Brooks v. Winter*, 461 U.S. 921 (1983).

[24] *Jordan v. Winter*, 604 F. Supp. 807 (N.D. Miss. 1984) (three-judge court), *aff'd, Mississippi Republican Executive Committee v. Brooks*, 469 U.S. 1002 (1984).

[25] Parker, at 72, 115, 119-127, 133.

representatives of their choice," as well as the fact that "support for the [legislature's plan] and opposition to alternative suggestions were sometimes characterized by overt racial appeals."[26] For example, the alternative plan was often called the "Black Caucus Plan" and even the "black plan" on the House floor even though it was supported by 38 white and 20 black members, and privately, some white legislators referred to it as "the nigger plan."[27]

In 1992, the legislature drew new plans in order to cure the Section 5 defects. The House plan was precleared, but DOJ objected once again to the Senate plan, specifically the districts drawn for southwest Mississippi.[28] The legislature then amended the Senate plan for that area and the new version was precleared.[29]

Special elections were held in 1992 under the new plans, resulting in the election of 33 black citizens in the 122-member House (27 percent) and 10 in the 52- member Senate (19 percent). A slight increase has occurred since that time and presently there are 36 black members in the 122-member House (29.5 percent) and 11 black senators in the 52-member Senate (21 percent).

C. Local Officials

As of 1965, the only black local elected officials in the state were the mayor and city council of the all-black town of Mound Bayou in the Mississippi Delta.[30] That has changed. The fruits of enforcement of the Voting Rights Act are reflected in the fact that Mississippi now has 127 black county supervisors, which is 31 percent of the total number of 410 supervisors.[31] (Each of Mississippi's 82 counties has five supervisors). Those 127 supervisors come from 67 different counties. Of those 67 counties, Section 5 objections were lodged one or more times against redistricting plans for supervisors in 43 of them. Two others were the subject of successful Section 2 lawsuits. (Some of the counties with Section 5 objections were also the subject of successful Section 2 litigation). Thus, most of the current plans under which black supervisors were elected in Mississippi are the legacy of direct enforcement of the Act, particularly the preclearance provision of Section 5. Even for those counties that never encountered a Section 5 objection or a Section 2 lawsuit, it is safe to say that most designed their plans lawfully because of a recognition that discrimination likely would be met by a Section 5 objection.

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[26] Section 5 objection letter, July 2, 1991, *quoted in, Watkins v. Mabus*, 771 F. Supp. 789, 792 (S.D. Miss.) (three-judge court), *aff'd in part and vacated in part,* 502 U.S. 954 (1991).

[27] Jay Eubank, "Racial Slurs Mar Work on Voting Lines, *The Clarion Ledger*, July 14, 1991, p. 1A.

[28] Section 5 objection letter, March 30, 1992.

[29] Section 5 preclearance letter, May 8, 1992. *See also, Watkins v. Fordice*, 791 F. Supp. 646 (S.D. Miss. 1992) (three-judge court)

[30] United States Commission on Civil Rights, *Political Participation*, app. VI, p. 218.

[31] This number was obtained from the Mississippi Association of Supervisors Minority Caucus, which maintains a current list of the black supervisors in the state.

Section 5 objections also were interposed over the years to the imposition of at-large elections and discriminatory redistricting plans for city councils. Efforts of municipalities to convert to at-large elections led to three objections, all of them before the 1982 reauthorization. New municipal redistricting plans led to 13 more objections, 10 of them since the reauthorization. And municipal annexations of property that changed the voting populations were met with another 13 objections, seven since reauthorization. There are no current statistics kept of the number of black city council members in Mississippi.

D. State Court Judges

In 1965, there were only a handful of black lawyers in Mississippi and no black judges. Over twenty years later, in 1986, the number of black lawyers had increased, but only one of nine state supreme court justices was black, only one of 79 circuit and chancery court judges was black, and only one of 23 county court judgeships had ever been held by a black person.[32] The nearly all-white trial bench was the result of the use of at-large elections to choose judges in every multi-judge district in the state. Further integration of the trial courts came about only after litigation under Section 2 and Section 5 led to the creation of a number of majority-black judicial election subdistricts and the abolition of numbered posts in some of the state's remaining at-large election districts.[33] Special elections held in 1989 resulted in a significant increase in the number of black trial court judges. At the present time, eight of 45 chancery court judges, eight of 49 circuit court judges and five of 26 county court judges are black.[34]

The Mississippi Supreme Court has nine justices. The state is divided into three districts generally running east-west, each of which elects three justices. None of the districts are majority-black. Prior to 1985, no black person served as a justice of the Mississippi Supreme Court in the twentieth century. Since 1985, one of the nine justices has been black. The other eight have been white. The first black justice was appointed to a mid-term vacancy. When he retired mid-term, another black jurist was appointed in his place, and when that justice retired mid-term, still another black judge was appointed to the seat. Each of these justices won when the seat came up for election, but they all had the advantage of incumbency. The district from which they were elected is 46 percent black VAP, according to the 2000 Census.

The Mississippi Court of Appeals is an intermediate appellate court that was created in the early part of 1990s and began operation in 1995. Ten judges serve on it, two each elected from one of five districts in the state. One of the five districts is majority-black and two of the ten judges are

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[32] *Martin v. Allain*, 658 F. Supp. 1183, 1193 (S.D. Miss. 1987).

[33] *Kirksey v. Allain*, 635 F. Supp. 347 (S.D. Miss. 1986) (three-judge court); *Martin v. Allain*, 658 F. Supp. 1183 (S.D. Miss. 1987); *Martin v. Mabus*, 700 F. Supp. 327 (S.D. Miss. 1988); *Martin v. Mabus*, 734 F. Supp. 1216 (S.D. Miss. 1990).

[34] Mississippi State Conference of NAACP listing of African American Judges, November 12, 2005. Not every county in Mississippi has a county court. Most counties that do so have only one county judge, although some more populous counties have more than one.

black, both elected from that district.

E. Public Service and Highway Commissions

The three-member public service commission and the three-member highway commission are elected from nearly identical districts as those used for the Supreme Court — three districts generally running east-west, all majority-white. No black candidate has ever been elected to these commissions.

V. Racially Polarized Voting

The unfortunate existence of racially polarized voting is, of course, the reason the Voting Rights Act is necessary, and its continuing presence confirms the need to keep in place all of the protections of the Act. In areas where racial bloc voting exists, with whites generally voting only for whites and blacks for blacks in black-white elections, minority voting strength will be reduced if election districts are drawn so that white voters are a majority in a disproportionately high number of election districts. That would mean the white majorities in those districts would control the outcome of an unfair number of elections, and since they would generally not vote for black candidates, black voters would have less power than their numbers would indicate and black citizens would be elected to fewer positions than they would be in a fair system.

Racial bloc voting has long been a fixture of Mississippi elections, and unfortunately, remains so to this day. The sad facts have been documented by a long litany of court decisions. In Jordan v. Winter, the congressional redistricting case, the three-judge district court said: "From all the evidence, we conclude that blacks consistently lose elections in Mississippi because the majority of voters choose their preferred candidates on the basis of race."[35] In Martin v. Allain, which involved a statewide challenge to the election of state trial court judges from multi-member districts, the federal district court noted that a number of court decisions has confirmed the pervasive existence of bloc voting in Mississippi. After examining statistical evidence from elections throughout the state, the Court concluded that "racial polarization exists throughout the State of Mississippi . . . and that blacks overwhelmingly tend to vote for blacks and whites almost unanimously vote for whites in most black versus white elections."[36] This same pattern has been confirmed in a number of decisions throughout the state dealing with local redistricting.[37]

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[35] 604 F. Supp. 807, 812-813 (N.D. Miss. 1984) (three-judge court), aff'd 469 U.S. 1002 (1984).

[36] 658 F. Supp. 1183, 1193-1194 (S.D. Miss. 1987).

[37] *See, e.g., Houston v. Lafayette County*, 20 F. Supp. 2d 996 (N.D. Miss. 1998); *Teague v. Attala County*, 92 F. 3d 283 (5th Cir. 1996), *cert. denied*, 522 U.S. 807 (1997); *Clark v. Calhoun County*, 88 F. 3d 1393 (5th Cir. 1996); *Ewing v. Monroe County*, 740 F. Supp. 417 (N.D. Miss. 1990); *Gunn v. Chickasaw County*, 705 F. Supp. 315 (N.D. Miss. 1989); *Jordan v. City of Greenwood*, 599 F. Supp. 397 (N.D. Miss. 1984).

[38] *Jordan v. Winter*, 604 F. Supp. at 812.

There have been instances of crossover voting that is sufficient to elect black candidates, but those are few and far between. When Mississippi's first black legislator in modern times, Robert Clark, attempted in 1982 to become Mississippi's first black congressman in the 20th century, he was defeated in the newly-drawn court-ordered 48 percent black VAP Second Congressional District when he received only 15 percent of the white vote.[38] After the district was redrawn by the Court in 1984 with a 53 percent black VAP district, Clark again lost, receiving 95 percent of the black vote but only 7 percent of the white vote. Finally, in 1986, Mike Espy narrowly won with 97 percent of the black vote and 12 percent of the white vote.[39]

No black candidate has won election to Congress or the state legislature from a majority-white district in Mississippi, and no black candidate has won a statewide office in the 20th century. The only state-level body where a majority-white district has elected a black candidate is the Mississippi Supreme Court, where, since 1985, there has been one black justice out of nine. This success occurred in the Central Supreme Court District, which elects three of the nine justices. All three of the Supreme Court districts are majority-white. The Central District has the highest black VAP of the three districts at 46 percent, according to the 2000 Census. Reuben Anderson, a black Hinds Country Circuit Judge, was appointed to a mid-term vacancy in 1985 and then won election over a far-right racist candidate, Richard Barrett. Running as an incumbent, Anderson received the overwhelming majority of the black vote and an estimated 58 percent of the white vote.[40] While it was comforting that a black incumbent could gain a majority of the white vote against an overt extremist, Justice Anderson's success with white voters was unique. The federal district judge in the Martin v. Allain case made that point in his discussion of the Anderson election, noting that in every other black-white judicial election in the state as of that time, black candidates had received, on average, two percent of the white vote.[41]

Indeed, each subsequent black candidate for that state Supreme Court seat was opposed by most white voters. When Justice Anderson's retirement from the Court led to a midterm vacancy in 1991, Hinds County Circuit Judge Fred Banks, who is black, was appointed to the position. He ran twice as an incumbent, defeating white candidates each time, winning first with 51 percent of the total vote and then 54 percent, but never receiving a majority of the white vote. When Justice Banks retired from the Court mid-term in 2002, Hinds County Circuit Judge James Graves, who is black, was named to the seat. Justice Graves ran as an incumbent in 2004, defeating a white candidate in a runoff with 57 percent of the vote. But, most whites voted against him. Justice Graves won all fourteen of the majority-black counties in his district but only two of the eight majority-white counties.

While the successive victories of black candidates for one of the nine Supreme Court seats,

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[39] *Martin v. Allain*, 658 F. Supp. at 1194.

[40] *Martin v. Allain*, 658 F. Supp. at 1194.

[41] *Id.*

coming in a 46 percent black VAP district, is a positive thing, Mississippi still has a long way to go to reach the day when voters routinely make their decisions in black-white elections based on qualifications and other non-racial factors. This point was emphasized dramatically in the most recent elections for statewide offices in Mississippi, held in 2003. The Director of the Mississippi Department of Finance and Administration, 46-year-old Gary Anderson, who is black, ran for the office of State Treasurer against a 29-year-old white candidate with no experience beyond the fact that he worked in a bank. Despite his superior qualifications, Gary Anderson received only 47 percent of the vote and lost the election. Of Mississippi's 25 majority-black counties, Anderson won 24. Of the 57 majority-white counties, Anderson won only 18 and lost 39. While he received some of the white vote, most whites voted against him.

Anderson is a Democrat and his opponent a Republican, but that does not explain his defeat. Another Democratic candidate for a down-ticket statewide office, Jim Hood, won 62.7 percent of the vote in his race for attorney general against an opponent who not only, like Hood, had experience as a state prosecutor, but also had experience as an FBI agent. Yet Hood won overwhelmingly. Obviously, a number of factors come into play in any election contest but a major reason for the different electoral fates of Jim Hood, a Democrat running for attorney general, and Gary Anderson, a Democrat running for Treasurer, is that Hood is white and Anderson is black.

The racial gulf in Mississippi was also driven home by the results of the racially charged 2001 referendum on the state flag, the upper left hand corner of which prominently displays the Confederate battle flag. A study of the election results showed that 93 percent of black voters supported a new flag. However, only 11 percent of the white voters supported a new flag, despite the widespread recognition that the old one, containing the symbol of the Confederate civil war struggle to retain slavery in the South, is offensive to most black Mississippians. The overwhelming majority of white voters were unwilling to reach across racial lines and abandon this relic of the slaveholding South.[42]

During Robert Clark's unsuccessful 1982 campaign for Congress, one black Mississippi Delta preacher summarized the unfortunate situation this way: "Most whites won't vote for a black, even if he was Jesus come down from the heavens. Even then, they'd be the first to say, 'That can't be Jesus. Everybody knows Jesus is white.'"[43] There has been some progress since 1982, but racial polarization and division remain to this day, and there is still a long way to go.

VI. Racial Campaign Appeals

In the 1982 congressional election held from the court-drawn 48 percent black VAP Second Congressional District, the victorious white candidate, Republican Webb Franklin, ran on the

[42] The numbers come from an unpublished May 29, 2001 study by Professor Allan Lichtman, who was the Chair of the History Department at American University. The numbers are based on a regression analysis that compares election outcomes in every precinct in the State with the racial demographics of the precincts.

[43] Melany Neilson, *Even Mississippi*, (Univ. of Alabama Press, 1989) at 86.

slogan, "He's one of us." The three-judge federal district court, in its subsequent 1984 decision, pointed out that this was an obvious racial appeal to the white majority:

> Evidence of racial campaign tactics used during the 1982 election in the Second District supports the conclusion that Mississippi voters are urged to cast their ballots according to race. This inducement to racially polarized voting operated to further diminish the already unrealistic chance for blacks to be elected in majority white voting population districts.[44]

The phrase "one of us" implies there is a "them." If a candidate, like Webb Franklin in 1982, says he is "one of us," he clearly means that his opponent is not, but instead is one of "them." The use of this in black-white campaigns — suggesting that "us" is one race and "them" is the other — is particularly unfortunate since it exploits racial divisions. Regrettably, this is not a thing of the past. The black incumbent Supreme Court Justice who reached office by appointment to a midterm vacancy, Justice James Graves, was opposed in his 2004 election by a white Rankin County Circuit Judge named Samac Richardson. Judge Richardson's campaign slogan, which adorned the front of his flyers, was "One of Us," the same words that the federal district court in Jordan v. Winter said were a racial appeal when used in 1982.

Other politicians have used similar tactics. Despite the fact that the governor and lieutenant governor in Mississippi do not run as a ticket, the successful gubernatorial candidate in the most recent election in 2003, current Governor Haley Barbour, used campaign literature to tie his opponent, Democratic incumbent Ronnie Musgrove, with the Democratic candidate for lieutenant governor, Barbara Blackmon. Ms. Blackmon is black. One of the direct mail pieces featured the headline, "If you think four years of Ronnie Musgrove have been bad, imagine what four years with Ronnie Musgrove and Barbara Blackmon would be like." This was accompanied by photographs of Musgrove and Blackmon, with the Blackmon photo in the more prominent position.

This trick of demonizing a black political figure and attacking an opponent by linking him to that figure was repeated in a special election held a few months later, in early 2004, for a state Senate seat. Incumbent Richard White pointed out in a flyer that his opponent "had a major fundraiser that was hosted by Barbara Blackmon." Others had hosted a number of fundraisers for his opponent but the only one chosen by White for the campaign literature was that of Ms. Blackmon, the black politician.

VII. The Deployment of Federal Observers

Section 8 of the Voting Rights Act authorizes the use of federal observers to monitor polling places on Election Day in jurisdictions certified by the federal courts or the attorney general. The repeated placement of federal observers in a particular area is some indication of the potential for discrimination in that area and the need for oversight and monitoring to ensure fairness at the polling place. In Mississippi, federal observers have been sent to various locations

[44] Jordan v. Winter, 604 F. Supp. at 813.

in the state to monitor elections on 540 separate occasions since 1966 - 250 times since the 1982 reauthorization.[45] Both figures are more than in any other state. In fact, Mississippi accounts for 40 percent of the overall elections to which federal observers have been sent since the 1982 reauthorization.[46]

Since 1982, observers were sent to 48 of the state's 82 counties. Many of these counties were the subject of repeat visits during that time period. For example, observers monitored 19 elections in Sunflower County, 17 in Noxubee County and 16 in Bolivar County since 1982.

VIII. The Battles over Dual Registration

Section 5 and Section 2 complement each other in a number of ways. For example, Section 5 is an important mechanism for protecting and maintaining progress achieved through Section 2. This is illustrated by the experience in Mississippi with dual registration.

The 1890 Mississippi Constitution was designed to minimize and ultimately eliminate the black vote. One of the statutory provisions passed in its wake two years later was a dual registration provision requiring voters to register separately for state and municipal elections. Over the better part of the next century, the Mississippi legislature maintained this dual provision, passing a revised version of it in 1984. Black voters filed a lawsuit and, in 1987, a federal district court struck down the requirement. The court held that the 1892 law was adopted for a racially discriminatory purpose and the 1984 revision had a discriminatory result, thus violating Section 2 of the Act.[47]

As a result of the federal court ruling, Mississippi moved to a unitary system where registration would allow a new voter to vote in all elections. However, that changed in 1995 when the state began implementing new procedures that it adopted to conform to the National Voter Registration Act (NVRA). Under those procedures, voters who registered under the terms of the NVRA would be eligible to vote only in federal elections and would have to register a second time under pre-existing state procedures in order to vote in other elections. Statistics indicated that blacks made up a majority of those registering pursuant to the NVRA. In addition, the state's Department of Human Services provided its mostly black public assistance clientele with only the NVRA registration forms, which registered a person only for federal elections, while the

[45] Each instance of monitoring in a particular location is counted separately. For example, if observers were sent to monitor eight different counties during a statewide election, this would be counted as eight separate observances. If observers were sent to two different municipalities to observe separate municipal elections in a single county on the same election day, it would be counted as two observances. Each particular election day is counted separately. If observers go to a particular county for both a primary election and again for the general election, these are two separate observances.

[46] National Commission on the Voting Rights Act, *Protecting Minority Voters: The Voting Rights Act, 1982-2005*, pp. 59-61.

[47] *Operation PUSH v. Allain*, 674 F. Supp. 1245, 1249-1252 (N.D. Miss. 1987), aff'd 932 F. 2d 400 (5th Cir. 1991).

state's Department of Public Safety allowed driver's license applicants, most of whom are white, to use the state voter registration form, which enabled them to vote in all elections.[48]

Mississippi refused to submit its procedures for preclearance. It finally did so only under order from the U.S. Supreme Court in the Young v. Fordice case in 1997.[49] Once the procedures were finally submitted, DOJ objected, noting that the state had resurrected a form of the dual registration policy struck down by the federal court in Operation PUSH v. Allain. According to the DOJ objection letter, the new procedures had a retrogressive effect on black voting strength and were implemented and maintained under circumstances indicating improper racial considerations.[50] Only after DOJ objected did Mississippi return to the unitary registration system it had adopted after the Operation PUSH decision.

IX. The Efficacy of Litigation

As is clear from the cases cited here, litigation under Section 2 of the Act has played a role in the changes that occurred in Mississippi. But, it has only been a small part of the story. Objections issued under Section 5 have made a far bigger difference.

The experience with county boards of supervisors is a prime example. As mentioned earlier, the 127 black supervisors holding office today come from 67 different counties - 43 of which incurred one or more Section 5 objections of redistricting plans for supervisors. There were only two counties whose redistricting plans were changed solely as a result of reported Section 2 lawsuits without any Section 5 objections. There were some counties with a combination of Section 5 objections and Section 2 litigation but the objections were the dominant feature in changing the landscape of Mississippi politics in the counties. And, as mentioned earlier, the counties that voluntarily adopted non-discriminatory plans without any objection or litigation did so with an awareness that failure to do so would not only be illegal, but likely futile in light of the Section 5 preclearance procedure.

If Section 5 is abolished, litigation under Section 2 will not be sufficient to prevent the discriminatory voting changes that will occur in the absence of a preclearance requirement. The legal resources did not exist in Mississippi in the past 40 years to bring a lawsuit in lieu of every one of the 169 objections that have been issued, and they will not exist in the future. Voting rights litigation is expensive and time-consuming and there are not enough lawyers who practice in that area to carry the load. Certainly, a few lawsuits would be filed here and there, but without the mechanism of Section 5 in place, the field will be open for a resurgence of discriminatory voting changes that the legal process will be unable to control.

X. Conclusion

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[48] Section 5 objection letter, September 22, 1997.

[49] 520 U.S. 273 (1997).

[50] Section 5 objection letter, September 22, 1997.

The phrase is often repeated: "Those who cannot remember the past are condemned to repeat it."[51] No place more than Mississippi has been torn by slavery, by the lost promise of emancipation after the Reconstruction period, by the resurgence of racist power in the latter part of the 19th century and most of the 20th, and by the legacy of poverty and racial separation that still exists. While people's behavior and people's hearts can change over time, vigilance is required to ensure that laws and structures remain in place to prevent us as a society from turning back to the worst impulses of the past. Occasional flashes of those impulses illustrate the need for that vigilance. Important changes have come to pass in Mississippi in the last 40 years - changes due in large part to the mechanisms of the Voting Rights Act, particularly the preclearance provision of Section 5. But like the gains that were washed away after the nation abandoned the goals of Reconstruction in 1876, the progress of the last 40 years is not assured for the future.

The state of Mississippi has come a long way, but still has a long way to go. This is not the time to abandon the law that has been more important than any other in the march of progress since 1965.

[51] George Santayana, Life of Reason, ch. 12 (1905-6).

TESTIMONY OF FRANK B. STRICKLAND TO THE SENATE JUDICIARY COMMITTEE

"THE VOTING RIGHTS ACT: CONSIDERATION OF SECTIONS WHICH COULD BE MODIFIED OR NOT RENEWED."

HEARING HELD MAY 10, 2006

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Mr. Chairman, Senator Leahy and members of the committee, thank you for this opportunity to provide testimony regarding the important issue of renewal of certain sections of the Voting Rights Act ("VRA" or "the Act"). While I recognize that the question of renewal extends to Sections 5, 6 and 8, my focus today is on Section 5 and whether it should be renewed, and, if so, to what extent.

I am a partner in the law firm of Strickland Brockington Lewis LLP in Atlanta, Georgia, a firm which together with its predecessors, dates back to 1971. My experience with Section 5 comes primarily from two sources: serving as a member of the election board for the largest county in Georgia and litigating redistricting cases, which, in Georgia, always involve Section 5 issues.

Although I am not here in an official capacity, I am one of five members of the Fulton County Board of Registration and Elections (the "Election Board"), a bipartisan board appointed by the Board of Commissioners of Fulton County, which has general supervision of all voter registration and election processes in Georgia's largest county. I previously served on the Election Board from 1971 to 1977. Substantially all of the City of Atlanta is located in Fulton County. The Election Board is independent in that it does not report to the Board of Commissioners, and its decisions on registration and election matters in Fulton County, including the appointment of the department director, are final.

In addition to my experience on the Election Board, I have litigated a number of redistricting cases which, as I mentioned, have all involved Section 5 issues to differing degrees. During the 1990s redistricting cycle, I was one of the attorneys representing a group of citizens in the case called *Jones v. Miller.* In that case, the citizens sought court

intervention in the redistricting process when the State of Georgia's 1991 redistricting plans were not precleared. Later in that decade, my law partner Anne Lewis and I served as counsel to former speaker Newt Gingrich and Congressman John Lewis as amici curiae in the case of *Abrams v. Johnson*, which was earlier known as *Johnson v. Miller*. In that case, my co-counsel and I had the distinct and rare privilege of representing both Congressman Gingrich and Congressman Lewis.

In the 2000 redistricting cycle, I served as one of the lawyers for four minority citizens – two Republicans and two Democrats – as intervenors in the case of *Georgia v. Ashcroft,* in which the State of Georgia sought Section 5 preclearance from the U.S. District Court for the District of Columbia. The voters we represented opposed Georgia's Congressional and state legislative redistricting plans on the ground that the plans were retrogressive. The District Court precleared the Congressional and state House plans but denied preclearance of the state Senate plan. The case went to the Supreme Court and was reversed and remanded. In essence, the Supreme Court redefined retrogression and added an additional method by which a jurisdiction might prove there was no retrogressive effect with respect to minority voting rights. Although retrogression had always been measured by whether the new redistricting plan so decreased minority voting strength in majority-minority districts that the plan resulted in a backsliding in minority voting rights, in *Ashcroft*, the Supreme Court determined that retrogression might also be measured by assessing the minority group's opportunity to participate in the political process, rather than simply whether the minority group still had an opportunity to elect a candidate of choice. In reversing and remanding, the Supreme Court directed the District

Court to consider whether the State, although not meeting the traditional test of retrogression, had, in fact, met the new test.

While the District Court in Washington was in the process of attempting to apply the Supreme Court's instructions – including whether to hold a new trial, what new discovery was required, what new evidence would be allowed and the like – we were litigating the case of *Larios v. Cox* in Georgia, in which we represented a group of 29 voters who contended that the state legislative and Congressional plans violated the constitutional guarantee of one person, one vote. We were ultimately successful on the state legislative plans, and they were redrawn in 2004 by a special master selected by the three judge federal court; that decision was summarily affirmed by the Supreme Court.[1] Based on the decision in *Larios*, the District Court in *Ashcroft* dismissed the latter case as moot and therefore never applied the new Section 5 test of *Ashcroft*.

I have submitted testimony which addresses two main areas. First, the State of Georgia has made such significant progress in the 40 years since the adoption of the Voting Rights Act that many – if not all – of the Section 5 preclearance provisions no longer should apply to Georgia. Second, assuming the preclearance provisions of Section 5 would still apply to Georgia, Congress should consider revising the list of changes that are subject to preclearance. The current list is over inclusive and raises unnecessary

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[1] The state House and Senate plans produced by the special master in *Larios* as well as the new Georgia Congressional Map — illustrate that the convoluted and bizarre shapes previously employed in Georgia's congressional and legislative redistricting maps were completely unnecessary in order to comply with Section 5. Neither the special master's plans nor the new Congressional plan retrogress, either in the number of majority-minority districts or the minority voting strength in those districts. However, these districts were far more compact than the districts that had been used in Georgia since 1992, while still complying with traditional redistricting criteria.

practical problems; in my testimony, I will cite a few of those problems dealt with by the Election Board in Georgia's largest county.

First, should Georgia continue to be a covered jurisdiction? The election results in Georgia over the years, not only in Fulton County but statewide, suggest that the answer is no. In a recent paper entitled "An Assessment of Voting Rights Progress in Georgia Prepared for the Project on Fair Representation," written by Charles S. Bullock III, Professor of Political Science at the University of Georgia, and Ronald Keith Gaddie, Professor of Political Science at the University of Oklahoma ("Bullock and Gaddie Report"), not only is there a much higher registration and voter turnout rate for African Americans, the number of black elected officials has steadily increased. In 1969, there were 30 African American officeholders, 14 of whom served in the legislature.[2] By 1973 this number had increased to 100 and in 1977 the number exceeded 200.[3] In 1991 more than 500 African Americans served in elected offices in Georgia. There were further increases during the 1990s so that by 2001, 611 African Americans held office in Georgia.[4]

The makeup of Georgia's Congressional delegation is even more revealing. Four of 13 members of Congress are African American. The other states which have as many as four African Americans in the House of Representatives are New York, which has a 29 member delegation and California with a 53 member delegation. In fact, the African American share of Georgia House seats (31%) exceeds the black population (29 %).[5]

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[2] Bullock and Gaddie Report, p. 12.
[3] Bullock and Gaddie Report, p. 12.
[4] Bullock and Gaddie Report, p. 13.
[5] Bullock and Gaddie Report, p. 14

At the state level there is a significant number of African American elected officials (nine of 34), including Attorney General, Labor Commissioner, three of seven justices on the Supreme Court of Georgia, three of 12 judges of the Court of Appeals and one Public Service Commissioner. All except one have run successful campaigns for reelection. Justice Harold D. Melton of the Supreme Court, appointed by Governor Sonny Perdue in 2005 to fill a vacancy, is running in 2006 for the unexpired term of his predecessor.[6]

The experience in Fulton County is similar. I would remind you that the Board of Commissioners of Fulton County has a 4-3 African American majority, the mayor of Atlanta has been an African American since 1972 and the Fulton County legislative delegation to the Georgia General Assembly includes a majority of African American representatives.

In addition to looking at whether African Americans are able to get elected, which they clearly are both statewide and in Fulton County, an examination of the people running elections in Fulton County is illuminating. The Election Board appoints a full time director of the election department, who for several years has been an African American woman. Approximately 95 percent of the election department staff is African American. In primary and general elections more than half of the paid poll workers in the 356 precincts in Fulton County are African American.

Some might suggest that rather than trying to escape coverage in renewal legislation, Georgia and particularly Fulton County pursue the bailout mechanism available under Section 4 of the Voting Rights Act. That Section allows a jurisdiction to

[6] Bullock and Gaddie Report, p. 20.

bail out of the preclearance requirements of the Act if it has had no objections interposed by DOJ for a period of 10 years, i.e., it must have a perfect record. That might appear to be the obvious choice for Fulton County, but there is a catch. Here is how the catch works. Because there are 11 cities within Fulton County, if any one of those cities has had a single objection interposed by DOJ during the 10 year period, Fulton County is automatically prevented from seeking to bail out of the preclearance requirements of the Act, even if its own 10 year record is flawless. A recent actual example that stopped Fulton County from pursuing the bail out provision resulted from the failure of the city of Alpharetta to obtain timely preclearance of one or more annexations from the county into the city in an area of the county where the African American population is probably less than five percent. This means that Fulton County must begin a new 10 year period of perfection in its own preclearance procedures and hope that all cities in the county will also achieve perfection for 10 years. There has to be a better way. I see no reason why Fulton County's perfect record should not stand alone and that the time period for compliance should not be shortened.

While Section 5 may continue to be an important component of election law and perhaps it should be renewed in some form, some states and local jurisdictions could and should be eliminated from its application. Georgia and Fulton County are two good examples for the reasons I have outlined.

Even if these jurisdictions remain covered, Congress must still examine what changes should remain covered. For example, the Fulton County Election Board spends considerable staff and board time reviewing and approving simple changes in the location of a polling place from one public building to another. In many instances the polling

place is in a church and is being moved to another church because the current location is no longer available (or will be temporarily unavailable) for use as a polling place.

Similarly, the simple task of setting a date for a special election must be precleared. Most of the requirements for special elections are a matter of Georgia law which can not be varied by the action of the Election Board.

There are 11 municipalities in Fulton County. Another example of unnecessary preclearance occurs when one of these cities annexes additional territory from the county. First, the annexation itself must be precleared. Next, when the Election Board modifies voting precinct lines to comport with the new city boundaries for the convenience of voters, the new precinct lines also must be precleared. Clearly, these are repetitive and unnecessary steps.

In the past year a new city of Sandy Springs was created in Fulton County by the General Assembly. The legislative act creating the city, the date of proposed city elections and the city council district lines all had to be precleared. The 2006 Session of the Georgia General Assembly resulted in legislative acts to create three more new cities in Fulton County as part of an effort to municipalize the entire County. The same preclearance procedures will apply to all of these new cities.

These preclearance requirements exist because the VRA presumes that decisions on such matters by the Election Board are suspect and must be approved by a Justice Department official before being implemented. Nothing could be further from the truth. Frankly, it is insulting to the integrity of the members of the Election Board and the entire staff of the election department, as well as to the government and citizens of Fulton County, to be told by Congress that another 25 years of supervision by the Justice

Department is required based on a presumption that our policies and procedures are suspect. In my service on the Election Board in the 1970s and during my current tenure since 2004, I am not aware of a single instance of improper relocation of a polling place, adjustment of precinct boundary lines or any issue with the date of a special election, yet the VRA, if renewed without modification or elimination of the application of Section 5 to the State of Georgia or Fulton County, will continue the fiction that all such decisions are suspect and require submission to the Department of Justice.

In the two decades since the Voting Rights Act was last amended and renewed in 1982, a revolution has occurred in American election law that has resulted in representation that more accurately reflects the composition of the American electorate than any previous time in our history. This is certainly the case in Georgia and Fulton County. If Section 5 is to be renewed, the Congress should consider what jurisdictions should remain covered and why, as well as what changes should remain covered and why. Anything less is an invitation to a constitutional challenge that will likely be successful.

Thank you for your consideration of my comments. I will attempt to answer your questions, and I would request that I be allowed to revise and extend my remarks where appropriate.