Senator John Cornyn
Questions for Witnesses for Voting Rights Act Hearings
July 13, 2006

Ms. Abigail Thernstrom:

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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.*

   Minorities in the covered jurisdictions participate in the electoral process at very high levels, clearly suggesting that their "ability" to do so should not be in doubt. The old barriers to participation are gone, of course—the barriers that made the Voting Rights Act so essential in 1965.

   The high level of minority participation in the covered jurisdictions is clear in the Charles Bullock and Keith Gaddie studies that were commissioned by me and a former colleague. They are part of the record. Just to take one state as an example, while Georgia once had a terrible history of black disfranchisement, in the most recent presidential elections, black participation rates actually slightly exceeded those of whites. And if one compares Georgia to states outside the South, black registration is slightly higher and turnout is roughly the same. Georgia is not unique.

   As the political theorist Michael Walzer once wrote, in a true democracy every citizen is "a *potential* participant, a *potential* politician." Of course not every citizen will have equal power. It is not power itself but the "*opportunities* and occasions of power" that must be properly shared. The covered jurisdictions now clearly meet this test.

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?*

   Updating the trigger is certainly better than leaving it as is. But it's important to remember why the original trigger used the 1964 participation figures. In 1965, total registration and turnout below 50 percent of the voting-age population combined with the use of a literacy

test was clear circumstantial evidence that blacks were deliberately being kept from the polls. And without explicitly naming a single state, the trigger perfectly targeted the states and counties with egregious histories of Fifteenth Amendment violations.

Even in 1970, however, the use of the 50 percent cut-off, using political participation figures for 1968, no longer made sense. The trigger brought three New York City boroughs under coverage, for instance, although blacks had been freely voting in the state for a century and had been elected to public office for fifty years. Coverage of assorted counties in Wyoming, Arizona, California, and Massachusetts was equally arbitrary.

Updating the trigger didn't make sense in 1975, either. Remember, the use of a literacy test was an essential element in 1965; the low political participation figures were indisputable evidence that an illegitimate test was being used for nefarious purposes. But the states and counties that the turnout figures in 1972 brought under coverage had a literacy test only in the form of English-only ballots—which by no stretch of the imagination were equivalent to racist registrars asking applicants to read the Beijing Daily in the Jim Crow South.

Moreover, if ballots in English were a problem, the solution was simple: bilingual material. What justified imposing on Texas and other jurisdictions the burden of having to preclear all newly instituted methods of election (a category that included the *retention* of at-large voting in municipalities that decided they would benefit economically from an annexation)? The 1975 hearings did not provide evidence that these were jurisdictions that had been deliberately keeping Hispanics from the polls—that were deeply suspect and required extraordinary federal oversight, with the burden of proof on them to show an absence of wrongdoing every time they moved a polling place.

Resting coverage today on turnout in 2004 is preferable to the continuing and indefensible use of 1972 data, but levels of political participation by now are unrelated to deliberate efforts to disfranchise minority voters—and that relationship was the entire basis of the trigger's legitimacy in the 1965 act. Why not move on, and recognize that the problems with America's electoral procedures in 2006 are unrelated to those that made section 5 of the Voting Rights Act so necessary forty-one years ago.

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 would not for the following reason: the legal standards that govern the enforcement of section 2 are a mess and hard to justify. As a consequence, jurisdictions that have been subject to section 2 litigation have not necessarily been engaged in discrimination.

Section 2 was supposed to be used only to attack those rare jurisdictions in which race dominated the political process, such that a racial census could be taken and the outcome of

an election would be known beforehand. (See the 1982 testimony of Armand Derfner, e.g.—a witness this year as well.) Such cases were supposed to be hard to win; in fact, plaintiffs prevail easily since all they have to show, as it turns out, is that the three "preconditions" outlined in the *Gingles* decision have been met. Whether the "totality of circumstances" indicates that minority voters have less opportunity than whites to participate politically and elect the representatives of their choice is a question that has disappeared along with the promises of Derfner and others. The difficult task of assessing equal electoral opportunity has been replaced by a crude formula that includes a definition of polarized voting that only Justice Brennan signed on to, and that makes no distinction between whites voting for partisan reasons and for reasons of racial animus.

In 1982, Senator Hatch warned that "future courts and future Justice Departments will look [at] proportional representation as the standard against which all electoral and voting practices [will be] assessed." He was the one and only Senator who saw what was coming down the road with the passage of section 2, which has indeed become an instrument to insist on districting arrangements that promote (to the degree possible) minority officeholding in proportion to the minority population. Note: Not proportionate minority *representation*, but proportionate minority officeholding has become the right. And yet section 2 does not refer to "minority representatives of their choice, but just "representatives"; elected officials representing minority interests can come in all colors.

A case currently being litigated in Springfield, Massachusetts illustrates the problem with section 2 today. The issue is an at-large voting system, under which both blacks and Hispanics have been elected to public office. In fact, the percentage of blacks on the school committee has sometimes been disproportionately high relative to their population numbers in recent decades. If Puerto Rican turnout in the city were not quite so low, they too would likely do very well. Despite this record of electoral success, the plaintiffs want the court to order race-based single-member districts on the theory that minorities are entitled to their "fair share" of seats and would more likely be assured of proportionality on the school committee and the city council with ward voting. If the plaintiffs win, would this be a clear case in which a city had engaged in electoral discrimination and deserved to be under section 5 coverage? Are single-member districts the only form of organizing the electoral landscape that is compatible with democratic government?

In amending section 2, Congress unequivocally and wisely rejected the notion of group entitlement to even one legislative seat. Group membership was to count as a qualification for office only where blacks and other minority citizens could prove themselves distinctively excluded from the electoral process. But today true black and Hispanic political exclusion is hard to find, and thus I have a problem with a great many cases in which plaintiffs in section 2 suits have prevailed. If the provision had turned out as intended and had provided a remedy only where legislative seats seemed largely reserved for whites, then using section 2 litigation as a measure of the need for continuing coverage would make sense.

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?*

   See my answer above—in response to question 2. Registration and turnout as the basis of a trigger makes no sense. The connection between fraudulent literacy tests and low levels of political participation legitimized the original trigger. Literacy tests are gone, and political participation under the 50 percent mark is no longer a reliable indicator of electoral discrimination.

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?*

   You are perfectly right that supporters of reauthorization and amendment rely mainly on anecdotes, some quite old. I'm a social scientist; I want data.

   The data to which you refer is indeed very telling. The report on "Voting Rights Enforcement & Reauthorization" recently released by the U.S. Commission on Civil Rights contains a great deal of data that tell the same story as the one above. As the report says, "during the last decade, objections have virtually disappeared, particularly with respect to change types that represent the bulk of the submitted changes."

   Section 5 was supposed to sunset in 1970. It's an extraordinary emergency provision. The emergency was not permanent; indeed, it's over. Neither section 2 nor the Fourteenth Amendment have been repealed; plaintiffs retain plenty of power to attack electoral discrimination wherever they believe they have found it. Section 5 is no longer needed.

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?*

My views should be clear by now. I would prefer a short reauthorization to a longer one, but my real preference is to recognize the provision was supposed to last only five years and it's now more than four decades old. Time to wave goodbye.

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?*

The new language in the bill that is described as overturning *Georgia v. Ashcroft* is so murky that it's hard to know precisely what the consequence of its adoption would be.

Let's begin with my view of the decision, however. The Supreme Court, starting with *Miller v. Johnson* in 1995, had expressed considerable concern about racially gerrymandered districts that rested on the "offensive and demeaning assumption that voters of a particular race, because of their race, 'think alike, share the same political interests, and will prefer the same candidates at the polls.'" In *Georgia* v. *Ashcroft*, the Court added another concern to that of racial stereotyping. Perhaps black votes were being "wasted" in what the ACLU approvingly referred to as "max-black" districts. That is, perhaps the goal should be to concentrate only as many blacks (or Hispanics) in a district as necessary to elect a minority representative, then to assign minority voters beyond that number to other districts.

Justice Sandra Day O'Connor's opinion for a majority of five was a classic study in just how lost courts can become when trying to sort out questions of racial fairness and political representation.

Georgia's state senate districting plan had lowered the percentage of black voters in some districts (although not below 50 percent), but increased the number of districts certain to elect white Democrats. This was an unusual legislative step, but Justice O'Connor explained the logic. "No party contests that a substantial majority of black voters in Georgia vote Democratic," she wrote, and thus any increase in the number of Democratic state senators--even if they were white--would boost minority representation. Correspondingly, the implication was, any decrease in the number of Republican legislators would be good for blacks.

In other words, white Democrats count as minority "representatives." It was a remarkable *legal* conclusion for the Court to reach.

Before *Georgia* v. *Ashcroft*, majority-black districts were sacrosanct; they couldn't be eliminated in a new map. That's still true. But the logic of O'Connor's opinion makes all existing Democratic districts that contain a significant number of blacks equally untouchable, since the assumption is that Democrats speak for the interests of blacks.

With *Georgia* v. *Ashcroft*, the Voting Rights Act became not just a charter for black enfranchisement and officeholding but also a statute to protect certain safe seats for white

Democrats. Never mind that Georgia is majority-Republican. With *Ashcroft*, Democratic districts in which blacks are an "influence" (the Court's term) appear to have become another permanent entitlement.

On the other hand, O'Connor's starting point was right. Minority "representation" is not so easy to define. Who counts as a "representative"? Blacks can clearly represent "white" interests; are we to argue that whites cannot represent "black" interests—assuming (erroneously) that interests are racially defined?

"The ability of minority voters to elect a candidate of their choice is important but often complex in practice to determine," she said. In calculating the level of "minority representation," there were factors to be weighed even beyond whether a white incumbent was "sympathetic to the interests of minority voters"--factors such as whether a white incumbent occupied a position of legislative power.

With *Ashcroft*, we have arrived at the equivalent of Justice Potter Stewart's famous definition of pornography: You know minority representation when you see it. O'Connor's opinion is a nightmare; it provides no coherent legal standards. Moreover, the decision hands to the Justice Department a task totally unsuited to the process of swift administrative preclearance—that of assessing the setting in which voting takes place and determining whether one plan is more racially "fair" (by some elusive but inevitably subjective definition) than another. Overturning it has the virtue that the old retrogression standard, which involved simply counting minority officeholders, would be revived. (Or so it seems; there are a number of law professors who are not so sure that it would do so.) But do members of Congress really want to sign on to the notion that only blacks can represent black voters, and thus we know the level of black representation by counting African Americans in public office?

In *Ashcroft, w*ithin the majority of five, only Justice Clarence Thomas kept his wits about him. He concurred with the Court's bottom line--remanding the case for further consideration in light of the majority opinion. But he reiterated his belief that his colleagues had "immersed the federal courts in a hopeless project of weighing questions of political theory." Even worse, by segregating voters "into racially designated districts . . . [they had] collaborated in what may aptly be termed the racial 'balkaniz[ation]' of the Nation."

The solution is the politically difficult one that I have already urged: abandon preclearance. What's the argument against asking plaintiffs in these suits to rest their cases on either section 2 or the Fourteenth Amendment? Complicated questions of racial equality in the political arena demand, at the very least, what the Court once called "an intensely local appraisal" of the sort that only an actual trial affords.

And, by the way, overturning *Bossier Parish II* creates the same problem: the DOJ will have to sort through complicated issues of intentional discrimination in settings that do not resemble Mississippi in 1965—a process that no one should have much confidence in. Moreover, it should not be forgotten that the burden of proof under section 5 is on the jurisdiction to show an *absence* of discrimination—a burden that was appropriate 41 years ago, but can hardly be justified today.

7. *What do the changes to the Voting Rights Act proffered in the current re-written version mean? Specifically, Section 5 of the currently proposed re-write of the Act says the following:*

(b) Any voting qualification, or prerequisite to voting, or standard, practice, or procedure, with respect to voting that has the purpose of or will have the effect of diminishing the ability of any citizens of the United States on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), to elect their preferred candidates of choice denies or abridges the right to vote within the meaning of subsection (a) of this section.

This revision of section 5 just compounds the problem of already murky statutory language. Who are the "candidates of choice" for minority voters? How are they to be identified?

The language of that provision refers to "representatives of their choice," plainly suggesting a definition of representation broader than that which would have been conveyed had the wording been, "*minority* representatives of their choice." Did that mean that a white candidate could qualify? What about an unsuccessful black candidate who was nevertheless the first choice of minority voters? When Rep. John Lewis first got elected to Congress in 1986 he got only a minority of the black vote against Julian Bond in the Democratic primary and was forced into a runoff that he won by picking up substantial white support. He was thus not truly the "preferred candidate" for black voters in his first successful election.

In *Georgia v. Ashcroft* (2003) Justice O'Connor's majority opinion rather wistfully noted: "The ability of minority voters to elect a candidate of their choice is important but often complex in practice to determine." Indeed. And the task of discerning when minority voters lack that "ability" has defeated the Court itself.

The question has arisen in the section 2 context as well. The Supreme Court, in its most recent section 2 cases, *LULAC v. Perry*, dismissed the argument that Rep. Martin Frost, a white liberal, was entitled to his congressional seat as the candidate of choice for black voters. Redistricting has fragmented the district from which he had been elected. Blacks were only 25 percent of the district, and, while they had consistently voted for Frost, they had had no choice if they wanted to support a Democrat. There had been no contested Democratic primary in the previous two decades. It was a district designed to elect an Anglo. "The fact that African-Americans preferred Frost to some others does not…make him their candidate of choice," the Court concluded.

Will the new section 5 language be read to incorporate that conclusion in a section 2 case? It's impossible to predict.

(c) The term 'purpose' in subsections (a) and (b) of this section shall include any discriminatory purpose.

Please tell the committee, in a few sentences, what you believe these phrases to mean.

In Bossier Parish I, the district court (on remand) had failed to answer a question that, a bit mysteriously, had never been raised in the decades since *Beer v. United States* (1976) had been decided. Did the retrogression principle govern the interpretation of discriminatory "effect" alone, or was it equally applicable to assessments of discriminatory purpose? In enforcing section 5, were there one or two legal standards? Perhaps a districting plan could be suspected of racial animus, although its "effect" did not leave black voters worse off than they had been before. Should that plan be precleared?

On the surface, the question might seem a tad ridiculous. Could the Court really argue that intentionally discriminatory districting maps did not necessarily violate section 5? Yes. It could—and did in *Bossier Parish II* (2000). Section 5 had a limited aim: to make sure the enfranchisement promised by section 4 was not undermined by alternations in electoral procedure that robbed blacks of expected political power. The provision was not an all-purpose tool that could be used to remedy other forms of voting-related intentional discrimination. Such an all-purpose tool would have been totally inappropriate to the administrative preclearance process, which was one option under section 5.

Appellants would recast section 5's phrase "'does not have the purpose and will not have the effect of x' to read 'does not have the purpose of y and will not have the effect of x,'" Justice Scalia wrote for the Court. They "refuse to accept the limited meaning that we have said preclearance has in the vote-dilution context," he went on. That limited meaning "does not represent approval of the voting change; it is nothing more than a determination that the voting change is no more dilutive than what it replaces, and therefore cannot be stopped in advance under the extraordinary burden-shifting procedure of §5, but must be attacked through the normal means of a §2 action."

In amending section 5 to overturn the *Bossier II* decision, Congress has (in Justice Scalia's words) refused "to accept the limited meaning that [the Court has] said preclearance has in the vote-dilution context." The Justice Department, in the preclearance process, will now re-acquire the liberty it abused in the 1980's and 1990s—the freedom to label as discriminatory in intent any districting map that provides less than a maximum number of safe minority seats. It will thus return to regarding roughly proportional racial and ethnic representation as a right—in direct conflict with the entire history of the statute.

8. *Putting aside the constitutional questions with regard to overturning Georgia v. Ashcroft and/or Bossier Parrish II – 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 a plan?

I would assume not. One of the points of overturning *Ashcroft* was to eliminate that possibility.

9. *The Court in LULAC v. Perry indicates that for purposes of Section 2, the analysis should focus on a district in isolation. In other words, the Court said that Texas could not remedy a possible Section 2 violation of "dilution" by creating a new offsetting opportunity district because the analysis must be performed in "isolation." This seems troubling. As Chief Justice Roberts pointed out:*

> *When the question is where a fixed number of majority-minority districts should be located, the analysis should never begin by asking whether a [] violation can be made out in any one district "in isolation." In these circumstances, it is always possible to look at one area of minority population "in isolation" and see a "violation" of §2…*
>
> *For example, if a State drew three districts in a group, with 60% minority voting age population in the first two, and 40% in the third, the 40% can readily claim that their opportunities are being thwarted because they were not grouped with an additional 20% of minority voters from one of the other districts. But the remaining minority voters in the other districts would have precisely the same claim if minority voters were shifted from their districts to join the 40%.*

If the analysis for Section 5 determination of "candidate of choice" are similarly decided on a district-by-district basis, how can it possibly work?

It can't possibly work. The population shifts over time, increasing minority voters in some districts, decreasing them in others. The section 5 question (when the districting in question is state-wide) should be retrogression in the state as a whole. If the black population drops from 60 percent to 45 percent in a particular district, affecting the likelihood that a "candidate of choice" will be elected, that should not constitute "retrogression" if the potential for black electoral success increases elsewhere.

10. If the re-written version of the Voting Rights Act is not adopted, and instead, we were to adopt something closer to a straight re-authorization, what would the result be?

It would have been far preferable to pass straight re-authorization, although I would have objected to that as well. Section 5 was an emergency provision; the emergency of black disfranchisement is long over. The problems that arise today are not necessarily in section 5 jurisdictions; nor do they remotely resemble the obstacles that blacks faced in the Jim Crow South.

11. I have a letter that I will insert into the record from the Secretary of State of Texas, Roger Williams, that details his concern that after the LULAC opinion, implementation of the Court's determination that District 23 be re-drawn, coupled with many other federal law requirements, like HAVA, will make it next to impossible for Texas to comply in a timely fashion. He writes:

> *In short, it is extremely cumbersome on the election officials in Texas to have to balance compliance with the wide array of federal election laws designed to ensure*

> *that every person has a timely, confidential and secure method of voting with the ever-evolving judicial interpretations of the Voting Rights Act.*

What concerns me is that we now seem to be poised to adopt significant revisions – that is adoption of "preferred candidate of choice" and "any discriminatory purpose" as standards – and we don't have agreement on what they mean. At what point does the continued ebb and flow of our law under the Voting Rights Act put states in a place where they are simply unable to redistrict without running afoul of federal law – even as they undertake the process with the purest and best of intentions?

No one can possibly know what electoral arrangements the courts and the Department of Justice will view as in compliance with the Voting Rights Act. There is still no consensus on the definition of "undiluted" votes. Are minority voters entitled to proportional representation; in *Bossier Parish I*, Justice Breyer in his dissent explicitly acknowledged the inevitability of proportionality as the benchmark in measuring the electoral power to which minorities are entitled. Likewise, in her concurrence in *Gingles v. Thornburg* (a section 2 case) Justice O'Connor charged the majority on the Court with having created "a right to usual, roughly proportional representation on the part of sizable, compact, cohesive minority groups. If," she went on, "under a particular multimember or single-member district plan, qualified minority groups usually cannot elect the representatives they would be likely to elect under the most favorable single-member districting plan, then 2 is violated."

There are numerous other unresolved questions: the proper definition of "racial bloc voting," among them. The statute is a mess—in part because it has no clear theoretical foundation any more. In 1965 the theoretical assumptions underlying the act were perfectly clear; the statute was pure anti-discrimination legislation. But no longer.