

**Response of Professor Drew S. Days III, Alfred M. Rankin Professor of Law,
Yale Law School, to Questions from Senator Tom Coburn
June 16, 2006**

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

Yes. In my view, the correct analysis for determining whether the trigger is appropriate is whether citizens in jurisdictions covered under Section 5 continue to suffer from persistent methods of voting discrimination.¹ Where the record before Congress shows sufficient evidence in that regard its power to leave the Section 5 mechanisms in place is clearly authorized by the Fourteenth and Fifteenth Amendments.

The Section 5 coverage formula was established after careful review of the evidence before Congress in 1965, 1970, 1975, and 1982 and was adopted to eradicate entrenched as well as new methods of discrimination against minority voters. The continued evidence of persistent violations of minority voting rights in covered jurisdictions in the record before this Congress highlights the necessity of continued review of voting changes that may have a retrogressive effect on minority voters in these jurisdictions.

I am generally aware that some academics or others have undertaken to craft proposals that modify the trigger formula for Section 5 to account for “improved race relations” in some covered jurisdictions and what some would characterize as worsening race relations in some uncovered jurisdictions. Although I am unfamiliar with specific proposals, in my opinion these modifications are without sufficient support in the record before Congress. Moreover, the Act already provides for the inclusion of uncovered

¹ See *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

jurisdictions under section 3(c) of the Act and the exclusion of covered jurisdictions under the bailout provisions of the Act.² It is my understanding that there is no credible evidence in the record that these measures, along with Section 5, (1) have not proven extremely effective in addressing some of the worst systemic failures in our constitutional democracy; or (2) precluded responses tailored to specific situations where circumstances warrant through the “pocket trigger” and bailout provisions.

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

Yes. The period of time between congressional review of the Voting Rights Act’s temporary provisions is a policy choice soundly committed to Congress to be determined in light of the evidence presented in this renewal process, as well as previous ones. When it enacted the Voting Rights Act in 1965, Congress hoped that issues of racial discrimination in elections would be resolved quickly. The four occasions on which Section 5 of the VRA previously was considered arguably make it the most carefully reviewed civil rights measure in our nation’s history. Each time the duration of the law was weighed in light of Congress’s assessment of the persistence of discrimination that it sought not to lessen, but to eradicate. Today, as in 1982, we have learned that voting discrimination is more entrenched than we had hoped. In fact, though some historical means of discrimination are less pervasive, new and creative methods of discrimination in the political process continue to emerge.³ Consequently, a Congressional policy decision to apply a renewed Section 5 provision for another 25 years should be based on the full record of Congressional experience under the Act.

² See e.g. *Jeffers v. Clinton*, 740 F. Supp. 585 (E.D. Ark. 1990); *McMillan v. Escambia County*, 559 F.Supp. 720, 727 (N.D. 1983).

Take the following case in point. A federal judge in Georgia, a covered jurisdiction, recently ruled preliminarily that a newly enacted voter identification measure was the modern equivalent of a poll tax.⁴ I do not believe any of the witnesses who testified at the 1982 renewal hearings envisioned, I certainly did not, that voting rights litigators would have to familiarize themselves with the constitutional, statutory, and case law sources associated with poll taxes. Yet, that is precisely what was required in the fortieth anniversary year of the Voting Rights Act. It might be suggested that the Georgia identification bill is not relevant because the measure was precleared by the Department of Justice. I do not believe the analysis ends there, however, since that decision was the subject of robust debate within the Department. Moreover, in the context of the limited point that I urge here, namely that new methods of discrimination in voting continue to be devised, it seems to matter less where a given court or fact finder comes down, than it does that very serious contemporary legal analyses were necessary to address a *bona fide* poll tax allegation. Although neither the Department of Justice nor the courts are infallible, over time Section 5 has proven to be remarkably effective at addressing both familiar and more innovative forms of voting discrimination when they appear.

On the record before Congress, it seems fairly apparent that Congress has met its duty under the *Boerne* doctrine. In this regard, it is worth noting that the Supreme Court has recognized that Congress acts as a continuous body when reviewing evidence. As the Court stated in *Fullilove v. Klutznick*,

Congress has no responsibility to confine its vision to the facts and evidence adduced by particular parties. Instead, its special attribute as a legislative body lies in its broader mission to investigate and consider all facts and opinions that may be relevant to the resolution of an issue. One appropriate source is the information and expertise that Congress acquires

⁴ *Common Cause v. Billups*, 406 F.Supp.2d 1326 (2005).

in the consideration and enactment of earlier legislation. After Congress has legislated repeatedly in an area of national concern, its Members gain experience that may reduce the need for fresh hearings or prolonged debate when Congress again considers action in that area.⁵

Each time Congress sits it is not being reconstituted, therefore all of the previous records (1965, 1970, 1975, 1982 and 1992) are properly part of the record. For practical as well as doctrinal reasons, it also stands to reason that Congress should not be required to make this substantial investment of resources every 5 years. More importantly, the frequency of the undertaking should be left to Congress' sound discretion in light of the substantial separation of powers costs that *Boerne* itself imposes.

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

I am not aware of any alternative conceptualizations with that effect.

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

No. When Congress reauthorizes the Voting Rights Act, it acts under the authority expressly granted by the Fourteenth and Fifteenth Amendments, which were specifically designed to expand federal power, and to effect a concomitant contraction of state authority with respect to racial discrimination. It is perhaps unsurprising, therefore, that the Supreme Court has consistently pointed to the Voting Rights Act as an example of Congress's striking an appropriate, if delicate, balance between the respective states and the federal government. For, as I have mentioned, the Act is among the most carefully and consistently reviewed by Congress and the Court.⁶ Moreover, recent

⁵ *Fullilove v. Klutznick*, 448 U.S. 448, 502-503 (1980).

⁶ *City of Rome v. U.S.*, 446 U.S. 156, 180 (1980); see *South Carolina v. Katzenbach*, 383 U.S. at 315.

Supreme Court decisions suggest that remedial legislation enacted by Congress to vindicate fundamental rights will pass constitutional muster.⁷

An unchanged trigger and a 25-year sunset provision will not render the Voting Rights Act unconstitutional because the 25-year period is not arbitrarily applied. Congress is prepared to act on a carefully developed record that spans from 1965 to the present day. In addition, the bailout provisions of the Act provide an incentive toward progress and eradicating discriminatory voting practices. Covered jurisdictions that eliminate racial discrimination in voting in 2017, ten years after reauthorization, can bailout of the preclearance provisions before 2031. Thus, the 25-year sunset provision of the Voting Rights Act and the current trigger formula do not enlarge the Congressional authority granted by the Fourteenth and Fifteenth amendments.⁸

Please discuss how a possible broad-based “bailout” of covered jurisdictions might be implemented?

Congress addressed this issue fully the last time around. I have seen nothing in the record that suggests more realistic or effective alternatives to those rejected at that time.

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

Perhaps, but I am unaware of their existence and am very uncertain of their necessity in light of my own experiences at the Department of Justice, and the record

⁷ See *Lopez v. Monterey*, 525 U.S. 266 (1999) (specifically upholding section 5 preclearance against a constitutional attack post-*Boerne*, just after the Court invalidated Congressional legislation during the same term in *Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank*, 527 U.S. 627 (1998) and before the Court in *Nevada Dep't of Human Resources v. Hibbs*, 538 U.S. 721 (2003) and *Tennessee v. Lane*, 541 U.S. 509 (2004) upheld Congressional remedial legislation under the Civil War Amendment enforcement powers).

⁸ See *Lopez*, 525 U.S. at 282-284 (1999).

before Congress. Moreover, the current bailout provision was enacted in 1982 after Congress discussed many alternative bailout provisions during the 1982 reauthorization. As I have set out above, the current bailout provisions balance concerns that jurisdictions that continue to abridge or deny the voting rights of minorities remain covered by the Act while encouraging compliance. Congress should not relax the bailout requirements in view of the fact that no jurisdiction has demonstrated that the current provisions present unreasonable obstacles. For Congress to do so in light of hearing evidence of serious VRA violations in the twenty-first century would send an unfortunate message.⁹

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

I did not attend the May 16, 2006 hearing, and was not provided with the full hearing transcript to review the quoted text in context. However, given testimony that I and other witnesses have offered that the standard in *Georgia v. Ashcroft*, which calls for the measurement of influence, is unworkable and lacks useful guidance, I find it hard to quantify what "influence" Black voters may have in the general circumstances posited.

⁹ In fact, there are some jurisdictions that continue to defy the requirements of the Act, despite the long application of the voting rights act, and fail to submit voting changes for preclearance. See Written Testimony of Jerome A. Gray before the House Judiciary Committee, November 1, 2005 at 3 (noting that an Alabama county failed to submit voting changes for preclearance from 1995 to 2005); See also Laughlin McDonald, *The Voting Rights Act in Indian Country: South Dakota, A Case Study*, 29 AM. INDIAN L. REV. 43, 43-44 (2004) (discussing South Dakota Attorney General Bill Janklow's advisement that his state not comply with the VRA's preclearance requirement. For example, between 1976 and 2002, South Dakota enacted more than six hundred statutes and regulations having an effect on elections or voting in Shannon and Todd Counties, but submitted fewer than ten for preclearance.).