Written Responses of Professor Drew S. Days III, Alfred M. Rankin Professor of Law, Yale Law School, to Questions from Senator John Cornyn
June 16, 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 am not aware of any comprehensive empirical studies that have compared covered and non-covered jurisdictions in this way. As I testified before Congress in 1982, most available empirical research on voting patterns has focused on covered jurisdictions.[1] If such studies have been conducted, I am not familiar with them.

2. *Currently, the Voting Rights Act identifies those jurisdictions subject to an additional oversight by looking at voter turnout in the presidential elections of 1964, 1968, and 1972. Reauthorization 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?*

I have not studied the impact of the use of the 2000 and 2004 elections in the formula, so I am unable to offer a recommendation on whether to add those election years in the coverage formula. As in 1982, however, I believe Congress should preserve the use of the presidential elections of 1964, 1968, and 1972 in the reauthorized formula, given the past reliability of the formula in appropriately targeting jurisdictions for pre-clearance with a historical pattern of

[1] *Extension of the Voting Rights Act: Hearing Before H. Comm. on the Judiciary, Subcomm. on Civil and Constitutional Rights,* 97th Cong. 2121 (July 13, 1981) (Prepared statement of Prof. Drew S. Days III, Professor of Law, Yale University) (noting the absence of "similarly detailed and persuasive evidence of the need for preclearance in jurisdictions other than those presently covered") [hereinafter, Days 1981 testimony].

voting discrimination that Congress must consider.[2] The original coverage formula considered whether a jurisdiction had employed a test or device *and* the level of voter turnout and registration. Accordingly, it bears emphasis that the depressed turnout and registration levels were an indicator of the larger problem of entrenched discrimination in voting that Congress intended to address and not the end itself.

During the earlier reauthorizations of the Voting Rights Act, Congress *added* years to the formula, but never *replaced* earlier election years with more recent ones. If recent presidential election years are added to the formula at all, Congress should similarly preserve those years currently in the formula. The Supreme Court considers both the history and ongoing nature of voting rights infringements in weighing Congress's legislative power to enforce voting rights.[3] In this regard, the years 1964, 1968, and 1972 are still relevant in recognizing the long history and ongoing nature of voting rights abuses and in identifying those jurisdictions in which minority voters are most in need of Section 5 protections.

There is no evidence in the record, however, that a revised formula is needed to pick up new jurisdictions. Rather, the existing Section 5 bail-in provision sometimes referred to as the "pocket trigger" is an adequate mechanism for requiring pre-clearance for previously non-covered jurisdictions that demonstrate evidence of voting discrimination. Although courts have been judicious – perhaps at times very judicious – in their use of the provision, it is structured to provide another tool for federal courts to protect minority voters where the evidence justifies future oversight. Given the existence of the bail-in provision as a mechanism for placing new

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[2] Days 1981 testimony, *supra* note 1, at 2123-24 (noting "the record amply confirms the utility of the current trigger" and that "the trigger formula has been tested and measured repeatedly . . . [and] has been found each time to be extraordinarily appropriate when tested by the realities of experience).

[3] *See, e.g., Tennessee v. Lane*, 541 U.S. 509, 528 (2004) (upholding the constitutionality of the Americans with Disabilities Act as applied to access for disabled to the courts based on the "long history" of discrimination adduced in the record).

jurisdictions under the preclearance requirements, it is unnecessary to change the preclearance formula itself to accomplish this goal. Since the current trigger formula still works in most instances to correctly identify those jurisdictions where preclearance is necessary given past and current patterns of discrimination, I see little support for substantially altering the trigger formula at this point.

In the 1982 reauthorization process, proposals were also on the table to change the trigger formula. I now reiterate my testimony at that time that the bail-out and bail-in provisions will continue to serve as "safety valves for both overinclusion and underinclusion" of jurisdictions that should or should not be covered under preclearance requirements,[4] allowing adjustments as necessary for jurisdictions where the trigger formula does not yield the appropriate result. The use of evidence of historical discrimination, coupled with more recent evidence that this discrimination continues to persist, is appropriate and necessary in determining the jurisdictions to which Section 5 should continue to apply. As I stated in 1982, "the trigger formula has been tested and measured repeatedly" and has continued to effectively identify those jurisdictions where minority voters are most likely to be deprived of their full voting rights. With no compelling evidence to suggest the trigger formula is any less effective now than in the past in identifying these jurisdictions, there is no compelling reason to revise the formula significantly now.

Although there may be overlap with jurisdictions charged with Section 2 violations, the existing Section 5 mechanisms are doing their job, rendering it unnecessary to also use Section 2 data in identifying jurisdictions that will be subject to preclearance requirements. The bail-in mechanism described above is available in Section 2 cases as well; thus, I see no reason to endorse the seemingly broad expansion to any jurisdiction that has been "subject to litigation."

[4] Days 1981 testimony, *supra* note 1, at 2123.

Of course, some jurisdictions that have been "subject to litigation" prevail and some do not. The existing bail-in provision is a much more finely calibrated standard for assessing the need for future oversight.

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?*

Because Congress must rely on both the historical patterns and ongoing nature of discrimination, evidence from the 1964 elections, as part of a longer pattern of discrimination, is still relevant to Congress's power to enforce the protections of the Voting Rights Act. Evidence of discrimination from the 1964 presidential election would be rendered "old" only if it was left as a stand-alone, one-time example of voting discrimination that has not been repeated since in form or scope, but this is not the case. To the contrary, the record before Congress indicates a long-term pattern of historical discrimination, which includes 1964 and continues to the present day.

This can be distinguished from the situation in *City of Boerne v. Flores*,[5] in which the Court cited the absence of contemporary examples of religious discrimination and disallowed the use of older examples that appeared unconnected to a historical pattern of discrimination. In *Boerne*, all of the evidence provided was more than 40 years old. Moreover, the Religious Freedom Restoration Act (RFRA), unlike the VRA, was newly-enacted legislation facing review for the first time. A reauthorized VRA, which has successfully protected minority voting rights for four decades, would likely not face the same scrutiny. Since Section 5 is directed at

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

eradicating racial discrimination, a suspect classification, with respect to voting, one of the most basic rights, the Court's deference to Congress should be at its greatest in this context, which the Court itself suggested in the *Boerne* decision.

The Court in *Boerne* specifically distinguished that case from its reasoning in *South Carolina v. Katzenbach*, in which the Court previously upheld the constitutionality of the Voting Rights Act.[6] Whereas in *Katzenbach*, the Court "noted evidence in the record reflecting the subsisting and pervasive discriminatory-and therefore unconstitutional-use of literacy tests" and "the necessity of using strong remedial and preventive measures to respond to the widespread and persisting deprivation of constitutional rights[,]"[7] the Court in *Boerne* cited the wholesale absence of contemporary evidence of discrimination in striking down RFRA. In doing so, it *specifically* contrasted its voting rights cases from the religious freedom context.[8]

As the record before you indicates, in the context of voting rights, there are many examples of modern instances of discrimination that are connected to a long-term pattern of discrimination that Congress is empowered to address through civil rights legislation. Therefore, evidence from 1964 is still relevant and permissible in the coverage formula. Indeed, Congress is required to establish an adequate record when addressing voting rights discrimination through the Voting Rights Act. The use of long-term data allows Congress to target preclearance requirements to those jurisdictions with the most serious records of discrimination; a jurisdiction with serious problems in 1964 that continues to demonstrate

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[6] *City of Boerne*, 521 U.S. at 525-26 (1997).
[7] *Id.*
[8] *Id.* at 530. The Court wrote:

> In contrast to the record which confronted Congress and the Judiciary in the voting rights cases, RFRA's legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry. The history of persecution in this country detailed in the hearings mentions no episodes occurring in the past 40 years.

Id.

discrimination today is one in which preclearance mechanisms are most needed. The combination of historical and current data enables Congress to tailor the VRA and ensure "congruence and proportionality" between voting rights infringements and targeted preclearance mechanisms. As I noted in Question 2 above, the record does not indicate that the current formula fails to accomplish these goals.

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?*

Section 5 has been effective both in raising DOJ objections to voting changes submitted for pre-clearance, but, as importantly, in preventing covered states and local jurisdictions from proposing discriminatory changes in the first place. The figures you cite do not encompass the full record of success of Section 5 in providing a strong disincentive to covered jurisdictions in considering changes that would diminish minority voting rights in those jurisdictions. These numbers do not support the contention that covered jurisdictions have simply stopped discriminating on their own. Instead, based on my experience administering Section 5's pre-clearance requirements at the DOJ, I believe that these figures can be correctly interpreted to indicate that vigorous enforcement of Section 5 over the years has resulted in a high level of compliance among covered jurisdictions. In the absence of the pre-clearance requirement, I expect that these same jurisdictions would lack the incentive to avoid objections to proposed changes by actively tailoring changes in a non-discriminatory fashion, as is currently the case. During my time at the DOJ, I observed substantially increased compliance by covered jurisdictions that anticipated a forceful federal response if preclearance was not sought.

Furthermore, as these covered jurisdictions expected fair, prompt, respectful, and constructive treatment of their submissions, they became increasingly likely to submit changes that were non-discriminatory in nature and in compliance with the Voting Rights Act requirements.

Additionally, as I noted in my testimony in 1982, these numbers vastly underestimate the true degree to which covered jurisdictions are making voting changes that disadvantage minority voters. Even with vigorous enforcement by the Justice Department, hundreds of changes that would not meet Section 5 preclearance requirements are never submitted for consideration. Given time and resource constraints, the Justice Department is unable to ensure that every electoral change influencing minority voters will be subject to preclearance.

Thus, while the figures you cite are small, they do not accurately reflect the broader impact of Section 5 on jurisdictions' decision-making processes on electoral changes, nor the full extent to which voting rights abuses still occur in these jurisdictions.

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

As I stated above in response to Question 1, I am not aware of any empirical studies that have compared covered jurisdictions and non-covered jurisdictions, nor any studies that demonstrate a "lack of clear differentiation" between the two types of jurisdictions. To the contrary, in my experience both enforcing the Voting Rights Act for four year as the Assistant Attorney General in the Civil Rights Division and as a legal scholar studying voting rights issues for many years, there is some differentiation in the level of voting rights discrimination in covered jurisdictions compared to non-covered jurisdictions.

I believe that a reauthorization term of 25 years is appropriate, although the length of the term is a policy determination that must be made by Congress. By establishing a 25-year term during the last reauthorization in 1982, Congress correctly recognized that eliminating voting rights infringements and racial discrimination will not happen overnight, but rather is a long-term process. Accordingly, the 25-year term made sense then and would make sense now, as the record before Congress indicates that much progress still needs to be made in addressing and eradicating voting rights abuses.

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 reauthorization 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?

Under *Georgia v. Ashcroft*, which interpreted the existing language of the Voting Rights Act, the Court replaced Section 5's concrete "ability to elect" retrogression standard with the more nebulous "influence district" concept. Since the *Georgia v. Ashcroft* "influence" standard is poorly defined and virtually impossible to meaningfully administer, its effect will be to undermine progress made under the Voting Rights Act and dilute minority voters' participation in the electoral process. As I stated in my testimony to the Committee, I believe the amorphous, easily manipulable *Georgia* standard is an open invitation to mischief. A return to the well-established and well-understood *Beer* non-retrogression test, which is not similarly open to manipulation or confusion, is recommended.

Although the proposed legislation would not overturn *Georgia*, it would strengthen the statutory language to create a clear, workable framework and effectively reestablish this previous "opportunity to elect" standard. Under this standard, impermissible retrogression would occur if the number of Congressional districts that could viably elect a minority representative decreased after a proposed redistricting plan. It is important to note that, depending on the specific demographics and voting patterns within a district, there is no absolute percentage of minority voters within a district to create a viable opportunity to elect a minority representative. Some majority-white districts may have the ability to elect non-white representatives, which may be impossible in other majority-white districts or districts with small majorities of minority voters, where persistent patterns of racial bloc voting preclude the election of minority representatives.

Prior to *Georgia v. Ashcroft*, the Voting Rights Act did not focus on minority voters' ability to "influence" majority-white districts, however that term is defined, nor was that the intent of Congress in enacting the VRA. The ability to effectively measure that "influence," if it exists, will be difficult or impossible in many circumstances. As a result, left unchecked, the *Georgia* decision may allow jurisdictions to return to intentional discrimination when redistricting, with no viable check on their ability to do so. The proposed legislation would restore the proven, workable "ability to elect" standard that allows effective enforcement, eliminating the host of problems and enforcement difficulties that would arise from the unclear influence framework introduced by the Court for the first time in that decision.