

RESPONSE OF FRED GRAY TO WRITTEN QUESTIONS FROM SEN. 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.

It is my understanding that the question of whether Section 5 should be renewed turns on whether or not there is still a demonstrable need for this important provision of the Act in the covered jurisdictions. Given this and given that my views are informed by my long experience litigating civil rights matters in the covered State of Alabama, I will briefly address the evidence in the record that speaks to continuing and persistent forms of discrimination in Alabama.

Since the 1982 reauthorization, the Department of Justice has interposed objections to forty-six submissions under Section 5. In addition, DOJ has deployed observers to monitor elections throughout Alabama sixty-seven times since the time of the last renewal.¹ Moreover, federal courts have found several times that the State of Alabama and/or its political subdivisions have engaged in intentional discrimination. Although improvements have been made that have provided minority voters with greater access to the political process, these gains are owed, in large part, to the protections provided under the Voting Rights Act. Given this evidence, in combination with persistent racially polarized voting, I believe that there is a sound basis for this Congress to renew the Section 5 preclearance requirement.

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?

¹ See generally Voting Rights in Alabama, 1982 – 2005 (unpublished manuscript)(forthcoming).

See response to Question #3.

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?***

I believe that Congress has sweeping power and authority under the Fourteenth and Fifteenth Amendments to extend the expiring provisions of the Act.² Congress has exercised its constitutional authority to enact legislation that prevents the denial or abridgement of the right to vote on account of race, color, or previous condition of servitude, and should continue to exercise that authority today.³

Questions 2 and 3 appear to be in response to the Supreme Court’s ruling in *City of Boerne*. As my testimony did not specifically address the concerns of the *Boerne* Court, I will defer to the other witnesses and experts who have testified in this area. However, I will note that the *Boerne* Court recognized that the VRA was enacted to protect the right to vote against racial discrimination and found that Congress’ power was at its “zenith” when enacting remedial legislation that reaches problems of racial discrimination.⁴ In light of the breadth of these expressly granted Congressional powers under the Fourteenth and Fifteenth amendment and significant evidence in the record that illustrates the continuing need for Section 5, I believe that revisions to the coverage formula are not necessary.

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***

² South Carolina v. Katzenbach, 383 U.S. 301, 315 (1966).

³ See U.S. Const. 14th Amendment, § 5; 15th Amendment, § 2.

⁴ Nevada Dep’t of Human Resources v. Hibbs, 538 U.S. 721, 735 (2003); see also Tennessee v. Lane, 541 U.S. 509, 529 (2004).

submissions. Is that sufficient to warrant Section 5 coverage? Why or why not?

As I noted above, the Department of Justice has interposed 46 objections to proposed voting changes in Alabama since the 1982 renewal. However, in my view, we cannot measure the success of Section 5 through objection statistics alone. For example, objection statistics do not reflect the success of the statute in providing leverage to minority elected officials who seek to ensure that the legislative process leads to the adoption of changes that do not put minority voters in a worse position. In addition, these statistics do not account for the many voting changes that were rescinded.

I have helped provide assistance to a number of jurisdictions that file submissions with the Justice Department pursuant to the preclearance requirements of Section 5. I know from my work with these jurisdictions that Section 5 has a strong deterrent effect and helps ensure that officials in these areas consider the impact of a particular change on the minority community before adopting it. In my experience, Section 5 has always served as a guidepost to help steer jurisdictions in the right direction to ensure that their legislative actions do not result in retrogressive and/or discriminatory voting practices that would worsen the position of minority voters.

Given the complexity of the Section 5 process, I believe that we must look beyond objection statistics in order to appreciate the impact that the preclearance requirement has had on helping ferret out retrogressive and discriminatory voting practices.

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 perspective is informed by over five decades of experience litigating some of the most seminal civil rights cases in the State of Alabama. Based on that experience, I recognize that Section 5 of the Voting Rights Act has been tremendously successful in barring many jurisdictions from implementing voting changes that would have otherwise placed minority voters in a worse position. Despite its success, the Department of Justice has interposed objections to various types of voting changes since the Act was last amended in 1982. Moreover, in those jurisdictions where minority voters and/or elected officials were able to help ensure that jurisdictions adopted non-retrogressive plans, Section 5 played a decisive role. Given my experience in the State of Alabama, I believe that Congress should extend the Act for an additional 25 years. This time period will help ensure that the Act is in place to provide leverage for minority elected officials seeking to ensure that their jurisdictions properly figure Section 5 requirements into their analysis when considering the adoption of voting changes. Most importantly, I believe that experience shows that 25 years provides a reasonable period for jurisdictions to properly comply with this mandate of the Act.

As a practical matter, some of Alabama's recent voting crises have taken many years to resolve. *Dillard v. Crenshaw County*⁵ led to changes from at-large to single-member districts for dozens of county commissions, school boards and municipalities. Filed in the 1980s, the litigation took over two decades in order to fully implement the protections of the Voting Rights Act around the state. I believe that these long struggles to resolve voting discrimination provide a sound basis for a 25 year renewal of the Act's expiring provisions.

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 support the language in the bill that will address the impact that the Supreme Court's ruling in *Georgia v. Ashcroft* on the effectiveness of the Section 5 preclearance process. In this case, the Court described an “influence district” as one in which minority voters “may not be able to elect a candidate of choice but can play a substantial, if not decisive, role in the electoral process.”⁶ I believe that this definition is unclear and will invite jurisdictions to eliminate those majority Black districts that have provided opportunities for minority voters to elect candidates of their choice. I think that this is particularly problematic given that Alabama still suffers from severe racially polarized voting.⁷ Only two African Americans have ever been elected to statewide office: the late Oscar Adams and Ralph Cook to the Alabama Supreme Court. Currently, no African American holds statewide office.

As for the question regarding influence districts, I am presently aware of a single example in the state legislature where an African American was elected from a district that is not majority Black. This district is 48% African American and, in my view, provides minority voters an opportunity to elect candidates of their choice. I believe that even these kinds of districts are subject to the protections of Section 5 of the Voting Rights Act.

⁵ *Dillard v. Crenshaw Co.*, 640 F. Supp. 1347 (M.D. Ala. 1986).

⁶ *Georgia v. Ashcroft*, 539 U.S. 461, 482 (2003).

⁷ See, e.g., *Dillard v. Baldwin County Commission*, 222 F. Supp.2d 1283, 1290 (M.D. Ala. 2002), *aff'd*, 376 F.3d 1260 (11th Cir. 2004).

RESPONSES OF FRED GRAY TO WRITTEN QUESTIONS OF SENATOR PATRICK LEAHY
May 23, 2006

1) ***Mr. Gray, some have argued that Section 5 has been so successful that is no longer needed. 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? Will softening or removing this successful deterrent risk the emergence of new abuses?***

As I noted during my testimony, I have witnessed Alabama move from a point in time where there were no black elected officials to the point where the state stands today with over 870 Black elected officials. This progress is attributable, in large part, to the success of the Voting Rights Act. Despite this progress, there are some facts that illustrate the continuing need for Section 5.

Since the 1982 renewal, the Department of Justice has interposed dozens of objections to proposed voting changes in Alabama. However, these numbers do not reflect the powerful deterrent effect that Section 5 has had in the political process. I have talked to officials from jurisdictions in Alabama who indicate that Section 5 serves as a guidepost that helps to ensure that they consider the impact that a voting change might have on minority voters. Section 5 helps to ensure that jurisdictions reach out to and solicit the input of minority elected officials in the process leading up to the adoption of a change. Indeed, we cannot underestimate this deterrent effect when talking about the role that Section 5 plays. Jurisdictions have expressed support for the Voting Rights Act; I attach resolutions passed by almost three dozen local jurisdictions in Alabama supporting reauthorization of the Voting Rights Act.¹

In addition, Section 5 often provides needed leverage to minority elected officials who seek to ensure that fellow legislators do not adopt changes that retrogress minority voting strength. Without this capital, many minority elected officials would be subject to the whim of the majority.

¹ Resolutions from the following jurisdictions are attached as Exhibit A: City of Andalusia, City of Ashland, Barbour County Commission, City of Birmingham, Bullock County Commission, Butler County Commission, Chambers County Commission, Clay County Board of Education, Clay County Commission, Township of Colony, Dallas County Commission, Elmore County Commission, Escambia County Commission, Etowah County Commission, City of Evergreen, Five Points, City of Florence, City of Gadsden, Town of Geiger, City of Goodwater, Houston County Commission, City of Huntsville, City of Jacksonville, Jefferson County Commission, City of Monroeville, Montgomery City Council, Town of Mt. Vernon, City of Opelika, City of Prattville, City of Russellville, City of Slocomb, Sumter County Commission, City of Union Springs, and Washington County Commission.

Finally, base objection statistics do not account for the many voting changes that were rescinded after the Department of Justice requested more information about the change. I have helped provide assistance to jurisdictions that file submissions with the Justice Department pursuant to the pre-clearance requirements of Section 5. I know from my work with these jurisdictions that Section 5 has a strong deterrent effect and helps to ensure that officials in these areas consider the impact of a particular change on the minority community before adopting it.

I believe that Section 5 has had a significant deterrent effect and that Congress should renew this expiring provision to help provide necessary guideposts to covered jurisdictions, provide leverage for minority elected officials seeking to prevent the adoption of retrogressive voting changes, and to help ensure that there is a mechanism in place to ferret out retrogressive and discriminatory voting practices.

2) In your view, what risks would we face to the progress we have made if we were to let Section 5 lapse? And have we solidified the gains we have made to date or are we at risk of backsliding like in the period after the Reconstruction?

Racial discrimination persists in the State of Alabama. This reality suggests that the gains made with respect to minority voting rights are extremely fragile and that Section 5 of the Voting Rights Act has played, and continues to play, a major role in helping secure and protect these rights.

As evidence of this persisting discrimination, I would like to highlight a recent voter referenda campaign to remove discriminatory language from Alabama's 1901 Constitution.² This effort was unsuccessful and thus, illustrates the racial challenges that continue to exist in Alabama. On November 2, 2004, voters defeated referenda that would have removed language requiring the racial segregation of schools, struck language inserted in 1956 as part of Alabama's massive resistance to federally imposed desegregation, and repealed the state's poll tax provisions.³ Despite the fact that well-settled Supreme Court precedent has rendered these state constitutional provisions unenforceable,⁴ and despite support on the part of the state's Republican Governor and other key leaders around the state, the referenda failed. Analysis conducted following the

² See generally Voting Rights in Alabama, 1982-2006 (unpublished manuscript)(forthcoming).

³ Ala. Act No. 2003-203; State of Alabama, Amended Certification Results, (Dec. 17, 2004), <http://www.sos.state.al.us/downloads/dl3.cfm?trgturl=election/2004/general/statecert-amendment2-recount-12-17-2004.pdf&trgtfile=statecert-amendment2-recount-12-17-2004.pdf>.

⁴ Brown v. Board of Education, 347 U.S. 483 (1954); Knight v. Alabama, 787 F. Supp. 1030 (N.D. Ala. 1991), *aff'd in relevant part*, 14 F.3d 1534 (11th Cir. 1994); United States v. Alabama, 252 F. Supp. 95 (M.D.Ala. 1966).

election revealed that very few white voters supported the referenda thus, illustrating the high levels of racial polarization that characterized the election.

In my view, this recent struggle in the State of Alabama illustrates that we have not solidified gains in minority voting rights and that without Section 5, there is the great potential for the type of backsliding that Congress sought to prohibit when it enacted the Voting Rights Act. If the Act was necessary in order to obtain these rights, certainly it is equally important, or more important, that the law continue in effect given persisting levels of racial discrimination in Alabama and other covered jurisdictions.

3) *In your professional opinion, what are the benefits of Section 5's pre-clearance process?*

Perhaps no benefit of the Section 5 preclearance process is more important than its deterrent effect in helping ensure that jurisdictions do not implement voting changes that will worsen the position of minority voters. In addition, the Section 5 preclearance process provides needed capital and leverage to minority elected officials seeking to work with other legislators to adopt changes and laws that will not impair minority voting strength. Finally, the preclearance process provides a guidepost for jurisdictions to help ensure that they appropriately weigh the concerns of minority voters when adopting changes and assess the likely impact of proposed changes on minority voters. Although this process has not been perfect, as illustrated by objections interposed by the Justice Department since 1982; recent litigation; and changes that are withdrawn or improved after jurisdictions receive formal letters requesting more information about a particular change, these benefits are tangible ones that would be lost were Congress not to renew Section 5 of the Act.

4) *During these hearing we have heard about the significant progress in minority representation and minority registration in your home state of Alabama. In your opinion, is racially polarized voting still a problem in Alabama? Why is this an important factor for us to consider?*

Voting remains extremely racially polarized in the State of Alabama.⁵ These patterns have been formally recognized on a statewide basis by the Department of Justice,⁶ experts who have testified in recent voting rights cases⁷ and in the judicial

⁵ See generally Voting Rights in Alabama, 1982-2006 (unpublished manuscript)(forthcoming).

⁶ Letter from John Dunne, Assistant Attorney General for Civil Rights, to Jimmy Evans, Attorney General of Alabama (Mar. 27, 1992) (Section 5 Objection Letter)

⁷ See Report of Gordon G. Henderson, PhD., Sinkfield defendants Exhibit 184, in *Kelley v. Bennett and Sinkfield*, 96 F.-Supp.2d 1301 (M.D. Ala.) (3-judge court), *rev'd on other grounds*, 531 U.S. 28 (2000).

findings of federal courts.⁸ As further evidence of this polarization is the fact that only two African Americans have ever been elected to statewide office in the State of Alabama. Although there are twenty-seven African Americans currently serving in the State House of Representatives and eight African Americans in the State Senate, all but one have been elected from majority-black districts. Where such polarization exists, it is important that “election systems and arrangements [] be able to provide equal opportunity for the minority voters to elect representatives of their choice.”⁹ Indeed, Section 5 has played an important role in the matrix of systems and arrangements that help secure minority voting rights by ensuring that jurisdictions do not adopt changes that would result in impermissible backsliding.

⁸ *White v. Alabama*, 867 F. Supp. 1519, 1552 (M.D. Ala. 1994), *vacated on other grounds*, 74 F.3d 1058 (11th Cir. 1996) (citing testimony of Dr. Gordon Henderson and Letter from Assistant Attorney General Deval L. Patrick to Alabama Attorney General Jimmy Evans, dated April 14, 1994 (file document no. 65), at 5); *Dillard v. Baldwin County Comm’n*, 222 F.Supp.2d 1283, 1290 (M.D. Ala. 2002), *aff’d*, 376 F.3d 1260 (11th Cir. 2004) (“The plaintiffs have shown that black citizens of Baldwin County still suffer from the racially polarized voting and from historically depressed conditions, economically and socially.”); *Wilson v. Jones*, 45 F. Supp.2d 945, 951 (S.D. Ala. 1999), *aff’d sub nom. Wilson v. Minor*, 220 F.3d 1297 (11th Cir. 2000)(acknowledging the weight given to polarized voting enhances the ability of African-American residents to elect representation of their choosing); *Dillard v. City of Greensboro*, 946 F. Supp.2d 946, 952 (M.D. Ala. 1996); *Dillard v. Town of Louisville*, 730 F. Supp. 1546, 1549 (M.D. Ala. 1990); *Dillard v. Town of Cuba*, 708 F. Supp. 1244, 1246 (M.D. Ala. 1988)(“Applying a principle known as ‘threshold of exclusion’”); *Dillard v. Chilton County Bd. of Educ.*, 699 F. Supp. 870, 874 (M.D. Ala. 1988), *aff’d* 868 F.2d 1274 (11th Cir. 1989) (table) (deciding that racially polarized voting in the county permits black residents to elect representation of their choosing); *Dillard v. Crenshaw County*, 649 F. Supp. 289, 295 (M.D. Ala.), *vacated on other grnds*, 831 F.2d 246 (11th Cir. 1986), *reaff’d*, 679 F. Supp. 1546 (M.D. Ala. 1988) (“the evidence reflects that racially polarized voting in Calhoun, Lawrence, and Pickens Counties is severe and persistent, and that this bloc voting has severely impaired the ability of blacks in three counties to elect representatives of their choice.”); *Clark v. Marengo County*, 623 F. Supp. 33, 37 (S.D. Ala. 1985); *Brown v. Bd. of Sch. Comm’rs of Mobile County, Alabama*, 542 F. Supp. 1078, 1091 (S.D. Ala. 1982), *aff’d*, 706 F.2d 1103 (11th Cir.), *aff’d*, 464 U.S. 1005 (1983) (examining previous cases permitting racially polarized voting); *Bolden v. City of Mobile*, 542 F. Supp. 1050, 1076-77 (conceding that racial bloc voting continues) (S.D. Ala. 1982).

⁹ See Reauthorization of the Voting Rights Act Before the Comm. on the Judiciary, 109th Cong. (2006)(statement of Theodore S. Arrington, Chair, Dept. of Political Science, University of North Carolina, Charlotte).

RESPONSE OF FRED GRAY TO WRITTEN QUESTIONS OF SENATOR TOM COBURN

1. 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?

In my view, the central question during these reauthorization hearings is whether there is still a demonstrable need for Section 5 in the covered jurisdictions. The history of discrimination that gave rise to the coverage formula helps us understand why Alabama and other states are today covered under this special provision of the Act. However, we must then look to see whether there is sufficient evidence of persisting voting discrimination today that warrants extension of the Act in these covered jurisdictions.¹

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

I do not believe that it is necessary to revise the coverage formula that identifies which jurisdictions are subject to coverage under the Act today. Further, given my experience litigating some of the major civil rights cases in the State of Alabama, I believe that Congress should extend the Act for an additional 25 years. This time period will help ensure that the Act is in place to provide political capital and leverage for minority elected officials seeking to make sure that jurisdictions properly incorporate the requirements of Section 5 into their analysis when enacting voting changes.

Moreover, I believe that experience shows that 25 years provides a reasonable period for jurisdictions to properly comply with this mandate of the Act. Some of Alabama's recent voting crises have taken many years to resolve. *Dillard v. Crenshaw County*² led to changes from at-large to single-member districts for dozens of county commissions, school boards and municipalities. Filed in the 1980s, the litigation took over two decades in order to fully implement the protections of the Voting Rights Act around the state.

3. 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?

See response to Question 4.

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

¹ 42 U.S.C. § 1973b.

² *Dillard v. Crenshaw Co.*, 640 F. Supp. 1347 (M.D. Ala. 1986).

Most of the concerns that have been expressed regarding the potential for a constitutional challenge to Section 5 stem from the Supreme Court's recent ruling in *City of Boerne*. In this case, the Supreme Court announced the new doctrine of "congruence and proportionality" which appears to place some limits on Congressional power under the Reconstruction Amendments by requiring that Congress develop a thorough legislative record before acting.³ Despite this new principle, I do not believe that the *Boerne* ruling places any clear limitations on Congressional power to enact prophylactic legislation that addresses issues of a racial dimension.⁴

The *Boerne* Court recognized that Congressional powers were at their "zenith" when enacting the VRA and noted that the Act, in its present form, exemplified Congress's enforcement power under the Reconstruction Amendments. Moreover, in *Lopez v. Monterey Co.*, 525 U.S. 266 (1999), the post-*Boerne* Court recognized that the Voting Rights Act "intrudes on state sovereignty" but noted that the "Fifteenth Amendment permits this intrusion."

Others have expressed concern regarding the trigger formula and the inclusion of certain presidential turnout figures that are currently incorporated into that formula. Opponents believe that these dates make Section 5 vulnerable to a legal challenge.⁵ However, unlike the legislation at issue in *Boerne*, Congress has here developed a substantive record of recent and persisting discrimination in Alabama and all other covered jurisdictions.

Because the coverage formula is appropriately complimented by evidence of continuing voting discrimination, I do not believe that Section 5, in its current form, would be vulnerable to a constitutional challenge.⁶ Moreover, because of the statutory safeguards that are built into the VRA, I do not believe that revision of the coverage formula is necessary as the bailout and bail-in safeguards (described in greater detail in Response #5) allow for change and revision where appropriate.

³ See *Lopez v. Monterey Co.*, 525 U.S. 266, 282-283 (1999) (citing *City of Boerne*, 521 U.S. at 518).

⁴ See *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003); *Tennessee v. Lane*, 541 U.S. 509, 529 (2004) (suggesting that where Congress acts to remedy problems in areas traditionally subject to higher judicial scrutiny, the sweep of its power is greater).

⁵ Also, it is important to note that turnout data for presidential elections in the 1960s and 1970s were not used alone to determine which jurisdictions had high levels of discrimination in voting. In determining which jurisdiction would be covered under Section 5 of 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." 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.

⁶ Moreover, in *Lopez v. Monterey Co.*, 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, 269.

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

I do not support a broad based bailout option given the current framework of the Act. In my view, the Act is appropriately structured to allow for change and revision with respect to those jurisdictions that are covered under the Act. Specifically, the bail-in mechanism set forth in Section 3(c) and the bail-out mechanism set forth in Section 4(a) of the Act work to ensure that the scope of Section 5 is expanded or restricted, where appropriate. I believe that Congress sufficiently revised and liberalized these provisions of the Act during the 1982 reauthorization effort. I also believe that the bailout process is reasonable and achievable for any jurisdiction that might have a political process that is open to minority voter participation. Given these features of the Act, the broad-based bailout option suggested by this question appears unnecessary.

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

In my experience providing counsel to jurisdictions seeking to make Section 5 submissions to the Justice Department, the Department’s Guidelines have been very instructive as to the information that DOJ needs in order to review any proposed voting changes. These Guidelines identify specific information that jurisdictions must provide in order for their submission to be deemed complete and reviewable. Further, the Guidelines are written in easy to understand language that generally avoids “legalese.” I believe that similar Guidelines would be helpful for those jurisdictions that may want to consider taking advantage of the Act’s bailout provisions. Because there are steps that can be taken administratively to educate jurisdictions about the availability of the bailout option that is outlined in Section 4(a) of the Act, I believe that revision of this particular provision is unnecessary.

7. 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 understood Professor Pamela Karlan’s statement to mean that there are problems with the “influence district” standard articulated in the Supreme Court’s *Georgia v. Ashcroft* ruling and that aspects of the Court’s opinion are hard to define. Indeed, it is

difficult to identify when the number of “influence districts” would suffice to replace a viable opportunity district or to identify when “influence operates in tandem with other factors such as the appointment of minorities to positions of power” to create a non-retrogressive outcome. The bill will restore the central feature of Section 5 analysis which looks to ensure that voting changes do not eliminate or reduce the number of districts that provide minority voters a tangible opportunity to elect candidates of their choice. Concerns of partisanship cloud this analysis and make it difficult to render clean preclearance determinations.

The retrogressive effect of a voting change has always been measured by looking to see whether or not the minority community’s ability to elect candidates of choice changes under the benchmark and proposed plans. In this regard, the bill restores the tangible “opportunity to elect” standard and does not allow jurisdictions to destroy or erode gains in minority voting strength under the intangible framework set forth by *Georgia v. Ashcroft*.⁷

As a final point, I note that there are instances in which minority voters may be vested with the ability to elect candidates of choice and these districts are and should remain protected under the Voting Rights Act. For example, there is currently a single state legislative district in Alabama, House District 85, that is 47.8% black, and in which the incumbent African-American member was re-elected in 2002. Certainly, this district provides minority voters an opportunity to elect candidates of their choice. Although this is the only non-majority Black district that provides such an opportunity statewide, this kind of district is subject to the protections of Section 5 of the Voting Rights Act.

⁷ *Id.*

**RESPONSE OF FRED GRAY TO WRITTEN QUESTIONS OF SENATOR EDWARD M.
KENNEDY**

Question 1

According to Dr. Thernstrom, the Voting Rights Act makes “sure that the majority-black districts stay black” and creates racially safe boroughs.” Based upon the most recent round of redistricting in 2000, does the evidence support Dr. Thernstrom’s argument? Why or why not?

Contrary to the views of Abigail Thernstrom, I am not aware of any provision in the Voting Rights Act that requires the maintenance of majority-minority districts that meet some particular threshold. The central inquiry in the Section 5 review process is whether or not the particular voting change places minority voters in a worse position. In the redistricting context, jurisdictions may satisfy the Section 5 preclearance requirement even where they have reduced the minority population percentage of a particular district. Moreover, districts that are not majority Black may be ones that provide minority voters an opportunity to elect candidates of their choice and these districts would be subject to protection under the Act. For example, there is currently a single state legislative district in Alabama, House District 85, that is 47.8% black, and in which the incumbent African-American member was re-elected in 2002.¹ Certainly, this district provides minority voters an opportunity to elect candidates of their choice. Although this is the only non-majority Black district that provides such an opportunity statewide, this kind of district is subject to protections of Section 5 of the Voting Rights Act. This particular example in the State of Alabama defies Thernstrom’s claims that the Act requires the maintenance of majority Black districts.

Despite this, there may be certain circumstances in which legislators may not be able to reduce the Black population percentage of a district because of persisting racial segregation which, in many places, is the legacy of slavery, Jim Crow and de jure discrimination. In other instances, legislators may draw plans that maintain such districts where they are balancing certain other districting criteria. Moreover, as a practical matter, many districts that provide an opportunity to elect are majority minority. This reality is attributable, in large part, to persisting racially polarized voting. Because of the unwillingness of white voters to extend support to Black candidates, and given lower turnout and registration rates among minorities, there is still a need to maintain majority Black districts.

Finally, Thernstrom suggests that districts that have minority population percentages above 50 percent are “racially safe boroughs” but does not apparently use such a label for majority white districts which represent the vast majority of local, state and federal districts in the covered jurisdictions.

¹ See Voting Rights in Alabama, 1982 – 2006 (unpublished manuscript)(forthcoming).

Question 2

Dr. Thernstrom contends that taking race into account in redistricting is “political exclusion-masquerading, of course, as inclusion.” Do you agree with Dr. Thernstrom? Why or why not?

I do not agree with this statement. There is firm evidence of the political exclusion of African Americans in the redistricting context. Section 5 of the VRA helps ensure inclusion by requiring that legislators be conscious and aware of the impact that these voting changes have on minority voters when undertaking the complex task of redistricting.

The assertion that considerations of race in the redistricting context have *caused* the marginalization of Blacks is false. Here, it is important that we distinguish between a cause and effect, as Thernstrom fails to do. Accounting for race in the redistricting context today is the *effect* or *result* of the historical exclusion of African-Americans from the political process. In the Section 5 process, race figures into the process by helping ensure that legislators weigh the impact of a proposed voting change on minority voters. The goal of this process is to bar implementation of those changes that result in impermissible backsliding or a retrogression of minority voting strength. The Section 5 review process and its consideration of race, along with other factors, has been upheld by the Supreme Court on several occasions.²

Question 3

Some have questioned whether the Voting Rights Act needs to be extended for twenty-five years. Can you explain why you believe the protections provided by the Voting Rights Act need to be extended for that period of time?

The extensive record compiled by the House and Senate, civil rights organizations, legal scholars, and congressional staff illustrates the continuing need for the expiring provisions of the Voting Rights Act. While the VRA has brought about marked change in the State of Alabama, and throughout other covered jurisdictions, there is still more work that needs to be done. Alabama still suffers from severe racially polarized voting, and jurisdictions continue to adopt voting changes that, if implemented, would have worsened the position of minority voters. For example, in 2000, the Justice Department objected to an annexation in the Town of Alabaster which would have eliminated the town’s only majority black district. In 1998, DOJ interposed an objection to the redistricting plan for Tallapoosa County Commission finding that the plan impaired the ability of black voters to elect a candidate of choice in order to protect a white incumbent.³ In addition, DOJ objected to the State Legislature’s 1992 congressional redistricting plan finding that fragmentation of cohesive black populations illustrated the “predisposition on the part of the state political leadership to limit black voting potential

² Lopez v. Monterey County, 525 U.S. 226 (1999).

³ DOJ Section 5 Objection letter from Bill Lann Lee, Feb. 6, 1998.

to a single district.”⁴ Finally, even in Selma – the birthplace of the Voting Rights Act – the Department of Justice has objected to redistricting plans as purposefully preventing African Americans from electing candidates of choice.⁵

Given my experience litigating some of the major civil rights cases in the State of Alabama, I believe that Congress should extend the Act for an additional 25 years. This time period will help ensure that the Act is in place to provide leverage for minority elected officials seeking to ensure that their jurisdictions properly incorporate the requirements of Section 5 into their analysis when enacting voting changes. Moreover, I believe that experience shows that 25 years provides a reasonable period for jurisdictions to properly comply with this mandate of the Act. Some of Alabama’s recent voting crises have taken many years to resolve. *Dillard v. Crenshaw County*⁶ led to changes from at-large to single-member districts for dozens of county commissions, school boards and municipalities. Filed in the 1980s, the litigation ultimately took over two decades in order to fully implement the protections of the Voting Rights Act around the state.

Although Alabama’s legacy of segregation and racism have weakened over time, there is still much work to be done. The Voting Rights Act is widely considered to be the gold standard of civil rights legislation, but successes that are directly attributable to this law should not and cannot provide the foundation for eliminating protection under that law.

⁴ DOJ Section 5 Objection letter from John Dunne, March 27, 1992.

⁵ See e.g., *Dillard v. Baldwin County Commission*, 222 F. Supp.2d 1283, 1290 (M.D. Ala. 2002), *aff’d*, 376 F.3d 1260 (11th Cir. 2004).

⁶ *Dillard v. Crenshaw Co.*, 640 F. Supp. 1347 (M.D. Ala. 1986).