Testimony of

Mr. Gregory Coleman

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

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

What a difference forty years makes. The tests and devices that formed part of the coverage threshold in the 1960s and 1970s have long since been banned, and minority registration and turnout rates in covered jurisdictions are comparable to those in noncovered jurisdictions. Neither the voluminous record accumulated in the House Judiciary Committee nor the record placed before this committee adduces evidence of any systematic violations or threatened violations of constitutionally protected voting rights in covered jurisdictions. If anything, the evidence demonstrates that voting rights are as fully protected in covered jurisdictions as in noncovered jurisdictions.

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

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

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

Although the Supreme Court has previously upheld §5 against constitutional challenge, Congress should keep in mind that a reauthorized §5 is essentially new legislation that will have to be constitutionally justified. Preclearance is a significant intrusion into the sovereignty of governmental units, which is guaranteed by the Constitution, except as authorized to effectuate the mandates of other constitutional protections, including those in the Fourteenth and Fifteenth Amendments. Circumstances today are radically different than those that led Congress to enact the original

preclearance provision and to reauthorize it in the periods prior to and including 1982, and scholars have expressed concern or have outright concluded that reauthorization of preclearance cannot be justified under either §5 of the Fourteenth Amendment or §2 of the Fifteenth Amendment.

The Supreme Court in City of Boerne v. Flores and more recent cases has required a real evidentiary link between the constitutional protection that Congress seeks to enforce and the method by which it acts to enforce it. The record before the House Judiciary Committee on reauthorization of preclearance, while voluminous, does not make that link. Assertions of anecdotal occurrences, most of which have no connection to state and local changes in voting procedures or to the preclearance process, do not establish any kind of pattern of purposeful state discrimination against voting rights.

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

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