Statement of

The Honorable Patrick Leahy

United States Senator
Vermont
May 16, 2006

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Ranking Member, Senate Judiciary Committee
Hearing on the Continuing Need for Section Five Pre-Clearance
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This morning we are convening our fourth hearing in the Senate Judiciary Committee on the Voting Rights Act. These are important hearings and I thank the Chairman for continuing to move forward during this busy time. I trust we will keep to our plan of concluding hearings this week and reporting our bill before we break for the Memorial Day recess at the end of the month. The House Judiciary Committee reported the bill last week by a vote of 33 to one. If we are to fulfill our commitment to reauthorizing this important measure this year we need to stay on schedule and push forward to make progress.

Today's hearing is focused on the continuing need for the provision of the Voting Rights Act that requires covered jurisdictions to "pre-clear" changes to voting before they go into effect. This provision has been a tremendous source of protection for the voting rights of those long discriminated against and also a great deterrent against discriminatory efforts cropping up anew. Our country is changing, thanks in no small part to the Voting Rights Act and to Section 5's pre-clearance requirements.

In the past several hearings, we have discussed the constitutional standard that we expect the Supreme Court will apply when reviewing an extension of the expiring provisions of the Voting Rights Act. It is a question about the power of Congress, and this is not a "gray area." Under the specific words of the Constitution, Congress has the power to remedy discrimination under the Fourteenth and the Fifteenth Amendments, and Congress is at the zenith of its power when giving enforceable meaning to these Amendments by enacting laws that address racial discrimination in connection with voting. The Fourteenth and Fifteenth Amendments have not changed. As long as these Amendments are in the Constitution, Congress has the authority to enforce them, especially on matters of racial discrimination in connection with the right to vote.

I believe the Supreme Court will again uphold congressional authority in this regard. We would all agree that Justice Sandra Day O'Connor was a vigorous defender of state's rights. And as recently as 1999 -- over three decades after the initial passage of the Voting Rights Act -- Justice O'Connor considered the continuing constitutionality of Section 5 in her Lopez v. Monterey County decision, and explicitly affirmed its constitutionality in accordance with the Fifteenth Amendment. Justice Antonin Scalia is also a vocal defender of state's rights. He has not only agreed that federal measures designed to stop racial discrimination are permitted, but also argued in his Tennessee v. Lane dissent that Congress should be subjected to lesser constitutional scrutiny on anti-discrimination laws that deal specifically with racial discrimination. This is entirely consistent with the widely-held belief that Congress is at the zenith of its lawmaking power when it is addressing our nation's historic struggle with racial discrimination.

A few witnesses have mentioned the City of Boerne decision, which invalidated an act of Congress aimed at stopping religious discrimination because that law was not tied closely enough to the problem it was intended to solve. Yet, in the City of Boerne decision, the Supreme Court went out of its way to recognize that the Voting Rights Act is an example of a law where Congress acted with authority and got it right. In his opinion in that case, Justice Anthony Kennedy declared that anti-discrimination laws such as the Voting Rights Act do not require termination dates or geographic tailoring in order to survive judicial review. Nonetheless our bill includes those limitations and shows, in Justice Kennedy's own words, aspects that "tend to ensure that Congress's means are proportionate." Similarly, in

the Morrison case, which struck down the Violence Against Women Act, the Supreme Court again pointed to the Voting Rights Act as an example of Congress acting appropriately under its constitutional authority. In fact, since upholding the law in 1966, whenever the Supreme Court has reviewed or even cited to the Voting Rights Act, it has affirmed it as a valid exercise of congressional authority.

Some academic witnesses have suggested that Section 5 should be a victim of its success. In my view abandoning a successful deterrent just because it works defies logic and common sense. Why risk losing the gains we have made? When this Committee finds an effective and constitutional way to prevent violations of the law, we should preserve it.

I welcome the witnesses who have traveled to be with us here today. Ted Arrington was elected as a Republican to the Mecklenburg County Board of Elections, which he chaired from 1985 to 1991. He currently serves as Chairman of the Department of Political Science at the University of North Carolina at Charlotte, where he specializes in elections and voting systems and behavior. Anita Earls is currently a professor at Duke University, specializing in civil rights litigation topics for the African and African-American Studies Department. She co-authored the Voting Rights State Reports for Virginia and North Carolina. Pam Karlan is a Public Interest Law Professor and the Associate Dean for Research and Academics at Stanford University, as well as a Supreme Court practitioner. I look forward to receiving their testimony.

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