Testimony of

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Mr. Chairman, members of this Committee, thank you for the opportunity to
provide testimony regarding the very important issue of the renewal of certain sections of the Voting Rights Act. Since the beginning of 1997, my work in the Office of the Attorney General of Alabama has included the representation of State election officials in redistricting, voting rights, Section 5, and election law matters and participation in the preclearance process.1 In my testimony, I will draw on my experience which leads me to several conclusions. One of those is that, in recent litigation, political motivations have played a more significant role than the face of the pleadings, the court decision, or both, would indicate. Another is that, even if it plans to reauthorize Section 5, Congress should limit the scope of Section 5's coverage and the duration of the reauthorization.

In submitting my testimony, I do not wish to minimize the scope of past discrimination in Alabama or question the decisions of Congress to pass the Voting

Rights Act in 1965 and renew it in 1982. Likewise, I do not overlook the contributions of brave men and women who fought to secure the civil rights and voting rights of the African-American citizens of Alabama and other covered jurisdictions. Without their efforts, it might not be possible to suggest that there is no need to renew Section 5 or that the coverage of Section 5 should be pared back. Their efforts helped to change the covered jurisdictions, however, and Congress should reward those covered jurisdictions that have changed by displaying a measure of confidence in them.
In my judgment, Congress should not further increase the coverage of Section 5
over the covered jurisdiction. Leaving aside the question whether the record supports reauthorization or tightening, treating Section 5 as a one-way ratchet fails to take into.

A list of representative court decisions is attached.

2 account the degree to which Alabama and other covered jurisdictions have changed since 1965. In the most recent presidential elections, black voters voted at a slightly higher rate than white voters. Turnout among black voters was 63.9%, compared to 63.1% among white voters. These rates are far above the rate of participation in 1964. Systematic barriers to the participation of minority voters have been removed, and there is no substantial likelihood that they will return. Moreover, the Alabama Legislature now includes a caucus of minority members in each house that is not strong enough by itself to pass legislation but is, likely, strong enough to block legislation that it views as detrimental to its interests. Alabama and the other covered jurisdictions should be rewarded, not punished, for their progress.

In suggesting that Congress relax the scope of Section 5's coverage, I do not suggest that Congress change the prohibition on the use of tests and devices to determine eligibility to vote. Congress included the prohibition on the use of tests and devices in the Voting Rights Act because it concluded that covered jurisdictions were using them to exclude minority voters, and it included Section 5 to preclude covered jurisdictions from implementing new discriminatory laws after previous discriminatory laws were declared unconstitutional. Maintaining the prohibition on the use of tests and devices provides substantial protection to minority voters without regard to whether Section 5 is renewed, tightened, or relaxed. Indeed, registration and participation rates show that there are no systematic barriers to minority participation.

Furthermore, the constitutional rule of one-person-one-vote in redistricting, even
the relaxed rule that applies to the States, has been a substantial engine of change. In 1968, J. Harvie Wilkinson pointed out the effects of applying a rule of one-person-one vote in Virginia on the Byrd Machine, which lost strength as legislative districts migrated toward the interstate highways and away from the Machine's rural base.2 The same

thing is happening in Alabama as the Legislative districts migrate from rural parts of the State toward the larger cities and their suburbs. In Alabama, the African-American legislative caucuses described above are the product of the one-person, one-vote rule and other considerations. In the remaining portions of this testimony, I will first discuss how the State of Alabama handles its obligations under Section 5. Then, I will suggest some ways in which the coverage of Section 5 might be relaxed without adversely affecting the interests of minority voters.

A. The Burden on the Office

The State of Alabama almost always obtains preclearance of changes in its election laws and procedures through the administrative process. I am not aware of any instance in which the State has sought judicial preclearance before a three-judge federal district court sitting in the United States District Court for the District of Columbia. The Legislature sits in one regular session each calendar year and may be called into one or more special sessions. After the legislative sessions are done and action by the Governor has been taken, an Assistant Attorney General reviews the legislation to identify any changes in election law that must be precleared. Preclearance submission packages are prepared for changes of statewide application and for some local laws.

With local laws that affect one of Alabama's 67 counties, we try to send the work related Wilkinson, Harry Byrd and the Changing Face of Virginia Politics, 1945-1966 (1968). to the preclearance submission to a local attorney; sometimes the local attorney can and will do the work. If not, an Assistant Attorney General will prepare the submission.

In the 2006 Regular Session, the Legislature passed laws that put some 25 constitutional amendments on ballots. It also passed some 14 laws of general applicability that affect voting, including a 370 page revision of the State's election code. Some 24 local laws also appear to require preclearance. We are working to submit all of these new laws to the United States Department of Justice.

Since I have been in the Office of the Attorney General, the preparation of preclearance submission letters has been an extra duty assigned to an attorney who already had a substantial workload. For some years, that attorney's regular workload involved the drafting of opinions regarding issues of Alabama law. More recently, the duties have been in addition to the duties of an Assistant Attorney General who has represented the State, its agencies, and employees in litigation. The duties related to preclearance are not a full-time job, but may periodically take up a substantial amount of time.

For my part, I have prepared or participated in the preparation of a number of preclearance submissions, consulted with the attorney preparing others, and litigated the adequacy of submissions that I did not prepare. More particularly, I participated in the preparation of the preclearance submissions for the State's legislative, congressional, and State Board of Education redistricting plans in 2001 and 2002, doing much of the drafting of the letters. More recently, in litigation involving a number of municipalities in the State of Alabama, I worked with local counsel to determine whether the municipality needed to change the district lines for its governing council to incorporate changes captured in the 2000 Census and comply with one-person-one-vote constitutional obligations. I helped several local counsel prepare their preclearance submission letters and did one myself for the City of Lipscomb. I did so because, while not a typical client for an Assistant Attorney General, Lipscomb was an orphan jurisdiction, that is, a jurisdiction without a lawyer and with limited funds. Finally, in cases like Ward v. Alabama and Boxx v. Bennett, I defended the adequacy of the State's preclearance submission letters.

My work with local counsel has shown me that experience with voting rights issues and preclearance is not widely distributed in the legal community. This lack of widespread knowledge and experience is a problem where an entire State is covered, as Alabama is. This Office is called on to shepherd local counsel through the process or to do it for them. It also reflects the fact that, while the Act covers the entire State, much of the State's business, including its legal business, proceeds without ever coming in contact with Section 5.

B. Proposed Changes

1. Remove Coverage for De Minimis Changes.
Congress should amend Section 5 so that it no longer covers de minimis changes that have proven to have no potential for discrimination. Covered jurisdictions and subdivisions submit changes in the location of polling places, the setting of special elections, and the inclusion of referenda on constitutional amendments for review. I suggest that those changes, and others, have a de minimis effect and should be removed from the scope of Section 5. Alternatively, the Department of Justice should classify the submissions that it receives according to type, so that the workload attributable to de minimis changes can be identified.

The applicable regulations provide a number of examples of changes that must be precleared, including "[a]ny change . . . . in the location of polling places." 28 C.F.R. § 51.13(d). The counties and municipalities of Alabama and other covered subdivisions secure polling places and, generally, do not seek to change them on a whim. In this election cycle, we have learned that one polling place had to be changed because the building that housed the earlier version collapsed. We also learned that, some two weeks before an election, local election officials were told that a hurricane in 2005 had destroyed a polling place. In each case, we had to ask USDOJ for permission to make a change and might have had to wait for up to 60 days for that permission to come, unless expedited treatment was requested and received.

With respect to the setting of special elections, the applicable regulations provide
that the discretionary setting of a special election, whether to fill a vacancy or to put a constitutional amendment to the voters, is subject to preclearance. 28 C.F.R. § 51.17. This holds true even where the proposed constitutional amendment has no effect on voting; where the amendment affects voting, both the special election setting and the substance of the amendment must be precleared if the amendment passes.

A three-judge federal district court sitting in the Northern District of Alabama rejected the contention that the Legislature's selection of a date for a special election on a referendum had the potential for discrimination. Greene County Racing Commission v. City of Birmingham, 772 F. Supp. 1207 (N.D. Ala. 1991) (three-judge court).3 In particular, the court rejected the claim that setting the special election on a day near the day on which the public schools opened did not have the potential for discrimination.

The court noted that "schools will be opening for white, blacks, and all other racial groups at the same time" and found "no evidence that the opening of schools will impact blacks to a greater or lesser degree than whites." 772 F. Supp. at 1217. Subsequently, I was involved in litigation involving another special election in the Birmingham area. The referendum involved a plan for the construction of a domed stadium and the related financing. On the eve of the election, a Section 5 claim was filed complaining that the date had not been precleared. We made a submission, but contended that it was unnecessary. Ultimately, preclearance was obtained on an expedited basis.

In both cases, the Section 5 claim most likely disguised opposition to the substance of the referendum. The Greene County Racing Commission would have to compete with the proposed thoroughbred horse racing and pari-mutuel wagering facility in Birmingham. Similarly, the referendum on public improvements attracted substantial opposition and was defeated in the end. Section 5 gave the opponents of the substance of the provision a tool that allowed for the possibility of a delay in the voting.

On appeal, the United States Supreme Court vacated the District court's judgment and remanded the case with instructions to dismiss as moot. See Harris v. City of Birmingham, 505 U.S. 1201, 112 S. Ct. 2986 (1992). The dismissal, based on United States v. Munsingwear, Inc., 340 U.S. 36, 71 S. Ct. 104 (1950), calls for vacatur. Even so, the decision of the three-judge federal district court has "persuasive value [because] it illustrate[s] the manner in which similar claims have been treated." See Greene County Racing Commission, 772 F. Supp. at 1216 fn. 14 (discussing similarly vacated prior decision in Hawthorne v. Hinley, 756 F. Supp. 527 (M.D. Ala. 1990)). In other instances, the State includes referenda on constitutional amendments on the ballot for primary or general elections. That inclusion must be precleared even though the State is already conducting an election at the time. It must be precleared even though the proposed amendment may not relate to voting.

Finally, it must be precleared notwithstanding the fact that, whether the referendum is put on a special election ballot or the ballot for a regularly scheduled election, someone frequently thinks it should have been done differently. In Greene County Racing Commission, the three-judge federal district court saw no significance in the fact that the

referendum was not set on the day when the Mayor of Birmingham and two city council members were up for election, noting "[t]he best that can be said for this claim is that any election having no candidates for public office is likely to produce a lower voter turnout than will an election at which candidates for public office are running." 772 F. Supp. at 1216. In other cases, opponents fear too large a turnout. Both concerns are, fundamentally, political and outside the purview of Section 5.

The Department of Justice has advised the Committee that last year it made only one objection out of 4,734 submissions. Indeed, since 1965, the Attorney General has objected to only 1,401 submissions out of the 120,868 received by the Department of Justice. And, in the last ten years, there have been only 37 objections. The records of the Department of Justice also show that, in the past 15 years, none of the changes that Alabama made in polling places, the inclusion of referenda on ballots, and the setting of special elections produced an objection. In fact, nearly all of the objections received by the State or its subdivisions since 1986 relate to redistricting or annexation. Even so, we expend time and effort to submit changes in polling places and other de minimis changes for review. The Committee should ask the Department of Justice to provide greater detail regarding the kind of changes that are submitted.

2. Update the Baseline Date.

Congress should update the date used as the baseline for the determination of coverage. In 28 C.F.R. § 51.4(b), the regulations state: Section 5 requires the preclearance of changes affecting voting made since the date used for the determination of coverage. For each covered jurisdiction that date is one of the following: November 1, 1964; November 1, 1968; or November 1, 1972. Id. In the case of Alabama, and most of the other Southern states, any change in voting standards, practices, or procedures from those that were in place on November 1, 1964 must be precleared before it can be implemented.

The continued use of a baseline that is 42 years old presents a serious practical problem. None of the election officials who were serving in 1964 is still serving today, and those 1964 election officials are not available to tell us what procedures they used.

With statutes and regulations, it is possible to identify those that were in place on November 1, 1964, and we do that. But, state election officials can tell us how they implement those statutes and regulations, filling in the gaps with practices that they do not reduce to writing. When we defend against a Section 5 claim, we need to be able to call on state election officials to explain what they do, but we must now trace that practice back to 1964.

The case of Connors v. Bennett, 202 F. Supp. 2d 1308 (M.D. Ala. 2002) (threejudgecourt), illustrates the practical difficulties that the continued use of a baseline that was then 38 years old presents. The litigation in Connors started after the Republican Party, in response to a challenge, disqualified a candidate for its nomination for a seat in the State Legislature on the ground that he did not live in the district he sought to represent. The Party had already certified its list of candidates to the Secretary of State within the five days allowed under Alabama law, and the Secretary of State had already certified the list of primary candidates to the probate judges when the Party advised the Secretary of State of the disqualification. The Secretary of State then amended his certification advising the probate judges in the legislative district not to include the name of the disqualified candidate on the primary ballot.

The disqualified candidate filed suit in state court, which ordered that his name appear on the ballot. In so doing, the state court gave no effect to § 17-16-12, Code of Alabama (1995), which provides:

The name of no candidate shall be printed upon any official ballot unless such person is legally qualified to hold the office for which he is a candidate and unless he is eligible to vote in the primary election in which he seeks to be a candidate and possesses the political qualifications prescribed by the governing body of his political party. Id. In addition, the state court rejected the contention that granting relief would constitute a change because, before November 1, 1964, the Secretary of State had honored party request to remove candidates from the primary ballot even after the party had certified its candidates. In fact, the state court rejected a letter from the Justice Department's Voting Section, written in response to a letter that I wrote, in which the Voting Section stated that it believed the directive to place the name of the disqualified candidate on the ballot was a change.

Evidence to support that practice came from the State's Archives, which included correspondence between the Secretary of State and the political parties. The changes had been made, but the party's changes did not appear to arise from a disqualification. On that narrow ground, which, in other words, is the State produced a spotted cow with the wrong spots, the court rejected the argument.

The State could do no better than to consult the Archives in this case. If election officials with knowledge were available, their testimony might have been persuasive. As it was, while the State could have and did consult its present election officials, their experience could take the State back only to about 1990.

Congress should change the baseline date to the present so that state election officials who know of the State's practices can defend them. Moreover, anything that was in place in 1964 and is still in place is immune from Section 5 challenge, and any change from what was in place that has been precleared is presumptively acceptable.

Any other changes are those that have not been precleared or objected to and will likely not be challenged on Section 5 grounds. The likelihood that injury will result from updating the baseline is minimal. That likelihood of injury hardly outweighs the benefit of helping the State use its election officials to defend their practices.

3. Clarify the Criteria for Bailout.

Section 4(a) of the Act establishes criteria and a procedure by which covered jurisdictions can graduate from the coverage of Section 5. In 1982, Congress amended Section 4(a) to provide that "any subdivision of a [covered] State (as such subdivision existed on the date such determination was made with respect to such State) though such determinations were not made with respect to such subdivision as a separate unit," can also file a bailout action. This language appears to modify the holding in City of Rome v. United States, 446 U.S. 156, 100 S. Ct. 1548 (1980), and may account for the fact that several counties in Virginia have successfully bailed out.

As with the date for the coverage determination, Congress should update Section 4(a). To the extent that it applies to political subdivisions of a covered State "as such subdivision existed on the date such determinations were made with respect to such State," it is frozen at November 1, 1964 for Alabama and other covered Southern States.

Some new municipalities have been created, and they should also be allowed to bail out if, after ten years, they can satisfy the criteria. In addition, political parties and other covered entities that are not political subdivisions of a covered State should also be authorized to pursue bailout. When the Alabama Republican Party asked about the possibility of filing a bailout action, it was told that it was not entitled to file. Denying the possibility of exit to a covered entity raises serious constitutional issues. The Alabama Republican Party has complied with its obligations under Section 5, and there is no record of any objection by USDOJ to its party rules. While there have been objections to the Democratic Party's state and local rules, the Party has submitted its rules and any changes for review under Section 5. In the 2004 election cycle, both political parties prevailed in Section 5 actions filed by disqualified candidates by showing that the party's rules had been precleared; the disqualification, which represented the application of previously precleared standards, practices, and procedures, was not a Section 5 problem.

More significantly, neither of the State's political parties has any interest in discriminating on the basis of race. Both want as many votes as they can get and are not picky about where they come from. The African-American community may vote solidly Democratic, but that is the community's choice; the African-American community is not locked in to that choice. In short, the political parties of covered jurisdictions appear to be good candidates for bailout. They should be empowered to file.

Any Extension Should be for less than 25 years.

The State of Alabama and its subdivisions have diligently attempted to comply with their obligations under Section 5, and the local courts have noted that the State has proceeded in good faith. See Connors v. Bennett, 202 F. Supp. 2d at 1322 (Thompson, J., concurring); Ward v. Alabama, 31 F. Supp. 2d 968, 974 (M.D. Ala. 1998) (three-judge court). In addition, there is no substantial difference between the participation rates of majority and minority voters. In short, Alabama sees little need for 25 more years of coverage.