Response of Debo P. Adegbile, Associate Director of Litigation, NAACP Legal Defense and Educational Fund, Inc., to Questions from Senator Edward M. Kennedy

1. Some argue that a comparison of voting discrimination in covered and non-covered jurisdictions must be made to support the constitutionality of a renewed Section 5.

> *Q: To the extent such a comparison is relevant, does the balance of the evidence support or not support reauthorizing the Voting Rights Act with the current trigger for Section 5 coverage?*

I do not share the view that a comparison between voting discrimination in covered and non-covered jurisdictions controls the assessment of whether the Section 4 trigger for Section 5 coverage is constitutional. There are both legal and legislative reasons that suggest that such a comparison is not controlling.

When Section 5 was reauthorized previously, the central question was not whether voting discrimination was more prevalent in covered jurisdictions than non-covered jurisdictions, but rather whether Sections 4 and 5, as currently conceived, were still needed in the decades ahead. The analysis was informed by a careful assessment of the experience within the covered jurisdictions.[1] The record before this Congress, just as in earlier renewals, indicates that voting discrimination continues in covered jurisdictions, and that the protections of Section 5 are still needed to protect minority voters.

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[1] *See, e.g.,* S. REP. NO. 97-417, at 10 (1982) ("The committee's analysis of the performance of the covered jurisdictions in recent years constitutes the basis for our conclusion that Section 5 . . . remain[s] necessary and appropriate legislation . . . ."); *see also Extension of the Voting Rights Act: Hearings on H.R. 939, H.R. 2148, H.R. 3247, and H.R. 3501 Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary,* 94th Cong. 8 (1975) (testimony of Rep. Peter W. Rodino, Chairman, H. Comm. on the Judiciary accompanied by Earl. C. Dudley, Jr., General Counsel, H. Comm. on the Judiciary) (explaining that the continuing need for the Voting Rights Act's special provisions in the longest covered jurisdictions demonstrated the necessity of renewing the provisions.); *cf.* S. REP. NO. 94-295 at 15 (emphasizing that Congress adopted Section 5 in recognition that the "great lengths" to which covered jurisdictions had previously gone to perpetuate voting discrimination indicated a proclivity for similar future behavior); *See also* Testimony of Eddie N. Williams, President, Joint Center for Political Studies, Washington D.C. *Extension of the Voting Rights Act: Hearings before the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary* (May, 1982); *See generally South Carolina v. Katzenbach,* 383 U.S. 301, 335 (U.S. 1966) (upholding the constitutionality of Section 5 because of Congress's evidentiary basis supporting the necessity of preclearance).

As a practical matter, Section 5's success and deterrent function makes a head-to-head comparison of voting discrimination between covered and uncovered jurisdictions exceedingly difficult. As Professor Theodore Arrington stated in his responses to written questions in the Senate, covered jurisdictions appear much "cleaner" than they would without Section 5 coverage because Section 5 deters them from implementing changes they know will not be precleared.[2] Additionally, any accurate assessment of Section 5's effectiveness must look beyond the mere number of DOJ objections to other categories of deterred and rejected voting changes. As I indicated in my written testimony, these include voting changes denied preclearance by the federal district court for the District of Columbia; matters settled while pending before that court (and/or other district Courts following Section 5 enforcement actions); and voting changes that were withdrawn, altered, or abandoned after the DOJ made a formal More Information Request regarding a pending change (MIR).

Moreover, the most likely metric for assessing the experience in non-covered jurisdictions is the record of voting rights litigation. This poses another difficulty because a significant number of Section 2 cases have been settled without any published opinion in covered jurisdictions as noted in reports submitted into the record by both the ACLU and the National Commission on the Voting Rights Act. This further complicates the comparisons between covered and uncovered jurisdictions, which may give false indications of parity if the substantial effect of these unreported Section 2 cases are not taken into account. As a result of the complex operation and deterrent nature of Section

[2] Theodore S. Arrington, Ph.D., *Written Responses to Members of the United States Senate Committee on the Judiciary Regarding: The Continuing Need for Section 5 Pre-Clearance,* (June 1, 2006) [hereinafter "Arrington Responses"].

5, concrete comparative analyses between covered and non-covered jurisdictions tend to yield incomplete results.

However, the fact that Section 5 has successfully deterred numerous discriminatory voting changes and corrected others should not be taken as support for its pending expiration: to the contrary, such evidence offers powerful proof that Section 5 works. Incongruously, were Congress or the Supreme Court to require a record of unchecked pervasive discriminatory conduct squaring with that which existed in 1965 in covered jurisdictions to justify Section 5's renewal, the requirement would essentially mean that Section 5 could only have a possibility of being renewed if it was largely ineffective. Congress has not required such a showing in the past, and recent case law does not suggest that it must do so now. The record contains significant evidence of voting discrimination in covered jurisdictions illustrating the continuing need for Section 5.

Second, while a direct comparison of covered versus non-covered jurisdictions under Section 5 is exceedingly difficult, the weight of the evidence through the lens of Section 2 suggests that voting discrimination continues to be most severe in covered jurisdictions. In her forthcoming article "Not Like the South? Regional Variation and Political Participation through the Lens of Section 2," Ellen Katz documents judicial findings in published Section 2 decisions, and found that more successful cases were brought and more instances of discrimination uncovered in covered jurisdictions than non-covered jurisdictions.[3] She notes, in particular, that

> courts in covered jurisdictions have both found and have been more likely to find: acts of official discrimination that impact voting rights, the use of

[3] *See* Ellen D. Katz, *Not Like the South? Regional Variation and Political Participation Through the Lens of Section 2* (forthcoming).

> devices that "enhance[]" opportunities for discrimination against minority voters, a lower level of minority voter registration and turnout, contemporary voting opportunities shaped by the continuing effects of discrimination in various socio-economic realms, racial appeals, and a lack of success by minority candidates.[4]

These findings suggest that voting discrimination continues to be most severe in covered jurisdictions, and that Section 5 as currently configured applies appropriately to the places where voters most need its protection. Additionally, Katz's findings suggest that in the absence of Section 5's reauthorization, Section 2 litigation will increase significantly in covered jurisdictions, at considerable cost to plaintiffs, jurisdictions, and the judiciary. Both of these findings weigh strongly in favor of Section 5's reauthorization and the existing coverage formula.

Finally, the argument that reauthorization of Section 5 requires a greater weight of evidence in covered jurisdictions is not supported by Supreme Court precedent. In the case *Katzenbach v. Morgan,* the Court explicitly stated that "a legislature need not 'strike at all evils at the same time,'" and that "reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind."[5] As noted by Professor Arrington, covered jurisdictions are systematically different because of their distinct political histories and long history of minority disenfranchisement. Consequently, Congress acted appropriately and within its powers when it enacted Section 5 as a prophylactic measure in these particular jurisdictions.

Several of the witnesses before this Senate have pointed out that Congress's authority to act under the enforcement provisions of the Civil War amendments may be more constrained under a fair reading of the *Boerne* cases when enacting *new* legislation

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[4] *Id.* at 4.
[5] *Katzenbach v. Morgan,* 384 U.S. 641, 657 (1966).

than when it acts to renew an existing statute such as Section 5 of the VRA. The aforementioned Katz article makes a similar point, and I share this view. The question presented in this renewal is not whether a problem of voting discrimination severe enough to warrant invocation of Congressional enforcement powers ever existed, but rather whether the threat to a fundamental right has passed. It seems that Congress's special institutional competence in fact finding is uniquely well suited to make this determination. The Supreme Court has recognized that Congress acts as a continuing body when reviewing evidence, and that previous legislative findings and experiences are properly part of the current record.[6]

The extensive record before and findings made by this Congress illustrate that significant voting discrimination continues to plague covered jurisdictions, and also suggests that discrimination in these jurisdictions is of a different character than that which exists in most non-covered jurisdictions. The balance of the evidence thus adequately supports reauthorization of Section 5 with the current "trigger" intact.

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[6] *See Fullilove v. Klutznick,* 448 U.S. 448, 502-503 (1980), noting that:

> Congress has no responsibility to confine its vision to the facts and evidence adduced by particular parties. Instead, its special attribute as a legislative body lies in its broader mission to investigate and consider all facts and opinions that may be relevant to the resolution of an issue. One appropriate source is the information and expertise that Congress acquires in the consideration and enactment of earlier legislation. After Congress has legislated repeatedly in an area of national concern, its Members gain experience that may reduce the need for fresh hearings or prolonged debate when Congress again considers action in that area.

See also Oregon v. Mitchell, 400 U.S. 112, 284 (1970) (Stewart, J. concurring in part, dissenting in part) (noting that "Congress was not required to make state-by-state findings concerning the . . . actual impact of literacy requirements on the Negro citizen's access to the ballot box," and that Congressional findings made in support of the Voting Rights Act's original passage "would have supported a nationwide ban on literacy tests").

2. The proposed legislation would overrule the Georgia v. Ashcroft standard of retrogression, but some have suggested that doing so will only encourage "packing" – concentrating of voters in a few voting districts.

Q: Do you agree? In your answer please explain how the earlier standard treats efforts to pack minority voters into fewer districts.

In my view the bill clarifies the Section 5 standard following *Georgia v. Ashcroft*. The "ability to elect" standard set forth in the proposed legislation does not require or encourage "packing", and may allow reductions in minority voter percentages where such reductions do not eliminate the ability to elect.[7] Several factors are used to determine whether the ability to elect exists, including: the extent of racially polarized voting; rates of turnout, registration, eligibility and citizenship status among the various racial groups; and the extent of cross-over voting. The ability to elect is assessed by analyzing maps, demographic information and election data that are particular to each jurisdiction.

The DOJ applied such a standard during its administrative assessment of the plan at issue in the *Georgia v. Ashcroft* decision. Though it objected to three of the State Senate districts, several others were precleared despite substantial drops in black voting age population (BVAP). In fact, the districts with the largest percentage drops in BVAP were not objected to. For example, Senate district 43's BVAP dropped by 25 percent; district 38's dropped by 16 percent; district 35's dropped by 15 percent; and the average drop in BVAP across all opportunity districts was 10 percent.[8] The standard applied by the DOJ prior to *Georgia v. Ashcroft* allowed for such drops in minority voting

[7] The term "packing" very often means different things to different people. I view the ability to elect standard as a useful reference point for determining if a district is "packed," which I understand to be a district containing minority voters clearly in excess of what is required to provide an effective ability to elect. It is also worth mentioning that in many situations, including some within my personal experience in redistricting litigation, residential segregation patterns, population density, and one-person one-vote considerations, lead to districts that are unavoidably "packed". Accordingly, while "packing" can be a dilutive technique, non-discriminatory reasons also can lead to the creation of districts that could be fairly described as "packed".

[8] *See Georgia v. Ashcroft,* 195 F.Supp. 25 (2002).

population where its particularized analysis determined that minority voters still retained the ability to elect candidates of choice. The language in the bill restores this standard and will allow jurisdictions to have some flexibility and latitude in redrawing district boundaries. The determination of whether minority voters have the "ability to elect" their candidate of choice rests not on whether a district is "packed," but instead on a rigorous, case-specific analysis.

3. Professor Carol Swain testified that race was no longer a barrier to the election of black-preferred candidates.

> *Q: Why aren't more minority-preferred candidates being elected in majority-white districts in the covered jurisdictions?*
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> *Q: Does the persistence of extreme racial polarization in voting in the covered jurisdictions undercut Prof. Swain's view?*

In discussing the *Georgia v. Ashcroft*[9] decision and its impact on minority voting rights before the Senate Judiciary Subcommittee on the Constitution, Carol Swain testified:

> The unpacking of majority-minority districts in traditionally Democratic districts does not bar the election of qualified minority politicians who have proven again and again their abilities to garner white crossover votes…Race is no longer a barrier to the election of qualified black Democrats in historically Democratic districts.[10]

As an initial matter, Professor Swain seems willing to draw her conclusions based upon sporadic levels of Black electoral success outside the covered jurisdictions. Professor Swain's table, submitted with her written testimony (and modified from her book, <u>Black Faces, Black Interests),</u> does not include information regarding current members of Congress which limits the probative value of her conclusions regarding the

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[9] *Georgia v. Ashcroft,* 539 U.S. 461 (2003).

[10] *Reauthorization of the Voting Rights Act: Hearing on Policy Perspectives and Views from the Field Before the Subcommittee on the Constitution, Civil Rights and Property Rights of the S. Comm. On the Judiciary,* 109th Cong. (2006) (testimony of Carol M. Swain, Professor, Vanderbilt University Law School).

current state of electoral politics. Second, all of her examples, with the exception of one from 1979, were in non-covered jurisdictions, which reveals little about the level of racially polarized voting in the covered jurisdictions.

Although there are examples of Black electoral success in majority white districts, including David Scott and Sanford Bishop of Georgia, these examples are not typical and reveal little about the systemic nature of voting discrimination and the vestiges of discrimination. Isolated examples do not demonstrate that Section 5 has outlived its usefulness.

Of the 26,670 U.S. House elections since the adoption of the 15th Amendment in 1870, only 415 (1.6%) produced black winners (92 individuals).[11] When looking exclusively at the success of African-American candidates in U.S. House races in southern, Section 5 covered jurisdictions, Swain's assertion that "[r]ace is no longer a barrier to the election of qualified black Democrats in historically Democratic districts" appears to lack not only an understanding of racially polarized voting but also an historical understanding. Fair opportunities for African Americans to elect candidates of their choice were essentially nonexistent from the end of Reconstruction up until the late 1980s and early 1990s.

Not until the first redistricting cycle after the 1982 Voting Rights Act reauthorization, when many state legislatures created ability to elect districts for the first time, did many Southern states elect their first African-American candidates to the U.S. House of Representatives. As David Canon testified to the Senate Subcommittee on the Constitution, six Southern states did not elect their first African-American to Congress

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[11] *See Reauthorization of the Voting Rights Act: Hearing on Policy Perspectives and Views from the Field Before the Subcommittee on the Constitution, Civil Rights and Property Rights of the S. Comm. on the Judiciary,* 109th Cong. (2006) (testimony of David T. Canon, Professor, University of Wisconsin).

after Reconstruction until the early 1990s.[12] Two other Southern states, Mississippi and Georgia failed to elect African-American candidates to the U.S. House until the late 1980s.[13]

Similarly, Professor Richard Engstrom has found severely racially polarized voting in state and gubernatorial elections in Louisiana, and has noted that not a single African-American state legislator comes from a majority-white district.[14] Moreover, in Alabama, only one Black state legislator has been elected from a majority-white district, and that district was 48 percent Black.[15]

Equally importantly, one should not reflexively assume, as Professor Swain appears to, that the Voting Rights Act required majority-minority districts to be drawn in all circumstances, either in the 1990's redistricting round, after the *Miller* decision, or, even more importantly, that it will require this if the pending bill is enacted.[16] Swain assumes that the Section 5 process requires that jurisdictions maintain districts that meet some particular minority voting population threshold. However, the effect prong of Section 5 only prohibits impermissible backsliding of the type that would eliminate a minority community's "ability to elect" candidates of their choice. The key question, thus, is what factors determine the ability to elect?

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[12] *See* David T. Canon, Written Responses to the Subcommittee on the Constitution of the Senate Committee on the Judiciary, July 6, 2006. The six Southern states are: Alabama (1877-1993); Louisiana (1877-1991); South Carolina (1897-1993); Virginia (1891-1993); Florida (1876-1993); North Carolina (1901-1993).
[13] *See supra* at 14. Georgia (1876-1987); Mississippi (1883-1987).
[14] *Oversight Hearing on the Voting Rights Act: The Continuing Need for Section 5 Before the Subcommittee on the Constitution of H. Comm. on the Judiciary,* 109th Cong. (2005) (testimony of Richard Engstrom, Professor, The University of New Orleans).
[15] Indeed, in many instances, districts that are not majority-Black elect Blacks because of Latino voters willing form coalitions with Black voters. It should not be assumed that a district that is not majority-Black is necessarily majority-White.
[16] *Miller v. Johnson*, 515 U.S. 900 (1995); *Georgia v. Ashcroft*, 539 U.S. 641 (2003).

As I explained in my previous answer, majority-minority districts are necessary in many cases, but they are not always necessary to provide an ability to elect. It is also important to mention that while Professor Swain focuses on the sporadic white crossover voting for minority candidates, the revisions to Section 5 of the bill protect the minority community's ability to elect "preferred candidates of choice." Indeed, there are some viable majority-minority districts in which African Americans support White or Hispanic candidates. In sum, Professor Swain's arguments about the decreasing importance of majority-minority districts raise several substantial questions about the basis for her conclusions, and appear optimistic when tested in many Section 5 covered jurisdictions. Recent data has shown the success of African-American candidates is geographically limited, and too small statistically to suggest the transformation in Southern politics that Professor Swain describes.

4. In testimony about the history of race discrimination in voting in the covered jurisdictions, some have characterized this discrimination as a part of history, and no longer existing today to a degree that warrants continued federal oversight under Section 5. These critics of Section 5 recount a past when African-American voters were denied the right to vote. However, the 15th Amendment prohibits both the denial and abridgement of the right to vote on the basis of race or color.

> *Q: Please explain the distinction between vote denial and abridgment and how vote abridgment continues to impede equal participation in the political process for minority voters.*

The primary initial focus of efforts under the Voting Rights Act was to combat the tactics of outright vote denial through tests and devices, among other things, that prevented many African Americans and other minorities from exercising their right to register and vote. These early efforts, with the aid of federal examiners, resulted in the registration of substantial numbers of African-American voters in the south, and a significant increase in minority voter registration and turnout rates. It is important to note, however, that the necessity of federal examiners (federal employees empowered to physically add eligible voters to the rolls when local officials persisted in their refusals to do so) to accomplish this progress indicates Congress's awareness that sustained resistance, in various forms, was anticipated from the outset. Even very soon after the Act was passed, as minority voters overcame barriers to registering and casting ballots, and in many cases in direct response to this progress, new methods of voting discrimination and dilution arose or were intensified in order to impede equal participation in the political process for minority voters. These methods include dilutive tactics such as gerrymandering, shifts from single member districts to at-large elections, changes in local government municipal boundaries (also referred to as annexations), transformation of offices from elected to appointed, and alterations in the duties, compensation of officeholders.

The voting changes at issue in the seminal 1969 Section 5 case of *Allen v. State Board of Elections,* arose in precisely these circumstances.[17] Once the federal government expressed its intolerance for vote denial through the VRA, abridgements or efforts to curtail the effectiveness of votes ensued. The record before this Congress contains numerous examples of these and other types of vote abridgment, including several examples occurring in the past few years. For instance, in May of *this year,* the DOJ rejected a reduction in the number of polling places in Woodlands, Texas because

[17] 393 U.S. 590 (1969) (Court made clear that contested Mississippi law, like all other voting changes adopted in covered jurisdictions, must be submitted either to the Attorney General or to a three-judge district court in the District of Columbia, for preclearance).

the change would have a discriminatory effect on minority voters by making it more difficult for them to access the ballot box on election day.[18]

The Supreme Court has expressly held that Section 5's coverage is not limited to cases of vote denial, but also applies to changes in "systems of representation" that favor or disfavor minority voters.[19] The Court additionally recognized that "the right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot."[20] The leading voting rights text, authored by three law professors who have testified in these hearings, explains the move from vote denial to abridgement.

> Although at first the suspension of literacy tests and the appointment of federal registrars in selected jurisdictions were the most significant aspects of the 1965 Act, once voters were registered attention turned to other electoral practices and to section 5 of the Act, which required covered jurisdictions to seek prior approval – "preclearance" – of any changes in voting practices in effect on the triggering date.
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> Many Southern jurisdictions responded to the explosive growth in black voter registration with a campaign of "massive resistance" akin to their attempts to evade the mandate of *Brown v. Board of Education*, 347 U.S. 483 (1954). Consider the first post-Act vote-dilution case, *Smith v. Paris*, 257 F.Supp. 901 (M.D. Ala. 1966), *modified*, 386 F.2d 979 (5th Cir. 1967). For over thirty years, elections to the Barbour County (Alabama) Democratic Executive Committee were held on a combined at-large and beat (that is, precinct) basis. Prior to the 1965 Act, only a minuscule number of blacks were registered to vote. Once federal examiners were sent to the county, however, black registration skyrocketed, and by March 1966, four beats in Barbour County had majority-black electorates. In each of these beats, black candidates filed to run. That month, the Committee "with little or no debate, without taking any minutes or making any record of its meetings or discussions, and, so far as the record reflects, with little or no discussion among the members of the community," changed the election method, requiring at-large (county-wide) elections for all positions. *Id*. at 904. The district court enjoined the new election method, finding that its purpose and effect "greatly diminish the

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[18] Nina Perales, Luis Figueroa and Criselda Rivas, *The Minority Voting Experience in Texas since 1982: Demonstrating the Importance of Reauthorizing the Voting Rights Act,* Leadership Conference on Civil Rights (June, 2006) at 15.

[19] *Allen v. State Bd. of Elections,* 393 U.S. 544, 586 (1969).

[20] *Id.* at 569.

> effectiveness of the Negroes' right to vote." *Id*. *See also*, *e.g.*, *Sims v. Baggett*, 247 F.Supp. 96 (M.D.Ala. 1965), the remedial stage of *Reynolds v. Sims*, where the district court rejected Alabama's state House reapportionment on the grounds that "the Legislature intentionally aggregated predominantly Negro counties with predominantly white counties for the sole purpose of preventing the election of Negroes to House membership." *Id*. at 109. *See generally* Frank R. Parker, Black Votes Count: Political Empowerment in Mississippi After 1965, at 34-77 (1990) (describing Mississippi legislation intended to neutralize black registration).[21]

Recent decisions make it clear that this practice of manipulating growing minority voting strength is not a distant memory.[22] Given the circumstances of the voting changes that have been rejected under Section 5 since 1982, it seems clear that abridgment of the right to vote continues to impede equal participation for minority voters despite significant increases in minority voter registration and turnout.

Experience has shown that increased minority voter registration can be an impetus for further abridgements of the vote and dilution. Minority voter registration and turnout tell us something about vote denial, but do not directly respond to or answer the important and longstanding abridgement question. The protections of Section 5 play an important role in preventing many forms of discriminatory tactics and help to ensure that minority voting rights are neither denied nor abridged.

Q: Does your experience in litigating the Louisiana declaratory judgment action, which involved the State's 2001 redistricting plan for the State House, indicate that discrimination against minority voters is not a relic of the past?

The Louisiana legislature's actions during the state legislative redistricting process in 2001, and the ensuing declaratory judgment action in *Louisiana House of Representatives v. Ashcroft*, illustrate that even at the state level, voting changes are being

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[21] SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD PILDES, THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS 571-72 (University Casebook Series Editorial Board eds., 2nd ed. 2001).

[22] *See League of United Latin American Citizens v. Perry,* 126 S. Ct. 2594 (2006).

made that not only disproportionately burden minority voters, but that also are rooted in discriminatory intent by policy makers in covered jurisdictions such as Louisiana. After failing to receive Section 5 preclearance for every single initial submission of its state legislative reapportionment plans since the Voting Rights Act went into effect four decades ago, the Louisiana legislature sought judicial Section 5 preclearance before a three-judge panel. The plan eliminated a majority black district in Orleans Parish but failed to create a comparable new opportunity for black voters anywhere else in the state.

During the proceedings, the state argued that *white voters* were entitled to "proportional representation," within Orleans Parish. The plan simply ignored the population *increase* by black voters in Orleans Parish in the preceding decade. The state sought to apply the concept of proportional representation selectively to white voters in Orleans parish. In other words, though proportionality is not required by the VRA, once the state decided to employ it, it did not ask: which allocation of legislative seats statewide would give a proportional balance to its legislature, but rather whether it could invoke a desire for proportionality limited to Orleans only, in order to defend a clearly retrogressive plan. The DOJ opposed the entry of a declaratory judgment by the federal court, on grounds that Louisiana was unable to meet its burden of showing that the plan was adopted without retrogressive purpose or effect.

The legislature's position in the case conceded that the plan was intended to benefit white voters at the expense of black voters. When the state's position is taken together with its procedural misconduct in the litigation prior to settlement,[23] this post-

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[23] See *Louisiana House of Representatives, et. al. v. Ashcroft* No. 02-0062 (D.D.C. dismissed 2002) (mem. order rejecting request to approve redistricting plan, finding the state "blatantly violate[ed] important procedural rules" through its litigation tactics, and condemning the state for its "radical mid-course revision in [its legal] theory of the case").

2000 Census, statewide redistricting suggests that Section 5 review of voting changes is still needed in Louisiana.

Louisiana ultimately abandoned its selective proportionality theory after evidence emerged before trial that significant racially polarized voting exists in virtually all electoral contests in the region, that the legislature specifically altered and ignored its own redistricting guidelines, and after a court order was issued explaining that the State had engaged in a "radical mid-course revision" of its legal theory to avoid summary judgment. The case was settled on the eve of trial, after the state agreed to restore the African-American opportunity district.

Moreover, although this case is a very recent example of overt racial discrimination by the state in the voting context, other examples have followed in the several years since. Discrimination in Louisiana is not a historical artifact as it persists in the state – just as it does in other jurisdictions covered by Section 5 – and these recent examples demonstrate that such discrimination will, unfortunately, likely continue in the years ahead. In 2002, for example, the Louisiana state legislature adopted a plan allowing the St. Bernard Parish electors to reconfigure the school board from 11 single-member districts, of which one was an African-American opportunity district, to 5 single-member districts and 2 at-large seats, none of which would have allowed African-American voters the opportunity to elect candidates of their choice. When the action was brought to court under Section 2, a St. Bernard Parish state senator admitted in testimony to using racially derogatory terms and holding racist views.[24] The court struck down the plan as unlawfully diluting the black vote in the parish. More recently, the DOJ in 2005

[24] *See St. Bernard Citizens for Better Government v. St. Bernard Parish School Board* (No. 02-2209)(E.D.La. Aug 28, 2002).

blocked a redistricting plan in the Town of Delhi, Louisiana, after finding it was motivated by intent to retrogress, would have eliminated an African-American opportunity district, and was more harmful to minority voters than alternative plans. These examples demonstrate the continuing need for Section 5.

5. You noted during your testimony that the trigger served as a "proxy" to reach jurisdictions with a history of entrenched discrimination against minority voters.

> *Q: Please explain what you meant by this point and upon what evidence you rely.*

The trigger or Section 4 coverage formula as initially crafted was based, in part, on voter registration and turnout rates, and in part on whether a jurisdiction had employed a literacy test or similar device to interfere with minority voting.[25] Indeed, though many of the discriminating jurisdictions could have been readily identified by name in 1965, the trigger was designed as a legislative proxy to reach many of the worst actors. The difficulty of healing deep racial divisions, together with the associated political considerations, counseled in favor of a formula and not a list. I characterized the original Section 4 trigger as a proxy during my oral testimony, however, to underscore that depressed registration and turnout rates were aspects or indications of the larger problem that Congress sought to address but not the entire problem in itself. The larger goal was the eradication of all discrimination in voting.[26]

In my view, those who seek to limit the purposes of the VRA in general, and Section 5 in particular, to a voter registration and turnout remedy overemphasize those aspects of the trigger in the current renewal debate. To be sure, reductions in the gap between White and African-American registration and turnout levels are markers of

[25] *See* S. Rep. No. 97-417, at 5.
[26] Indeed, the VRA was "designed to banish the blight of racial discrimination in voting." *See South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1996) (upholding the constitutionality of Section 5 of the Act).

progress (even though this progress does not extend in equal measure to Hispanic voters). However, the breadth,[27] legislative history,[28] and case law,[29] of the VRA make clear that the far-reaching purposes of the Act – the eradication of voting discrimination – could not be achieved through improved registration alone.[30] The anchoring reference to registration and turnout data in the Section 4 trigger was a way for the remedial and prophylactic protections of Section 5 to reach many places in the nation where voting discrimination had been most intense based upon a discernible manifestation of that discrimination. But as I explain in greater detail below, improvements in registration and turnout rates do not end the inquiry about whether voting discrimination persists.

During previous VRA renewals, and most recently in 1982, in addition to considering improvements in voter registration and turnout, Congress has considered whether the goal of eliminating voting discrimination more broadly had been achieved before determining whether Section 5 coverage was still necessary. In 1975, Congress found that "while most jurisdictions had complied with Section 4 for ten years by not using tests or devices, there had nonetheless been widespread violation of the Act and widespread voting discrimination in the covered jurisdictions."[31] Based upon this finding, among other things, Congress confirmed the continued need for preclearance. As explained in the corresponding record:

> Congress continued the preclearance requirement for the jurisdictions originally covered in 1965, not on the basis of some permanent stigma for

[27] *Id.*
[28] *See e.g.* S. Rep. No. 97-417, at 6 ("[T]he right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot." (quoting *Allen v. Board of Elections,* 398 U.S. 544, 569 (1969))).
[29] *County Council of Sumter County v. U.S.,* 555 F.Supp. 694, 707 (D.D.C. 1983) ("Obviously, the preclearance requirements of the original act and its 1982 amendment had a much larger purpose than to increase voter registration . . . .").
[30] *See e.g.* Written Response to Question 4 *supra*.
[31] *See* S. Rep. No. 97-417, at 8.

> events which had occurred before 1965, but rather on the basis of a careful review of the contemporaneous record of ongoing voting rights discrimination in 1970 and 1975 respectively.[32]

Likewise in 1982, Congress renewed Section 5 of the VRA after determining that performance in the covered jurisdictions was still not sufficient to afford minority voters their full voting franchise. At this time, Congress observed that "although we have come a long way since 1965, the Nation's task in securing voting rights is not finished" and that "continued progress toward equal opportunity in the electoral process will be halted if we abandon the Act's crucial safeguards now."[33] Congress declined to change the coverage formula during the 1982 renewal, recognizing that discrimination against racial and language minorities persisted in covered jurisdictions, and that, in many jurisdictions, overt measures of vote denial had simply been replaced with "more sophisticated devices that dilute minority voting strength."[34] This legislative history makes clear that Section 5 coverage does not rely upon the trigger alone but also upon an assessment of the circumstances in the jurisdictions identified for coverage.

As Congress understood when renewing the VRA in 1970, 1975 and 1982, improvement in voter registration and turnout are necessary, but not sufficient measure of increased minority voting guarantees. Just as in 1982, the record before this Congress exhibits widespread continued voting discrimination in covered jurisdictions which Section 5 is uniquely suited to remedy. As the Leadership Conference on Civil Rights's recent reports on voting rights in Louisiana and Texas, for example, have shown, and as my own experience litigating voting rights cases in Louisiana has demonstrated, various methods of voting discrimination persist in covered jurisdictions. These facts permit the

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[32] *Id.* at 8-9.
[33] *Id.* at 10.
[34] *Id.; See also* Written Response to Question 4.

inference that the basic coverage formula supported in 1965, 1970, 1975 and 1982, now informed by careful evaluation of the existence and threat of voting discrimination in covered jurisdictions, continues to be justified.[35] Voting abridgments such as dilution, the most common present-day form of voting discrimination, cannot be measured with reference to registration and turnout rates alone: the VRA generally, and Section 5 in particular, focus appropriately on both vote denials and abridgments.

6. Some have suggested that because African-American voting registration has increased significantly in the covered jurisdictions since enactment of the Act, Section 5 is no longer needed.

> *Q: What is your view of the relationship between African-American voter registration and the continued need for Section 5?*

I believe I have substantially answered this question in my responses to questions 4 and 5. In addition, as expressed by Professor Alexander Keyssar in his written testimony to this Committee, this country's progress in the expansion of the voting franchise has been "piecemeal and fitful, not steady and gradual."[36] Over time, the right to vote has been narrowed and expanded, gains have been made and lost, and populations that once possessed the right to vote have been subsequently disenfranchised. In this context, the preclearance provision of Section 5 works as a critical mechanism for preventing another round of rollbacks and reversals of the gains achieved by African Americans and other minority groups.[37] As illustrated by the record and my previous responses, the need for the remedial and prophylactic Section 5 measure persists despite improvements in voter registration.

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[35] In 1999 the Supreme Court firmly upheld the constitutionality of Section 5 and the existing trigger formulation, citing in its opinion that these jurisdictions were "properly designated for preclearance." *Lopez v. Monterrey County, 525 U.S. at 282-283 (citing City of Boerne, 521 U.S. at 518*).

[36] Alexander Keyssar, *Written Testimony Submitted to the Senate Committee on the Judiciary,* (June 12, 2006).

[37] *Id.*

7. Some argue that Section 2 of the Voting Rights Act, which is a permanent provision and applies nationwide, would be an adequate remedy for voting discrimination if Section 5 is not reauthorized.

Q: Do you agree or not agree? Please explain.

No, I do not agree that Section 2 would be an adequate remedy for voting discrimination if Section 5 were not reauthorized. While Section 2 provides an important ongoing remedy for voting discrimination in many circumstances, it is less a less effective tool for responding to some of the episodic forms of discrimination common to jurisdictions currently covered by Section 5. Section 5 is a more effective provision for responding to seemingly small voting changes that can have clearly dilutive effects on minority voting power. Examples of such dilutive changes can include polling place changes, changes in the length of voting periods, or last-minute election date changes.

Due to the complex nature of Section 2 litigation, it can be difficult and costly to challenge VRA violations, such as those described above, under Section 2. Section 5, on the other hand, is specifically designed to deal with these all voting changes expeditiously. Additionally, without Section 5 there would likely be an increase in Section 2 cases throughout covered jurisdictions. As I noted in my response to Question 1, even with Section 5 in place there have been more successful Section 2 cases brought in covered jurisdictions than non-covered jurisdictions. Without Section 5 preclearance, this disparity would likely grow much larger, at significant cost to litigants, covered jurisdictions, and the judicial system. Finally, whereas Section 5 works to deter voting discrimination *before* it has taken effect, Section 2, in large part, typically addresses discrimination after the fact. As a result, minority voters can still be denied their full voting rights while litigation is pending, contrary to the legislative intent under the VRA.

Response of Debo P. Adegbile, Associate Director of Litigation of the NAACP Legal Defense and Educational Fund, Inc., to Questions from Senator Patrick Leahy

1. *Some witnesses have proposed that Section 5 coverage be extended nationwide. You testified that you oppose that proposal because it would not be congruent and proportional to the harm being remedied. Why?*

Nationwide extension of Section 5 preclearance would present serious legal and practical dangers. The approach has been suggested and rejected during previous renewal debates as a form of poison pill. For example, as Congressman Henry Hyde stated in 1982 in response to the nationwide argument, those who seek nationwide extension of Section 5 risk "strengthen[ing] it to death".[1] Below I describe in greater detail the constitutional and practical problems with proposals for nationwide extension that I described more briefly during the hearing.[2]

Under the *Boerne* line of cases, Congress may act after careful assessment and documentation of a constitutional problem and threat provided that its legislative response is "congruent and proportional" to the violation it seeks to remedy. The remedy can be both remedial and prophylactic in nature, thus, in crafting the legislative response, Congress enjoys latitude to employ its enforcement powers under the Fourteenth and Fifteenth Amendments. In several recent cases, the Supreme Court referenced or explicitly upheld Congress's enactment of the VRA, including Section 5, as an example of carefully and appropriately crafted remedial and prophylactic legislation. Central to these findings was the unique history of voting discrimination in covered jurisdictions.

The existing record does not support nationwide extension of Section 5 to many jurisdictions that, to date, have no substantial pattern of voting discrimination. Consequently,

[1] *Extension of the Voting Rights Act: Hearings Before the Subcomm. On Civil and Constitutional Rights of the H. Comm. on the Judiciary,* 94th Cong, 28 (1981) (testimony of Lane Kirkland, President, AFL-CIO.

[2] *Id.* As Congressman Hyde stated,: "It would be administratively impossible to administer, but most importantly, it would be unconstituitional."

were a statute mandating nationwide coverage subject to a constitutional challenge, the Court would likely strike it down because its reach would not be "congruent and proportional" to the record of voting discrimination that Congress now has before it. In contrast, Section 5 as currently constructed is appropriately focused on the history of discrimination that gave rise to the coverage formula, augmented by more recent examples of discrimination in covered areas. It likewise includes adequate measures through its bail-in and bail-out provisions to respond to new instances of discrimination in uncovered jurisdictions, or to release jurisdictions from coverage where Section 5's protections are no longer needed.

Practically speaking, extending Section 5 nationwide would also prove to be an administrative quagmire. The DOJ is not presently equipped with the resources or personnel that would be needed to extend its existing preclearance responsibilities nationally. Additionally, expansion of coverage would prevent the DOJ from focusing its preclearance responsibilities on the jurisdictions where voting discrimination has historically been, and continues to be, a serious problem.

Proposals to extend the Act in this fashion appear, once again, to be designed to end its application both legally and practically. Instead, Section 5 should continue to cover selected jurisdictions, because this arrangement satisfies the *Boerne* requirements and has proven successful in combating voting discrimination where its effects are most severe.

2. *Some have pointed to increases in black voter registration and turnout as evidence that Section 5 is no longer needed. Do you agree with that conclusion? Why or why not?*

No, I do not agree with that conclusion. As I noted in my responses to Senator Kennedy, the VRA was enacted to combat both vote denial *and* abridgment, and voting abridgment (in the form of vote dilution) remains a widespread and persistent problem in covered jurisdictions. The fact that more African-American voters are registered and turnout today than when the VRA was passed attests to the VRA's success on this critical issue, however, it does not prove that voting discrimination against African Americans or other minorities has ended. Rather, the congressional record is replete with examples of continuing voting discrimination against racial minorities in the covered jurisdictions, and this discrimination works to limit or reduce the effectiveness of their votes.

As minority voters have overcome barriers to registering and casting ballots, new methods of voting discrimination and abridgment have arisen to impede equal participation in the political process for minority voters. These methods include dilutive tactics such as redistricting, shifts from single-district to at-large elections, and changes in local government/ municipal boundaries (also referred to as annexations). The record before this Congress contains numerous examples of these and other types of abridgments, including several examples occurring in the past few years. The Supreme Court's ruling in the Texas redistricting case, *LULAC V. Perry,*[3] is but one recent example. Likewise, in May of *this year,* the DOJ objected to a voting change that would have reduced the number of polling places in Woodlands, Texas and thereby, restricted minority voters' access to the ballot box.[4]

Additionally, the Supreme Court has expressly held that Section 5's coverage is not limited to cases of vote denial, but also applies to changes in "systems of representation".[5] The Court further recognized that "the right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot."[6] As stated by Attorney Armand Derfner

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[3] *League of United Latin American Citizens v. Perry*, 126 S.Ct. 2594. (2006).
[4] Nina Perales, Luis Figueroa and Criselda Rivas, *The Minority Voting Experience in Texas since 1982: Demonstrating the Importance of Reauthorizing the Voting Rights Act,* Leadership Conference on Civil Rights (June, 2006) at 15.
[5] *Allen v. State Bd. of Elections,* 393 U.S. 544, 586 (1969).
[6] *Id.* at 569.

in his previous testimony before this Congress, "the trends perceived by the Civil Rights Commission of 1968 were the beginning of an epidemic of dilution methods in covered jurisdictions."[7] In fact, as Derfner noted, of the over 13,000 changes that the DOJ has rejected to date, the vast majority have involved changes in representational systems that would result in minority vote dilution.[8] Given these statistics, it seems clear that Section 5 remains very much needed, despite significant gains in voter registration and turnout. The protections provided by Section 5 preclearance play an important role in detecting and remedying dilutive and discriminatory tactics, and ensuring that minority voting rights are neither denied nor abridged.

3. *John Park testified that he believes that "de minimis changes that have proven to have no potential for discrimination: such as "the location of polling places, the setting of special elections, and the inclusion of referenda on constitutional amendments" should be removed from Section 5 coverage. Do you agree? Why or why not?*

Although certain voting changes, including the ones to which you refer, may appear to be of minor importance to some, I disagree with Mr. Park that such changes are "*de minimis*" as a matter of course. Indeed, any type of voting change can potentially be discriminatory given the specific local context in which it is made. Moreover, even the smallest changes have the potential to impact a great number of people depending on the type of change at issue. Voting procedures are often very complex and present multiple opportunities for seemingly small changes to have broad impacts. The opportunities for discrimination at various levels of the electoral process were part of the reason that Section 5 was enacted in 1965.

[7] *To Examine the Impact and Effectiveness of the Voting Rights Act: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 109th Cong. (2005) (Statement of Armand Derfner, Attorney, Derfner, Altman & Wilborn).
[8] *Id.*

According to Black's Law Dictionary, a "*de minimis*" change is "trifling" or "minimal" and is "so insignificant that a court may overlook it in deciding an issue or case."[9] Enforcement of the Voting Rights Act has repeatedly demonstrated, however, that voting changes such as polling place or election date changes that appear benign can, in fact, diminish minority voting strength, in violation of the VRA.

For example, a polling place change may be unlawfully discriminatory if the geographic location of the new polling place makes it more difficult for minority voters to travel to or access the site. In addition, jurisdictions may also seek to move polling places to areas or communities that have historically been hostile to minority voters. The Department of Justice has blocked polling place changes such as these through the Section 5 preclearance process.

In Virginia, the Dinwiddie County Board of Supervisors in 1999 was forced to move a polling place for one precinct after the existing location burned down. Initially, the privately-owned Cut Bank Hunt Club, which had a large African-American membership, was designated the new polling place. Subsequently, 105 citizens petitioned the county to move the polling place to a Methodist church three miles away, which petitioners described as a "more central location," but the church removed itself from consideration as a possible polling place. Ultimately, the Board of Supervisors selected a Presbyterian church at the far eastern end of the precinct as the new polling place. Since the majority of African-American residents lived in the western portion of the precinct, the DOJ objected to the proposed move, finding that the selection of the Presbyterian church would have placed minority voters in a worse position.[10]

Similarly, in 1992, the DOJ objected to a proposed polling place change by the City of Wrightsville, Georgia from a county courthouse to a racially segregated American Legion hall

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[9] BLACK'S LAW DICTIONARY 443 (7th ed. 1999).
[10] Letter from Bill Lann Lee, Acting Assistant Attorney General, Civil Rights Div., U.S. Dep't of Justice, to Benjamin W. Emerson, Sands, Anderson, Marks & Miller (Section 5 objection letter) (Oct. 27, 1999).

that had a reputation of refusing membership to African Americans. Finding the American Legion to be "considered hostile and intimidating to potential black voters[,]" the DOJ objected to the change.[11]

Earlier, in 1987, the Bibb County, Georgia school board moved a bond measure from March 8, 1988, the Super Tuesday primary election in which many African-American voters were expected to turn out because of the candidacy of Rev. Jesse Jackson, to Tuesday, May 31, 1988, the day after the Memorial Day holiday. The change, not submitted to the DOJ until March 28, 1988, *after* the original election date, did not receive preclearance from the DOJ. The DOJ responded with a letter seeking more information about the change and specifically asking for a "detailed explanation of the reason for choosing May 31, 1988, as the bond election date."[12] The board attempted to hold the election before it responded to the DOJ, causing Justice Anthony Kennedy, acting as Circuit Justice, to grant a stay enjoining the election just before polls opened.[13]

These are just several examples of seemingly "*de minimis*" polling place and election date changes that, if implemented, would have made access to the polls more difficult for minority voters. These changes were properly blocked through the Section 5 preclearance process. The examples illustrate the multiple ways in which seemingly insignificant changes can have severe consequences on minority voting strength. Section 5 blocks these changes prior to their implementation, rather than forcing minority voters facing discriminatory practices to file Section 2 lawsuits after the changes have already occurred, which, in many circumstances, would not happen due to limited resources.

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[11] Letter from John R. Dunne, Assistant Attorney General, Dep't of Justice, Civil Rights Div., to Charlotte Beal (Section 5 objection letter) (Oct. 28, 1992).
[12] *Lucas v. Townsend*, 486 U.S. 1301, 1303 (1988).
[13] *Id.* at 1304.

4. *You testified that the trigger dates for Section 5 coverage do not need to be "updated." Explain why the current triggering formula should be maintained and how it meets the "congruent and proportional" test under City of Boerne v. Flores.*

I believe I responded to the latter part of this question in my response to Question 1 above. As I noted there, Section 5's coverage formula satisfies the "congruent and proportional" test under *Boerne* because it is narrowly tailored to remedy the particular constitutional violation at issue: voting discrimination in jurisdictions with a proven history of denying and abridging minority voting rights, augmented by new findings of discrimination within the covered jurisdictions. Additionally, as I stated in my written testimony, the existing "bail-in" and "bail-out" provisions of Section 5 operate in tandem with the coverage formula to ensure that the scope of Section 5 is appropriately contracted or expanded.

My view is that the trigger dates do not need to be "updated" because voting discrimination, unfortunately, persists in the covered jurisdictions, and the dates are only one aspect of a much larger legislative picture. In establishing the initial coverage formula, Congress considered not only presidential turnout data, but also which jurisdictions "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." The breadth of this initial inquiry illustrates that the VRA's enactors were concerned not only with voter registration and turnout, but more importantly with the ability of voters to meaningfully exercise their franchise. While voter registration and turnout has increased measurably in covered jurisdictions since the VRA was enacted, this does not support the argument that jurisdictions that discriminated against minority voters for over 100 years should be allowed to opt out in the face of ongoing discrimination. To the contrary, the years 1964, 1968 and 1972 remain relevant to recognizing the long history and ongoing nature of voting discrimination in these jurisdictions, and the current record is, unfortunately, replete with present-day examples in the covered jurisdictions. Using only a current date to determine which jurisdictions should be covered would ignore the history and evidence of voting discrimination in currently covered jurisdictions.

When Congress considered this issue in 1982, it determined that the formula did not need to be updated because, as now, many forms of discrimination persisted in covered jurisdictions. As noted in the responses of my colleague, Theodore Shaw, this assessment was vindicated when the Supreme Court rejected a constitutional challenge to Section 5 as recently as 1999. In *Lopez v. Monterey County,* the court held that Congress possessed the authority to identify and protect against persisting discrimination in covered jurisdictions. Congress undoubtedly possesses this same authority today.[14]

5. *Describe some of the best evidence of recent discrimination supporting reauthorization of Section 5.*

Over the past decade, Section 5 has effectively blocked proposed voting changes that would have otherwise retrogressed the voting strength of African Americans, Latinos, American Indians, and Asian Americans. As recently as this year, Section 5 has been used to block discriminatory practices including: (1) reapportionment plans that sought to eliminate viable majority-minority voting districts; (2) at-large voting plans instituted only after African-American candidates were successful in single-member districts; (3) targeting minority candidates through changes to district boundaries, requirements for office, and other practices; and (4) state and local jurisdictions' refusal to submit changes for Section 5 preclearance in defiance of the Voting Rights Act.

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[14] *Lopez v. Monterey County,* 525 U.S. 226 (1999).

The following recent examples, from covered jurisdictions illustrate that voting discrimination continues, usually in jurisdictions with histories of discrimination that extend much further into the past.

Florida. In 2002, the DOJ interposed an objection to the proposed Florida House of Representatives redistricting plan, stating that the plan would make it "impossible" for Hispanic voters in Collier County, Florida to elect candidates of choice. Because of the DOJ's Section 5 objection, the Hispanic majority-minority district in Collier County was preserved.

Georgia. Just this year, in anticipation of the upcoming 2006 county school board election, election officials in Macon County, Georgia, modified district boundaries such that the African American county school board chairman and his family were removed outside of the boundaries of majority black District 5 to majority white District 4. Based on significant racial bloc voting in Macon County, it would have been unlikely that Henry Cook, the board chair, would have been reelected from the majority white district. Although the change was significant, as it would deprive black voters of an incumbent black candidate who had received strong support in the past, the county refused to submit the change for Section 5 preclearance until ordered to do so by a federal court in June 2006. The court's order, which enjoined the change for failing to comply with Section 5, held that "preclearance of the change is required."[15]

Louisiana. In 2001, the state legislature attempted to eliminate a majority African-American state legislative district in Orleans Parish with the express intention of providing selective "proportional representation" to *white* voters, despite significant growth of the parish's African-American population over the previous decade. Notwithstanding the clear retrogressive effect of the proposed change, the state legislature sought judicial preclearance for the plan. Under Attorney General John Ashcroft, the DOJ opposed the plan believing that the state could

[15] *Jenkins v. Ray*, Civ. No. 4:06-CV-43 (CDL) (M.D.Ga.) (June 5, 2006).

not meet its burden of showing the plan was adopted without retrogressive purpose or effect. The state ultimately abandoned its selective proportional representation theory after evidence emerged before trial that significant racially polarized voting existed in virtually all electoral contests, that the legislature specifically ignored its own redistricting guidelines, and that the plan, if adopted, would have diminished minority voting strength. The case was settled on the eve of trial, restoring the Orleans opportunity district.

Mississippi. On two occasions in the last two years, two minority office-holders in Mississippi were targeted by discriminatory actions. Most recently, in 2005, the City of McComb attempted to remove a black member of the city's Board of Selectmen by changing the requirements for holding that office. A federal court enjoined the state from removing him from office, because the city failed to seek preclearance even though it clearly altered an existing practice. A year earlier, in 2004, an African-American incumbent Supreme Court justice in Mississippi was opposed by a white candidate who employed a race-based appeal to white voters that was virtually identical to one that made its way into a Supreme Court opinion nearly 20 years ago. The white opponent, Samac Richardson, used the slogan "One of Us" on his flyers, the same phrase previously found to constitute a racial appeal by a federal district court in *Jordan v. Winter*.[16]

South Carolina. In 2004, the DOJ objected to the State's proposed change to the Charleston County school board's method of election. The State proposed moving from a non-partisan to a partisan system. The DOJ concluded that the change would "make it extremely difficult for minority-preferred candidates to win" seats on the school board, compared to the existing system which provided minority-preferred candidates a chance of success. In its objection to the plan, the DOJ noted the vast majority of minority elected officials, including

[16] 604 F. Supp. 807 (N.D. Miss. 1984).

every African American legislator from Charleston County, opposed the change. The DOJ also noted that there were non-retrogressive alternatives available that the state legislature failed to consider.

In 2003, the DOJ interposed an objection to a proposed municipal annexation in the Town of North, South Carolina, because the town had "been racially selective in its response to both formal and informal annexation requests."[17] The DOJ found that white petitioners "have no difficulty in annexing their property to the town" while the requests of black residents were largely ignored by town officials. The DOJ concluded that race was "an overriding factor in how the town responds to annexation requests."[18]

South Dakota. In 2001, the South Dakota state legislature adopted a redistricting plan that diluted American Indian voting power by over-concentrating, or "packing," American Indian voters into one unusually large new district. Under the plan, the boundaries of District 27, which included Shannon and Todd counties, were altered so that American Indians comprised 90 percent of the district, which would become one of the most overpopulated districts in the state. Without the unnecessary packing, American Indians could have been majorities in both District 27 and the adjacent District 26. The State refused to submit the redistricting plan for preclearance until a federal district court ordered it to do so. Although the DOJ found that the packing of American Indian voters into one district was not retrogressive and precleared the change, the federal judge considering the related Section 2 claim held otherwise. The court invalidated the redistricting plan and found "substantial evidence that South Dakota officially excluded Indians from voting and holding office."

[17] Letter from R. Alexander Acosta, Assistant Attorney General, Civil Rights Div., U.S. Dep't of Justice, to H. Bruce Buckheister, Mayor, North, SC (Sept. 16, 2003).
[18] *Id.*

Texas. In 2001 and 2002, the DOJ blocked two separate efforts by a city government and a consolidated three-county school district to institute at-large voting schemes that would have retrogressed minority voting strength in the State of Texas.

In 2002, officials in a majority-minority jurisdiction in Texas were blocked from implementing a new election system that would have harmed black and Latino voters' ability to elect candidates of their choice. In Freeport, Texas, which was 47.3 percent Latino and 12.3 percent African American at the time, officials proposed reverting from its single-member city council district system to an at-large system, which it had previously abandoned in 1992 as part of a voting rights settlement agreement. Under the single-member system, the DOJ found that "minority voters . . . demonstrated the ability to elect candidates of choice in at least two districts," whereas the at-large system would "have a retrogressive effect on the ability of minority voters to elect a candidate of their choice" given the extremely racially polarized in the city. The DOJ objected to the change during the Section 5 preclearance process.

Similarly, in 2001, the Haskell Consolidated School District in Haskell, Knox, and Throckmorton Counties, abandoned its plan to revert from single-member districts to at-large elections after the DOJ expressed concerns regarding the proposed change.

Of course, the Supreme Court's very recent ruling in *LULAC v. Perry*, is a timely statewide reminder that one of the most populous states, with one of the highest minority populations, is capable of violating the rights of very large numbers of minority citizens in the context of redistricting.

Virginia. On two occasions in the past five years, officials in Northampton County, Virginia have proposed redistricting plans that would have diminished African-American voting strength. In 2001, Northampton County, Virginia proposed collapsing its six existing Board of

Supervisors voting districts into three larger districts, eliminating three majority-minority districts in which African American voters regularly elected candidates of their choice and leaving only one majority-minority district intact. The DOJ objected to the plan finding evidence of retrogressive effect. In 2003, the county proposed a new six-district plan, which the DOJ also opposed for having the same retrogressive effects as the earlier three-district plan. Although the DOJ identified a non-retrogressive, alternative six-district plan, the County has not implemented the non-discriminatory plan.

Response of Debo P. Adegbile, Associate Director of Litigation of the NAACP Legal Defense and Educational Fund, Inc., to Questions from Senator Tom Coburn

1. *Some of the cases you cite as evidence of discrimination are actually Section 2 violations (US v. Charleston County and Moultrie v County Council). As you know Section 2 is permanent. Are the other cases you cite on page 8 of your testimony Section 2 cases or Section 5?*

Most of the cases cited on page 8 of my testimony are Section 2 cases that were brought after a voting change had been precleared under Section 5, but subsequently found to have a discriminatory effect on minority voting strength. Consequently, voters were required to challenge these VRA violations under Section 2. Indeed, Congress long ago recognized that Sections 2 and 5 are complimentary tools for combating the same evil – discrimination in voting. From a policy standpoint, it is my view that discrimination is discrimination, and evidence relevant to whether Congress should renew Section 5 can be found in reported evidence of discrimination (statutory or constitutional), unreported cases, descriptions of voting behavior by officials, administrative findings in the preclearance context, polarized voting patterns, racial campaign appeals, and actions taken in response to DOJ requests for more information, among other things. Moreover, the fact that so many Section 2 cases have been brought successfully in covered jurisdictions further attests to the continuing need for the Section 5 preclearance requirement in that actual harms and the threat of future harms exist. Finally, I believe that all of the Justice Department's Section 5 objection letters, and a detailed empirical analysis examining the provision's deterrence effects prepared by Professors Luis Fraga and Maria Lizet Ocampo, about which I testified, are part of the Congressional record in the event that you find a more narrow focus exclusively on Section 5 illuminating.

2. *In your testimony you state that it is not a good idea to expand the DOJ pre-clearance requirement to the whole nation. The proposal I have heard is to update the trigger to cover all states that need to be covered based on current data.*

    a. *For Example: over the past 15 years, Alabama has not had a single court find it guilty of violating the Constitution or violating the very broad protections afforded by Section 2 of the Voting Rights Act. The same cannot be said of Massachusetts; Chicago, Illinois; Wisconsin; Hawaii; Ohio; Hempstead, New York; Los Angeles County, California; Arkansas; Colorado; Dade County, Florida; Maryland; Missouri; Montana; or Nebraska – none of which are covered under the Voting Rights Act.*
    b. *Given that these non-covered jurisdictions have an equally bad, or worse, record, would you support extending the Voting Rights Act's temporary provisions to them as well?*

I am not in favor of updating the coverage formula nationwide because such a change would both weaken Section 5's administrability from a practical standpoint and make the provision vulnerable to constitutional challenge from a legal standpoint. Accordingly, those who support nationwide extension either lack a full understanding of the governing law and operation of Section 5 or understand both very well and seek to end Section 5's application as a legal and practical matter.

It also bears mention that several of the examples of jurisdictions identified in 2a above are covered by Section 203 of the VRA: Massachusetts has six covered cities; Cook County (Chicago), Illinois is covered; Hawaii is covered; the Town of Hempstead (Nassau County), New York is covered; Los Angeles is covered; ten counties in Colorado are covered; Dade County, Florida is covered; Montgomery County, Maryland is covered; two counties in Montana are covered; and two counties in Nebraska are covered. This 203 coverage, taken together with the point the question raises regarding the violations that occurred in those jurisdictions, highlight that voting discrimination often is present in Section 203 jurisdictions because of their large language minority populations. Furthermore, several of these jurisdictions (Hempstead, Los

Angeles, and Dade County) already benefit from 4(f)(4) coverage in other parts of the state; and jurisdictions within two, Arkansas, and Illinois have had court ordered preclearance under the bail-in or 3(c) provision of the VRA. This further illustrates one of the points that I made during my oral testimony that the coverage formula is not static, as some would suggest.

I do not embrace the premise, however, that because certain non-covered jurisdictions have been found to violate a constitutional or statutory prohibition in the past 15 years they have "an equally bad or worse" record of discrimination as covered jurisdictions. While most would agree that every voting violation is serious, there is a significant difference between jurisdictions with a recent voting rights violation and those with a long history of persistent and adaptive discrimination that can be traced to the present day. The record before Congress contains ample documentation of widespread and sustained voting discrimination in covered jurisdictions, including state by state reports focused on violations that have occurred since 1982 alone.

Again, Sections 3(c) and 4(a) of the Act, also known as the "bail-in" and "bail-out" mechanisms, make the revisions of the coverage formula that you identify unnecessary, and in my view, legally unwise in light of the record that Congress has assembled. These provisions work to ensure that coverage under Section 5 is appropriately expanded or contracted. Under Section 4(a), currently covered jurisdictions that can establish a clean record in the electoral process for a sustained period of time can seek to end Section 5 coverage. Likewise, under Section 3(c) a court can order a jurisdiction that is not currently covered to submit its voting changes for preclearance in the future if circumstances warrant this oversight. Together these features of the VRA ensure that Section 5 coverage remains appropriately tied to jurisdictions with a serious and continuing record of discriminating against minority voters.

3. *Can you give examples, from the past ten years, of states committing unconstitutional voting discrimination?*

Over the past decade, Section 5 has effectively blocked proposed voting changes that had the purpose or effect of diminishing the voting power of African Americans, Latinos, American Indians, and Asian Americans. As recently as this year, Section 5 has been used to block discriminatory practices including: (1) reapportionment plans that would eliminate majority-minority voting districts; (2) at-large voting plans instituted after African-American candidates were successful, or on the brink of success, in single-member districts; (3) targeting minority candidates through changes to district boundaries, requirements for office, and other practices; and (4) state and local jurisdictions' refusal to submit changes for Section 5 preclearance in defiance of the Act's requirements.

Significantly, largely because of the remedial and prophylactic protections of the VRA, there has been a decline in the number of judicial findings of constitutional voting violations. It bears emphasis that the decrease is, in part, explained by the ability of a strongly enforced, and widely recognized statutory regime to stop voting discrimination -- through litigation or administrative avenues -- prior to a judicial finding of a constitutional violation. Under the doctrine of constitutional avoidance, courts adjudicate the statutory issues first, and, as the term suggests, avoid reaching constitutional questions. Nevertheless, within the last month, two of the covered states that have figured very prominently in the renewal debates, Georgia and Texas, have had rulings of constitutional violations, in both state and federal court, that "bear the mark of intentional discrimination" in the estimation of the Supreme Court.[1]

[1] *League of United Latin American Citizens v. Perry,* 126 S. Ct. 2594, 2622 (2006) (finding the Texas legislature's changes to a majority-minority Latino voting district violated §2 of the VRA and signaled a potential constitutional violation)*;*); *Common Cause/Georgia v. Billups,* No. 4:05-CV-0201-HLM (N.D. Ga., 2006) (order granting preliminary injunction on the grounds that "the 2006 Photo ID Act[] . . . unduly burdens the [fundamental] right . . . to vote . . . ."); *Lake v. Perdue,* No. 2006CV119207 (Ga. Sup. Ct. 2006) (order granting temporary restraining order

In addition, a surprisingly significant number of the Justice Department's objection letters point to evidence of intentional discrimination; and the examples that I set out in response to Senator Leahy's written question 5 also bear on your inquiry.

4. *In your testimony, you state that English-only voting materials bar non-English speaking citizens from voting. However, 42 U.S.C. §1973aa-6, Section 207 of the VRA, allows citizens who have an "inability to read or write" to be "given assistance by a person of the voter's choice" excluding the voter's employer or an agent of the voter's union. Senator Feinstein stated at the last hearing that she utilized this law to help her mother vote. This is the law that protects the right to vote of all naturalized Europeans (Russians, Germans, Irish, etc.) and all voters who speak the languages covered by Section 203 but do not qualify for language assistance in their county due to the low number of people with the same language needs, as determined by the Census. Are you aware of this law?*

As an initial matter, it appears that the question mistakenly refers to a section of the VRA other than that which was intended. Section 207 of the Act requires that the Census Bureau compile registration and turnout statistics. Presumably, the query intended to refer to Section 208 of the Act, which provides for voter assistance.

Moreover, the question also is based upon a potentially misleading premise that Section 208 "protects the right to vote of all naturalized Europeans (Russians, Germans, Irish, etc.), and all voters who speak the languages covered by Section 203 but do not qualify for language assistance in their county due to the low number of people with the same language needs…." The legislative history of Section 208, which was added to the VRA in 1982, makes it clear that the provision does not address language barriers to voting. Instead, Congress added Section 208 to effectuate its legislative intent in banning literacy tests through Section 201 of the Act,[2] after

enjoining enforcement of 2006 Photo ID Act on grounds that the "statute unduly burdens the fundamental right to vote"); These Georgia cases were in response to a new photo identification measure after a ruling just last year that Georgia's law requiring voters to present photo identification represents a modern "poll tax" and thus violates the 24th and 14th Amendments. *See Common Cause/Georgia v. Billups,* 406 F.Supp.2d 1326, 1370 (N.D. Ga., 2005)**.**

[2] 42 U.S.C. § 1973aa.

determining that existing law did not adequately protect voters who needed assistance.[3]

Specifically, Congress made the following findings in enacting Section 208:

> Certain discrete groups of citizens are unable to exercise their rights to vote without obtaining assistance in voting including aid within the voting booth. <u>These groups include the blind, the disabled, and those who either do not have a written language or who are unable to read or write sufficiently well to understand the election material and the ballot</u>. Because of their need for assistance, members of these groups are more susceptible than the ordinary voter to having their vote unduly influenced or manipulated. As a result, members of such groups run the risk that they will be discriminated against at the polls and their right to vote in state and federal elections will not be protected.[4]

The plain language of Section 208 confirms that it is not targeted for language assistance. Instead, it provides, "Any voter who requires assistance to vote <u>by reason of blindness, disability, or inability to read or write</u> may be given assistance by a person of the voter's choice, other than the voter's employer or agent of that employer or officer or agent of the voter's union."[5]

Section 208 compliments, but does not replace, the need for the language assistance provisions in Section 203 of the VRA. Section 203 addresses a different sort of harm. It enhances the policy of "removing obstructions at the polls for illiterate citizens" and is "specifically directed to the problems of 'language minority groups.'"[6] Congress found that the high illiteracy rates experienced by language minorities were "not the result of choice or mere happenstance," but instead resulted from "the failure of state and local officials to afford equal educational opportunities."[7] The obstacle that illiteracy posed for language minority citizens

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[3] *See* S. REP. NO. 97-417 at 63-64, *reprinted in* 1982 U.S.C.C.A.N. 242 (noting that the amendment "does not create a new right … to receive assistance; rather it implements an existing right by prescribing minimal requirements as to the manner in which voters may choose to receive assistance").

[4] S. REP. NO. 97-417 at 62, *reprinted in* 1982 U.S.C.C.A.N. 240 (emphasis added).

[5] 42 U.S.C. § 1973aa-6 (emphasis added).

[6] S. REP. NO. 94-295 at 37, *reprinted in* 1975 U.S.C.C.A.N. 804.

[7] S. REP. NO. 94-295 at 28, *reprinted in* 1975 U.S.C.C.A.N. 794; *see also* 42 U.S.C. § 1973aa-1a(a) ("The Congress finds that, through the use of various practices and procedures, citizens of language minorities have been effectively excluded from participation in the electoral process. Among other factors, the denial of the right to vote of such minority citizens is ordinarily directly related to the unequal educational opportunities afforded them,

attempting to vote has been exacerbated even further by the lack of adequate bilingual language assistance at the polls. The Senate has previously found that state and local jurisdictions had been "disturbingly unresponsive" to illiteracy among language minorities:

> Some, such as Connecticut, do provide bilingual officials or materials in areas with 5 percent or more Spanish-speaking citizens; others, with a much higher concentration of language minorities, provide no assistance whatsoever. Seventeen states do allow for the possibility of bilingual assistance "through the aid of a judge or friend," <u>but ... this assistance is often inadequate.</u> Another seventeen states lack any provision for voter assistance whatsoever to language minorities, and of these seventeen, eleven come under Title III, which is based on a concentration of 5 percent or more of language minority citizens.[8]

Section 203 adopts a practical approach to the illiteracy problem that is unique from Section 208. "[T]he purpose of suspending English-only and requiring bilingual elections is not to correct the deficiencies of prior educational inequality. It is to permit persons disabled by such disparities to vote now."[9] There is no question that language minority voters benefit from the protections of Section 208. At the same time, Section 208 is an inadequate substitute for the unique manner in which Section 203 provides language minority citizens with equal access to the elections process.

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resulting in high illiteracy and low voting participation. The Congress declares that, in order to enforce the guarantees of the fourteenth and fifteenth amendments to the United States Constitution, it is necessary to eliminate such discrimination by prohibiting these practices, and by prescribing other remedial devices.").

[8] S. REP. NO. 94-295 at 39, *reprinted in* 1975 U.S.C.C.A.N. 805-06 (emphasis added).

[9] S. REP. NO. 94-295 at 34, *reprinted in* 1975 U.S.C.C.A.N. 800; *see also id.* at 34, 1975 U.S.C.C.A.N. 801 (observing that Title II of the 1975 amendments "is a temporary measure to allow such citizens to register and vote immediately; it does not require language minorities to abide some unknown, distant time when local education agencies may have provided sufficient instruction to enable them to participate meaningfully in an English-only election.").

a. *Limited English Proficient people who live in jurisdictions not covered by the Section 203 coverage formula (the 5% or 10,000 person threshold) are covered by the law cited above. Are you aware of any actual problems that have occurred because of this?*

Yes. Many language minority voters have no family members sufficiently fluent in English to provide them with voting assistance. According to the 2000 Census, 4.4 million households encompassing 11.9 million people are "linguistically isolated" from the rest of the population, which means that all members of the household fourteen years and older are limited-English proficient. Among the language groups covered by Section 203, the following are linguistically isolated: 29.2 percent of the 2.8 million Asian American and Pacific Island language-speaking households; 23.9 percent of the 10.7 million Spanish-speaking households; and 5.0 percent of all Alaskan Native and American Indian persons.[10]

Moreover, a comprehensive nationwide study of 810 jurisdictions in the 31 states covered by Section 203 shows that language minority voters will be disenfranchised without the language assistance provisions. The election officials admitted in the study that they do not permit voter assistance. Only 10.3 percent of responding election officials in 31 states covered by Section 203 of the Voting Rights Act reported voter assistance practices that are at least as protective as Section 208; of this percentage, just 1.9 percent correctly stated the federal standard, with an additional 8.4 percent identifying voter assistance practices more protective than Section 208.[11] Over half of all responding jurisdictions would not allow the sort of voter assistance that Senator Feinstein described having provided to her mother during the Section 203 hearing because they do not permit voters to receive assistance from a minor (under the age of eighteen) child, even if

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[10] BUREAU OF THE CENSUS, ECONOMICS & STATISTICS ADMIN., U.S. DEP'T OF COMMERCE, LANGUAGE USE AND ENGLISH-SPEAKING ABILITY: 2000, at p. 10 (OCT. 2003); 2000 Census, Summary Tape File 3 (STF-3), Tables QT-P17 and P20.

[11] DR. JAMES THOMAS TUCKER & RODOLFO ESPINO ET AL., MINORITY LANGUAGE ASSISTANCE PRACTICES IN PUBLIC ELECTIONS 80-82 (Mar. 2006).

that child is fully capable of providing effective assistance (whether language or otherwise) to their parent.[12] Similarly, only 11 percent of responding jurisdictions permit voters to receive assistance from a campaign worker, even if that campaign worker is the voter's assister of choice.[13] Perhaps most relevant for language minority voters, approximately 30 percent of responding jurisdictions indicated that bilingual poll workers are not permitted to provide assistance to voters in the voting booth and about one-half of responding jurisdictions do not allow a voter to receive assistance in the voting booth from a translator.[14]

The candid admissions by election officials that they do not permit language assistance to LEP voting age citizens is confirmed by the legislative history of Section 203. Prior to the enactment of Section 203, language minority voters were routinely denied assistance if they were illiterate in English. For example, in Texas, election officials construed state voter assistance laws narrowly to exclude all forms of language assistance, resulting in the disenfranchisement of over 300,000 illiterate Mexican American citizens.[15] Similarly, vote denial occurs when only Section 208 is available to language minority voters. In 2002, the Department of Justice sued Osceola County for discriminating against Hispanic voters through hostile treatment at the polls, failure to recruit bilingual poll workers, and prohibiting Hispanic voters from bringing bring assistors of their choice into the polling places.[16] On July 22, 2002, Osceola County entered into a consent decree to remedy these violations. Just four days later, Osceola County became

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[12] Id. at 81.
[13] Id.
[14] Id. at 82.
[15] *Garza v. Smith*, 320 F. Supp. 121 (W.D. Tex. 1970); 94 Cong. Rec. 800, 875 (1975).
[16] *United States v. Osceola County*, Civil Action No. 6:02-CV-738-ORL-22JGG (M.D. Fla. 2002).

covered for Spanish under Section 203 following the new Census determinations.[17] The problems have not reoccurred since Osceola County became covered by Section 203.

In 2003, the Department of Justice successfully sued Berks County, Pennsylvania for denying assistance to language minority voters.[20] The federal court noted the deleterious effect the denial of assistance has on language minorities: "When Defendants deny Spanish-speaking voters in Reading the right to bring their assistor of choice into the voting booth, voters feel uncomfortable with the process, do not understand the ballot, do not know how to operate the voting machine, and cannot cast a meaningful ballot, in violation of Section 208."[21]

Empirical data shows that voter assistance under Section 208 is an insufficient substitute for Section 203. Acting Assistant Attorney General Bradley Schlozman testified before the House Judiciary Committee on the Constitution that as a result of Section 203 litigation brought by the Civil Rights Division of the Department of Justice against Yakima County, Washington, "Hispanic voter registration is up over 24 percent since the Division's Section 203 lawsuit. In San Diego County, California, Spanish and Filipino registration rates are up over 21 percent, and Vietnamese registration is up over 37 percent since the Division's enforcement action."[22] Mr. Schlozman also testified, "A Section 203 lawsuit in Passaic, New Jersey, was so successful for Hispanic voters that a Section 2 challenge to the at-large election system was subsequently withdrawn. A Memorandum of Agreement in Harris County, Texas helped double Vietnamese turnout, and the first Vietnamese candidate in history was elected to the Texas legislature –

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[17] *See* Voting Rights Act Amendments of 1992, Determinations Under Section 203, 67 Fed. Reg. 48,871 (July 26, 2002) (to be codified at 28 C.F.R. pt. 55).

[18] *United States v. Osceola County*, Civil Action No. 6:02-CV-738-ORL-22JGG (M.D. Fla. 2002).

[19] *See* Voting Rights Act Amendments of 1992, Determinations Under Section 203, 67 Fed. Reg. 48,871 (July 26, 2002) (to be codified at 28 C.F.R. pt. 55).

[20] *United States v. Berks County*, 277 F. Supp.2d 570 (E.D. Pa. 2003).

[21] 277 F. Supp.2d at 580.

[22] *Oversight Hearing on the Voting Rights Act: Section 203—Bilingual Election Requirements (Part I) Before the Subcommittee on the Constitution of H. Comm. on the Judiciary,* 109th Cong. (2005) (statement of Bradley J. Schlozman, Acting Assistant Attorney General).

defeating the incumbent chair of the Appropriations Committee by 16 votes out of over 40,000 cast."[23] If Section 208 sufficiently addressed the problem, then you simply would not see participation by language minority voters skyrocket after successful Section 203 litigation is brought.

b. *Why is 42 U.S.C. §1973aa-6 sufficient to protect some language groups, but not others?*

For the reasons I have explained above, although Section 208 complements the language assistance provisions, it does not specifically "protect" any "language groups" on the basis of their limited English proficiency. Additional language groups were not included under Section 203 because there has been no evidence introduced showing that they experienced similar difficulties in voting arising from educational disparities and voting discrimination.[24]

5. *Do you think it is a good idea/ good policy for the government to take race into account when creating voting districts? Please explain.*

This country has a longstanding tradition of taking race into account when drawing voting districts (*see Gomillion v. Lightfoot*).[25] Without doubt, the NAACP LDF, Inc., an institution that is itself dedicated to eradicating racial discrimination in the United States, is committed to the guarantee of the 15th Amendment -- that all citizens should be able to exercise their fundamental right to vote, which the Supreme Court has called "preservative of all other rights," without regard to race. However, for most of our nation's existence, including 95 years preceding the enactment of the Voting Rights Act, the words of the Fifteenth Amendment were essentially a dead letter in many parts of the United States. The Voting Right Act, as a race-

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[23] Id.
[24] *See* S. REP. NO. 94-295 at 31, *reprinted in* 1975 U.S.C.C.A.N. 797.
[25] 364 U.S. 339 (1960).

conscious remedial and prophylactic measure represents an appropriate exercise of expressly granted constitutional authority to protect the right to vote for all citizens.

Several factors affect the drawing voting districts, including geographic contiguity, communities of interest, incumbency protections, partisan and one person one vote considerations, and, at times race. Because of the well-documented patterns of residential segregation in this country, which predate the VRA and are rooted in our history of racial discrimination, it is not surprising that race is considered as one of these factors.[26] Additionally, the national preference for single-member districts means that geography and demographic information are inherently a part of the districting process. When modern mapmakers sit down at the computer to draw districts, they will necessarily have before them information about the racial characteristics of the voting districts they set out to draw. This information can be, and has frequently been, used to disadvantage minority groups, as the Supreme Court recognized in a decision just last month.[27]

In sum, the question we now face is not whether race should be take into account, but whether the VRA's protections are necessary to ensure that race is not taken into account *only* to disadvantage minorities, but also to ensure that they can participate in the electoral process on equal terms.

6. *Should race be a deciding factor in any policy decision we make, or should Congress write laws that treat all Americans equally regardless of the color of their skin? Please explain.*

I believe that my answer to question 5, above, provides the basis for my answer to this question as well. Just as in the voting arena, in too many other areas our nation's history of

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[26] *See* Drew Day's written response to Steward Taylor's article "More Racial Gerrymandering," submitted in response to Senator Hatch's inquiry.
[27] *See League of United Latin American Citizens v. Perry,* 126 S. Ct. 2594, 2622 (2006)

racial discrimination has led to race being taken into account very often to disadvantage minority groups and citizens.[28] Thus, policy decisions like that which Congress is faced with when weighing renewal of the VRA often must account for this reality. At this stage in our societal efforts to heal the wounds of a long period of entrenched racial discrimination, the choice is very often not between "racial considerations" and "no-racial considerations," but rather whether race can be taken into account only to disadvantage and not to protect.

It is also important to note the Supreme Court has identified some limitations on the consideration of race in redistricting that remain consistent with vigorous VRA enforcement. These limitations are discussed in the cases *Shaw v. Reno*[29] and *Miller v. Johnson*[30], among others, and can be compared and reconciled with the Court's recent decision in *LULAC v. Perry.*[31]

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[28] For a more detailed history of the use of race under the law to disadvantage African Americans, *see* A. LEON HIGGINBOTHAM, JR.. IN THE MATTER OF COLOR: RACE & THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD (1978); A. LEON HIGGINBOTHAM, JR., SHADES OF FREEDOM: RACIAL POLITICS AND PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS (1996).
[29] 509 U.S. 630 (1993).
[30] 531 U.S. 1090 (2001).
[31] *League of United Latin American Citizens v. Perry,* 126 S. Ct. 2594, 2622 (2006).

Response of Debo P. Adegbile, Associate Director of Litigation, NAACP Legal Defense and Educational Fund, Inc. to Questions from Senator 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.*

The question implies that a comparison between covered and non-covered jurisdictions controls the Section 5 renewal inquiry. This is a view that I do not share, however, for reasons that I have set out more fully in my response to Senator Kennedy's first written question.

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?*

No, I would not support this change, because the record currently before Congress does not provide any support for dropping the earlier election years from the coverage formula for reasons that I set out more fully in response to Senator Kennedy's questions 1, 4-6 .

    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 believe that the responses referred to in response to the question above provide my answer to this query.

3. *Given this statement, would you support removing – at a minimum – the year 1964 from the coverage formula? Why or why not?*

   Please refer to my previous responses.

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?*

I have not personally performed the calculations, so I do not know the precise ratio of objections issued to submissions made. Assuming, arguendo, that the above figures are accurate, I do not believe that the low ratio of formal objections supports the conclusion that Section 5 has outlived its usefulness. Obviously, a high percentage of formal objections to submitted electoral changes by the DOJ would necessarily be problematic, as it would indicate that Section 5 has largely been an ineffective tool to battle voting discrimination. A low percentage of objections, however, may understate the role that Section 5 plays in barring the implementation of discriminatory voting changes that would otherwise adversely impact minority communities. A single discriminatory district boundary change, for example, may only yield one DOJ objection, but would, if not blocked during preclearance, impact the rights of thousands of minority citizens in the affected community or state. This danger is particularly acute when a voting change involves an entire state or large urban area.[1] Thus, the relevant inquiry is not the raw percentage of objections, but the potential impact that those changes, and those that have been deterred because of Section 5, would otherwise have on minority voters. This inquiry should include, at minimum, consideration of which group or groups are affected and the number of citizens for

[1] *League of United Latin American Citizens, et al. v. Perry,* 126 S. Ct. 2594, 2622 (2006) (finding the Texas legislature's systematic carving of 100,000 Latino voters out of a majority-minority Latino voting district violated §2 of the VRA and bore " the mark of intentional discrimination").

whom the right to vote has been restricted or diluted. As a critical remedial and prophylactic tool for blocking changes affecting large numbers of individuals *before* discrimination occurs, Section 5 remains invaluable in light of the existing Congressional record.

Additionally, formal objections are not the sole indicator of the impact of Section 5 on preventing discriminatory voting changes. The deterrent effects of Section 5 serve to prevent covered jurisdictions from proposing changes that would be blocked if submitted for preclearance. Many proposed changes are dropped by covered jurisdictions after the DOJ issues an informal More Information Request letter, but before a formal objection is issued. Thus, the actual percentage of voting changes blocked by Section 5 is appropriately assessed by looking at a wide range of factors that are not reflected in objection statistics alone.

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?*

The trend in Section 5 renewals has been to increase, not decrease, the term length of the legislation. After the passage of the VRA in 1965, subsequent renewals were five years apart in 1970 and 1975, seven years apart in 1982, and then 25 years from 1982 to 2007. The increasing length of the terms was due to Congress's recognition that voting discrimination was found to be more persistent and difficult to eradicate than originally thought. In the aggregate, change is gradual and not unidirectional.[2] In other words, as has been true throughout American history, and since the most recent reauthorization in 1982, we have experienced some progress accompanied by renewed or adaptive discrimination, as the record reflects.

[2] *See, e.g* Alexander Keyssar , *Written Testimony Submitted to the Senate Committee on the Judiciary,* (June 12, 2006) (concluding that while "[o]ver the long run, the history of the right to vote in the United States is a history of increasing inclusion, . . . frequently, in one state or another, the change has been in the opposite direction" and recommending that the uneven history of voting rights improvements should be taken into account in reauthorizing the Voting Rights Act).

Another 25-year renewal, which is clearly a policy judgment informed by the record since 1965, may be warranted for one additional important reason. The highest number of voting changes made in covered jurisdictions and corresponding objection activity follows the decennial legislative redistricting cycles that occurs upon the release of new Census figures at the start of each decade. A 25-year reauthorization period would extend Section 5 protections for minority voters through three future redistricting cycles in 2010, 2020, and 2030. This would be an adequate and appropriate period of time in which to measure progress. A 10-year term, which would extend through only the next redistricting cycle, would be too short to measure concrete change. A 50-year term, in contrast, would be too long, as periodic review of the legislation by Congress is important for both legal and practical reasons.

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 do not believe that the ability to elect clarification of the retrogressive effects standard as embodied in S 2703 and H.R. 9 poses any serious constitutional question. Among other reasons, I hold this view because the bill merely restores a long accepted construction of the statute, and clarifies Congressional intent consistent with a rule that the Supreme Court applied with little difficulty just this term in the Texas redistricting cases – albeit in the Section 2 context.

As I stated in my Senate testimony, the proposed bill restores the original ability to elect test for measuring minority voting strength. In *Georgia v. Ashcroft*, the Supreme Court abandoned this straightforward non-retrogression test in favor of a confusing, amorphous, and difficult to administer "influence" standard.[3] This new standard permits electoral changes where the DOJ can identify that proposed plans trade "ability to elect" districts for those in which minority voters wield "influence."[4] Although there may be situations where minority "influence" is measurable and important, in reality discerning such instances seems not only unrealistic, but administratively unworkable. For instance, in the absence of any clear metric for "influence," which was not provided by the Court in *Georgia v. Ashcroft*, it would be difficult to evaluate the tradeoffs that this new standard injects into the Section 5 analysis. Additionally, an influence trade-off theory could be used to cloak purposefully retrogressive or discriminatory acts from meaningful Section 5 review. The "ability to elect" standard restored by the current bill withstood the test of time prior to the *Georgia v. Ashcroft* decision. It has also proven workable both judicially and administratively as a means of protecting minority communities' ability to elect candidates of their choice.

Determinations about whether a district provides the minority community with the ability to elect have been, and must continue to be made on a case-by-case basis. Indeed, prior to *Georgia v. Ashcroft*, the Department of Justice utilized case-by-case analysis to determine whether a voting change impacted the minority community's ability to elect. Specifically, DOJ performed an intensely jurisdiction-specific review of election results, demographic data, maps and other information in order to compare the minority's community ability to elect under benchmark and proposed plans. Other information considered by DOJ, outlined in the Procedures for the Administration of Section 5 of the Voting Rights Act," 28 C.F.R., Part 51, include the extent to which a reasonable and legitimate justification for the change exists; the extent to which the jurisdiction followed objective guidelines and fair and conventional

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[3] *Georgia v. Ashcroft*, 539 U.S. 461 (2003).
[4] *Id*. at 482 (defining an influence district as one "where 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.").

procedures in adopting the change; the extent to which the jurisdiction afforded members of racial and language minority groups an opportunity to participate in the decision to make the change; and the extent to which the jurisdiction took the concerns of members of racial and language minority groups into account in making the change. This analysis provides a reasonable test to determine whether districts provide minority voters the ability to elect and it is these districts that should be protected under the plan.