Written Responses to Members of the United States Senate

Committee on the Judiciary

Regarding

"The Continuing Need for Section 5 Pre-Clearance"

Following the Hearing 16 May 2006

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The answers I can give to this series of questions are largely interrelated. I will try to avoid repetition, while answering fully. Some aspects of each answer are necessarily related to the answers given to previous questions. When I have not addressed a question it is because I do not have the expertise or the experience to deal with the topic. I am reluctant to testify about matters that I have not studied deeply.

From Senator 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 inability of minority citizens to participate equally in the political process and to be equally able to elect representatives of their choice is related to racially or ethically polarized voting (RPV). However, RPV is a problem only when it interacts with electoral arrangements in such a fashion as to prevent minority citizens from having a reasonable opportunity to elect representatives of their choice, regardless of whether their choice is a member of their racial or ethnic group. If minority citizens do not have such reasonable opportunity, we say there is vote dilution. They are not denied the vote, but their vote doesn't count because it is diluted. At-large voting, numbered place or residency requirements, majority vote rules, or apportionments that "crack" minority populations are examples of the kinds of arrangements that can produce minority vote dilution where there is RPV.

Since RPV is widespread throughout the United States, we need to look for the incidence of the use of voting arrangements that interact with RPV to produce vote dilution. We should consider whether the current Section 5 coverage is useful to identify the

places where the use of such devices are most likely to be proposed. Concrete comparative statistics are not possible for two reasons. First, the areas covered by Section 5 have been significantly deterred from considering such devices because they know that such changes would not be pre-cleared. There are other instances where such changes were proposed and were not pre-cleared. This makes the covered jurisdiction much "cleaner" than they would have been without Section 5 coverage. Second, each jurisdiction is distinct and must be examined in light of the totality of the circumstances "on the ground." This is the way the courts and the Justice Department approach both Section 2 and Section 5 cases. The examination of specific cases cannot be dismissed as mere anecdotes. Social scientists sometimes joke that anecdote is the singular of data. Taken together, the findings of vote dilution in Section 5 covered jurisdictions by courts and the Justice Department provide a compelling basis for reauthorizing Section 5 in those jurisdictions.

I believe that the covered jurisdictions in the South are systematically different from the uncovered jurisdictions in the North and Midwest because of their different political histories. The North and Midwest experienced a long period of in-migration during which the political arrangements were modified to accommodate intense ethnic politics. Districts were drawn to reflect ethnic interests, and the balanced slate was invented to take account of ethnic and racial diversity for executive offices. These accommodations were by no means perfect. But the history of ethnic accommodation still echoes in these regions and can often be used to provide minority representation in the face of RPV. For example, single-member districts are the rule in these regions, and districting to take account of racial or ethnic concentrations is the tradition.

The European migrants of previous centuries avoided the South, and there was no similar history of accommodation. The major migration pattern in the South until after World War II was the out-migration of blacks. The political history in this region was one of efforts to prevent racial accommodation. This history still echoes in this region, as my experience indicates, even though things have changed greatly because of three factors: in-migration since World War II from the North and Midwest, return of blacks, and the VRA.

My CV (which was attached to my written testimony) indicates the broad range of my expert testimony in the South and in a few jurisdictions that are not covered by Section 5 such as Illinois, New York (including boroughs of the City that are covered and other parts of the State which are not), Montana, Connecticut, Maryland, and Counties not covered in Florida and North Carolina. Let me cite some examples of jurisdictions that should absolutely remain covered as indicated by their recent behavior.

The District Court's decision in *United States v. Charleston County Council* (2001) and the Circuit Court affirmation of that decision were attached to my original testimony. One interesting thing about this case is the extreme RPV that still exists in that county. The RPV existed in all kinds of elections in Charleston. But it was the interaction of RPV with the particular arrangement for election of County Council that deprived black citizens of their right to an equal opportunity to elect representatives to that body. The system was a partisan, countywide, numbered post system. My testimony and the Court's opinion clearly stated that blacks had a much greater (though not necessarily equal) opportunity to elect representatives to the Charleston School Board because it was structured differently. Soon after the Court's decision was final, the South Carolina legis-

lature passed a bill to restructure the Charleston School Board to be an exact replica of the old County Council structure that the Court had just declared was a violation of the VRA. Of course, the Attorney General refused to pre-clear. I cannot think of a clearer indication that Section 5 is needed.

In redistricting after the 2000 US Census, the Louisiana Legislature had to deal with population loss in the New Orleans region. This loss dictated that the City area would have one less State House district. The legislature chose to reduce the number of black districts and maintain the same number of white districts. When I say "black district" I merely mean a district in which African-American citizens have a reasonable opportunity to elect a representative of their choice. A "white district" simply means a district in which no such reasonable opportunity for black voters exists. The US Census for 2000 indicated that the loss of population in New Orleans was in the white population. Indeed, the number of blacks in the City had increased. I drew several district plans for the region that had lower population deviations, had more compact districts, and treated incumbents equally as well as the districts proposed by the State. Yet I maintained the same number of black districts and reduced the number of white districts by one. How could anyone justify reducing opportunities for blacks when it was the white population that was leaving the area? Of course, Louisiana could not justify their arrangement and the Attorney General did not pre-clear their original proposal. They finally adopted something similar to my district plans.

My experience in uncovered jurisdictions, especially in the North, has been different to a great extent. I have found a willingness to accommodate minority populations as part of the general pattern of representation, even though there is no Section 5 "club"

forcing immediate compliance with the VRA. In statewide redistricting in Connecticut, New York, and Illinois I found that provisions for representation for minorities was not considered to be anything out of the ordinary. Various interests fought over details, but within the context of understood needs for representation. In New York the battles were over how to provide representation for both Latinos and blacks. In Illinois the disputes had to do with arrangements that did or did not provide for minority representation separate from the Democratic Party Machine. When the Machine agreed not to run Anglo candidates in minority districts, the Court easily approved the district plan proposed by the State. I do not claim that the inhabitants of uncovered jurisdictions are racial liberals. I only claim that in my experience there is a lesser chance of such jurisdictions trying to change voting arrangements in such a fashion as to dilute minority votes in a context of RPV.

From Senator Coburn:

7. In the Unofficial Transcript of the hearing on May 16, 2006, pg. 35-36, Professor Pam Karlan said in reference to Georgia's redistricting plan at issue in *Georgia v. Ashcroft*, that the Department of Justice "got it right" because two of the white Democrats elected under the new plan switched party affiliation and became Republicans. She said "Now I am sure that the Republicans in Georgia are very fair folks, but those black voters have no influence in those districts." Do you agree with Professor Karlan's assertion that minority voters in Republican districts "have no influence"?

I agree with Professor Karlan. The African-Americans in those districts will have no (or at least vanishingly little) influence on the Republican representatives for two reasons. First, as I am sure the Senator knows, every electoral politician divides his or her constituency into three groups: Sinners, saints, and saveables. Republican politicians, especially in Georgia, must know from public surveys, private surveys for campaigns and

other public information that fewer than 10% of black voters vote for Republican candidates in general and a similar percentage might be considered independent voters (saveables). There is very little that a Republican candidate can do to get any appreciable percentage of the black vote other than to "arrange" to have an avowed racist nominated by the Democrats.

Second, any attempt by Republican politicians to court the black vote would suffer from a backlash from those who still harbor the racial animosity of the past and regularly vote Republican. It is doubtful that such voters would vote for a Democratic candidate, but they might be discouraged from turning out to vote especially in an off-year election. Attempts to bridge that gap between these "core" Republican voters and blacks, who are strongly opposed to Republicans, would be doomed from the start.

These two Georgia representatives, who have suddenly become Republicans, might take actions that help their black constituents, or at least oppose actions that are clearly racist. If they take such actions, however, it is because they think it is the right thing to do, not because black voters in their districts have influenced them. The best I can say about "influence" in these districts is that the representatives might be careful not to take the lead in actions that offend black voters in order to discourage black mobilization. While this is a kind of negative influence, it is not what the majority opinion of the US Supreme Court had in mind in *Georgia v. Ashcroft.*

From Senators Kennedy and Leahy:

1. Describe how racially polarized voting has changed over time in the South. In your response, explain how these changes have affected the demographic composition of districts necessary to provide minority voters with an equal opportunity to elect candidates of their choice in the following years: 1965; 1982, and 2006.

In the period since 1965 there has been enormous progress in registering African-American voters and getting them to the polls on election day. There has been little progress in reducing racially polarized voting (RPV). In a sense it has increased, since there was no polarized voting in some areas before 1965 because there were few or no black voters. In the 1980s there was a myth that a "majority-minority" district necessarily required a 65% black majority. The idea was that anything less than that did not provide minority voters with a reasonable opportunity to elect representatives of their choice even if their choice was a candidate of color because RPV was so extreme. This was never a "rule," as there were jurisdictions where careful analysis by experts would demonstrate that less or more than this level of minority concentration was necessary for a district to "perform."

The lack of change in RPV in some areas can be seen in my analysis of New Orleans for *The Louisiana House of Representatives v. Ashcroft.* In that Section 5 case (see some details on this case above) I had to determine the level of black concentration necessary to create a minority opportunity district. Because of the unusual two-stage open election process in Louisiana and the low rate of white crossover voting in New Orleans, that level is still above 60%, as I demonstrated in my declaration for the Justice Department in that case. On the other hand, in helping the Attorney General with pre-clearance of the North Carolina General Assembly Districts after the 2000 census, I found that a much lower threshold of minority concentration was necessary to form a minority opportunity district. Indeed the black turnout and voter cohesion is so good and the white crossover for black Democratic nominees so high that less than a majority of registered voters is required to permit an equal opportunity to elect a black candidate of choice.

Generally a higher threshold is necessary when one is dealing with Latinos or Indians, whose levels of registration and turnout are generally far lower than for blacks. For example, in *United States of American v. Blaine County, Montana* I found that the concentration of Indians had to be very high (well above 50%) in order to form a district that would perform. I found a similar pattern in New York City for the Latino districts there, but not for the black districts.

In short, there has been an increase in white crossover vote in some places, especially for minority candidates who can win the Democratic nomination. In other places the crossover is still minimal. If minority candidates are better off today, it is mostly because they have increased their levels of registration and turnout. But the degree of polarization in some areas covered by Section 5 remains as high as ever. This is certainly true in South Carolina and Louisiana.

2. How is racially polarized voting addressed by Section 5? What impact does the *Georgia v. Ashcroft* standard have on the ability of Section 5 to address racially polarized voting?

Section 5 is the first line of defense in preventing changes in election procedures that would interact with racially polarized voting (RPV) to prevent minority citizens from being equally able to elect representatives of their choice. See my analysis above on this subject.

Georgia v. Ashcroft could have a strongly negative impact on the ability of the Justice Department and the D.C. District Court to prevent retrogressions. In that case the narrow 5 to 4 majority seemed to support the notion that a jurisdiction could satisfy §5 (and perhaps by implication §2) by substituting what are called "influence districts" to provide "substantive representation" instead of creating or maintaining districts in which

minority voters have a reasonable opportunity to elect representatives of their choice. There are a number of problems with this. First, there are no clear guidelines for measuring influence districts or substantive representation. Like the Court's decisions about district shape in *Shaw v. Reno* and its progeny, we are left with no clear guidelines for drawing districts; no way to know how to comply with the Court's mandate. This is quite unlike the one-person-one-vote standard, which can be mathematically determined as the districts are being drawn. At what level of minority concentration, short of a reasonable opportunity to elect representatives of their choice, does a district provide "influence"? Do minority voters have influence over a representative they voted against and whose policies they oppose? How many influence districts are equal to one opportunity to elect district in providing equal participation?

Second, to the extent that I can imagine what measures would be used to determine whether substantive representation or influence has been enhanced to prevent retrogression, these measures amount to simply helping Democratic Party candidates. In virtually every state legislature, in the Congress, and in many local jurisdictions, minority representatives – especially African Americans – are strongly allied with the Democratic Party. Helping Democratic Party candidates would be argued to be equivalent to increasing minority voter influence and helping minority substantive representation. In other words, influence districts, if seen as a replacement for opportunities for minority voters to elect representatives of their choice, would become simply a rationale for creating Democratic Party gerrymanders. This takes us back to the situation before *Gingles* when minority voters did not participate equally in the political process and Republican voters were underrepresented.

Substantive representation is often contrasted with what is called "descriptive representation," which means that only a black person can represent African-American voters, only women can represent female voters, and so forth. Quite frankly, the concept of descriptive representation is a straw man. The Voting Rights Act does not require the election of minorities, and I know of no competent expert or voting rights lawyer who has argued that it does. But I believe that the Voting Rights Act should require that minority voters have an equal opportunity to elect representatives of their choice, regardless of their race or ethnicity. The fact derived from extensive analysis of voting patterns shows that minority voters, like the rest of us, usually prefer candidates who are like themselves in race, ethnicity, and partisanship. This is not descriptive representation, it is just giving minority voters the same opportunity that Anglo voters have to elect their choice. If minority voters are restricted to choosing among Anglo candidates, they cannot be said to be participating equally in the political process. Experts have developed procedures for determining whether a district offers minority voters a reasonable opportunity to elect representatives of their choice, and this can be known as the districts are drawn. The reauthorization of the Voting Rights Act should make it clear that influence districts and substantive representation are not acceptable substitutes for districts in which minority citizens have a reasonable opportunity to elect representatives of their choice.

3. Can politics be separated from race in examining evidence of polarized voting? Why or why not? Do you have specific examples that support your answer from cases in which you have been retained as an expert witness?

Race and politics have always been linked in American politics. This is our history, we cannot run from it and expect to formulate just policy in the area of election law. But I think your question really asks whether partisanship and race can be separated.

No, I do not believe that partisanship and race can be separated in any meaningful way. First, race and partisanship are so closely intertwined in many jurisdictions that there is no way to separate them in statistical analysis. In technical terms, there is the problem of multicollinearity. Second, they are intertwined in the minds of voters. Black citizens are strongly allied with the Democratic Party, and Latinos somewhat less so. The prevalence of racially (and ethnically) polarized voting (RPV) in partisan general elections is a clear indication that some white (or Anglo) voters are "polarized" or driven to the Republican Party, perhaps in part because they identify the G.O.P. with their interests seen to be in conflict with the interests of minority citizens. This was evident in my analysis in the Charleston County Council case (see discussion above). The degree of racial polarization was greater in partisan Council contests than in nonpartisan School Board elections held at the same time. Party and race complimented or reinforced each other when the party labels were on the ballot.

In my analysis of New Orleans elections I found that the two-stage election process with party labels attached to candidates names at both stages served to hinder the election of minority candidates. On the other hand, in closed primary states, such as North Carolina, blacks can form a majority within the Democratic electorate, obtain the Democratic nomination, and count on a somewhat larger crossover white vote from "yellow dog Democrats." This often enables them to form an effective voting majority in districts in which they are not a majority of the voters. These examples show that the way in which the election is structured in terms of partisanship interacts with RPV to dilute or to enhance the vote of minority citizens. This is why jurisdiction specific analysis is always required.

4. Kennedy: What can we infer from the fact that African American registration and turn-out numbers are similar in covered and non-covered jurisdictions? Does this mean that the VRA has done its job? Leahy: Professor Gaddie testified about his report. Have you reviewed that report and, if so, do you believe it includes all relevant evidence? Does his comparison of covered jurisdictions and non-covered jurisdictions take into account the widely recognized deterrent effect of Section 5?

The data on registration and turnout rates for African-Americans indicates that the VRA has accomplished miracles throughout the country, but especially in the South where black voting was largely or totally suppressed prior to 1965. The progress among Latinos, Indians, and other minority groups is not as great. These other racial and language minorities still lag behind Anglos in voter participation in many areas. In my work in Montana I found that Indian turnout was a mere fraction of that of their Anglo neighbors. I found similar problems with turnout among Latinos in New York City (in Section 5 covered jurisdictions there). Even when you take citizen voting age population into account, these other groups are seriously hampered in their attempts to mobilize eligible citizens to vote.

But the VRA is about more than just the mere ability to cast a vote. The Congress has always recognized that vote dilution can be a problem. The vote must be counted and must count. This job is far from over. Both Section 5 and Section 2 are very much needed to prevent or to remedy vote dilution for all kind of minority voters. My discussion above should demonstrate the continued necessity for both parts of the VRA.

In my analysis (above) I have indicated why comparisons of registration and turnout rates between covered and uncovered jurisdictions are not a reliable indicator of whether Section 5 is still needed. Nor are such comparisons a reliable indicator of whether the "trigger" needs to be revised. Dr. Gaddie's data is a good indicator of the

progress we have made in mobilizing black citizens in the covered jurisdictions. But it does not address the lagging turnout of other minorities nor does it deal with the question of vote dilution. In my discussion above, I addressed the deterrent effect and the way in which it makes such comparisons irrelevant.

From Senator Kohl:

1. We can all agree that the Voting Rights Act was one of the most significant civil rights laws ever enacted in this country. As we consider whether or not to renew the expiring provisions of the Act, we should bear in mind that the Assistant Attorney General for the Civil Rights Division testified last week that "our work is never complete" with regards to enforcing the Voting Rights Act. Would you agree with that more work remains to be done? Why or why not? And given that statement, would you agree that the Voting Rights Act should be extended?

In my discussion above, I think I make clear that the VRA is still needed, and definitely needs to be extended.

2. Some argue that the reason African Americans and Latinos are underrepresented in elective office in the South and Southwest has more to do with partisan politics than race. Based on your research in this area, is that right?

I address some aspects of the partisanship question above. But I think I can address this question more directly here. In doing so, let me emphasize that I am not lecturing the Committee on what the law is. I am not lawyer and many of you are. Instead, let me speak as a political scientist about what I think the law <u>should be.</u> After all, the Congress is making the law and should be concerned with what would be simple justice in this area.

There is no question that Latinos are mostly allied with the Democratic Party, although not as much so as African-Americans. There are those who argue that the voting rights of minorities should not be protected if they are part of the Democratic coalition.

Their argument runs this way: Minority voters prefer Democratic candidates; this jurisdiction only elects Republicans; therefore, there is no racial problem here, it all just partisanship. There are several problems with this analysis. First, we frequently find that nonpartisan elections are also racially polarized, and sometimes the RPV is greater for nonpartisan than for partisan offices. When it is possible to control statistically for partisanship, there is a residual ethnic or racial effect in the voting. Second, the argument essentially denies minority voters an equal opportunity to elect representatives of their choice because of the nature of that choice. The argument is that minority voters could elect their choice, if they would only choose Republicans. Third, the argument is based on the idea that a *de facto* partisan gerrymander is a justification for laying the VRA aside.

To illustrate the third point, I return again to the Charleston County Council case. In recent years the Council had been 100% Republican, although Democratic candidates regularly received more then 40% of the votes in all kinds of elections in Charleston County. The countywide numbered post arrangement was, therefore, a *de facto* Republican gerrymander. As to the legal question of whether at-large elections could be considered an illegal gerrymander, I refer the Senator to *Republican Party of North Carolina v. Hunt* (CA No. 88-263-CIV-5, E.D.N.C., 1996) in which the court found that statewide election of superior court judges in North Carolina was designed to and had the effect of being an illegal partisan gerrymander, because Republican candidates for judge could have won election in many judicial districts across the state. I was the Republican Party's expert in that case, which is to my knowledge, the only successful partisan gerrymandering case in American history, and certainly the only successful case meeting the rigors of the *Davis v. Bandemer* (1986) standard.

Since all the candidates supported by black voters in Charleston were Democrats, they were all defeated for County Council. A black Republican had been elected several times to the Council, but he was never a candidate of choice of black voters. Defendant's expert, Dr. Ronald Weber, argued that the system was not a violation of the VRA. He maintained that the loss of election by minority-supported candidates was the result of partisanship not racial bias. The district court and the circuit court saw the case as I did. Countywide numbered post elections for County Council had the effect of preventing minority voters from having an equal opportunity to elect representatives of their choice. I would add that it would be a strange legal situation if a partisan gerrymander were to be considered justification for racial discrimination.

The proof could be stated another way. If the partisan aspect of the Charleston County Council elections were changed but the countywide numbered post provisions remained in place, the black candidates would still have been usually defeated, as was clear from comparisons of the County Council elections with the nonpartisan Countywide School Board elections. Black preferred candidates had been more successful in elections for School Board, but were still usually defeated by white bloc voting. But the County Council members could be elected from districts with a partisan ballot and black voters would then have an equal opportunity to elect representatives of their choice. This proved that the partisan aspect of the election system was not the problem.

If partisanship were considered a justification for vote dilution, the situation would be illogical. This result would say that racially polarized voting (RPV) in Democratic primaries and nonpartisan elections that usually result in the defeat of the choice of minority voters could be a violation of the VRA. But RPV that usually results in the de-

feat of the choice of minority voters in partisan general elections is not a violation of the VRA. It creates a "catch-22." If the voting is not polarized in partisan general elections, then there is no violation of the VRA. If it is polarized in partisan general elections, then it is "just partisanship." Under this Alice in Wonderland interpretation of the VRA, minority vote dilution can never occur in partisan general elections unless white Democrats are elected and black Democrats defeated. This interpretation would make the race of the candidate rather than the choice of minority voters the key indicator of vote dilution. This is an approach that has generally been rejected by the Congress and the Courts. The purpose of the VRA is to protect minority voters, not minority candidates.

3. What can we infer from the fact that African American registration and turn-out numbers are similar in covered and non-covered jurisdictions? Does this mean that the Voting Rights Act has done its job?

See my discussion, above, of a similar question from Senators Kennedy and Leahy.