

**Response of Anita Earls, Director of Advocacy, Center for Civil Rights, University
of North Carolina School of Law
To Written Questions from Senate Judiciary Committee Members
On “The Continuing Need for Section 5 Pre-Clearance”
June 16, 2006**

Questions from Senator Coburn

Question 1: With the improved state of race relations in the US since 1965, including vastly improved minority voter registration and turnout, is the Section 4 trigger for coverage under Section 5 still appropriate to the proposed reauthorization of the Voting Rights Act?

It is appropriate for Section 5 to continue covering the jurisdictions that are currently covered. The trigger formula of Section 4 was designed to identify those jurisdictions where literacy tests or similar devices had been used to prevent blacks from participating in the electoral process.¹ The special remedial provisions that applied to jurisdictions so identified were “aimed at areas where voting discrimination has been most flagrant.”² The purpose of Section 5 was to “insure that old devices for disenfranchisement would not simply be replaced by new ones.”³ Section 5 was not intended merely to increase minority registration rates, but rather to make sure that covered jurisdictions did not put in place at-large election systems, use their annexation powers in a discriminatory fashion, move polling places, enact majority vote requirements, or resort to a host of other practices that would negate or dilute the voting strength of newly enfranchised black voters. Current minority voter registration and turnout rates are not the right indicators of where in the country Section 5’s non-retrogression principle is necessary to protect minority voting rights.

The Supreme Court previously rejected a constitutional challenge to the coverage formula and approved the application of Section 5 to the jurisdictions identified by the Section 4 trigger, holding that “Congress was therefore entitled to infer a significant danger of the evil in the few remaining States and political subdivisions covered by ... the Act. No more was required to justify the application to these areas of Congress’ express powers under the Fifteenth Amendment.”⁴

The relevant question today is whether the current coverage of Section 5 correctly identifies jurisdictions where there is a danger of new laws and practices being put in place that would have the purpose or effect of disenfranchising minority voters. There are two reasons why the current coverage is appropriate. First, the jurisdictions currently covered by Section 5 still enact laws that disadvantage minority voters. There is

¹ S. REP. NO. 417, 97th Cong., 2d Sess. 5, *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 177, 182 [hereinafter “1982 SENATE REP.”]

² *South Carolina v. Katzenbach*, 383 U.S. 301, 315 (1966).

³ 1982 SENATE REP. at 6.

⁴ *South Carolina v. Katzenbach*, 383 U.S. at 329.

significant evidence before Congress, particularly from objections, submissions that have been withdrawn or modified, and unsuccessful declaratory judgment actions, that the covered jurisdictions in fact do continue to enact changes affecting voting that would have the purpose or effect of making minority voters worse off.⁵ Second, the current coverage is appropriate because self-correcting measures in the law allow for expanded or contracted coverage if it becomes apparent that additional jurisdictions need to be covered in order to prevent continuing racial discrimination in voting, or that covered jurisdictions no longer pose a risk of enacting discriminatory measures.

When the Section 4 trigger was originally passed, it faced criticism for being under-inclusive.⁶ Attorney General Nicholas Katzenbach noted that the provision could miss some districts that should have been included under Section 5 coverage. However, the Voting Rights Act [hereinafter “VRA”] also gives a court the power to initiate Section 5 coverage by court order in any proceeding instituted by the Attorney General or an aggrieved person where the court finds that violations of the fourteenth or fifteenth amendment justify equitable relief.⁷ In fact, some jurisdictions have been brought under Section 5 coverage as a result of such litigation.⁸ Thus, coverage can be expanded to include jurisdictions where there are serious constitutional violations and the risk is great of continued barriers to minority political participation.

Any worry about the Section 4 trigger being over-inclusive is negated by the more than ample “bailout” provisions of the VRA, created in Section 4 and amended in 1982. According to voting rights attorney J. Gerald Hebert, these provisions are “easily proven” for jurisdictions that do not have discriminatory voting practices.⁹ The fact that a majority of jurisdictions have failed to bailout on an individual basis illustrates that Section 5 is still necessary in those jurisdictions.

Altering the Section 4 trigger for Section 5 coverage is thus both unwise and unnecessary, as the bailout provisions already in place provide suitable means for the termination of Section 5 coverage for jurisdictions without discriminatory voting

⁵ In addition, a recent analysis of reported opinions in Section 2 litigation revealed that courts in covered jurisdictions have found more acts of official discrimination that impact voting rights, the use of devices that enhance opportunities for discrimination against minority voters, the use of racial appeals in campaigns, more extreme racially polarized voting, and other factors disadvantaging minority voters, than courts in non-covered jurisdictions. See Ellen D. Katz, *Not Like the South? Regional Variation and Political Participation Through the Lens of Section 2*, June 19, 2006, at page 4; publication forthcoming, available at: <http://www.sitemaker.umich.edu/votingrights/files/notlikethesouth.pdf>. This further demonstrates that Congress is justified in continuing coverage for the currently covered jurisdictions.

⁶ Protecting Minority Voters: The Voting Rights Act at Work 1982-2005, The National Commission on the Voting Rights Act. 28. Feb 2006.

⁷ See 42 U.S.C. § 1973a(c).

⁸ See *Jeffers v. Clinton*, 740 F.Supp. 585 (E.D. Ark 1990), *appeal dismissed* 498 U.S. 1129 (1991); *McMillan v. Excambia County*, 559 F. Supp. 720, 727 (N.D. Fla. 1983) *cert. denied* 464 U.S. 830 (1983). See also *Sanchez v. Anaya*, Civ. No. 82-67M (D.N.M. 1984) (requiring preclearance of redistricting plans for ten year period); 1982 SENATE REP. at 15 (Thurston County, Nebraska covered by the preclearance provisions of Section 3(c) as the result of a court order).

⁹ CivilRights.org, Hearings to Examine the Impact and Effectiveness of the Voting Rights Act, <http://www.civilrights.org/issues/voting/details.cfm?id=37137¤tpage=1> (last visited June 14, 2006).

practices. The bailout provision is more appropriate than a change in the Section 4 trigger because it deals with jurisdictions on a case by case basis rather than trying to find a proxy that applies to all jurisdictions, regardless of their current voting practices.

Question 2: If the trigger is to be maintained as 1972 presidential election participation, is it appropriate to extend coverage for 25 years?

It is appropriate to extend coverage for 25 years because the current evidence of continuing voting rights violations in covered jurisdictions supports the judgment that it will take at least that long to afford minority voters a level playing field for political participation. Moreover, extending coverage for 25 years is appropriate because the bailout provisions allow jurisdictions that have complied with the law for ten years to no longer be covered.

The current trigger, however, is not based only on the 1972 presidential election participation. It is important to understand how the Section 4 trigger was amended in 1970 and 1975. The 1970 Amendments did not replace the initial trigger, but rather added to it.¹⁰ Thus, coverage included all jurisdictions previously covered along with any political subdivisions that used a literacy test as of November 1, 1968 and where less than 50% of the voting age population were registered as of that date, or less than 50% of such persons voted in the presidential election of November 1968. The new jurisdictions covered by the additional 1968 trigger included counties and towns in Arizona, California, Connecticut, Maine, Massachusetts, New York, New Hampshire and Wyoming.¹¹ In addition, several jurisdictions in Alaska, Arizona and Idaho that had successfully bailed out from coverage were re-covered.¹²

Likewise, the 1975 Amendments added to the prior covered jurisdictions rather than replaced the existing triggers.¹³ In addition to those jurisdictions covered by the 1965 and 1970 triggers, the 1975 Amendments added any jurisdiction using a literacy test in 1972 and meeting one of the two 50% criteria. The 1975 legislation also brought language minority groups within the Act's special remedial provisions, and expanded the definition of "test or device" to include any practice of conducting elections only in English where more than five percent of the citizens of voting age residing in the jurisdiction are members of a single language minority group.¹⁴ Thus, if a jurisdiction conducted elections only in English, had a five percent citizen voting age population of a single language minority group, and had less than 50% of the voting age population registered or voting in the 1972 election, they would be covered by Section 5 and required to comply with the preclearance provision. The 1975 coverage formula resulted in the entire states of Texas, Arizona and Alaska being covered by Section 5, as well as

¹⁰ Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, § 4, 84 Stat. 373.

¹¹ See 39 Fed. Reg. 16, 912 (1974); 36 Fed. Reg. 5809 (1971).

¹² See 36 Fed. Reg. 5809 (1971).

¹³ Voting Rights Act of 1965 – Extension, Pub. L. No. 94-73, tit. II, §202.

¹⁴ Id., § 203.

local jurisdictions in California, Colorado, Florida, Michigan, New Mexico, North Carolina, Oklahoma, and South Dakota.¹⁵

There was no change in coverage under Section 4 in the 1982 Amendments. However, the current trigger is a combination of jurisdictions that meet the standards based on 1962, 1968 and 1972 registration and turnout data, not simply the 1972 participation. The current bill to reauthorize Section 5, like the 1982 legislation, does not alter the coverage of Section 5. The fact that it was considered appropriate, in 1982, to extend Section 5 for 25 years without altering the trigger at that time illustrates that the measure of the need for Section 5 preclearance is whether or not the jurisdictions it covers are likely to continue to try to dilute minority voting strength.

Question 3: Are there alternative conceptualizations of the trigger that might address concerns of critics who wish to update the trigger, while also alleviating the concerns of “blacksliding” if the trigger is updated from 1972?

I am not aware of any new trigger formula using registered voter data or turnout that would better capture jurisdictions that are likely to enact new voting laws that disadvantage minority voters. In past reauthorizations, when the trigger was updated, Congress added new covered jurisdictions without removing any of the existing covered jurisdictions. At a minimum, any such alternative conceptualization of the trigger should be applied in addition to the existing covered jurisdictions rather than to replace or remove any currently covered areas.

Question 4: Does leaving the trigger unchanged increase the likelihood that a reauthorization until 2031 will be struck down by the Supreme Court?

No. Changing the trigger will not make a 25 year reauthorization of the expiring provisions of the Voting Rights Act more likely to be upheld as a constitutional exercise of Congress’ power. Since the current coverage best corresponds to the jurisdictions most likely to pass laws that make minority voters worse off, as further explained in the answer to Question 1 above, the reauthorization bill as drafted satisfies the constitutional requirement that there be “congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”¹⁶

If the goal of changing the trigger is to add new jurisdictions that should be covered but are not, while desirable to enhance the effectiveness of Section 5, the failure to do so cannot make the reauthorization unconstitutional. Congress has the authority under Section 5 of the Fourteenth Amendment and Section 2 of the Fifteenth Amendment to enforce the voting rights of racial minorities but the fact that its measures do not reach every corner of the country where such discrimination may occur does not invalidate those measures. Thus, the only constitutional concern is if the failure to change the

¹⁵ See 41 Fed. Reg. 783-84, 34,329 (1976); 40 Fed. Reg. 43,746, 49,422 (1975).

¹⁶ *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997).

trigger results in jurisdictions being covered that should not be covered because there is no history of unconstitutional conduct or no likelihood of “backsliding” in the future. This problem of over-inclusiveness is readily resolved by several observations. First, the Supreme Court previously has found the coverage to be congruent and proportional, and re-affirmed that finding in the *City of Boerne* case itself as well as in post-*Boerne* cases.¹⁷ The issue at this stage is not whether these jurisdictions can be covered at all, but whether continuing coverage is justified, which should be a lower burden. Second, over-inclusiveness can be corrected by jurisdictions making use of the bailout procedures, which allow them to withdraw from coverage once they have established a relatively short history of full compliance with the Act. Thus, leaving the trigger unchanged does not jeopardize the constitutionality of the Act’s reauthorization.

Question 5: Please discuss how a possible broad-based “bailout” of covered jurisdictions might be implemented?

During the last reauthorization in 1982, there were extensive discussions of whether to change the bailout procedures and consideration of various revisions that ultimately resulted in substantial changes in the bailout procedures.¹⁸ Proposed changes at that time ranged from measures that would have been a virtual automatic termination of Section 5, to changes that might have made it even more difficult for jurisdictions to bailout. The record at this time does not justify instituting a broad-based bailout. As Congress concluded in 1982, “if we turn the bailout into a sieve, it would make the extension of Section 5 an exercise in futility and a cruel hoax on millions of black and brown Americans.”¹⁹

Question 6: Are there alternative conceptualizations of the bailout provision that would increase the opportunity for a jurisdiction to succeed in a bailout attempt?

Certainly there are ways to modify the bailout provision that would make it easier for jurisdictions to meet the requirements. The important question is whether termination of Section 5 coverage in those circumstances will result in new laws and practices that disadvantage minority voters and make it more difficult for them to participate equally in the political process. The current bailout requirements are reasonable and strike the right balance between allowing jurisdictions that comply with the law to bailout while keeping Section 5 in place where it is still needed to protect minority voting rights.

Question 7: In the Unofficial Transcript of the hearing on May 16, 2006, page 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

¹⁷See *Lopez v. Monterey County*, 525 U.S. 266 (1999) (upholding constitutionality of Section 5 preclearance requirement).

¹⁸ See 1982 SENATE REP. 43-62.

¹⁹ *Id.*, at 44.

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”?

From the question itself, it appears to me that Professor Karlan did not assert that minority voters in Republican districts have no influence but rather, that she asserted that black voters had no influence in the particular districts at issue in the *Georgia v. Ashcroft* case. To the degree that influence may be measured at all, that is an empirical question that I would answer by looking at the degree to which voting in the districts in the new plan is racially polarized, and by examining the voting records and positions on issues of the legislators who were elected in those districts. I do not have that information.

However, I do agree with the Justices who dissented in the *Georgia v. Ashcroft* case that generally, measuring influence is extraordinarily difficult and cannot be done simply by looking at the percentage of the identifiable minority group in a district, whereas measuring the ability to elect is more manageable. Justice Souter, writing for himself, and Justices Stevens, Ginsberg and Breyer, explained:

Indeed, to see the trouble ahead, one need only ask how on the Court's new understanding, state legislators or federal preclearance reviewers under § 5 are supposed to identify or measure the degree of influence necessary to avoid the retrogression the Court nominally retains as the § 5 touchstone. Is the test purely *ad hominem*, looking merely to the apparent sentiments of incumbents who might run in the new districts? Would it be enough for a State to show that an incumbent had previously promised to consider minority interests before voting on legislative measures? Whatever one looks to, however, how does one put a value on influence that falls short of decisive influence through coalition? Nondecisive influence is worth less than majority-minority control, but how much less? Would two influence districts offset the loss of one majority-minority district? Would it take three? Or four? The Court gives no guidance for measuring influence that falls short of the voting strength of a coalition member, let alone a majority of minority voters. Nor do I see how the Court could possibly give any such guidance. The Court's "influence" is simply not functional in the political and judicial worlds.²⁰

Finally, I would add that if the black voters in the districts at issue in the statement quoted above are Democrats, and the candidates who were elected are now Republicans, it seems a fair conclusion that the black Democratic voters in those circumstances have no influence over the Republican elected official.

²⁰ *Georgia v. Ashcroft*, 539 U.S. 461, 495 (2003).

Questions from Senator Cornyn

Question 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.

There are three sources of empirical data I would cite that demonstrate that minority voters have significantly less ability to participate fully in elections in the covered jurisdictions compared to the non-covered jurisdictions. I do not mean to suggest that these are the only sources of empirical data, these are simply three sources that I am aware of. In addition, my response only pertains to Section 5 covered jurisdictions and not Section 203 jurisdictions.

First, Spencer Overton has compiled a list of states that are most susceptible to political practices that disadvantage voters of color, assessing eight different factors.¹ His indicators of political exclusion are:

1. Most voting rights act objections and claims per capita
2. Most federal observers sent to monitor elections per capita
3. Largest disparities between citizens of color and statewide elected officials of color
4. Largest disparities between citizens of color and officials of color in all elected positions
5. Least party competition for voters of color
6. Largest racial disparities in voter turnout
7. Largest minority group
8. Largest low-English-proficient populations

Section 5 covered states predominate in every category above except 6 and 8.² Thus, on six of eight indicators of political exclusion, Section 5 covered states are in the lead. In addition, the fact that Section 5 states do not predominate in the list of states with the largest racial disparities in voter turnout leads to a very significant finding – even though minority voters in the covered jurisdictions actually turn out to vote in numbers more commensurate with non-minority voters than they do in non-covered jurisdictions, they still cannot elect persons of color to statewide or local offices in covered jurisdictions.

The second source of empirical data is the cumulative evidence contained in individual state reports on covered jurisdictions since 1982 that have been introduced into the record during the Voting Rights Act reauthorization hearings in the House and Senate. A careful review of those reports yields overwhelming evidence of polarized voting in covered jurisdictions, attempts to circumvent court orders regarding redistricting plans and other election practices, widespread use of racial appeals in election campaigns, violations of Section 2 of the Voting Rights Act, and overt attempts

¹ SPENCER OVERTON, STEALING DEMOCRACY 118-19 (2006) (copy of table attached as Exhibit 1)

² *Id.*

to intimidate minority voters. While there are isolated incidents of such practices in non-covered jurisdictions, and some Section 2 cases are brought and won in non-covered states, there is no evidence of significant and continuing violations of minority voting rights at the state and local level in non-covered jurisdictions.

The third source of empirical data comparing covered jurisdictions to non-covered jurisdictions is highlighted in a recent article by Ellen D. Katz based on a review of every reported opinion in a Section 2 case throughout the country since 1982.³ The most significant of the many findings from that study is the fact that racially polarized voting is more extreme in covered jurisdictions. Reviewing elections results from hundreds of state and local elections, the courts regularly found more extreme racially polarized voting in the covered jurisdictions than in non-covered jurisdictions..

Nearly ninety percent of the specific minority v. white elections documented in covered jurisdictions involved white bloc voting rising to at least 80 percent, meaning that 80 percent of white voters voted exclusively for white candidates in these elections. Virtually all of the elections (96%) analyzed by courts in covered jurisdictions since 1982 exhibited white polarized voting at a level of seventy percent or more. In non-covered jurisdictions, by contrast, only forty percent of the elections documented involved white polarization of 80 percent or higher, and about 60 percent involved white polarization rising to seventy percent.⁴

In short, in the elections that involved white and minority candidates analyzed as part of Section 2 claims in cases with reported decisions, virtually all such elections in covered jurisdictions had levels of white bloc voting at 70% or above while less than two thirds of such elections in non-covered jurisdictions had white bloc voting at 70%. Even more striking, 90% of elections in covered jurisdictions were at the 80% level for white bloc voting while only 40% of elections in non-covered jurisdictions were at that level. The level of racially polarized voting is a key factor that determines whether minority voters can elect a candidate of their choice. This wide divergence in racially polarized voting between covered and non-covered jurisdictions is an important empirical finding demonstrating that minorities have less ability to participate equally in the political process in covered jurisdictions.

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.”

³ See Ellen D. Katz, *Not Like the South? Regional Variation and Political Participation Through the Lens of Section 2*, June 19, 2006, at page 4; publication forthcoming, available at: <http://www.sitemaker.umich.edu/votingrights/files/notlikethesouth.pdf>.

⁴ *Id.*, at 10 (references omitted).

- 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?*
- 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?*

a. No, I would not support changing Section 5 coverage to refer to elections of 2000 and 2004 because it is my understanding that doing so would in effect repeal Section 5. No states would be covered as a whole by such a standard.⁵ I do not know nationally how many counties, cities, school boards or other local jurisdictions would meet this standard. If North Carolina is typical of other covered states, only a very few local jurisdictions would be covered⁶ There is no justification for repealing Section 5 in this manner because of the extensive evidence of the continuing need for its protections.

Additionally, it would be irresponsible to change Section 5 coverage based on this new formula without first knowing what jurisdictions will be covered. By changing the coverage formula, Congress is thereby not simply keeping in place an existing enforcement mechanism but rather potentially expanding it to new areas of the country. Some scholars suggest that the Constitutional standard under *City of Boerne* is somewhat different when Congress is enacting a new law rather than simply continuing an existing remedial program.⁷ If Congress changes the coverage formula, it is enacting a new law for the newly-covered areas. At a minimum, Congress needs to examine evidence of whether there is a history of unconstitutional conduct in the new jurisdictions affecting the ability of minority voters to participate in elections, and in order to do that, Congress must know which jurisdictions are being added. Thus, it is crucial to know which jurisdictions, if any, would be covered by Section 5 under this new formula.

⁵Hawaii is the only state in which turnout as a percentage of citizen voting age population in 2000 and 2004 was less than 50%. Since Hawaii did not use a literacy test, it would not be covered by Section 5. See Amie Jamieson, Hyon Shin, and Jennifer Day, "Voting and Registration in the Election of November 2000" *Current Population Reports*, February 2002, available at: www.census.gov/prod/2002pubs/p20-542.pdf; U.S. ELECTION ASSISTANCE COMMISSION, A SUMMARY OF THE 2004 ELECTION DAY SURVEY 7 (September 2005) available at: http://www.eac.gov/election_survey_2004/pdf/EDS%20exec.%20summary.pdf.

⁶ It appears that only four of the currently covered counties in North Carolina would meet this standard, and that another three counties might be added, depending on whether they used literacy tests in the past. This is based on turnout as a percentage of registered voters in 2000 and 2004, data available at: http://www.sboe.state.nc.us/enrs/main_primary.asp?ED=11xx02xx2004&EL=GENERAL&YR=2004&CR=A. and <http://www.sboe.state.nc.us/y2000elect/stateresults.htm>.

⁷ See Katz, *supra* note 3, at 20-21; *The Continuing Need for Section 5 Pre-Clearance: Hearing Before the S. Comm. on the Judiciary* (May 16, 2006) (written testimony of Pamela Karlan, Professor, Stanford Law School).

Finally, as discussed in my answers to Questions 1 and 2 from Senator Coburn, I would not support replacing the current trigger with one using data from the Presidential elections of 2000 and 2004 because I believe the important question for reauthorization is not whether the original basis for coverage should be changed but rather whether there is evidence in the jurisdictions currently covered by Section 5 that indicates that the preclearance requirement is still necessary to protect minority voters.

b. As stated above, I believe that the current coverage of Section 5 is appropriate, justified by the evidence of recent discrimination, and compelled by the risk of retrogression if Section 5 expires just as the country is enacting more election reforms than ever before. Adding new jurisdictions, whether by identifying the few local areas where turnout was below 50 percent in recent elections, or by looking at where there have been Section 2 violations, is justified to the extent that there is evidence specific to those jurisdictions that there are likely to be laws passed that disadvantage minority voters. To some degree, however, changing coverage in this manner is redundant because Section 3(c) of the Act allows federal courts to bring jurisdictions under the preclearance requirement where circumstances justify it.

Question 3: In City of Boerne v. Flores, the Supreme Court indicated that Congress may not rely on data over forty years old as a basis for legislating under the Fourteenth and Fifteenth Amendments. City of Boerne v. Flores, 521 U.S. 507, 530 (1997). In striking down the Religious Freedom Restoration Act, the Court observed, “RFRA’s legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry.”

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

No. Removing from coverage all the states that are covered as a result of the 1964 turnout data is not required by the Supreme Court’s holding in *City of Boerne v. Flores*. First, the Supreme Court did not say that Congress may not rely on data over forty years old as a basis for enacting remedial legislation under the Fourteenth and Fifteenth Amendments. Instead, the Court was making the point that there was no evidence of recent constitutional violations to support Congress enacting the Religious Freedom Restoration Act (RFRA). In making that point, the Court, writing in 1997, specifically referred to the record supporting the Voting Rights Act as containing what is required. The Court wrote:

A comparison between RFRA and the Voting Rights Act is instructive. In contrast to the record which confronted Congress and the judiciary in the voting rights cases, RFRA’s legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry. The history of persecution in this country detailed in the hearings mentions no episodes occurring in the past 40 years. The absence of more

recent episodes stems from the fact that, as one witness testified, "deliberate persecution is not the usual problem in this country."⁸

Thus, the problem with RFRA was not that it relied on forty year old evidence, but that it only relied on such evidence. There was no recent evidence of widespread or significant constitutional violations. The *Boerne* Court went on to explain that lack of support in the legislative record was not the most serious problem with the statute. The Court determined that RFRA exceeded Congresses' power under the Fourteenth Amendment because, "regardless of the state of the legislative record," the statute was out of proportion to a supposed remedial or preventive purpose.⁹ The Supreme Court explicitly noted that judicial deference is not based on the state of the legislative record compiled by Congress.

More recent decisions by the Supreme Court have also indicated that historical evidence, while not sufficient standing alone, can form part of the record justifying remedial legislation. For example, in upholding the application of the Family and Medical Leave Act (FMLA) to states as employers, the Court noted the "long and extensive history of sex discrimination" in concluding that the record of constitutional violations compiled by Congress was sufficient to justify the FMLA.¹⁰ Similarly, in upholding application of Title II of the Americans with Disabilities Act to the states, the Supreme Court referred to the long history of discrimination against persons with disabilities and the persistence of such discrimination despite earlier legislative attempts to remedy it.¹¹ Thus, there is no reason to believe that inclusion of jurisdictions covered in part because of the trigger that was initially based on 1964 data and subsequently amended, will make the reauthorization unconstitutional. The extensive record of continuing discrimination in voting in the covered jurisdictions since 1982 makes clear that those jurisdictions should continue to be covered.

Question 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?

Yes. The record of discrimination in voting in covered jurisdictions is sufficient to warrant continuing Section 5 coverage. Focusing solely on the number of objections fails to measure the true impact of Section 5 and is misleading. The evidence in the record is not simply anecdotal. I identified some sources of broad empirical data in my answer to Question 1 above. Numerous research reports have been submitted to

⁸ *City of Boerne v. Flores*, 521 U.S. 507, 530 (1997).

⁹ *Id.*, at 532.

¹⁰ See *Nevada Dept. of Human Res. v. Hibbs*, 538 U.S. 721, 730-35 (2003).

¹¹ See *Tennessee v. Lane*, 541 U.S. 509, 528 (2004).

Congress, including two authored by the UNC Center for Civil Rights, that provide detailed information about all of the Section 5 objections, litigation under Sections 2, 5, and 203 of the Voting Rights Act, the extent of racially polarized voting in the jurisdiction, the extent to which candidates of choice of minority voters are elected, and significant events that have recently occurred that deny, discourage or dilute the minority vote.¹²

In addition, it appears from publicly available information on the Department of Justice website that this question understates the number of submissions and the number of objections during the period indicated.¹³ Further data supporting my answer to this question is contained in my answer to Question 3 from Senator Kohl below.

To properly measure the true impact of Section 5 it is necessary to take into account all of the ways that the preclearance requirement operates to deter and prevent the use of voting practices that disadvantage minority voters. Objections are not the only way that changes with a discriminatory impact or effect are blocked. Whenever a jurisdiction seeks preclearance in the D.C. District court and is denied, those unsuccessful declaratory judgment actions also bar the implementation of discriminatory laws.

¹²In addition to the materials already referenced in response to these questions, additional materials already submitted to Congress include, but are not limited to: Debo P. Adegbile, Voting Rights in Louisiana 1982-2006 (Mar. 2006), <http://www.civilrights.org/issues/voting/LAVRA.pdf>; Juan Cartagena, Voting Rights in New York, 1982-2006 (Apr. 2006), <http://www.civilrights.org/issues/voting/NewYorkVRA.pdf>; Anita S. Earls, Kara Millonzi, Oni Seliski, and Torrey Dixon, Voting Rights in Virginia, 1982-2006 (May 2006), <http://www.civilrights.org/issues/voting/VirginiaVRA.pdf>; Anita S. Earls, Emily Wynes, and LeeAnne Quatrucci, Voting Rights in North Carolina, 1982-2006 (May 2006), <http://www.civilrights.org/issues/voting/NorthCarolinaVRA.pdf>; Ellen Katz et. al, Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982, <http://www.votingreport.org> (Dec. 2005); Robert Kengle, Voting Rights in Georgia, 1982-2006, (March 2006); Natalie Landreth and Moira Smith, Voting Rights in Alaska, 1982-2006 (Mar. 2006), <http://renewthevra.civilrights.org/resources/akreport.pdf>; Laughlin McDonald & Daniel Levitas, American Civil Liberties Union, The Case for Extending and Amending the Voting Rights Act Voting Rights Litigation, 1982-2006: A Report of the Voting Rights Project of the American Civil Liberties Union (Mar. 2006), <http://www.votingrightsact.org/report/finalreport.pdf>; Laughlin McDonald, Janine Pease, and Richard Guest, Voting Rights in South Dakota, 1982-2006 (May 2006), <http://www.civilrights.org/issues/voting/SouthDakotaVRA.pdf>; Robert McDuff, The Voting Rights Act in Mississippi, 1965-2006 (May 2006), <http://www.civilrights.org/issues/voting/MississippiVRA.pdf>; National Commission on the Voting Rights Act & Lawyers' Committee for Civil Rights Under Law, Protecting Minority Rights: The Voting Rights Act at Work 1982-2005 (Feb. 2006); JoNel Newman, Voting Rights in Florida, 1982-2006 (Apr. 2006), <http://www.civilrights.org/issues/voting/FloridaVRA.pdf>; Phillip A. Olaya, Glenn D. Magpantay, Nancy W. Yu & Margaret Fung, Asian American Legal Defense and Education Fund, Asian Americans and the Voting Rights Act (Jun. 2006), <http://renewthevra.civilrights.org/resources/details.cfm?id=44388>; Dr. James Tucker & Dr. Rodolfo Espino, Voting Rights in Arizona, 1982-2006 (May 2006), <http://www.civilrights.org/issues/voting/ArizonaVRA.pdf>; James Thomas Tucker and Rodolfo Espino, Arizona State University, Minority Language Assistance Practices in Public Elections (Mar. 2006) <http://renewthevra.civilrights.org/203report.pdf>.

¹³See http://www.usdoj.gov/crt/voting/sec_5/obj_activ.htm.

One of the options available to the Department of Justice (DOJ) once they receive a submission is to request more information regarding the proposed change.¹⁴ Thus, in addition to issuing objections to proposed changes, the Department frequently sends More Information Requests (MIRs). The MIR procedurally acts to give the DOJ all necessary information about the policy before it issues an objection to a proposed change. Therefore the requirement prevents valid changes from being objected to simply because of a lack of information or procedural misstep. However, often these letters lead to submissions being withdrawn. The use of MIR's has increased dramatically over the last ten years.¹⁵

MIRs are also a useful tool in deterring voter discrimination, often signaling to the local authorities that new policies may be questionable.¹⁶ When the DOJ requests more information, a local authority is given the opportunity to review the policy they submitted and make appropriate changes. What often results from a MIR is the withdrawal of the policy altogether. This means that many questionable policies that would have likely been objected to are preemptively withdrawn. Therefore, in considering the potency of Section 5, the number of policies that are withdrawn or altered because of a MIR must be considered in the same vein as an objection.

In their study of MIRs, Fraga and Ocampo characterize the request as having a deterrent effect if the submission is withdrawn, if subsequent changes are made, or if there is no response back to the DOJ.¹⁷ They conclude in their report that since 1982 the use of MIRs has increased the deterrent effect of Section 5 by 51 percent.¹⁸

MIRs should not be viewed simply as a bureaucratic gap-filler but as an additional tool available to the DOJ under Section 5 to preempt discriminatory policies in voting legislation. Because MIRs allow for revision and clarification by the submitting authority, they emphasize the narrow tailoring of the Voting Rights Act in striking only those rule changes with discriminatory effects. MIRs play an essential role in the DOJ's ability to combat minority voter dissolution by ensuring that the DOJ is always acting on the most accurate information available.

The Department also has a deterrent impact by routinely conferring with jurisdictions before they make a submission, explaining how the retrogression standard is applied and how changes affecting voting, including measures such as majority vote requirements, annexations, polling place changes, changes to appointed from elected office, and numerous other non-redistricting changes are reviewed by the Department. While I was a Deputy Assistant Attorney General, from 1998 to 2000, I observed how this informal consultation process assisted jurisdictions in enacting laws that would not unfairly burden minority voters. Often, an objection letter was the result of such

¹⁴ 28 C.F.R. Part 51 Subpart E 51.37(a).

¹⁵ See Louis Ricardo Fraga & Maria Lizet Ocampo, More Information Requests and the Deterrent Effect of Section 5 of the Voting Rights Act (June 7, 2006) (unpublished essay, submitted to Senate Judiciary Committee on June 9, 2006).

¹⁶ *Id.*

¹⁷ *Id.* at 3.

¹⁸ See *id.* at 3.

“negotiations” falling apart, but frequently jurisdictions changed how they planned to implement a state law based on such discussions.¹⁹ Similarly, Section 5 review has a deterred effect even without any involvement of DOJ personnel. Jurisdictions are less likely to try to enact discriminatory redistricting plans, or voting procedures because they know that the Justice Department will object.

Finally, there are several explanations for the lower number of Section 5 objections in recent years which demonstrate that the numbers are not the result of a decrease in discriminatory actions by state and local governments. First, it is important to remember that percentages here can be misleading. Prior to 1982 there was widespread non-compliance with the preclearance requirement.²⁰ While there continues to be some non-compliance by jurisdictions, the number of submissions has increased. In some instances they are recent submissions of pre-1982 changes. With a larger number of submissions overall, it is not surprising that the percentage of changes objected to would decrease. More importantly, the *Bossier II* decision has had a severely negative impact on the ability of DOJ to object to intentionally discriminatory voting changes, as I explained in my original testimony.

There are also some issues of under-enforcement of Section 5, in circumstances where the Department should have objected, but failed to. Because affected communities do not have the right under the statute to appeal the grant of preclearance,²¹ there are many examples of minority community groups opposing voting changes as retrogressive where the Department has granted preclearance. In the Georgia Voter ID case, the submission of a law later enjoined by a federal district court on the grounds that the plaintiffs were likely to prevail on their claims that the law was an unconstitutional poll tax and that it lacked a rational basis, was precleared against the advice of career attorneys in the Department.²² This preclearance also departed from earlier objections to Voter ID provisions, where the Department held jurisdictions to higher standards. Thus, there are some instances where the enforcement of Section 5 has not been as rigorous as it needs to be.

The lower number of objections from 2005 is consistent with past patterns of the ebb and flow associated with decennial redistricting. Section 5 submissions and resulting objections are greatest in the years immediately prior to and after redistricting cycles. In a mid-decade year, such as 2005, you would expect to see a smaller number of submissions and objections because there are significantly fewer redistrictings.

¹⁹ JoNel Newman gives a recent example of this in the report on Florida. See JoNel Newman, Voting Rights in Florida, 1982-2006, *supra* note 12 at 13-15.

²⁰ See 1982 SENATE REP. at 47-48 (finding that “there are numerous instances in which jurisdictions failed to submit changes before implementing them and submitted them only, if at all, many years after when sued or threatened with suit. Put simply, such jurisdictions have flouted the law and hindered the protection of minority rights in voting.”)

²¹ See *Morris v. Gressette*, 432 U.S. 491 (1977).

²² See Kengle, Voting Rights in Georgia, *supra* note 12, at 29-30 & n.131; *Common Cause of Georgia v. Billups*, 406 F. Supp. 2d 1326 (N.D. Ga. 2005).

Many of the objections in the last ten years have involved statewide objections impacting minorities throughout the state. Objections at the state level also have prevented sophisticated attempts to disenfranchise minority voters. This is not merely a “numbers” game. No single measure is determinative of the continuing need for reauthorization. Taken together, the evidence in the record supports reauthorization.

The current standard for bailout is the best measure for when Section 5 is no longer needed. If all covered jurisdictions eventually meet this standard, then Section 5 would lapse of its own accord.

Question 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?

Since I believe the evidence indicates there is a clear differentiation between covered and non-covered jurisdictions, and because in my experience of litigating voting rights cases around the country over the past 18 years, including cases in covered jurisdictions and in non-covered jurisdictions I have found important differences between those jurisdictions, I believe that reauthorization needs to be for a period of 25 years. Covered jurisdictions show a continuing pattern of enacting laws and procedures designed to suppress and dilute the voting strength of minority voters. Despite years of Section 5 review, local governments in particular, but also state legislatures in the covered jurisdictions have repeatedly ignored the harmful effect of voting changes on minority voters. Section 5 needs to be in place for another 25 years to ensure that minority voters truly have an equal opportunity to participate in the political process before its protections are removed.

Perhaps the fundamental problem that remains most severe in covered jurisdictions is racially polarized voting, as I explain in greater detail in response to Question 1 above. It is entirely reasonable to conclude that it will be at least another 25 years before those patterns change and the political process is more open for racial and ethnic minorities to field candidates of their choice who have a realistic possibility of winning election. Requiring jurisdictions to keep in place election methods and practices at the state and local levels that provide fair representation for politically cohesive minority voters is also important for federal elections because candidates for federal office frequently gain political experience and prove their leadership capacities in local and state public offices. It is reasonable for Congress to conclude that the Act should be reviewed after another twenty-five years because it is likely to take that long to have a lasting impact on election practices.

Another fact that supports reauthorizing the Voting Rights Act for 25 years instead of a shorter period is that not only do there continue to be wide disparities between minority and white voters’ participation in the political process, as measured by

factors such as the rate of minority office holding²³, but the gains that have been made are very recent. At the Congressional level, for example, many covered jurisdictions in the south only elected an African-American to Congress for the first time since reconstruction following the 1990 round of redistricting. Such recent gains will be easily reversed if the non-retrogression standard is removed.

Finally, it is important to remember that the bailout provisions give jurisdictions that comply with the Act a streamlined procedure for ending coverage once they have met the criteria. It is entirely possible that most, if not all, jurisdictions will have “bailed out” within the next twenty-five years, if they comply with the Act’s requirements and no longer pass laws that make minority voters worse off.

Question 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?

No. In my view so-called “influence” districts would not be protected by Section 5. As I understand the language in the reauthorization bill, the intent is to protect the ability of minority voters to elect candidates of their choice. As I explained in my answer to Question 7 from Senator Coburn, I believe that “influence” is difficult to define, measure and implement in the practical world. On the other hand, it is usually possible to determine when minority voters have the ability to elect their candidate of choice by using regression analyses to determine voting patterns.²⁴ Thus, I would understand the Section 5 retrogression principle to be applied where minority voters have the ability to elect their candidates of choice, without regard to any particular numerical cut-off.

²³ See, e.g., data on political exclusion in response to Question 1 above, and the state reports of covered jurisdictions. *supra* note 12.

²⁴ Occasionally in very small jurisdictions it may be difficult to analyze polarized voting if there is only one voting precinct in the jurisdiction. In these instances, other types of evidence of racially polarized voting, such as lay testimony, may be relevant.

Questions from Senator Kohl

Question 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?

Yes, I agree that more work needs to be done and that the Voting Rights Act must be extended. Two of the most salient facts that demonstrate why are: First, the continued prevalence of racially polarized voting that denies black voters the opportunity to elect candidates of their choice, and the fact that racially polarized voting is more severe in the jurisdictions covered by Section 5, as further explained in my answer to Question 1 from Senator Cornyn, and second, the continued disparity between the number of minority elected officials and the percentage of minority voters. Until minority voters have a level playing field to participate in the political process, we need the full protections of the Voting Rights Act to be extended and restored to the force they had in 1982.

Question 2: Given that there is evidence that black voter registration has increased dramatically since 1965, why do we still need the Voting Rights Act?

While black voter registration has increased dramatically since 1965 in the aggregate, there is ample statistical evidence that the Voting Rights Act (VRA) still has work to do in improving the ability of all citizens to fully participate in elections. Nationally, white voter registration continues to be consistently higher than black voter registration (in 2004, 67.9% to 64.4%).¹

Evidence that minority voter registration has increased since the inception of the Voting Rights Act is not an indication of its irrelevance but rather a mandate of its continued necessity. The VRA assures the civil rights of many minorities, and it was put in place not to simply increase black voter registration or even voter turn-out; it also serves to make sure that once those votes are cast they are not diluted by methods such as redistricting and annexations. The sad truth is that in certain areas of the country the civil rights of many citizens are still threatened, and the VRA must be reauthorized and strengthened to address continued racial discrimination in voting.

While black voter registration has increased, the same cannot be said of all other minority citizens. The Voting Rights Act protects the rights of many minorities, not just African Americans. There are instances where the Voting Rights Act has been used to protect the rights of Hispanic Americans, Asian Americans, Native Americans, and American Eskimos. For example in Bayou La Batre, Alabama during the 2004 election

¹ U.S. Census Bureau, Voting and Registration, <http://www.census.gov/population/www/socdemo/voting.html> (last visited June 14, 2006).

Asian Americans constituted a third of the electorate and fielded a candidate for city council.² Supporters of the Caucasian candidate engaged in systematic voter intimidation through legal challenges to Asian American voters. Allowed by state law, the challenges required voters to fill out a paper ballot and have a registered voter vouch for them. The Department of Justice was able to use the VRA to prevent purely racially targeted challenges from occurring during the general election. Though African American registration rate has been raised, that fact alone does not indicate the VRA is obsolete because it applies to all minorities.

Section 203 of the VRA requires election officials in covered areas to provide bilingual assistance if it is needed.³ Bilingual assistance is required if more than 10,000 people or 5 percent of the voting age population has limited English proficiency and the area's literacy rate is below the national average. Bilingual assistance can consist of having someone proficient in another language to aid at the polls, bilingual ballots, and advertisement of bilingual assistance.

According to the 2000 Census, 46,951,595 people spoke a language other than English at home.⁴ And of those people, 10,986,851 of them listed their English proficiency as 'not well' or 'not at all.'⁵ The VRA illegalized literacy tests as a requirement to vote; and the Supreme Court has agreed that holding literacy tests violate equal protection.⁶ Without Section 203 millions of Americans will have a serious burden placed upon their ability to exercise their constitutional right to vote.

The Voting Rights Act is not aimed at simply increasing minorities' voter registration rates. According to the Supreme Court's interpretation, the purpose of the VRA is to thwart any weakening of minority electoral influence.⁷ The VRA protects the rights of minorities to exercise their electoral rights without impediment in areas where there is a history of prior discrimination.

One recent example of the VRA combating voter discrimination occurred in Kilmichael, Mississippi in 2001, where the African American voting population became over 50% of the voting age population according the 2000 Census.⁸ Three weeks before the 2001 election, the all-white board of aldermen cancelled the election when four of the ten citizens running for Aldermen were black as well as one of the three mayoral candidates.⁹ However, due to Section 5, the DOJ was able to object to the change. This

² Protect Voting Rights, Renew the VRA; Learn More, Real Stories, <http://renewthevra.civilrights.org/resources/detail.cfm?id=196> (last visited June 14, 2006).

³ Voting Rights Act of 1965 § 203.

⁴ U.S. Census Bureau, American Fact Finder, <http://www.census.gov/prod/2003pubs/c2kbr-29.pdf>, Table 1.

⁵ Id.

⁶ See *Katzenbach v. Morgan*, 384 U.S. 641 (1966).

⁷ *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 120 S. Ct. 866, 145 L. Ed. 2d 845 (2000).

⁸ U.S. Census Bureau, American Fact Finder, http://factfinder.census.gov/home/saff/main.html?_lang=en (last visited June 13, 2006).

⁹ U.S. Department of Justice, Civil Rights Division, http://www.usdoj.gov/crt/voting/sec_5/pdfs/l_121101.pdf (last visited June 14, 2006).

example, among dozens of others,¹⁰ illustrate that the need for Section 5 of the VRA has remained in great capacity in recent years and must be renewed.

The decrease in DOJ objections issued, along with increasing African American voter registration rate indicate progress, but by no means do they signify that the fight is over. As previously mentioned, since 2000, a conservative estimate is that the VRA has prevented 1,195,899 Americans from having their voting rights violated.

Attempts to disenfranchise minorities are not always as blatant as poll taxes and literacy tests, but simply because some of the threats to minority voting are more subtle does not mean they are any less potent. Today the biggest threats to minority political influence come from creatively drawn districts that dilute minority voting strength, selective annexations, and prohibitive voting methods.

These statistics demonstrate that the VRA does more than just help minorities vote; it ensures that once that vote is cast, it is not diluted by techniques such as redistricting and annexations. Evidence obtained from the Department of Justice's website and the Census Bureau shows that just since 2000 at least 1,195,899 minority voters have been directly aided by Section 5.¹¹ The majority of these cases occurred after these citizens had registered and voted by prohibiting legislation changes that would diminish the power of these minority votes.¹² In the last six years alone, minorities would have lost the ability to elect a candidate of their choice in 81 state and local elections without Section 5 assistance.¹³

Evidence that a law is being complied with to some degree is not a reason to do away with it. If there was an environmental regulation that limited pollution levels, cleaner air would not signify that it is no longer needed, but that it is sufficiently serving its purpose and must be renewed.

Failing to renew Section 5 of the VRA would not only be unwise, it would be totally unnecessary due to the self-terminating mechanism of the bailout provision created in Section 4 and amended in 1982. J. Gerald Hebert, an attorney who specializes in national voting rights issues, testified to the House Judiciary Committee on October 20, 2005 that "Most of the factors to be demonstrated [for a jurisdiction to bailout of Section 5] are easily proven for jurisdictions that do not discriminate in their voting

¹⁰ See, e.g., U.S. Department of Justice, Civil Rights Division, Voting Section, About Section 5 of the Voting Rights Act, http://www.usdoj.gov/crt/voting/sec_5/obj_activ.htm (last visited June 13, 2006).

¹¹ The number of minorities affected by Section 5 was obtained by combining information catalogued on U.S. Department of Justice, Civil Rights Division, Voting Section, About Section 5 of the Voting Rights Act Website, http://www.usdoj.gov/crt/voting/sec_5/obj_activ.htm, with population data from the U.S. Census Bureau, American Fact Finder Website, http://factfinder.census.gov/home/saff/main.html?_lang=en (last visited June 13, 2006). See Minority Voters Affected by Section 5 Objections, Jan. 2000 – May 2006, attached hereto as Appendix 2; and Minority Voters Affected by Withdrawn Submissions, 2000 – 2005, attached hereto as Appendix 3.

¹² See *id.*

¹³ See *id.*

practices.”¹⁴ Despite the fact that bailout provisions are “easily proven,” few jurisdictions have done so. The fact that a majority of jurisdictions have failed to bailout on an individual basis illustrates the ongoing need for Section 5 regulation.

Hebert further testified that the most common complaint issued by a jurisdiction failing to bailout of Section 5 is that they were rejected due to a recent submission that was not precleared.¹⁵ This complaint, however, illustrates that several of the jurisdictions attempting to bailout of Section 5 still have work to do in altering their voting legislation. Once these jurisdictions have proven that they can enact voting laws that do not have a retrogressive effect on their minority voters, they will be able to bailout of Section 5 coverage through already approved means.

Question 3: The Department of Justice has testified that the rate of objections by DOJ to election law changes is very low in recent years. Does this mean that we no longer need Section 5?

While it is true that the rate of objections to submissions has lowered in recent years, it is misleading to conclude that this drop signifies that Section 5 is not necessary. Two more accurate analyses are that the drop is in part due to the severe increase in submissions to the DOJ and in part due to the fact that *Bossier II*¹⁶ has limited the ability of the DOJ to object to purposeful discrimination in voting practices. I make these points and others in my answer to a very similar question (Question 4) from Senator Cornyn above. However, I would like to provide additional data in support of these analyses.

The number of submissions to the DOJ has skyrocketed since 1982, going from an average of 2,566 submissions per year from 1965 to 1981, to an average of 16,506 submissions per year from 1982 to 2005.¹⁷ Thus, while the percentage of submissions that were not precleared may have lowered in the last twenty-five years, the number of objections has actually almost doubled from an average of fifty-one per year from 1965 to 1981 to an average of ninety-nine per year from 1982 to 2005.¹⁸

Bossier II, decided on January 24, 2000, seriously hinders the ability of the Department of Justice (DOJ) to combat intentional discrimination. The literal language of Section 5 of the VRA allows the DOJ to preclear a submission only if it “does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color.”¹⁹ Prior to *Bossier II* the DOJ had the ability to find

¹⁴ CivilRights.org, Hearings to Examine the Impact and Effectiveness of the Voting Rights Act, <http://www.civilrights.org/issues/voting/details.cfm?id=37137¤tpage=1> (last visited June 14, 2006).

¹⁵ *Id.*

¹⁶ *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 120 S. Ct. 866, 145 L. Ed. 2d 845 (2000).

¹⁷ U.S. Department of Justice, Civil Rights Division, Voting Section Home Page, Section 5 Changes by Type and Year, http://www.usdoj.gov/crt/voting/sec_5/changes.htm (last visited June 13, 2006).

¹⁸ *See id.*

¹⁹ 42 U.S.C. 1973c.

discriminatory purpose regardless of the current state of the jurisdiction.²⁰ However, in a controversial 5-4 decision, the Supreme Court in *Bossier II* tied the Department's hands by permitting an objection on purpose grounds only if the jurisdiction has the purpose specifically to retrogress rather than a general purpose to discriminate against minority voters.²¹ The practical effect of *Bossier II* has been to reward the "most intransigent perpetrators of discrimination."²² These jurisdictions, after decades of purposeful discrimination to dilute minority voting influence, may now continue their prejudices legally as long as they maintain an "exclusionary *status-quo*."²³

An analysis of the DOJ's activity pre and post-*Bossier II* shows how this *status-quo* has functioned to hinder voting equality. Between 1982 and 1999, the DOJ objected to an average of 124 submissions a year.²⁴ Following *Bossier II*, that average dropped to 9 objections a year.²⁵ It is important to note that at the same time the number of objections fell to less than 10% of their previous average, the number of More Information Requests (MIRs) issued by the DOJ to deter voter dilution actually increased (from an average of 47.3 withdrawn, superseded, and no response MIRs from 1982-1998, to an average of 51 such MIRs per year from 1999 to 2005).²⁶ The comparison illustrates that the need for DOJ intervention in voting alterations has continued in at least a great of capacity as before; it is just the ability of the DOJ to effectively intervene that has been undermined.

While *Bossier II* and the increase in Section 5 submissions have led to a decrease in the percent of submissions that are objected to by the DOJ, Section 5 objections have still aided a minimum of 663,503 minority voters in the last six years.²⁷ Using this substantial number as a starting point to hypothesize about the number of voters who could have been helped in the absence of *Bossier II*, it becomes evident that Section 5 should not simply be renewed, it should also be strengthened by a statutory amendment to clarify that discriminatory "purpose" means any discriminatory purpose, not simply the purpose to retrogress.

²⁰ See, e.g., *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977).

²¹ See generally *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320 (2000).

²² Testimony of Debo P. Adegbile Before the House Judiciary Committee's Subcommittee on the Constitution, Legislative Hearing on H.R. 9, http://www.naacpldf.org/content/pdf/reauthorization/VRA_House_Testimony_Presented_by_Adegbile.pdf, 4 (last visited June 14, 2006).

²³ See *id.* at 4.

²⁴ Luis Ricardo Fraga and Maria Lizet Ocampo, More Information Requests and the Deterrent Effect of Section 5 of the Voting Rights Act, 12 (June 7, 2006).

²⁵ See *id.* at 12.

²⁶ See *id.* at 12.

²⁷ The number of minorities affected by Section 5 was obtained by combining information catalogued on U.S. Department of Justice, Civil Rights Division, Voting Section, About Section 5 of the Voting Rights Act Website, http://www.usdoj.gov/crt/voting/sec_5/obj_activ.htm, with population data from the U.S. Census Bureau, American Fact Finder Website, http://factfinder.census.gov/home/saff/main.html?_lang=en (last visited June 13, 2006). See Minority Voters Affected by Section 5 Objections, Jan. 2000 – May 2006, attached hereto as Appendix 2; and Minority Voters Affected by Withdrawn Submissions, 2000 – 2005, attached hereto as Appendix 3.

Finally, it is important to remember that the preclearance requirement is especially important at a time when state legislatures are enacting significant changes to their election laws in response to the Help America Vote Act. These new laws affect everything from the creation of statewide voter registration databases to election day polling place procedures to the use and counting of provisional ballots.²⁸ Depending on how they are implemented, these changes can have a disproportionate effect on minority voters, making it harder for them to register to vote, and possibly more likely that their vote may not be counted.²⁹

²⁸ According to the National Conference of State Legislatures, there were 92 new election reform laws passed in 2005 in the sixteen states that are covered in whole or in part by Section 5 of the Voting Rights Act. *See* <http://www.ncsl.org/programs/legman/elect/elections.cfm>.

²⁹ For example, an objection to a Florida law dealing with absentee ballots noted that in the areas where the law had been put in place without preclearance, the votes of minority voters were more likely to have been declared illegal than the votes of white voters because of the onerous witness requirements. *See* Letter from Bill Lann Lee, Acting Assistant Attorney General for Civil Rights to Robert Butterworth, Florida Attorney General, dated August 14, 1998, available at: http://www.usdoj.gov/crt/voting/sec_5/fl_obj2.htm. Similarly, in the November 2004 election in North Carolina, minority voters were 18% of the electorate, but 36% of those who cast an out-of-precinct provisional ballot, so that a rule that prevented the counting of those ballots would have disproportionately affected minority voters.

Questions from Senator Leahy

Question 1: Some witnesses have testified that voting changes leading to DOJ objections under Section 5 have declined since the last authorization. Some have cited this decline in the overall percentage of objections compared to submissions as evidence that Section 5 is not longer needed. What explains this declining percentage? Is the declining percentage of DOJ objections relevant to the question of whether Section 5 is effective or should be extended?

The declining percentage in Section 5 objections is explained by several factors, including:

1. The fact that more changes are being submitted for preclearance;
2. The fact that the Department is increasingly using More Information Letters and informal contacts with jurisdictions rather than objection letters to achieve the same goal – barring the implementation of a discriminatory election practice;
3. The fact that jurisdictions are more often seeking declaratory judgments in the D.C. District court, meaning that settlements or the denials of judgments for plaintiffs in those actions are what enforces the Act rather than objection letters from the Department of Justice;
4. The fact that the Department of Justice is severely hampered in its ability to object to changes that have a discriminatory but non-retrogressive purpose or effect following the *Bossier Parish II*, decision; and
5. The fact that the Department on occasion fails to object even when a law will have a retrogressive effect.

I explain each of these in greater detail in my answers to Question 4 from Senator Cornyn and Question 3 from Senator Kohl.

The declining percentage of Section 5 objections is only slightly relevant to the question of whether Section 5 is effective or should be extended. The declining percentage must be examined in light of evidence about what is happening in the covered jurisdictions. Since there is strong evidence that racially discriminatory redistricting plans, unfair annexations, racially polarized voting, voter suppression tactics aimed at minority voters, and a host of other practices that disadvantage minority voters are still occurring in the covered jurisdictions, it is clear that Section 5 is still needed. The question of its effectiveness in recent years actually relates to whether Congress has engaged in sufficiently rigorous oversight of the Department of Justice's enforcement of the Act.

The more important question is how Section 5 enforcement has protected minority voters in recent years and whether that protection is still needed. Between 1965 and 1981, there were 815 objections to submissions sent to the DOJ for preclearance.¹ Between 1982 and 2005, the number of objections totaled 2,282.² Thus, while the

¹ Luis Ricardo Fraga and Maria Lizet Ocampo, *More Information Requests and the Deterrent Effect of Section 5 of the Voting Rights Act*, 1 (June 7, 2006).

² *See id.*

percentage of submissions that were not precleared may have lowered in the last twenty-five years, the number of objections has actually almost doubled from an average of fifty-one per year from 1965 to 1981 to an average of ninety-nine per year from 1982 to 2005.³ The drop in percentage of submissions that are objected to is therefore not a product of objections going down, but of submissions becoming over 6.7 times more frequent.⁴

Even in light of the severe limitations on Section 5 review that occurred as a result of *Bossier II*, discussed further in my answer to question 3 from Senator Kohl, the Department of Justice (DOJ) has objected to fifty-four submissions since 2000 for changes to voting procedures from Alabama, Arizona, California, Georgia, Louisiana, North Carolina, South Carolina, Texas, and Virginia.⁵ These objections have ranged in subject from state and local redistricting, annexations, voting methods, voting time, poll place location, and in at least one occasion the absolute cancellation of an election.⁶ Section 5 objections have functioned to aid small as well as large scale elections, shielding as few as 208 and as many as 215,406 voters with a single objection.⁷

DOJ objections since 2000 have protected 8,764 voters in Virginia, 10,518 voters in Georgia, and 12,756 voters in North Carolina.⁸ During the same time period, nine objections to South Carolina submissions protected 96,143 African-American voters, two objections to Arizona submissions protected 163,647 Hispanic and American Indian voters, and six objections to Texas submissions protected 359,978 African American and Hispanic voters.⁹ Approximately thirteen school board members, twenty-seven local legislators, and six state legislators have been determined by this activity.¹⁰ In total, 663,503 minority voters in the last six years have been aided by Section 5 objections.¹¹

Although a large percentage of voters protected by Section 5 are those living in jurisdictions where objections have prevented the use of retrogressive election laws, they do not constitute the full number of voters assisted by the law. It is also possible to partially measure the number of voters protected by Section 5's deterrent effect by examining records showing when jurisdictions have abandoned a proposed change

³ *See id.*

⁴ U.S. Department of Justice, Civil Rights Division, Voting Section Home Page, Section 5 Changes by Type and Year, http://www.usdoj.gov/crt/voting/sec_5/changes.htm (last visited June 13, 2006) (cataloging Section 5 submissions by year).

⁵ U.S. Department of Justice, Civil Rights Division, Voting Section, About Section 5 of the Voting Rights Act, http://www.usdoj.gov/crt/voting/sec_5/obj_activ.htm (last visited June 13, 2006).

⁶ *See id.* (containing links to .pdf files that catalogue the objections made by the DOJ).

⁷ *See id.*

⁸ The number of minorities affected by Section 5 were obtained by combining information catalogued on U.S. Department of Justice, Civil Rights Division, Voting Section, About Section 5 of the Voting Rights Act Website, http://www.usdoj.gov/crt/voting/sec_5/obj_activ.htm, with population data from the U.S. Census Bureau, American Fact Finder Website, http://factfinder.census.gov/home/saff/main.html?_lang=en (last visited June 13, 2006). *See* Minority Voters Affected by Section 5 Objections, Jan. 2000 – May 2006, attached hereto as Appendix 2; and Minority Voters Affected by Withdrawn Submissions, 2000 – 2005, attached hereto as Appendix 3.

⁹ *See id.*

¹⁰ *See id.*

¹¹ *See id.*

because the Department of Justice sends a More Information Request (MIR). MIRs are used by the DOJ to “promote submission, facilitate full review, and develop arenas of understanding” among all the parties involved.¹² A recent study at Stanford University found that MIRs contributed to the deterrent effect of Section 5 by 51%.¹³ Between 1982 and 2005, 13,697 MIRs and 3,120 follow up requests were sent to various jurisdictions submitting voting alterations.¹⁴

While it is impossible to measure deterrence regarding submissions that are never written, there is clear evidence of deterrence when looking at the number of MIRs that are either withdrawn, submitted subsequently with a superseded change that replaced the original change, or never responded to or responded to with insufficient information. These numbers have not only stayed constant since 1982, they have actually increased of late from an average of 47.3 withdrawn, superseded, and no response MIRs from 1982-1998, to an average of 51 per year from 1999 to 2005.¹⁵ This figure illustrates that the need for Section 5’s deterrent effects are needed at least in as great of a capacity as they have been in the past.

A conservative estimate of voters aided specifically by withdrawals can be determined from information catalogued on the DOJ’s website. In the last six years, fifty-seven submissions to the DOJ have been withdrawn before they could be fully reviewed.¹⁶ Similarly to Section 5 objections, withdrawn submissions cover all kinds of alterations of voting time, place, and manner. Since 2000, withdrawn submissions have aided as few as 63 and as many as 171,132 voters in a single withdrawal.¹⁷ They have come from eleven different states and have influenced both local and state-wide elections.¹⁸ At least thirteen school board members, twenty-one city and county legislators, and one state legislator have been determined in great part due to withdrawn submissions to redraw districts.¹⁹ In total, conservative estimates of 532,396 voters have been protected by withdrawn submissions to the DOJ.²⁰ When combined with the more abstract figures of submissions that are altered due to MIRs and potential submissions that are never written due to Section 5’s influence, it is clear that deterrence plays an essential role in assuring minority voting strength.

When combined, the number of voters helped by Section 5 objections, MIRs, and deterrence is staggering. In the last six years alone, minority voters have maintained the ability to elect a candidate of choice in at least eighty-one state and local elections.²¹ A

¹² Luis Ricardo Fraga and Maria Lizet Ocampo, More Information Requests and the Deterrent Effect of Section 5 of the Voting Rights Act, 3 (June 7, 2006).

¹³ *See id.* at 9.

¹⁴ *See id.* at 3.

¹⁵ *See id.* at 12.

¹⁶ *See* Minority Voters Affected by Withdrawn Submissions, 2000 – 2005, attached hereto as Appendix 3.

¹⁷ *Id.*

¹⁸ *See id.*

¹⁹ *See id.*

²⁰ *Id.*

²¹ *Id.*

minimum of 1,195,899 minority voters have been directly aided by Section 5.²² Voting is a fundamental right, guaranteed by the Fifteenth Amendment to the Constitution.²³ With the amount of activity generated by Section 5 authority, it is clear that Section 5 is still necessary to ensure this right to a significant portion of the minority population.

Question 2: Can you tell us about recent examples of DOJ objections and types of objections that have made a difference in preserving voting rights for minority citizens? How many citizens' voting rights have been implicated in your examples? What would have happened in these cases if Section 5 did not exist? How much more difficult would it have been for minority voters to invalidate these changes if Section 5 did not exist? Why wouldn't a Section 2 lawsuit work just as well?

Between 1965 and 2001, the town of Kilmichael, Mississippi did not elect a single African-American to the Board of Aldermen and only one African-American even ran for mayor of the town.²⁴ Statistics from the 2000 census indicated that the town had become majority African-American and would likely elect multiple black Alderman and perhaps even a black Mayor in the 2001 election.²⁵ With this knowledge, the all-white council cancelled their general election three weeks before its scheduled date with no notice to the community.²⁶ The stated purpose for the town's action was to develop a single-member ward system for electing town officials; however, because the town was required to submit the proposal to the DOJ for preclearance, the elections were reinstated.²⁷ Thus, without Section 5, voters in the town would not have been able to elect new town officials, and the existing officials would have been able to enact a single-member districting plan that unfairly diluted the voting strength of black voters. Ultimately black voters would have had to find a way to file a Section 2 lawsuit in order to vindicate their rights. Such a case would probably not have been resolved until at least a year after it was filed.

Earlier this year in Texas, the DOJ issued a Section 5 objection when the North Harris and Montgomery Community College District, comprised of an area of over 1000 square miles, reduced the number of polling places from 84 to 12.²⁸ Had this change been implemented, it would have put a disproportionate burden on minority and poor populations, who are less likely to have access to the transportation necessary to travel long distances to the polling places. Also, these groups are less likely to be able to take the time off of work necessary to make it to one of the few polling places. The Department's objection letter noted specifically that under the proposed change, the site with the smallest proportion of minority voters served just 6,500 voters, while the site

²² See *id.*

²³ U.S. Const. amend. XV, § 1.

²⁴ U.S. Dept. of Justice, Civil Rights Division, Kilmichael, Mississippi, http://www.usdoj.gov/crt/voting/sec_5/pdfs/l_121101.pdf (last visited June 14, 2006).

²⁵ See *id.*

²⁶ See *id.*

²⁷ See *id.*

²⁸ U.S. Dept. of Justice, Civil Rights Division, North Harris Montgomery Community College District, http://www.usdoj.gov/crt/voting/sec_5/ltr/l_050506.htm (last visited June 14, 2006).

that served a population that was 79.2% black and Hispanic served over 67,000 voters. Without Section 5, the polling place change would have gone into affect and minority voters would have found it much more difficult to vote.

In 2002, the DOJ objected to an Arizona plan for statewide redistricting which would have diminished the districts where Hispanics could elect their candidate of choice from eight districts to five districts.²⁹ The plan would have made it so the Hispanic population, which constituted over 25 percent of the state's population, would only have been able to elect 16 percent of the state's congressional delegation.³⁰

A conservative estimate of 162,067 minority voters were protected in the three districts which were retained in the Arizona objection.³¹ Similarly, an estimated 215,406 minority voters were protected in the Texas polling place objection, and 219 minority voters were saved from vote dilution in the Kilmichael objection.³² These cases illustrate that the VRA is effective for large districts as well as small municipalities, aiding minority voters both by the hundreds and by the hundreds of thousands. In total, the right to vote of a conservative estimate of 1,195,899 minority voters since 2000 has been protected by the enforcement of Section 5 of the VRA.³³

In these three examples, as in all Section 5 objections, the DOJ was able to stop the problematic voting alteration *before* it was put in place. If Section 5 were not renewed, then violations would have to be dealt with retroactively under Section 2 of the VRA. A Section 2 lawsuit is a more burdensome method of protection as it must retroactively stop voting legislation after it has already been implemented. It takes time to assemble plaintiffs with standing, file a case and engage in discovery, and even on an expedited schedule, trial will be months and possibly over a year after the new law is put in place. Section 2 is also more difficult as it shifts the burden of proving the violation to the plaintiffs, where Section 5 requires the submitting authority to preemptively show no such violation would occur.

Question 3: Assistant Attorney General Wan Kim testified that covered jurisdictions have overwhelmingly complied with Section 5 of the VRA. Yet, other witnesses have testified that Section 5 has been so successful it is no longer needed. What is your

²⁹ U.S. Dept. of Justice, Civil Rights Division, Arizona, http://www.usdoj.gov/crt/voting/sec_5/ltr/l_052002.htm (last visited June 14, 2006).

³⁰ *See id.*

³¹ The number of minorities affected by Section 5 was obtained by combining information catalogued on U.S. Department of Justice, Civil Rights Division, Voting Section, About Section 5 of the Voting Rights Act Website, http://www.usdoj.gov/crt/voting/sec_5/obj_activ.htm, with population data from the U.S. Census Bureau, American Fact Finder Website, http://factfinder.census.gov/home/saff/main.html?_lang=en (last visited June 13, 2006). *See* Minority Voters Affected by Section 5 Objections, Jan. 2000 – May 2006, attached hereto as Appendix 2; and Minority Voters Affected by Withdrawn Submissions, 2000 – 2005, attached hereto as Appendix 3.

³² *See id.*

³³ *See id.*

opinion on whether overwhelming compliance with the law is a reason for doing away with it?

Evidence that a law is being complied with is not a reason to do away with it. If there were an environmental regulation that limited pollution levels, cleaner air would not signify that it is no longer needed, but rather that it is sufficiently serving its purpose. So long as the risk of pollution continues the law would need to be renewed. Professor Ellen Katz makes this point as well when she argues that “Section 5’s very success in addressing racial discrimination in voting is itself neither proof that preclearance has become obsolete nor license for the statute to continue indefinitely.”³⁴ While there is evidence that certain jurisdictions are not complying with the act, evidence that Assistant Attorney General Wan Kim may not have been aware of,³⁵ the most important question is whether Congress has reason to believe that racially discriminatory laws and practices that disadvantage minority voters will be put in place in the covered jurisdictions if Section 5 is not renewed. There is a strong basis in evidence before Congress at this point for concluding that retrogression will occur if Section 5 is not renewed.

Question 4: We have received testimony that Section 5’s preclearance requirement is effective in not only preventing, but deterring, discriminatory voting practices. Can a successful deterrent still be a success if it is no longer operational? In your opinion, would softening or removing this successful deterrent risk the emergence of new abuses?

Section 5 will not have a deterrent effect if it is not renewed. There are several reasons why I believe that new abuses will occur if Section 5 is allowed to expire. First, as I testified earlier, we are seeing in North Carolina that counties that are not covered by Section 5 are seeking to return to at-large election methods even though racially polarized voting in those counties has not decreased. There is every reason to believe that covered jurisdictions throughout the country will seek to do the same if they are released from the preclearance requirement.

Second, the recent use of voter suppression techniques aimed at minority voters, such as the post-card campaign in North Carolina, threats to videotape voters as they enter polling places, threats to challenge voters on election day, and a variety of other practices, indicate that racial animus still motivates some actors in the political process. Without Section 5, they will have no restraint and can implement new voting practices that disadvantage minority voters.

³⁴ See Ellen D. Katz, *Not Like the South? Regional Variation and Political Participation Through the Lens of Section 2*, June 19, 2006, at page 20; publication forthcoming, available at: <http://www.sitemaker.umich.edu/votingrights/files/notlikethesouth.pdf>.

³⁵ See Laughlin McDonald, *The Voting Rights Act in Indian Country: South Dakota, A Case Study*, 29 AM. INDIAN L. REV. 43, 43-44 (2004) (South Dakota enacted hundreds of statutes affecting elections that were never submitted for preclearance between 1976 and 2002); Written Testimony of Jerome A. Gray before the House Judiciary Committee, November 1, 2005 at 3 (a county in Alabama failed to submit voting changes for preclearance from 1995 to 2005).

Third, there have been more new election laws passed since the 2000 election than at any time in recent memory.³⁶ The wave of election reform laws has not yet crested, and these laws should be examined in the covered jurisdictions to ensure that they do not operate to the detriment of minority voters.

Question 5: Professor Gaddie testified about his report. Have you reviewed that report and, if so, do you believe it includes all evidence relevant to the continuing need for Section 5? Does his comparison of covered jurisdictions and non-covered jurisdictions take into account the widely recognized deterrent effect of Section 5?

I have reviewed the paper that that Professor Gaddie attached to his written testimony³⁷ and the seventeen studies of various jurisdictions authored by Professors Bullock and Gaddie posted on the American Enterprise Institute's website, referred to by Professor Gaddie in his written testimony.³⁸ Professor Gaddie's paper examines voter turnout and minority office holding in eleven states. Most of the seventeen studies evaluate three factors: Black registration and turnout, African-American office holding, and racial voting patterns. The reports for Texas, Arizona, California, Florida and New York examine minority registration and turnout and minority office holding, and the report that combines Alaska, Michigan, New Hampshire and South Dakota looks at registration and office holding for various minority groups. Gaddie's report on Georgia includes a section on redistricting, and his report on Florida has a section on "Representation and Section 5 Covered Counties". With these minor exceptions, all of the reports are uniform in their coverage of the three factors identified above: turnout, office holding and racial voting patterns.

These reports do not include all evidence relevant to the continuing need for Section 5. The bulk of the evidence I have identified in my answers to Questions 1 and 4 from Senator Cornyn, Questions 2 and 3 from Senator Kohl and Questions 1 & 2 from Senator Leahy above is completely missing from Professor Gaddie's paper and reports. While some of the findings in Professor Gaddie's reports indicate that there is a continuing need for Section 5 coverage,³⁹ his overall emphasis on just three factors does not include the range of information about the current ability of minority voters to participate in the political process that is relevant to determining whether Section 5 is still needed.

³⁶The National Conference of State Legislatures has started maintaining a database of new election-related laws introduced and passed by the states. See www.ncsl.org/programs/legman/elect/taskfc/database.htm.

³⁷ Charles S. Bullock, III & Ronald Keith Gaddie, "A Comparative Analysis of the Impact of the Voting Rights Act", paper presented at the annual meeting of the Southwestern Political Science Association in San Antonnia, TX, April 13-15, 2006.

³⁸ The seventeen reports can be found at: http://www.aei.org/publications/pubID.23859/pub_detail.asp.

³⁹ For example, he finds that in Virginia "black turnout still lags white participation levels in the Commonwealth and sometimes lags black voter turnout in the rest of the country. The proportion of African-American legislators compares less favorable with the black proportion in Virginia's adult population than is found in similar comparisons in other southern states subject to Section 5." Charles S. Bullock, III & Ronald Keith Gaddie, An Assessment of Voting Rights Progress in Virginia, at pg. 12, unpublished paper prepared for the Project on Fair Representation, American Enterprise Institute, available at: http://www.aei.org/publications/pubID.23864/pub_detail.asp.

Professor Gaddie's paper and reports do not discuss the deterrent effect of Section 5 in any of the covered jurisdictions. Thus, his comparison of covered and non-covered jurisdictions does not appear to take this effect into account. He does not discuss more information letters, withdrawn submissions, or the informal consultation that occurs between state and local officials and Department of Justice lawyers. Professor Gaddie does not examine the extent to which local officials in covered jurisdictions involve minority community leaders in their decision making. In short, he does not examine the totality of circumstances facing minority voters as they seek to participate in the political process.

Question 6: You have had extensive experience with Section 5 through your 18 years of practice with voting rights cases, including two and a half years as a Deputy Assistant Attorney General in the Civil Rights Division of the U.S. Department of Justice, with responsibility for the Voting Section, and through the public hearings you held in North Carolina and Virginia to gather information about the impact of the Voting Rights Act at the local level in those states. In your experience, do state and local officials find section 5 to be burdensome? To what extent do they find Section 5 to be beneficial?

One of the best indicators of the fact that many state and local officials do not find Section 5 to be burdensome is that so few have sought to bailout from coverage. To be sure, during my time at the Justice Department there were occasional complaints from state and local officials about an objection that we issued. Similarly, a few jurisdictions made known their general opposition to having to submit changes and, in a few instances, refused to cooperate with our requests for information. Overall, however, the majority of officials that I had direct contact with did not find Section 5 requirements to be burdensome, and in the majority of instances that I was aware of, there was an excellent working relationship between Department personnel and state and local officials.

I was at the Justice Department during the time that the Civil Rights Division was preparing for the onslaught of redistricting submissions that would follow release of the 2000 Census data. The Voting Section went to great lengths to make sure that the technology and internal operating procedures in place would facilitate electronic submission of much of the required information. We conferred with state and local officials so we could take their concerns into account as we structured our processing of submissions. We also modified the Section 5 regulations to make the process technically easier for jurisdictions.

The main benefit of Section 5 for state and local jurisdictions that I heard expressed by local officials was that after a voting change was precleared, they could deflect criticism by minority voters by pointing out that the redistricting plan, or polling place change, for example, had been precleared by the Department of Justice.

As a practicing attorney litigating Section 2 voting rights cases, I saw a different benefit to Section 5 coverage. In negotiating with local officials to change from an at-

large system to single-member districts, local officials could use Section 5 preclearance as a justification for doing the right thing when some constituents did not want them to create avenues for minority voter participation. Thus, Section 5 was a shield for local officials when they were negotiating settlements in Section 2 cases.

Question 7: In your professional opinion, does the existing coverage formula requiring preclearance of voting changes need to be altered?

No. The coverage formula does not need to be altered. I have discussed this issue at length in my answers to Questions 1 through 4 from Senator Coburn and Questions 2 and 3 from Senator Cornyn above.

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INDICATORS OF POLITICAL EXCLUSION*

1. Most Voting Rights Act objections and claims per capita: *South Carolina, Louisiana, Mississippi, Montana, North Dakota, South Dakota, Georgia, Virginia, New Mexico, Texas, North Carolina, Alabama, Arizona, New Jersey, and Massachusetts.*
2. Most federal observers sent to monitor elections per capita: *Mississippi, New Mexico, Arizona, New Jersey, Utah, Alabama, Michigan, Washington, Indiana, California, Louisiana, South Carolina, New York, Pennsylvania, and Illinois.*
3. Largest disparities between citizens of color and statewide elected officials of color: *Mississippi, Maryland, Louisiana, New York, California, South Carolina, Texas, Florida, Alabama, Virginia, Georgia, North Carolina, Delaware, Arizona, and Arkansas.*
4. Largest disparities between citizens of color and officials of color in all elected positions: *Texas, New York, California, Maryland, New Jersey, Florida, Mississippi, Delaware, Georgia, Nevada, Virginia, Louisiana, Illinois, South Carolina, and Connecticut.*
5. Least party competition for voters of color: *Mississippi, Louisiana, Maryland, Illinois, Georgia, Tennessee, Alabama, New York, Arkansas, Florida, Michigan, Pennsylvania, South Carolina, North Carolina, and Delaware.*
6. Largest racial disparities in voter turnout: *Nevada, California, Arizona, Colorado, Texas, Connecticut, Massachusetts, New Mexico, Florida, New York, Delaware, Oklahoma, Virginia, New Jersey, and Indiana.*
7. Largest minority group: *Hawaii, New Mexico, Mississippi, Louisiana, South Carolina, Georgia, Maryland, Alabama,*

*Section 5 currently applies to all or parts of the states listed in italics.

*California, North
Arkansas.*

8. Largest low-Engl
*Arizona, Hawaii, A
Jersey, Massachuset
New York, and Idaho*

While the lists help
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Carolina have used C
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Similarly, voters' tenden
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Startling reports abou
American Indians in So
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We should also limit
significant percentage of
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California, North Carolina, Virginia, Delaware, Arizona, and Arkansas.

8. Largest low-English-proficient populations: New Mexico, *Arizona, Hawaii, Alaska, Texas, Connecticut, California, New Jersey, Massachusetts, Rhode Island, Colorado, Florida, Nevada, New York, and Idaho.*²⁰

While the lists help us identify places that should remain covered, there are other important variables. The lists fail to consider intangibles that evade objective measurement. For example, within the past ten years, politicians in Mississippi, Georgia, and South Carolina have used Confederate-flag debates to polarize voters along racial lines. Politicians in California, Texas, and other states have shown their willingness to manipulate district lines to protect incumbents or give an advantage to one party. But quantifying such variables as the Confederate flag or the willingness of politicians to manipulate election rules is difficult, at least in ranking states. Similarly, voters' tendency to cast ballots along racial lines is a relevant factor, but we don't have a comprehensive database on racially polarized voting in every political contest in the nation that allows a comparative analysis among states (although the dearth of statewide elected officials of color and the lack of party competition for voters of color are rough proxies for racially polarized voting). Startling reports about recent voting discrimination against American Indians in South Dakota have also emerged, so perhaps parts of that state should remain covered.

We should also limit preclearance coverage to areas that have a significant percentage of people of color. In such areas, discrimination may be more rampant because voters of color likely carry more political weight. If we were to exclude states that lack a single minority group that makes up at least 5 percent of the population, we would release New Hampshire from current coverage. We also

20. U.S. Department of Justice, Civil Rights Division, Litigation Brought by the Voting Section, www.usdoj.gov/crt/voting/litigation/caselist.htm; U.S. Department of Justice, Civil Rights Division, Section 5 Objection Determinations, www.usdoj.gov/crt/voting/sec_5/obj_activ.htm; U.S. Department of Justice, Civil Rights Division, About Federal Examiners and Federal Observers, www.usdoj.gov/crt/voting/examine/activ_exam.htm; U.S. Department of Justice, "Justice Department to Dispatch Federal Election Monitors to Alabama, California, and New Mexico," press release, June 1, 1998, www.usdoj.gov/opa/pr/1998/June/247cr.htm.html; U.S. Department of Justice, "Federal Observers and Justice Department Personnel to Monitor General Elections in States Across the Nation," press release, November 4, 2002, www.usdoj.gov/opa/pr/2002/November/02_crt_640.htm; U.S. Department of Justice, "Department of Justice Announces Federal Observers to Monitor General Election in States Across the Country," press release, October 28, 2004, www.usdoj.gov/opa/pr/2004/October/04_crt_725.htm; U.S. Census Bureau, "Table 4a. Reported Voting and Registration of the Total Voting-Age Population, by Sex, Race and Hispanic Origin, for States: November 2004," www.census.gov/population/socdemo/voting/cps2004/tab04a.xls; Ethnic Majority, African, Hispanic (Latino), and Asian American Members of Congress; State and Local Government on the Net; "Encyclopedia: List of United States Governors"; CNN.com, Election Results: U.S. President, www.cnn.com/ELECTION/2004/2004/pages/results/states/AL/P/00/epoll.s.o.html (accessed on June 11, 2005); Michael Bocian, e-mail message to author, July 13, 2005; U.S. Census Bureau, "Reported Voting and Registration of the Total Voting-Age Population, by Sex, Race and Hispanic Origin, for States," www.census.gov/population/www/socdemo/voting/p20-542; U.S. Census Bureau, "Reported Voting and Registration of the Total Voting-Age Population, by Sex, Race and Hispanic Origin, for States," www.census.gov/population/www/socdemo/voting/past-voting.htm; U.S. Census Bureau, State and Country QuickFacts, <http://quickfacts.census.gov/qfd>; U.S. Department of Justice, "The Attorney General's Language Minority Guidelines: 28 C.F.R. Part 55: Appendix to Part 55—Jurisdictions Covered Under Section 203(c) of the Voting Rights Act of 1965, as Amended," www.usdoj.gov/crt/voting/28cfr/55/28cfr55.htm; FairData, Socio-Economic Contract Charts—Census 2000 Profiles, www.fairdata2000.com/SF3/contrast_charts/index.html.
21. Laughlin McDonald, "The Voting Rights Act in Indian Country: South Dakota, A Case Study," *American Indian Law Review* 29 (2004): 43; <http://factfinder.census.gov/servlet/SAFFPeople?sse=on>.

Chapter Five

1. Colin Campbell, "Mass," *New York Times*; Lawrence's Hispanic 1989; Efrain Hernandez, *Globe*, September 1; Lawrence, Office; Murphy, "In Lawrence December 2, 1988; Fate," *Boston Globe*; Lawrence Share; Louise Cole, "Law October 7, 1987; Department Sue; Equal Participation; 1998; Joe Healey, *Boston Herald*; "New Defended," *Boston*; Behind District Sch 1999, www.tomb.com; of Justice, "Lawrence Discrimination, Un September 9, 1988; Voters at Polls," *Boston*; "New Majority Eyes 10, 2001; Cambridge; Watched Race," *Boston*; Department of Justice Will Increase Oppor of Their Choice," *Boston*; "Mapping Latinos: Pay Off," *Boston Globe*; Voting Probes Net 19, 2003; "Short Circuit Democratic State; *Boston Globe*, June 1998.
2. Isabel Melendez, *Boston Globe*, June 1998.
3. Garrine P. Lacey, *Boston Globe*, June 1998.

**Minority Voters Affected by Section 5 Objections
Jan. 2000 - May 2006**

State:	Date:	Locality:	Type:	Description:	Voters:	Minority:
AL	16-Aug-00	City of Alabaster	Annexation	City wanted to annex section that contained 179 registered white voters and 2 black voters, decreasing registered minority from 51.2% to 45.7%.	1580	African-American
AZ	20-May-02	Arizona	Statewide redistricting	Redistricting would likely take number of Hispanic reps from 8 to 5.	162,067	Hispanic
AZ	4-Feb-03	Coconino Association for Vocations, Industry, and Technology	Local Redistricting	Default provided for 5 equal school districts, electing one board member each. They switched to 4 districts and 1 at large member. Evidence shows that under default, 2/5 would be Native, under their system, 1/5 would be.	1,548	American Indian
CA	29-Mar-02	Monterey County	Voting Method	Attempt to switch back to an at large voting method for school board that showed evidence of being retrogressive to Hispanic voters (who are actually majority).	1,260	Hispanic
GA	11-Jan-00	Webster County (98-1663)	local redistricting	school board redistricting plan diminished percentage of minority voters	470	African-American
GA	17-Mar-00	Tignall (99-2122)	voting method	city council election method changed from plurality vote and individual council races	208	African-American
GA	1-Oct-01	Ashburn(94-4606)	voting method	city council election method changed to numbered posts and majority vote	1167	African-American

State:	Date:	Locality:	Type:	Description:	Voters:	Minority:
GA	9-Aug-02	Putnam County (2002-2987)	local redistricting	local redistricting reduced the number of majority black districts for the county commission from 2 to 1	1866	African- American
GA	9-Aug-02	Putnam County (2002-2987)	local redistricting	local redistricting reduced the number of majority black districts for the board of education from 2 to 1	1866	African- American
GA	23-Sep-02	Albany (2001-1955)	local redistricting	redistricting of a minority ward continuously reduced the percentage of minority voters for the city board of commissioners	4391	African- American
GA	15-Oct-02	Marion County (2002-2643)	local redistricting	redistricting of the school board reduced minority influence	550	African- American
LA	13-May-02	Richland Parish (2002-3400)	local redistricting	school district redistricting reduced minority ability to elect their candidates	794	African- American
LA	2-Jul-02	Minden (2002-1011)	local redistricting	council redistricting reduced minority influence in one district	900	African- American
LA	4-Oct-02	Ponte Coupee Parish (2002-2717)	local redistricting	school district redistricting reduced minority ability to elect their candidates	962	African- American
LA	31-Dec-02	DeSoto Parish (2002-2926)	local redistricting	school district redistricting reduced minority ability to elect their candidates	788	African- American
LA	4-Jun-03	Ville Platte (2003-4549)	local redistricting		298	African- American
LA	6-Oct-03	Tangipahoa (2002-3135)	local redistricting		3405	African- American
LA	12-Dec-03	Plaquemine (2003-1711)	local redistricting		400	African- American
LA	25-Apr-05	Delhi (2003-3795)	local redistricting		219	African- American

State:	Date:	Locality:	Type:	Description:	Voters:	Minority:
MS	12/11/2001	Town of Kilmichael	Change of Date	Before 2001 election, only one alderman (5 elected every 4 years) had been elected since 1965, and only one black person had ever run for mayor. This election, 4 of the 10 who qualified for alderman were black, and one of the 3 mayoral candidates. The board then cancelled the election.	291	African-American
NC	23-Jul-02	Harnett County	Local Redistricting	Redistricting would likely take number of AA BOE member from 1 to 0 (out of 5).	6,378	African-American
NC	23-Jul-02	Harnett County	Local Redistricting	Redistricting would likely take number of AA BOCCommissioners from 1 to 0 (out of 5).	6,378	African-American
SC	12-Oct-01	Charleston	Local Redistricting	12 council members elected from 12 districts, new plan would reduce minority-majority population from 6 to 5.	3,193	African-American
SC	2-Nov-01	Greer	Local Redistricting	Redistricting generally favored white voters over black, and most likely made black voters unable to elect legislators in any one ditrict	977	African-American
SC	27-Jun-02	Sumter County	Local Redistricting	City council would've moved from 4 maj. AA districts to 3 (7 total).	6,004	African-American
SC	3-Sep-02	Union County	Local Redistricting	School Board elects 9...2 from majority AA. Reduce them by 4% and 7% respectively.	2,390	African-American
SC	9-Dec-02	City of Clinton	Local Redistricting	Redistricting weakened ward 1 below majority AA status	544	African-American
SC	16-Jun-03	Cherokee County School District #1	Local Redistricting	School Board wanted to move from 9 board members (2 elected from majority AA) to 7 board members (1 elected from majority AA).	1808	African-American

State:	Date:	Locality:	Type:	Description:	Voters:	Minority:
SC	9/16/2003	North	Annexation	Town was trying to annex white voters while denying black voters requests (specifically 2 white voters in this case).	269	African-American
SC	26-Feb-04	Charleston County School District	Voting Method	County School Board tried to switch from plurality to majority voting, making it very difficult for minority candidates.	73,343	African-American
SC	25-Jun-04	Richland-Lexington School District	Voting Method	County School Board tried to switch from plurality to majority vote and "numbered posts"	7,615	African-American
TX	5-Jun-00	Sealy independent School District	voting method	school board went to numbered posts	1381	African-American/Hispanic
TX	24-Sep-01	Haskell Consolidated Independent School District	voting method		881	African-American/Hispanic
TX	16-Nov-01	Entire State (2001-2430)	Statewide redistricting	accounting for the 3 districts lost	138,614	African American/Hispanic
TX	21-Jun-02	Waller county (2001-3951)	local redistricting	lost the ability to elect a candidate of choice in a district for county commission	2473	African American/Hispanic
TX	12-Aug-02	Freeport (2002-1725)	voting method	change to at large voting for city council	1223	African American/Hispanic
TX	5-May-06	North Harris and Montgomery Community College District (2006-2240)	voting method	changed polling places for 1000 square mile district from 84 to 12, serving considerably different racial compositions	215,406	African American/Hispanic
VA	28-Sep-01	Northhampton County (2001-1495)	Voting Method	county commission went from six single-member districts with half minority representation to three two-member districts with none	2201	African-American/Hispanic

State:	Date:	Locality:	Type:	Description:	Voters:	Minority:
VA	29-Apr-02	Pittsylvania County (2001-2026)	local redistricting	school board and county commission redistricting keep minorities from being able to elect the candidate of their choice	3341	African- American
VA	9-Jul-02	Cumberland County (2001-2374)	local redistricting	they would lose a seat in a redistricting plan	727	African- American
VA	19-May-03	Northampton County (2002-5693)	local redistricting	2002 redistricting plan insufficient	2495	African- American/Hi spanic
VA	21-Oct-03	Northampton County (2003-3010)	local redistricting	2003 redistricting plan insufficient	832	African- American/Hi spanic
				Total Number of Minority Voters Affected by Section 5 Objections	663503	

Section 5 Objections since 2000 – a note on methodology

Estimating number of affected minority voters when the Department of Justice objected to a redistricting plan:

Section 5 objections letters since 2000 are posted the DOJ's website and frequently contain substantial information about the jurisdiction and the change at issue. For example, a redistricting in Putnam County, GA (http://www.usdoj.gov/crt/voting/sec_5/pdfs/1_080902.pdf) was objected to by the DOJ because they determined that one district would go from 73.3% African American to 39.0% African American, eliminating the ability of the minority voters in this district to elect a candidate of choice. The DOJ's information also specified that there are five total districts for the county. Census data was obtained from the objection letter if it was included and from the census bureau if it was not.

Our calculation went as follows:

$$\frac{\text{Number of Lost Districts}}{\text{Total number of Districts}} * \text{Total population} * \text{Minority's Majority (assumed 51\% if unknown)} * \frac{\text{Minority VAP}}{\text{Total Min. Population}}$$

$$\frac{1}{5} * 18,812 * 73.3\% * \frac{3,804}{5,622} = 1,866.0$$

Our estimated number of minority voters affected for Putnam County was 1,866.

Minority Voters Affected by Withdrawn Submissions, 2000 to 2005

State:	Date:	Locality:	Type:	Description: (case file reference)	Voters:	Minority:
AL	8-May-02	Escambia County School District	Redist. (2001)	2001-3995	2443	African-American
AL	27-Mar-02	Henry County	Redist. (2001)	2001-3937	1162	African-American
AL	20-Oct-00	Tarrant	Annex (2)	2000-2137	881	African-American
AZ	28-Oct-03	Mohave County	Voter Reg. Procedures	2003-2434	10,428	Hispanic
AZ	16-Feb-00	Arizona (30 districts)	Redist. Procedure	1999-1532	54,022	Hispanic
AZ	25-Jan-00	Dysart Unified School District #89	Annex	2000-4146	8,002	Hispanic
GA	4-Sep-03	Albany	Redist., Precinct Realignment	2003-2161	4388	African-American
GA	23-Jul-03	Bibb County	Redist.	2002-3517	10,447	African-American
GA	3-Jun-03	Pulaski County	Precinct Consolidation, Poll Place (consolidation)	2002-4663	2,433	African-American
GA	30-Jan-03	Jones County School District	Redist., Stag Terms, Impl. Sched.	2002-3550	2202	African-American
GA	10-Sep-02	Atkinson County	Redist.	2002-2645	440	African-American
GA	1-Aug-02	Dodge County School District	Redist.	1996-1934	944	African-American
GA	7-Jan-02	Griffin	Redist.	2001-1854	1097	African-American
GA	1-Oct-01	Stapleton	Num Posts	2001-1350	63	African-American
LA	21-May-03	Arcadia	Redist.	2002-5734	204	African-American
LA	17-Mar-03	Concordia Parish	Poll Place (changed)	2002-4481	5,097	African-American
LA	17-Dec-02	Arcadia	Redist.	2002-3488	204	African-American
LA	22-Oct-02	Webster Parish	Redist.	2002-3586	1196	African-American
LA	22-Oct-02	Webster Parish School District	Redist.	2002-3587	1203	African-American

State:	Date:	Locality:	Type:	Description: (case file reference)	Voters:	Minority:
LA	8-Oct-02	West Carroll Parish School District	Redist.	2002-3401	639	African-American
LA	26-Jul-02	Alexandria	Redist.	2002-1032	2580	African-American
LA	9-Jul-02	Haynesville	Redist.	2002-1024	176	African-American
LA	25-Jun-02	Webster Parish	Redist.	2002-0249	1196	African-American
LA	25-Jun-02	Webster Parish School District	Redist.	2002-0264	1203	African-American
MI	18-Jul-02	Buena Vista	Election Admin. (2)	2002-1913	3,853	African-American
MI	18-Jul-02	Clyde	Election Admin. (2)	2002-1912	372	Hispanic
MS	17-Jul-03	Greenville	Redist.	2003-0085	2254	African-American
MS	6-Feb-03	Chickasaw County	Redist. (2)	2002-4939	1284	African-American
MS	3-Feb-03	Forrest County	Redist. (2), Poll Place (consolidation), Precinct Added, Precinct Consolidation, Poll Place (added)	2002-5346	4963	African-American
MS	20-Jul-01	Flora	Redist.	2001-0242	94	African-American
MS	19-Oct-00	Hernando	Redist.	2000-0350	464	African-American
MS	10-Oct-00	Hernando	Annex	1998-0992	980	African-American
NC	30-Jul-02	Craven County	Election method / Redist.	2001-3957	16,269	African-American
NC	16-Apr-02	Beaufort County School District	Redist.	2001-4063	1470	African-American
NC	19-Dec-01	Tarboro	Redist.	2001-1474	493	African-American
NC	9-May-01	Rowland	Maj Vote	2000-0815	550	African-American
NC	20-Jun-00	Stoneville	Stag Terms, Term Office, Impl. Sched.	1999-3975	148	African-American
NY	22-Nov-02	New York	Poll Place (loc deleted) (47)	2001-2034	?	
SC	23-Oct-03	Blacksburg	Redist.	2002-5580	?	African-American

State:	Date:	Locality:	Type:	Description: (case file reference)	Voters:	Minority:
SC	19-Oct-01	Richland County	Poll Place (changed)	2001-2612	130,577	African-American
TX	30-Dec-03	Vidor City	Billing Pro, Annex	2003-1313	241	Hispanic
TX	30-Apr-03	Huntsville Independent School District	Poll Place (changed) (2)	2003-0804	11,355	African-American
TX	12-Dec-02	Northside Independent School District	Redist.	2002-4959	171,132	Hispanic
TX	4-Dec-02	Azle	Billing Pro	2002-3221	299	Hispanic
TX	5-Nov-02	Killeen	Poll Place (loc estd.) (11)	2002-4906	20,055	African-American
TX	5-Sep-02	Marlin Independent School District	Poll Place (changed)	2002-0246	2,753	African-American
TX	8-Jul-02	Marlin Independent School District	Redist.	2001-4042	511	African-American
TX	14-May-02	Schleicher County	Redist., Term Office, MOE	2002-0173	132	Hispanic
TX	17-Apr-02	Hays Consolidated Independent School District	Redist.	2002-0019	1352	Hispanic
TX	1-Apr-02	Seguin	Redist., Precinct Realignment	2002-0076	911	Hispanic
TX	28-Mar-02	East Central Independent School District	Redist., Term Office	2002-0020	1406	Hispanic
TX	19-Feb-02	Castro County	Precinct Realignment, Poll Place	2001-3708	2,545	Hispanic
TX	14-Feb-02	Jefferson County	Redist. (2), Precinct Consolidation (2), Precinct Realignment	2001-3785	11028	African-American
TX	28-Jan-02	Reagan County Independent School District	Redist., Meth Stag Term, Impl. Schedule	2001-3175	143	Hispanic
TX	26-Dec-01	Spur	Num Posts, MOE, Number of Officials	1998-3647	217	Hispanic

State:	Date:	Locality:	Type:	Description: (case file reference)	Voters:	Minority:
TX	2-Feb-00	Klein Independent School District	Maj Vote	1999-3378	13,389	Hispanic
VA	28-Aug-01	Henrico County	Poll Place (changed)	2001-1838	18506	African-American
				Total number of minority voters aided by withdrawan submissions to the Attorney General:	532396	

Withdrawn Submissions: Note on methodology.

We relied on the list of withdrawn submissions identified by the staff for the National Commission on the Voting Rights Act. They make the following caution regarding their data:

The method employed for identifying withdrawn submissions also undercounts the actual number of them. The data were obtained through a Freedom of Information Act request for a list of all voting changes since 1982 where the Department had sent jurisdictions a letter requesting more information before deciding whether to preclear. All submissions containing the word "Withdraw" after a "more information" letter had been submitted were tallied to arrive at the total number of withdrawals used in the accompanying maps and charts. It was later discovered that the Department sometimes used another notation ("ND/wd") to indicate a withdrawn submission. Unfortunately, there was insufficient time to go through the submissions yet again to count the additional ones containing the latter notation.

National Commission on the Voting Rights Act & Lawyers' Committee for Civil Rights Under Law, Protecting Minority Rights: The Voting Rights Act at Work 1982-2005, at page 115, n.198 (Feb. 2006).

Estimating affected minority voters when a redistricting submission was withdrawn:

Information received from the DOJ on withdrawals tells us the following information for each withdrawal that we catalogued:

MISSISSIPPI

Subjurisdiction: GREENVILLE

County: WASHINGTON

Action Date: 01/13/2003

Redistricting plan (Council)

Submission received

Submission Number: 2003-0085

After reviewing this information, we visited factfinder.census.gov and found the total population of the area, the minority voting age population, and the total minority population. In this case, the total population was 41,633, the African American voting age population was 18,529, and the total African American population was 29,093.

Next, we searched the local government in question for the number of districts from which they elect board members. In this case, we discovered that six council members are elected by ward in Greenville (<http://www.greenvilleareachamber.com/greenville.htm>).

To ensure that our numbers were conservative, we assumed that the withdrawal would have affected just one of the districts. Since Section 5 now only applies to cases of retrogression in minority voting strength (*Bossier II*), we assumed that the withdrawn submission would have affected a district with a minority-majority status. The calculation went as follows:

$$\frac{\text{Number of Lost Districts}}{\text{Total number of Districts}} * \text{Total population} * \text{Minority's Majority (assumed 51\% if unknown)} * \frac{\text{Minority VAP}}{\text{Total Min. Population}}$$

Therefore, in our example, the numbers would plug in as follows:

$$\frac{1}{6} * 41,633 * 51\% * \frac{18,529}{29,093} = 2253.8$$

Are estimated number of affected minority voters for this case was 2254.