Sherrilyn Ifill, Associate Professor of Law
University of Maryland Law School
Written Responses to Senator Cornyn's Questions

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.

I did not receive the questions provided in your July 23, 2006 letter until July 31, 2006 -- four days after the Voting Rights Act renewal bill was signed by President Bush. Several of the questions are framed in terms that suggest that they were designed to explore some of the issues that would inform the Senate vote. As I understand it, your questions 1-6, and 8 were put to and answered by several witnesses prior to the Senate's 98-0 vote in favor of the renewal bill and thus prior to the President's signing. I have had the opportunity to review the responses of Drew Days, Pam Karlan, and Ted Shaw, among others, and believe that I agree with the substance of their responses to your questions and that no meaningful contribution to the relevant legislative record can be made at this post-enactment stage. Indeed, I presume that your satisfaction with the thorough testimony offered by witnesses and to the written responses provided in response to your queries, as well as to those of the other Senators, was manifested in your vote in favor of the bill. Accordingly, in lieu of providing written responses to questions 1-6, 8 here, I rest on those written responses that were provided prior to the Senate vote by the witnesses that I identified above. In addition, I believe that the answers I furnished at the hearing with regard to the significance of the number of Department of Justice objections under Section 5, are responsive to question 4.

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. Reauthorization of the Act in its current form would preserve those dates as the "triggers".

a) Would you support updating the coverage formula to refer to the Presidential elections of 2000 and 2004, instead of 1964, 1968, and 1972? Why or why not?

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?

Please see my response to Question 1.

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 14th and 15th amendments. In striking down the Religious Freedom Restoration Act, the Court observed, "RFRA's legislative record lacks examples of modern instance 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?

Please see my response to Question 1.

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 .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 one objection out of 4734 submissions. Is that sufficient to warrant Section 5 coverage? Why or why not?

Please see my response to Question 1, and also my live testimony at the hearing on July 13, 2006.

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?

Please see my response to Question 1.

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?

Please see my response to Question 1.

7. What do the changes to the Voting Rights Act proffered in the current re-written version mean? Specifically, Section 5 of the currently proposed re-write of the Act says the following:

(b) Any voting qualification, or prerequisite to voting, or standard, practice, or procedure, with respect to voting that has the purpose of or will have the effect of diminishing the ability of any citizens of the United States on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), to elect their preferred candidates of choice denies or abridges the right to vote within the meaning of subsection (a) of this section.

(c) the term 'purpose' in subsections (a) and (b) of this section shall include any discriminatory purpose.

Please tell the committee, in a few sentences, what you believe these phrases to mean.

Although many of the issues raised in my response to Question 1 apply equally here in that post-enactment legislative history cannot have informed the vote, I provide the following brief written response because I am not aware that this specific question has been addressed by numerous witnesses. The "preferred candidate of choice" language was designed to clarify Congressional intent in light of the Supreme Court's recent ruling in *Georgia v. Ashcroft*, which held that the presence of influence districts may factor into whether or not a redistricting plan can be deemed retrogressive. This new language in the bill will help ensure that under Section 5 jurisdictions are not permitted to dismantle districts that provide minority voters an opportunity to elect candidates of choice in favor

of districts in which minority voters "can play a substantial, if not decisive, role in the electoral process" -- more commonly referred to as influence districts.[1]

In addition, the "any discriminatory purpose" language contained in the bill further clarifies Congressional intent in light of the *Reno v. Bossier Parish School Board II* ruling which held that evidence of discriminatory purpose was not sufficient to sustain a Section 5 objection. In *United States v. Bossier Parish School Board*, 520 U.S. 471 (1998), the Supreme Court confirmed that *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977), provides the framework for determining whether there was sufficient circumstantial evidence or direct evidence of invidious discriminatory purpose infecting the adoption of a particular voting change. The *Arlington Heights* framework requires the Justice Department and courts to determine whether the "the impact of the official action" "bears more heavily on one race than another," the historical background of the jurisdiction's decision, the sequence of events leading to the challenged action, legislative history and departures from normal procedural sequences and contemporary statements by members of the decision making body.[2] The newly enacted bill will help ensure that Section 5 appropriately filters out changes enacted with discriminatory intent and not only those manifesting the more narrow retrogressive intent.

8. Putting aside the constitutional questions with regard to overturning Georgia v. Ashcroft and/or Bossier Parrish II – 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 a plan?

---

[1] *Georgia v. Ashcroft*, 539 U.S. 461, at 482 (2003).

[2] *Arlington Heights*, 429 U.S. at 266-68.

Please see my response to Question 1.

9. The Court in LULAC v. Perry indicates that for purposes of Section 2, the analysis should focus on a district in isolation. In other words, the Court said that Texas could not remedy a possible Section 2 violation of "dilution" by creating a new offsetting opportunity district because the analysis must be performed in "isolation." This seems troubling. As Chief Justice Roberts pointed out:

> *When the question is where a fixed number of majority-minority districts should be located, the analysis should never begin by asking whether a [] violation can be made out in any one district "in isolation." In these circumstances, it is always possible to look at one area of minority population "in isolation" and see a "violation" of§2…*
>
> *For example, if a State drew three districts in a group, with 60% minority voting age population in the first two, and 40% in the third, the 40% can readily claim that their opportunities are being thwarted because they were not grouped with an additional 20% of minority voters from one of the other districts. But the remaining minority voters in the other districts would have precisely the same claim if minority voters were shifted from their districts to join the 40%.*

If the analysis for Section 5 determination of "candidate of choice" are similarly decided on a district-by-district basis, how can it possibly work?

Although many of the issues raised in my response to Question 1 apply equally here in that post-enactment legislative history cannot have informed the vote, I provide the following brief written response because I am not aware that this specific question has been addressed by numerous witnesses. The Court's recent ruling in *LULAC* helps clarify the governing standards for both proving and for remedying a violation of Section 2 of the Voting Rights Act, including the Section 2 prerequisite of compactness, the requirement which requires a showing, in the context of a redistricting challenge, that

minority voters are sufficiently compact and numerous such that a district can be created that would provide those voters with an opportunity to elect candidates of their choice. 126 S.Ct. 2594; *see also Johnson v. DeGrandy*, 512 U.S. 997 at 1008 (1994); *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986). As outlined in Justice Kennedy's controlling opinion, the three "*Gingles*" prerequisites must initially be met "[c]onsidering the district in isolation." 126 S.Ct. 2594, 2616. Thereafter, however, Justice Kennedy recognized that a broader examination might lead to the conclusion that there could be no Section 2 violation under the circumstances.

The State of Texas argued that even though the *Gingles* prerequisites were met with respect to the challenged District 23 (because the District could have been drawn in an equally compact manner so as to including a sufficient numbers of Latinos of voting age to permit those voters to elect a candidate whom they preferred) there was no Section 2 violation because "it met its §2 obligations by creating new District 25 as an offsetting [Latino] opportunity district," *id.* The Court rejected this argument because it found that District 25 under the State's plan was not "compact" in the sense that had it not been drawn by the State, individuals in the area could have succeeded, in a different Section 2 case, in meeting the *Gingles* compactness prerequisite by proposing it. *Id.* at 23-29. Justice Kennedy's opinion clarified that a "State [may] use one majority-minority district to compensate for the absence of another only when the racial group in each area had a §2 right and both could not be accommodated," *id.* at 23.

It is evident from this approach that the Court did not limit the Section 2 analysis to a single district "in isolation." Justice Kennedy's opinion confirms this by stating that "the first *Gingles* condition requires the possibility of creating more than the existing

number of reasonably compact districts with a sufficiently large minority population to elect candidates of its choice." *Id.* at 23, quoting *Johnson v. DeGrandy*, 512 U.S. 997, 1008 (1994). Further clarifying the compactness requirement, the *LULAC* Court also noted that this "inquiry should take into account 'traditional districting principles such as maintaining communities of interest and traditional boundaries.'" LULAC (quoting Vera, 517 U.S. at 977, (plurality opinion)). Most importantly, the Court held that states cannot use one majority-minority district to compensate for the absence of another except in those instances when the racial group in each area had a Section 2 right and both could not be accommodated.

It is important, in interpreting the Court's language, to bear in mind the well-established principle statement regarding the need to review Section 2 claims in isolation to mean that Section 2 addresses a different harm than that addressed in the Section 5 context. Section 2 goes beyond the bare protections provided in the Section 5 context by looking to see whether the voting strength of minority voters in a particular jurisdiction has been diluted. In that sense, the protections afforded by Section 2 are broader in scope. Section 2 violations do not require the kind of comparative analysis conducted in the Section 5 context by looking at electoral opportunities provided under an old and new plan. Rather, Section 2 violations are largely jurisdiction geographic area-specific and require an intensely localized examination of the factors outlined constituting in the *Gingles* preconditions, including the compactness requirement, in order to determine whether a meritorious claim has been presented. It also is clear, however, that the Court's precedents have recognized that considerations of "substantial proportionality"

on a jurisdiction-wide basis may serve as a limitation on Section 2 claims. *See DeGrandy*, 512 U.S. 997, 1015-16 (1994)**.**

The analysis conducted in the Section 5 context is entirely distinct from that conducted in the Section 2 context, although it. However, the analysis is comparable in that preclearance determinations also turn on require a very localized and focused analysis. However, unlike the Section 2 context, this analysis aims to determine the number of truly viable districts under the benchmark and proposed plans. Indeed, determining whether a particular district is viable as a minority-opportunity district calls on for an careful regression analysis of voting patterns to that help determine whether minority voters are able to elect their "candidates of choice."

Thus, for the reasons outlined above, I believe that Section 2 and 5 are workable provisions that address different harms utilizing distinct forms of analysis.

10. The Supreme Court said that Henry Bonilla, a Hispanic Republican – a man that grew up in the barrios, a man who was the first in his family to attend college – could not represent Hispanics in his district – seemingly, simply because he is not a Democrat.

    Similarly, you wrote the following in a July, 12 2005 editorial piece in the Baltimore Sun:

    > *"The nomination of Justice Thomas to the seat vacated by Justice Marshall reduced the idea of diversity to its most simplistic and cosmetic terms. One need not question Justice Thomas' race or his authenticity as a black justice to recognize that describing him as "representative" of blacks, when his views reflect those of only 10 percent of the black population, is cynical and crude."*

    What support by the minority population in an elected official's district should be sufficient to indicate who can represent them?

> Similarly, forgetting for a moment that Justice Thomas is not an elected official – and thus, is not "representative" of any constituency in particular… if 10% support is not enough support for Justice Thomas to represent the views of African-Americans, what is enough? Would 20% be enough? 40%?

As I have articulated in my scholarship over the past 13 years, the term "representation" is a dynamic one, capable of multiple meanings depending on the context. Even appointed officials can serve in a "representative" capacity, although not in precisely the direct manner that elected representatives do. For example, on our federal circuit courts of appeal, judges are selected from the states that comprise each appellate district. In the 4th Circuit for example, judges are selected from North Carolina, South Carolina, Maryland, Virginia and West Virginia. Ideally, each of those states should be "represented" on the 4th Circuit. This does not mean that judges on the 4th Circuit are expected to advance the interests of their home states in deciding cases. But without question, the experience and familiarity of judges from particular states with the practice of law, the political reality, and governing structures in their home states should inform the work of the entire 4th Circuit.

Justices on the Supreme Court and other appointed courts can and do serve a representative function – albeit a quite different one than legislators. Judges must be impartial decision makers. But adherence to impartiality does not mean that a judge has no representative function. I have described the boundaries of judicial representation in my article, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 Wash. & Lee. L. Rev (2000) at pages 466-479, and I invite you to review that article for a more expansive articulation of my views in this regard.

With regard to the percentage of support needed to "represent" a community, it is an accepted pillar of our democracy that a candidate who receives the support of a majority (50% + 1) of the electorate becomes the representative of that jurisdiction. I know of no circumstance in which a leader who enjoys the support of only 10% of a relevant constituency has been regarded as the legitimate "representative" of that community. I use this same standard when thinking about whether an appointed official can be said to "represent" a particular constituency, recognizing of course that appointed officials – especially judges – are not pure or direct representatives in the same way as legislators or executives. In short, I ask, are the views and decisions of the "representative" reflective of those of the majority of the constituency to be represented?

I reject any notion that representation based on solely on shared racial background or characteristics is legitimate. Again, I elaborate on this in my article *Racial Diversity on the Bench*, cite above at pages 479-491. I fully acknowledge that shared racial background can be an important aspect of representation, but only if that shared background translates into common views, perspectives, values or goals between the putative representative and his constituents. For this reason, I argue that Justice Clarence Thomas is not "representative" of African Americans in the United States. He is African American, but his views as expressed in cases such as *Grutter v. Bollinger*, 539 U.S. 306, 349 (2003) (Thomas, J., dissenting), *M.L.B. v S.L.J*, 519 U.S. 102, 129 (1996) (Thomas, J., dissenting), *Holder v. Hall*, 512 U.S. 874, 892 (1994) (Thomas, J., concurring), *Hudson v. McMillan*, 503 U.S. 1, 28 (1992) (Thomas J., dissenting), to name just a few, demonstrate that he does not share the opinion, perspectives or goals of the vast majority of African Americans. The views he advances may represent those of African American

conservatives, but conservatives constitute only 10% of the adult African American population in the U.S.

Finally, I would emphasize that only the group that is to be represented can determine who represents them. Thus regardless of Henry Bonilla's background, if Mexican American voters in District 23 believed that he did not represent them, then he was not their representative. Here I would correct a premise of Question 10, above. The Supreme Court did not say the Henry Bonilla "could not represent Hispanics in his district." The Court said that Hispanics believed increasingly that Bonilla *did not* represent them. Mexican American voters demonstrated this belief by giving Bonilla a smaller and smaller percentage of their votes. Certainly Bonilla has the potential to represent the views, perspectives and goals of a majority of Mexican Americans in that District. But he cannot be regarded as the "representative" of Mexican American constituents simply by virtue of his being Mexican American, and from an impoverished background. That shared ethnic, cultural and social heritage must be combined with a common contemporary political agenda with Mexican American voters in that district, in order for Mr. Bonilla to be legitimately regarded as their representative.