

Supplemental Statement of Pamela S. Karlan
Submitted to the United States Senate Committee on the Judiciary
In Response to Written Questions Received from
Senators Leahy, Kennedy, Kohl, Cornyn, and Coburn

I. Introduction

On May 16, 2006, I presented written and oral testimony to the Committee on “The Continuing Need for Section 5 Preclearance.” As a professor of law and experienced voting rights attorney, I testified that renewal and amendment of section 5 represents an appropriate use of congressional power under Article I, section 4 of the Constitution (the “elections clause”) as well as sections 5 and 2 of the Fourteenth and Fifteenth Amendments, respectively (the “enforcement clauses”).

I have received written questions from five senators. What follows are my answers to those questions. The Senators’ questions are in *italics*. My answers are in roman. In some places, I have referred to answers already given. I hope these additional comments will be helpful.

Answers to Questions from Senator Leahy

1. *In 1999, the Supreme Court decided Lopez v. Monterey County, which came after City of Boerne. In Lopez, the Court again upheld, as it has many times, Congress’s authority under the Fifteenth Amendment to require a jurisdiction to pre-clear voting changes. It did so even where that change was required to implement the law in a non-covered state and the jurisdiction had no discretion in making it, recognizing “that Congress has the constitutional authority to designate covered jurisdictions and to guard against changes that give rise to a discriminatory effect in those jurisdictions....” Does Lopez provide strong evidence that the Supreme Court will continue to give deference to Congress in reauthorizing the VRA, even after City of Boerne?*

As I explained in my written testimony, *Lopez v. Monterey County*, 525 U.S. 266 (1999), reinforces the Supreme Court’s earlier decisions upholding the preclearance regime. In reaffirming the constitutionality of the Act, the *Lopez* Court explicitly cited *City of Boerne*, see *Lopez*, 525 U.S. at 282-83. More generally, the Supreme Court’s decisions after *Lopez* – most particularly, *Tennessee v. Lane*, 541 U.S. 509 (2004), and *Nevada Dep’t of Human Resources v. Hibbs*, 538 U.S. 721 (2003) – as well as its elections clause cases, reaffirm that the Voting Rights Act satisfies the *City of Boerne* congruence and proportionality test.

2. *In his dissent in another case coming after City of Boerne, Tennessee v. Lane (2004), Justice Scalia suggests that Congress should be subjected to lesser constitutional scrutiny where its anti-discrimination remedies are tied to discrimination based specifically on race. In your view, should this reauthorized VRA be entitled to greater deference from the Supreme Court for this reason?*

Answering this question as posed is complicated by the fact that I disagree with Justice Scalia’s underlying premise: namely, that Congress’s enforcement powers with respect to equal

protection are generally quite limited. As you will recall, Justice Scalia's dissent in *Lane* announces that he would apply a test to congressional enforcement powers that would foreclose virtually all prophylactic legislation. See *Lane*, 541 U.S. at 557-60. While he ostensibly carves out an exception for prophylactic legislation involving racial antidiscrimination, see *id.* at 61, as a matter of stare decisis, his overall approach to congressional enforcement power is so restrictive that I cannot endorse it, since Justice Scalia's approach would prevent legislation broadly protecting the right to vote that rests on the fundamental rights strand (rather than the antidiscrimination strand) of the equal protection clause.

That being said, since under Justice Scalia's cramped approach to enforcement, statutes like the Voting Rights Act are entitled to relatively greater deference, a fortiori such statutes are entitled to greater deference under standards that are more generally respectful of congressional power.

3. *In your analysis of constitutional law, should the level of deference given by the Supreme Court to Congress' powers to reauthorize Section 5 of the VRA depend on the precise length of the extension of the reauthorization?*

No. There is no particular magic to any precise time period. It seems to me that Congress must make a pragmatic assessment of how much longer preclearance is warranted that takes into account factors such as the recent nature of relatively effective minority participation in many covered jurisdictions, current political realities, the relationship to decennial redistricting cycles, the incentives for bailout (with its affirmative efforts to include minorities) provided by different potential extension periods, and the like.

Perhaps the following analogy might be helpful to you in thinking about this issue. The Copyright and Patent Clause of the Constitution, Art. I, § 8, cl. 8, provides that "Congress shall have Power . . . to promote the Progress of Science . . . by securing [to Authors] for limited Times . . . the exclusive Right to their . . . Writings." In *Eldred v. Ashcroft*, 537 U.S. 186 (2003), the Supreme Court, by a vote of 7-2, upheld Congress's enactment of the Copyright Term Extension Act that enlarged the copyright terms of existing works by twenty years. The Court's analysis of the word "limited" focused on the ways in which the extension was constrained within certain bounds, but gave tremendous deference to Congress in deciding the length of the extension.

More generally, judicial deference to the specific policy choices is particularly appropriate in light of the fact that Congress itself has both chosen to revisit the question of the continuing need for the Act by requiring periodic renewal and each time compiled a detailed record to justify its decisions.

4. *The Supreme Court requires a strong record of discrimination to uphold laws that impinge on the states. In enacting the VRA and reauthorizing it 4 times, Congress has relied on extensive fact-finding showing the recurring use of discriminatory tactics in covered jurisdictions. Do you believe that the Court views evidence of state discrimination as perishable—with some kind of constitutional expiration date—even after *Tennessee v. Lane*, in which the Supreme Court upheld key portions of the Americans with Disabilities Act on the basis of older evidence of discrimination?*

There is nothing in the Supreme Court's decisions that suggests some sort of "statute of limitations" on evidence of discrimination. As I explained in my written testimony, this should be especially true when the question of renewing, rather than enacting a statute is at issue. The Voting Rights Act of 1965 was passed only after roughly a century of experience with repeated subversions of minority voting rights in the covered jurisdictions – a century that followed a prior century in which African Americans were expressly barred from voting nearly everywhere in the United States and enslaved in large parts of the nation. It is well within Congress's competence to conclude that the effects of that discrimination have not yet been completely eradicated. The analogy I used in my oral testimony may be helpful here. When a patient is given a strong antibiotic for a virulent infection, the doctor often warns her not to stop taking the drug (which may have some side effects) the moment she feels better, but to continue the course of treatment, because otherwise she cannot be sure the disease has been eradicated completely. So, too, with the racial exclusion the Voting Rights Act was intended to cure.

5. *Because of the history of discrimination in covered jurisdictions, which Congress has established in previous reauthorizations and the Supreme Court has upheld as a constitutional basis for Section 5, is it enough for Congress to find that there are recurring instances of discrimination in covered jurisdictions?*

If I understand this question correctly, my answer is that Congress can rely on the evidence in the legislative history underlying the Act's original passage as well as its amendment and extension in 1970, 1975, and 1982, as well as evidence of discrimination during the past 24 years. That is, the justification for the Act rests not only on examples of discrimination that have occurred since the last renewal, but also on Congress's understanding that that discrimination occurred against a backdrop of prior pervasive discrimination and efforts to eradicate it.

6. *I want to ask you about Professor Gaddie's report in terms of the evidentiary standard that the Supreme Court will apply to Congress' record in support of extending Section 5. In order to establish the kind of record Congress needs in order to extend Section 5, does Congress have to find that there is more evidence of discrimination in covered jurisdictions than non-covered jurisdictions?*

It does not, as discussed in my response to Senator Kennedy's third question. Prior to the enactment and earlier extensions and amendments to section 5, there were clear and striking differences between covered and non-covered jurisdictions. There is still evidence of a gap, although (fortunately) that gap seems to be decreasing.

The issue here is a conceptual one. If, after several decades of enforcement, the gap between covered and non-covered jurisdictions remained as wide as it was in 1965, or even 1982, that would raise serious questions about whether the Voting Rights Act is appropriate legislation: the lack of any improvement in observed conditions would suggest that the Act had been utterly ineffectual.

By contrast, the fact that the gap is narrowing suggests that the Act is working. But it does not answer the question whether the gap would continue to narrow, remain the same, or grow if the Act were eliminated. Given past history, it seems the more prudent course to keep the Act in place

until the gains it has produced are cemented and internalized within covered jurisdictions.

7. *In 1982, I helped amend the VRA to include a new bailout provision to give covered jurisdictions without recent violations the opportunity to get out of Section 5 coverage. Even though no jurisdiction that has tried to bail out has failed, fewer than a dozen jurisdictions have sought to remove themselves from Section 5 coverage. What is the constitutional significance to the fact that jurisdictions have been choosing not to exercise the option to bailout from Section 5 coverage?*

As with your previous question, there are several different stories consistent with the rarity of bailout. The first is that jurisdictions have not sought bailout because they have not satisfied all the conditions – including the important “constructive efforts” detailed in section 4(a)(1)(F) – and see no point in a futile effort to bail out, an effort that might lead to scrutiny over whether the jurisdiction has even fully complied with section 5. A second is that jurisdictions appreciate either the “seal of approval” that preclearance accords or the political cover it provides. A third is that local jurisdictions are unaware of the bailout process. That the jurisdictions that have pursued bailout have been successful in obtaining it suggests that the actual process strikes an appropriate balance.

8. *Assistant Attorney General Wan Kim testified that Section 5 has had a deterrent effect in covered jurisdictions, discouraging attempts to implement discriminatory voting tactics. Does Professor Gaddie’s comparison of the record of covered jurisdictions compared with non-covered jurisdictions ignore this widely recognized deterrent effect? Is evidence of this deterrent effect relevant evidence which would help meet Congress’ burden of establishing a sufficient record in support of reauthorization?*

As I explained in both my written and oral testimony, the deterrent effect of section 5 is very real, and cannot be captured by looking at objection letters, reported lawsuits, or other such evidence. Indeed, if section 5 worked perfectly to deter the adoption of discriminatory changes, there would be no objection letters at all.

Analysis of section 5’s deterrent effect is entirely relevant to Congress’s reauthorization of the Act. As my answer to your earlier question about Justice Scalia and *Lane* indicated, congressional power to enforce the antidiscrimination commands of the Fourteenth and Fifteenth Amendments clearly extends to prophylactic legislation – that is, legislation that prevents violations from occurring, rather than merely remedying them after the fact.

9. *Professor Chandler Davidson and others have testified about the risk of backsliding and the risks to the progress we have made if we were to let Section 5 lapse. Is this evidence of the risk of backsliding constitutionally relevant?*

Yes. Here, too, Congress is addressing the question whether the Voting Rights Act is appropriate prophylactic legislation.

Answers to Questions from Senator Kennedy.

1. *The Supreme Court in the Bossier II case ruled that Section 5 only prohibits voting changes that worsen or are intended to worsen the position of minority voters. Do you agree that under the Bossier II standard the Department of Justice and the District Court in D.C. must preclear even an illegal or unconstitutional voting change, so long as there is no backsliding in minority voting power? What is your view of this case? Could it result in voting changes that may not be retrogressive, but may still dilute minority voting power and intentionally discriminate?*

Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, prohibits covered jurisdictions from enacting or administering changes to their voting-related practices or procedures unless they can persuade preclearance authorities (either the Department of Justice or the D.D.C.) that the proposed change “does not have the purpose and will not have the effect” of discriminating against members of a protected class. In *Reno v. Bossier Parish*, 528 U.S. 320 (2000) (*Bossier Parish II*), the Supreme Court limited the phrase “discriminatory purpose” in section 5 cases to apply only to a purpose to retrogress, that is, to make protected voters worse off. Thus, the Court “h[e]ld that § 5 does not prohibit preclearance of a redistricting plan enacted with a discriminatory but nonretrogressive purpose.” *Id.* at 341.

In general, government actions that have a racially discriminatory purpose are unconstitutional. (Some racial classifications may survive strict scrutiny, but only because a reviewing court concludes that such classifications are narrowly tailored to serve a compelling government purpose. Thus, if the *purpose* is to disadvantage individuals or groups on account of race, the use of race is illegitimate.) That includes actions that deliberately perpetuate existing discrimination. For example, prior to the passage of the Fifteenth Amendment, many states expressly limited the franchise to whites. A state that adopted a new strategy for perpetuating that past, purposeful disenfranchisement would violate the Fifteenth Amendment even if the new device “served only to perpetuate those old laws and to effect a transparent racial exclusion.” *Rice v. Cayetano*, 528 U.S. 495, 513 (2000).

“Retrogressive purpose” is thus only a subset of the larger category of “unconstitutional racially discriminatory purposes.” Thus, after *Bossier Parish II*, the Supreme Court has directed preclearance authorities to permit changes that have an unconstitutional, racially discriminatory purpose as long as the purpose is simply to perpetuate unconstitutional conditions and not to make them actually worse.

Had the Supreme Court’s view in *Bossier Parish II* been the prevailing view in 1965, the Voting Rights Act would have been a dead letter in any covered jurisdiction where black voters were entirely excluded – for example, the counties in Mississippi or Alabama where no black voters (or only a token handful) were registered. Those jurisdictions would have been permitted to substitute other disenfranchisement mechanisms for their literacy tests with impunity: no black voters could vote prior to the suspension of the literacy test, so no black voters would have been rendered worse off by new disenfranchising tactics.

My view is that *Bossier Parish II* is a deeply misguided decision, since the changes for

which it requires preclearance are changes that, by the Court's own hypothesis, are unconstitutional, but will remain in effect until plaintiffs can muster the counsel to bring constitutional or statutory challenges. As I explained in my earlier testimony before the Committee, the voting rights bar is small and underfinanced, and thus it may be hard for the minority community to find lawyers to bring cases challenging many unconstitutional changes, particularly at the local level.

2. *As a result of the Bossier II case, and the new Section 5 standard that the Justice Department has had to implement, would you agree that the number of Justice Department objections since that case is likely to underestimate the unconstitutional attempts to limit minority voting power by covered jurisdictions?*

Yes. As my answer to the previous question set out, *Bossier Parish II* requires preclearance of unconstitutional attempts to limit minority voting power. Moreover, as I explained in my written testimony, *Bossier II* will also decrease the deterrence effects of section 5 because jurisdictions will no longer bear the burden of negating an inference of unconstitutional purpose. Especially at the local level, where practices like selective annexations and deannexations are commonplace, this may be especially important.

3. *Do City of Boerne and its progeny require Congress to compare voting practices in covered states and non-covered states before renewing Section 5 of the Voting Rights Act? Or is Congress constitutionally permitted to address discriminatory voting practices incrementally by focusing first on states with a demonstrated history of discriminatory voting practices, rather than addressing the entire nation's various voting problems in a single piece of legislation?*

I do not believe that *City of Boerne v. Flores*, 521 U.S. 507 (1997), requires Congress to engage in a new and detailed comparison of voting practices and procedures and levels of minority participation and electoral success in covered and non-covered jurisdictions before renewing section 5.

As I set out in my written testimony, the Supreme Court has, both before and after the decision in *City of Boerne*, recognized the propriety of Congress's decision to focus the stringent remedies of section 5 on those jurisdictions with a long and pervasive history of disenfranchising or otherwise limiting the political participation of minority citizens. Congress generally has the prerogative to proceed incrementally. As the Court explained in *Katzenbach v. Morgan*, 384 U.S. 641, 657 (1966):

[I]n deciding the constitutional propriety of the limitations in such a reform measure we are guided by the familiar principles that a "statute is not invalid under the Constitution because it might have gone farther than it did," *Roschen v. Ward*, 279 U.S. 337, 339, that a legislature need not "strike at all evils at the same time," *Semler v. Dental Examiners*, 294 U.S. 608, 610, and that "reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind," *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489.

Thus, while I would certainly support additional legislation to more fully protect the right

to vote nationwide, the need for such legislation in no way undermines either the need for, or the continued constitutionality of, the section 5 preclearance framework. This is especially true, considering how effective preclearance has proven in addressing voting discrimination.

4. *Can you provide your analysis of Congressional authority to renew the language access provisions?*

I have not done a sustained analysis of the language access provisions of the Voting Rights Act, but the constitutional analysis I set out in my written testimony can fairly easily be applied to those provisions as well. Congress had before it in 1975, when it extended the preclearance requirement to various jurisdictions that used English language-only election materials despite the presence of large numbers of non-proficient citizens, and in 1982, when it enacted the bilingual election materials provisions, sufficient evidence to conclude that substantial numbers of citizens were not able to exercise effectively their fundamental right to vote. Thus, the decision to regulate this part of the electoral system represents an appropriate enforcement under section 5 of the Fourteenth Amendment of the fundamental rights/equal protection view of voting under section 1 of the Fourteenth Amendment. In addition, as I explained in my written and oral testimony, requirements of bilingual election materials certainly fall within Congress's Article I, § 4 power with respect to the conduct of federal or mixed federal-state elections.

Moreover, Congress has before it evidence of the continuing effects of discrimination against individuals who are members of language minorities, particularly Native Americans and Latinos. The 1975 legislative history describes the historical record in painful detail. And the congressional findings in Section 203(a) explain the constitutional basis for the exercise of that power. I set out the underlying analytic rationale more fully in the William & Mary Law Review article appended to my earlier written testimony, but the language provisions address two separate forms of discrimination, what one might term "internal" and "external" discrimination (with those two adjectives referring to whether the discrimination occurs inside or outside the political process narrowly defined). Language provisions are designed both to remedy voting discrimination and to remedy educational discrimination and unequal learning opportunities that have resulted in high illiteracy rates and prevented some citizens acquiring the English language skills necessary to effective participation. Section 203 is narrowly crafted to address this issue. Thus, Congress's redefinition of "test or device" to recognize that English language-only materials can be tantamount to a literacy test for these citizens is appropriate.

The United States Supreme Court upheld a similar exercise of the Enforcement Clause powers in *Katzenbach v. Morgan*. In *Katzenbach*, the United States Supreme Court upheld Section 4(e) of the Act, which provides for language assistance for "persons educated in American-flag schools in which the predominant classroom language was other than English." The State of New York argued that Section 4(e) of the Act was unconstitutional as applied to New York, which had passed an English language requirement for voting to give language minorities an incentive to learn English. The Court rejected that assertion, finding that Congress may have "questioned whether denial of a right deemed so precious and fundamental in our society was a necessary or appropriate means of encouraging persons to learn English, or of furthering the goal of an intelligent exercise of the franchise." 384 U.S. at 658. *Katzenbach* upheld the language assistance requirements as a

valid exercise of congressional enforcement powers under the Fourteenth and Fifteenth Amendments, which the Court recognized give “the same broad powers expressed in the Necessary and Proper Clause.”

5. *According to Dr. Thernstrom, the Voting Rights Act makes “sure that majority-black districts stay black” and creates “racially safe boroughs.” Based upon the most recent round of redistricting in 2000, does the evidence support Dr. Thernstrom’s argument? Why or why not?*

Nothing about the Voting Rights Act creates “racially safe boroughs.” The fact of residential racial segregation in large parts of the United States remains a reality. To the extent that black Americans, Latinos, and other language minority citizens live in communities with substantial numbers and concentrations of minority residents, any system of representation that uses geography as one indicator of shared interests will create a significant number of majority nonwhite districts.

To be sure, the Voting Rights Act prevents retrogression. In jurisdictions with existing majority nonwhite districts, this may require the preservation of such districts if covered jurisdictions or the preclearance authorities conclude that minority voters will otherwise suffer a diminution in their ability to participate fully and effectively in the political process and to elect candidates of their choice. But in jurisdictions where minority voters can elect candidates of their choice from less heavily minority districts, nothing about the Voting Rights Act – as opposed to run-of-the-mill political considerations – requires preserving the footprint of existing districts.

6. *Dr. Thernstrom contends that taking race into account in redistricting is “political exclusion – masquerading, of course, as inclusion.” Do you agree with Dr. Thernstrom? Why or why not?*

I am not entirely sure what Dr. Thernstrom means by this phrase. Race and ethnicity have *always* been taken into account in redistricting, for a variety of reasons. The old “balanced tickets” in urban areas – for example, in New York City, the traditional slating of Jews, Irishmen, Italians, and blacks for various offices, see Nathan Glazer & Daniel Patrick Moynihan, *Beyond the Melting Pot: The Negroes, Puerto Ricans, Jews, Italians, and Irish of New York City* xxvii-xxviii, 305 (2d ed. 1970) – were examples of explicit race-conscious political inclusion. Since I am not certain who Dr. Thernstrom is claiming has been excluded, I find it hard to answer her contention in more detail.

More generally, though, the argument that consciously drawing some districts in which blacks, Latinos, Native Americans, or Asian Americans can elect representatives of their choice somehow excludes other, nonminority voters from the process depends on minority voters having distinctive political interests that the majority does not share. But Dr. Thernstrom, at least in the work of hers that I have read, denies this fact. Thus, her argument is deeply self-contradictory.

Answers to Questions from Senator Kohl

1. *We can all agree that the Voting Rights Act was one of the most significant civil rights laws ever enacted in this country. As we consider whether or not to renew the expiring provisions of the Act, we should bear in mind that the Assistant Attorney General for the Civil Rights Division*

testified last week that “our work is never complete” with regards to enforcing the Voting Rights Act. Would you agree with that more work remains to be done? Why or why not? And given that statement, would you agree that the Voting Rights Act should be extended?

I agree that more work remains to be done, and that some of that work is best accomplished by extension of the preclearance provisions. The record, both before the House and in the Senate, shows that minority citizens still have not fully realized the promise of the Fourteenth and Fifteenth Amendment. Indeed, just this past month, the Department of Justice objected to a reduction in polling places in a Texas community college district – a reduction that evidenced, in the Department’s words, a “remarkably” uneven assignment of polling places, with the most heavily minority polling place being expected to serve more than ten times as many voters and the least minority polling place. As we all know, long lines can discourage voters from participating.

2. *Some argue against reauthorization of the Voting Rights Act on the ground that since voting discrimination is not limited to the states subject to the Act, the provisions of Section 5 should not be limited to them. Do you agree?*

I believe my answer to Senator Kennedy’s third question, combined with my earlier testimony, responds to this question.

3. *We have heard testimony that the proposed bill to reauthorize the Voting Rights Act, S. 2703, may need to be changed in order to survive constitutional scrutiny by the Supreme Court. Based on your extensive experience litigating these issues, including in the Supreme Court, do you agree?*

I do not agree. I think it is unlikely that the Supreme Court will strike down outright an extension of the Voting Rights Act of the kind laid out in the current bill. More possible, to my mind, is yet another set of restrictive interpretations of the Act by Justices fundamentally unsympathetic to the Act or to congressional power more generally. As to this risk, I am not sure there is much that can be done, other than to make as clear a record of the problems that have led Congress to extend and amend the Act and to make as clear as possible in the legislative history what Congress’s intent is with respect to how the Act should be interpreted. For example, that is what S. 2703 does with respect to the Supreme Court’s misinterpretations of congressional intent in the *Bossier II* and *Georgia v. Ashcroft* decisions.

Answers to Questions from Senator Cornyn

1. *What empirical data can you cite that indicates the ability of minorities in the covered jurisdictions to participate fully in the electoral process is substantially different from minorities outside the covered jurisdictions? Please be specific with respect to covered jurisdictions vs. non-covered jurisdictions.*

I am not a political scientist. As you will have seen from my written and oral testimony, I have limited my remarks primarily to the issues on which I have special expertise – primarily the extent of congressional power to amend and extend the Voting Rights Act and secondarily, based

on my experience as a voting rights litigator and counselor to elected officials, how the Act has operated in the jurisdictions in which I have worked.

Moreover, my view on the underlying constitutional question does not turn on the kind of empirical differences about which your question inquires, as my answer to Senator Kennedy's third question explains. Given that view, I have not personally conducted a detailed study of electoral participation and success in covered and non-covered jurisdictions. Rather, I have relied on the work and analysis of trained social scientists and empirical scholars whose work I have come to respect. Among those on whom I have relied who have testified or whose work has been included in the record before this committee are Theodore Arrington, Chandler Davidson, Richard Engstrom, Bernard Grofman, Ellen Katz, Alexander Keyssar, J. Morgan Kousser, Peyton McCrary, and Nathaniel Persily.

2. *Currently, the Voting Rights Act identifies those jurisdictions subject to additional oversight by looking at voter turnout in the presidential elections of 1964, 1968, and 1972. Re-authorization of the Act in its current form would preserve these dates as the "triggers."*

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

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?*

With all respect, I think the subquestions rest on a fundamental misperception of the triggers. In its earlier enactments, Congress did *not* pick the 1964, 1968, or 1972 elections as triggers because it thought something distinctive had happened in any of those elections. Rather, quite frankly, Congress was looking for a formula that reached the jurisdictions that had a long, open, and notorious history of disenfranchising minority citizens and diluting their voting strength whenever they did manage to register and cast ballots. To be sure, the trigger has always been both slightly over- and under-inclusive. Some jurisdictions (for example, the New Hampshire townships) that don't have a history of discrimination got covered, while some jurisdictions (for example, the Arkansas Delta) with sorry histories of racial discrimination were not picked up (because Arkansas used a poll tax, rather than a literacy test). But the trigger formula overall fit the problem closely enough.

So the question about which jurisdictions should be covered is *not* really one about what turnout was like in a particular presidential election, but rather about whether this jurisdiction has a history of pervasive discrimination that calls for more stringent oversight. The turnout in the specified elections was but an indicator of a broader problem, and not the problem itself.

I don't think we need to add additional triggering conditions. I would like to see more use of the "pocket trigger" of section 3(c) of the Act if there are areas where preclearance is warranted. I explain this point more fully in my written testimony. Any over-inclusiveness issues are addressed

already by the bailout provision of section 4(a) of the Act, which allows jurisdictions free of voting discrimination for ten years to be removed from Section 5 coverage.

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.”

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

I believe you have misstated what the Supreme Court said in *City of Boerne*. The Court did *not* say that Congress cannot rely on forty year-old data to legislate under the Fourteenth and Fifteenth Amendments. What it said was that, with respect to RFRA, “[t]he history of persecution in this country detailed in the hearings mentions *no* episodes occurring in the past 40 years.” 521 U.S. at 530 (emphasis added). That is, the most recent example of the underlying problem occurred so far in the past that the legislation could not reasonably be said to be addressing a current problem.

By contrast, the record before Congress regarding the Voting Rights Act, while it of course stretches back to the century of blatant, sustained, overt discrimination between 1865 and 1965, also contains a substantial volume of documented examples of continued exclusion of minority citizens and continued racial bloc voting up until the present day. This evidence is in the form of hundreds of Section 5 objections, hundreds of successful Section 2 cases, dozens of successful enforcement actions, and requests for more information, as detailed in the study by my colleague at Stanford, Professor Luis Fraga. Moreover, as I explained both in my written testimony and in response to Senator Kohl’s eighth question, the imposition of preclearance has also had a significant deterrent effect. Thus, although there is substantial evidence of continuing problems, there is also evidence that the Voting Rights Act has prevented a substantial number of violations that might otherwise have occurred.

4. *While I am still reviewing the record, it seems to me the arguments thus far focus mostly on anecdotes regarding specific covered jurisdictions – yet, for the period 1996 through 2005, the Department of Justice reviewed 54,090 Section 5 submissions and objected to 72, or 0.153 percent. What percentage of objections below 0.153 do covered jurisdictions need to achieve before Congress can let Section 5 expire? Last year, according to DOJ data, there was only 1 objection out of 4734 submissions. Is that sufficient to warrant Section 5 coverage? Why or why not?*

I have already answered this question. The number of objections does not capture the Act’s tremendous deterrent effect.

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?*

As I explained in my answers to Senator Leahy's third and fourth questions, there is nothing magical about extending the Act for any particular period of time. My own view is that a five year extension would be nothing but a sham, since it would not even take the preclearance regime through the next full round of redistricting. Moreover, as I have already explained in my answer to Senator Leahy's seventh question, extending the Act for too short a time period undermines the incentive for jurisdictions to undertake the constructive efforts detailed in the bailout provision. See also S. Rep. No. 97-417, at 60-61 (1982). In addition, given the huge investment of time in compiling and considering the detailed record, reenacting the Act for too short a period seems inefficient.

Given these considerations and the Supreme Court's decisions in *Hibbs* and *Lane*, there is no reason for the Supreme Court to second-guess implementation-level decisions about preclearance, such as the precise length of reauthorization, as long as the record supports the extension of preclearance.

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. As I read the proposed amendment responding to *Georgia v. Ashcroft*, it does not require examination of, or protection for, so-called “influence districts.” To the contrary, it is the Supreme Court's current interpretation that seems to require this kind of analysis, as I set out in the article on *Georgia v. Ashcroft* appended to my written testimony.

[7.] *Please explain, in your view, precisely when and under what circumstances “covered” jurisdictions should be relieved of such coverage under Section 5.*

I think the current bailout requirements of section 4(a) strike precisely the right balance regarding when covered jurisdictions should be relieved of such coverage.

[8.] *In your written testimony, you state “[t]he question whether Congress can continue coverage of the already covered jurisdictions as part of an extension of the Act does not require that Congress conclude that if it were writing on a completely clean slate today, it would choose the original triggering formulas. Rather, it depends on whether continuing to subject the covered jurisdictions to the preclearance regime is congruent and proportional to preventing future constitutional injury.” Your position seems to be that if it is constitutional (as you believe it is) then coverage should continue as long as there is at least some evidence of bad conduct. Is it your position that re-authorization of the expiring provisions of the Voting Rights Act should not take into account the relative state of affairs today in covered jurisdictions vs. non-covered jurisdictions?*

I think you have misstated my position. I never said that extension of the preclearance regime is warranted “as long as there is at least some evidence of bad conduct.” Rather, I said that

minority success and enfranchisement is still a sufficiently recent phenomenon in the history of this country that it is entirely appropriate for Congress to conclude that the Act remains necessary.

Of course, Congress can take into account the relative state of affairs in covered and non-covered jurisdictions, including the impact that Section 5 coverage itself has had on the conditions in covered jurisdictions. But as I explained in response to Senator Leahy's sixth question, that evidence does not clearly show that preclearance is unnecessary. To the contrary, it is entirely consistent with the view that preclearance is necessary to achieve the narrowing of the gap that has occurred.

[9.] *Do you believe that today, in 2006, the people residing in covered jurisdictions are more racist than those living in non-covered jurisdictions? On what evidence do you base your belief?*

I have no evidence one way or another about whether particular individuals are racists. There is substantial evidence that the candidate preferences of minority and nonminority voters differ more significantly in many covered jurisdictions than in non-covered jurisdictions. In the last round of redistricting, for example, federal courts in cases involving South Carolina, Georgia, and Texas all found the continued existence of racial bloc voting. Both Professor Arrington and Professor Engstrom have testified before Congress on their work finding significant racial bloc voting in South Carolina and Louisiana. The question of *why* racial bloc voting occurs is one Congress does not need to answer. That it does is clear, and that the consequences include the exclusion of minority voters from effective participation are also clear.

In fact, in 1982, one of the reasons Congress amended section 2 of the Act to prohibit practices with a discriminatory impact regardless of the intent behind them was precisely because it concluded – quite wisely in my view – that requiring courts to label jurisdictions or officials as racists was unnecessarily divisive. The same holds true for labeling individual voters.

[10.] *Can you say with any degree of certainty whether non-covered jurisdictions are more likely to respect voting rights of minorities than covered jurisdictions? What evidence can you cite that defends your claim one way or another?*

I cannot reach any certain conclusions on this point. It is precisely because the issue is uncertain that I have concluded that a decision to extend the Voting Rights Act lies within Congress's enforcement powers, not to mention its plenary powers under Article I, § 4.

[11.] *Many Americans, across the political spectrum, believe that there are significant benefits to requiring immigrants to learn English and ballots be printed in English. Do you believe that any American, elected or otherwise, who believes that an individual should be required to learn English to become an American citizen is racist or anti-immigrant? Do you believe that any American, elected or otherwise, who believes that an individual be required to be proficient enough in English to vote on English-only ballots is racist or anti-immigrant?*

If you had phrased your question “Do you believe that *every* American, elected or otherwise” who would deny citizens the right to vote until they are English proficient is a racist, I would of

course answer *that* question “No.” Of course not. But do I believe that there is “*any* American” who holds that view for racist reasons, the answer is certainly “Yes.” I believe that some individuals who hold those beliefs are racists, some individuals who hold those beliefs seek to cynically manipulate the political process, some individuals who hold those beliefs are ignorant of the evidence suggesting that a majority of citizens who benefit from the language-assistance provisions of the Voting Rights Act are native-born American citizens (and that many of those citizens are the victims of shoddy public education systems), and some individuals who hold those beliefs are acting in good faith but are mistaken about what the promise of American democracy means. As to any particular American, elected or otherwise, I cannot tell you into which category he or she falls.

Answers to Questions from Senator Coburn

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?*

For the reasons I gave in response to Senator Cornyn’s second question, the answer to this question is “yes.” Section 4’s trigger was a formally neutral device for capturing a more historically based truth: certain jurisdictions have had a long history of racial disenfranchisement and dilution. The identity of the jurisdictions with that pervasive history and contemporary voting discrimination has not changed.

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

I believe that my answers to Senator Leahy’s third and fourth questions and Senator Cornyn’s fifth question provide a response to this 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 “backsliding” if the trigger is updated from 1972?*

I have not considered this question in any systematic way and thus don’t feel qualified to give an informed answer as to whether there are alternative triggers that might also satisfy the various concerns involved.

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

I don’t think the length of the reauthorization period is likely to have an outcome-determinative effect on the Supreme Court’s analysis of the continued constitutionality of the Voting Rights Act for the reasons I have explained already.

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

As I explained in response to Senator Cornyn's seventh question, and in my written testimony as well, the current bailout provision strikes the right balance.

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

I'm not entirely sure what you mean by alternative conceptions of the bailout provision. Of course, it would be possible to amend section 4(a) to make it easier for jurisdictions to bail out. I have yet to see any convincing argument as to why that should be done. The congressional decision in 1982 about what bailout should require seems entirely appropriate to me. If a jurisdiction has a clean bill of health free of voting discrimination for ten years, it can bailout.