

Response of Robert McDuff to Written Questions from Senator John Cornyn

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

The appropriate inquiry looks to evidence of a history of discrimination that, in part, gave rise to the coverage formula, and the evidence of persisting forms of discrimination in those covered jurisdictions subject to the special requirements of Section 5 of the Voting Rights Act (VRA).¹ This analysis can only be conducted by comparing the status of minorities and non-minorities within the covered jurisdictions themselves. On a number of occasions, the Supreme Court has acknowledged that this selective geographic reach of Section 5 was justified by the exceptional history of voting discrimination within the covered jurisdictions.² Now Congress must look to see whether discrimination continues in those covered jurisdictions in renewing the expiring provisions of the Act.

As I testified, I have not conducted a study of non-Section 5 jurisdictions, but I do know the Supreme Court has held that Congress had a basis for the coverage formula it created, and I believe the record demonstrates the need to continue the operation of Section 5 in the covered jurisdictions, including Mississippi.

In looking specifically at the State of Mississippi, we see that there is substantial evidence of continuing voting discrimination that warrants the renewal of Section 5. The Department of Justice (DOJ) has interposed 112 objections since the Act was reauthorized in 1982. 86 of these objections relate to redistricting. Other objections were imposed because of changes involving at-large elections, annexations of territory, numbered post requirements, majority vote requirements, candidate qualification requirements, changes from election to appointment of certain public officials, drawing of precinct lines, polling place relocations, open primary laws, repeal of assistance to illiterate and disabled voters, and a variety of other measures. In the context of racial bloc voting, which is the pernicious legacy of segregation, many of these retrogressive voting changes, if implemented, would have severely worsened the position of minority voters throughout the state.

Seventy-nine objections were interposed to voting changes involving Mississippi's counties -- these objections covered the vast majority of Mississippi's 82 counties, a number of which were repeat offenders. At various times, black voters had to return to the courts to force state and local officials to fulfill the basic requirement of

¹ 42 U.S.C. § 1973b (1982).

² *South Carolina v. Katzenbach*, 383 U.S. 301, 333-34; *See also* An Introduction to the Expiring Provisions of the Voting Rights Act and Legal Issues Relating to Reauthorization Before the S. Comm. on the Judiciary, 109th Cong. (May 2006) (Statement of Laughlin McDonald, Director ACLU Voting Rights Project).

submitting voting changes for Section 5 review. The evidence shows that Section 5 has worked to ferret out a number of retrogressive voting changes that would have otherwise worsened the position of minority voters, relative to non-minority voters, in the State of Mississippi.

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?*

There are mechanisms within the Act that work to ensure that the coverage formula is appropriately revised and retailored. For example, the bail-out mechanism described in Section 4(a) and the bail-in mechanism outlined in Section 3(c) of the Act work to ensure that the scope of Section 5 is appropriately expanded or restricted. Together, these two features of the Act provide a mechanism for jurisdictions and courts to expand or reduce the scope and reach of Section 5.

Also, it is my understanding that turnout data for presidential elections in the 1960s and 1970s were not the only pieces of information used to determine which states would subject to coverage under the Act. Congress also looked to those jurisdictions that simultaneously "engaged in the use of tests or devices for the purpose or with the effect of denying or abridging the rights to vote on account of race or color."³ Together, these data point to jurisdictions that have long histories of discrimination and are relevant to developing a record that illustrates what gave rise to the designation of covered jurisdictions.

I believe that Congress has compiled a thorough and extensive record of continuing discrimination in the covered jurisdictions that warrants renewal of Section 5 of the Act.

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.⁴ In striking down the Religious Freedom Restoration Act, the Court observed, "RFRA's

³ 42 U.S.C §1973b(d) (1982).

⁴ City of Boerne v. Flores, 521 U.S. 507, 530 (1997).

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?*

It is my understanding that the legislation at issue in *Boerne* was struck down by the Supreme Court, in part, because the legislative record lacked any recent examples of modern instances of discrimination and because the history of persecution described in the hearings took place more than 40 years ago.⁵ I do not believe that the *Boerne* ruling calls for the wholesale exclusion of historical data, such as the 1964 presidential election turn-out figures that led to the construction of the coverage formula, particularly where this data is accompanied by more recent and contemporary evidence of persisting voting discrimination in the covered jurisdictions.⁶ Congress has compiled an extensive record of this continuing discrimination. Above, I note that the Department of Justice (DOJ) has interposed 112 objections in Mississippi since the Act was reauthorized in 1982, and that these objections relate to a variety of voting changes. Given this record, I believe that there is no need in law or fact to revise the existing coverage formula.

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?*

Objection rates only tell part of the story of Section 5's success. These statistics do not account for enforcement actions that have been filed to force jurisdictions to submit their voting changes as required under the Act. Also, these statistics do not account for the strong deterrent effect of Section 5 in helping ensure that retrogressive voting changes are not put in place. As I testified, the existence of the Section 5 review process often discourages jurisdictions from adopting voting changes that may place minority voters in a worse position.

In addition, objection rates do not account for the large number of jurisdictions that have withdrawn submissions made to the Department of Justice after the jurisdiction received more information requests (MIR) from DOJ. A study completed by Professors Luis Ricardo Fraga and Maria Lizet Ocampo examined the impact of letters issued by the

⁵ *Boerne* 521 U.S. 507 (1997).

⁶ Moreover, in *Lopez v. Monterey Cty.*, the only case involving a post-*Boerne* challenge to § 5, the Supreme Court upheld the constitutionality of the § 5 preclearance provisions in the context of the substantial "federalism costs" of preclearance. 525 U.S. 266, at 269.

Justice Department requesting more information (MIRs) about pending Section 5 submissions. Although MIRs are among several mechanisms used by the DOJ to help facilitate analysis of a pending change, these letters can also serve as an indicator that DOJ has concerns regarding the potentially retrogressive effect or purpose of a particular proposed change. In many instances, jurisdictions that received an MIR withdrew the proposed change, submitted a superseding change, or made no timely response which effectively terminates a pending submission. In Mississippi, MIRs have played a significant role helping bar the implementation of dozens of potentially retrogressive voting changes. In Mississippi, for example, DOJ issued 874 MIRs between 1982 and 2005 which prevented the implementation of a total of 93 changes. Overall, Fraga and Ocampo conclude that MIRS enhanced the deterrent effect of Section 5 by 51%.⁷

Finally, some of the decrease in the number of objections may also be attributable to several recent Supreme Court cases that restricted the scope and reach of Section 5 including the *Bossier II* and *Georgia v. Ashcroft* rulings.

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?*

In my view, there is a distinction between covered and non-covered jurisdictions and this Congress has compiled an extensive record of discrimination in those areas that remain subject to the special requirements of Section 5 of the Act. This discrimination has been particularly severe in Mississippi where jurisdictions continue to adopt retrogressive redistricting plans and other voting changes; where there is evidence of racial appeals in campaigns; and where racially polarized voting remains part of the state's political reality.

While Section 5 has made, and continues to make, an important difference in Mississippi, there is still a long way to go. Enormous gaps exist between the socioeconomic and political standing of whites and blacks. Despite the highest black population percentage of any of the 50 states, none of Mississippi's statewide elected officials are black. Many elections are still driven by racially polarized voting, and most white voters do not vote for black candidates in black-white elections despite their qualifications. In the most recent statewide elections, held in 2003, the state's 46 year-old director of the Department of Finance and Administration, a black man named Gary Anderson, was defeated in the state treasurer's race by a 29 year-old white bank employee who had no experience in governmental finance. Racial campaign appeals still surface in elections in the state. In a recent contest for a state Supreme Court seat in

⁷ Luis Ricardo Fraga and Maria Lizet Ocampo, *More Information Requests and the Deterrent Effect of Section 5 of the Voting Rights Act*, Stanford University (June 7, 2006) at 4.

2004, the white candidate in a black-white election adopted the campaign slogan, "one of us," which had been characterized as a racial appeal by a federal court when it was used by a white candidate in a black-white congressional race over twenty years earlier. I attach a copy of the palm cards of the two Supreme Court candidates for the record and to illustrate that the use of race in electoral contests, not to mention electoral arrangements, within Mississippi persist even in the face of progress. In recent times, discriminatory measures such as dual registration requirements have been resurrected years after they were abolished. Moreover, officials routinely fail to submit voting changes for preclearance leading to enforcement actions around the state.

Given the degree of ongoing discrimination in Mississippi, I believe that Section 5 should be renewed for an additional 25 years. As long as jurisdictions continue to ignore the requirements of the law, and as long as race plays a significant role in electoral voting patterns, there is a grave potential for backsliding that must be avoided at all costs.

6. *Putting aside the constitutional questions with regard to overturning Georgia v. Ashcroft – I want to better understand some of the practical implications.*

Assuming the new language in the re-authorization is adopted, would it be your view that even districts that are "influence" districts, with relatively low numbers of minority voters, should be protected under the plan? Why or why not?

I do not view the drafted bill as overturning the Supreme Court's ruling in *Georgia v. Ashcroft*. Rather, I believe that the bill represents Congress' efforts to clarify its intent with respect to the reach and scope of Section 5. The *Georgia* ruling has essentially rendered Section 5 unworkable. The ruling offers an intangible definition of an influence district that is difficult to measure. The drafted bill corrects this very important aspect of the Section 5 retrogression analysis, which has long helped ensure that jurisdictions would be barred from enacting voting changes that eliminate or reduce the opportunity for minority voters' to elect candidates of their choice. I think that the bill's focus on the ability to elect requires case by case assessments, making it difficult to answer in advance a given arrangement without knowing the specific circumstances.