

**Testimony of Theodore M. Shaw
President and Director-Counsel of the NAACP Legal Defense and
Educational Fund, Inc.**

Before the House Judiciary Committee's Subcommittee on the Constitution

**Voting Rights Act Renewal Oversight Hearing on the Judicial Evolution of the
Retrogression Standard**

November 9, 2005

2 PM

2141 Rayburn House Office Building

Introduction

Good afternoon Chairman Chabot, Representatives Nadler, Conyers, Watt, Scott, and other distinguished members of the Committee. As President and Director-Counsel of the NAACP Legal Defense & Educational Fund, Inc. (“LDF”), I welcome the opportunity to testify before the Committee regarding the judicial interpretation of the retrogression standard as it relates to the renewal of Section 5 of the Voting Rights Act (“VRA”). Passage, renewal and enforcement of the VRA have been, and continue to be, of critical importance to LDF as part of our efforts to vindicate the voting rights of African Americans and other racial and language minorities.

The Voting Rights Act is widely regarded as one of the greatest achievements of the Civil Rights Movement; it reflects Congress’s meaningful and lasting embrace of Equal Protection of the law and equal political opportunity. Of course, Congressional activity in the voting rights arena has always been shaped by the experience of citizens who have made considerable sacrifices in order to ensure that our nation remains true to our high democratic principles. Accordingly, these hearings represent the latest installment in our ongoing national discussion about the value of political inclusion, the principle upon which the VRA rests.

The Context for the Current Renewal Debate

From LDF's perspective, there are two truths that shape the current VRA renewal debate. First, we must recognize that a great deal has changed for the better since 1965. Second – and LDF's experience bears this out – any accurate description of the situation within covered jurisdictions illustrates that, in significant respects, a great deal remains to be done if we are to achieve the political equality to which the Reconstruction Constitutional Amendments unequivocally commit us. It is important that Congress take full measure of both of these truths during the VRA renewal debate. The VRA and its expiring enforcement provisions have been the primary catalysts for dramatic increases in minority political participation, minority representation in elected bodies at the local, state and federal levels, and for the reductions in barriers to access to the political process for African Americans,¹

¹ The VRA in general, and the expiring enforcement provisions in particular, serve to protect African-American political access and empowerment, and these effects can be traced throughout the decades. The trend illustrates both the effectiveness of the Act and ongoing need for its protections. *See e.g., Department of Justice Objection Letter*, State of North Carolina, March 18, 1971 (objection to use of literacy test for voter registration purposes); *Department of Justice Objection Letter*, State of Georgia, March 24, 1972 (prohibited State Senate and House redistricting plan); *Department of Justice Objection Letter*, Waller County, Texas, July 27, 1976 (objection to redistricting plan of County Commissioner and Justice precincts); *Department of Justice Objection Letter*, Perry County, Alabama, September 25, 1981 (objection to the purging of registration and reidentification of voters); *Department of Justice Objection Letter*, Robeson County, North Carolina, September 21, 1984 (objection elimination of polling place in Smiths Township); *Department of Justice Objection Letter*, Bacon County, Georgia, June 11, 1984 (objection to method of electing Board of Commissioners from at-large residency districts); *Department of Justice Objection Letter*, Hemingway, South Carolina, July 22, 1994 (objection to annexation of town); *Department of Justice Objection Letter*, Kilmichael, Mississippi, December 11, 2001 (objection to cancellation of the June 5, 2001, general election); *Department of Justice Objection Letter*, Waller County, Texas, June 21, 2002 (objection to 2001 redistricting plans for the commissioners court, justice of the peace and constable districts), *Department of Justice*

Latinos,² Asian Americans, and Native Americans.³ Section 5, the language access provisions

Objection Letter, Delhi, Louisiana, April 25, 2005 (objection to 2003 redistricting plan for the Town of Delhi in Richland Parish, Louisiana which would eliminate one of the four wards in which minorities, based on their voter registration levels, had the ability to exercise the franchise effectively).

² The historical record illustrates that Latinos in regions throughout the country have been beneficiaries of the VRA. *See e.g.*, *Department of Justice Objection Letter*, Nueces County, Texas, January 26, 1976 (objection to redistricting of State Representative Districts in Nueces County, Texas); *Department of Justice Objection Letter*, Burleson City, Texas, June 5, 1981 (objection to reduction of polling places from 13 to 1 in “areas which are centers of [Black and Latino] population”); *Department of Justice Objection Letter*, Coconino County, Arizona, November 4, 1991 (objection to voter registration challenge procedures based upon mail questionnaire and purge practices); *Department of Justice Objection Letter*, Bronx, Kings, and New York Counties, New York, July 19, 1991 (objection to the 1991 districting plan that would pack Latino voters in Brooklyn at the expense of Latino voters in adjacent Bushwick and Cypress Hills districts “causing the Hispanic electorate to be unfairly underrepresented on the city council.”); *Department of Justice Objection Letter*, City of Hansford, California, April 5, 1993 (objection to residential annexations in Kings County, California which would have decreased the city’s Latino population from 35.9% to 29.4%); *Department of Justice Objection Letter*, Collier, Hardee, Hendry, Hillsborough, and Monroe Counties, Florida, August 14, 1998 (objection to additional state requirements for the absentee voting certificate, absentee balloting, and a corresponding criminal penalty, in part because of the burden to Latino voters in covered counties requiring Spanish language translation). Moreover, federal observers have been deployed in a number of elections since the 1992 amendments to Section 203 because of concerns regarding treatment of Latino voters, including deployments to Kings and New York, and Bronx Counties in 2001 and in Queens County, New York in 2004.

³ More recent application of the VRA has seen the Act’s provisions employed to address barriers to Asian American and Native American political empowerment. *See e.g.*, *Department of Justice Objection Letter*, Tripp and Todd Counties, South Dakota, October 26, 1978 (objection to commissioner precinct redistricting plan that would draw a district in which Native Americans were “substantially underrepresented” in comparison to two predominantly white districts.”); *Department of Justice Objection Letter*, City of New York – Kings and New York Counties, New York, August 9, 1993 (objection to proposed city and city school district Chinese language voter information program that failed to target 50% of Chinese-speaking voting age population of Kings and New York Counties). In 2004, the first Vietnamese American, Huber Vo, was elected to the state legislature in Houston, Texas within 2 years of the requirement that Harris County provide Vietnamese language assistance in compliance with Section 203 of the Voting Rights Act.

and federal observer provisions of the VRA serve as important checks on both familiar and also new methods of disfranchisement and vote dilution. Discriminatory vote denial has yielded to “second generation” attempts to dilute or weaken the impact of minority votes. The power of the VRA’s expiring enforcement provisions is in their ability to correct seemingly large and small distortions of the political process, and thus positively impact multiple racial and language minority groups in diverse regions across the nation. Section 5's use in changing circumstances, its success in promoting inclusion and preventing backsliding, as well as its deterrent effect over many decades illuminate the extent to which the VRA has been the Nation’s most effective mechanism for protecting minority voting rights. There is thus no inconsistency in embracing the progress that the VRA has, in large part, made possible while recognizing that its deterrent effect and enforcement protections continue to be vital safeguards.

Various threats to minority voters – including surprise polling place changes,⁴ exclusionary use of at-large voting methods,⁵ dilutive annexations,⁶ or language access non-compliance⁷ – can have a significant adverse impact on political participation, and the creation and protection of opportunities for minority communities to have the ability to elect candidates of their choice have been at the core of the VRA. The centrality of the ability-to-elect concept flows directly from: (1) the national preference for single-member electoral districts principally based upon geographic considerations; (2) the continued existence of racially polarized voting patterns; and (3) persistent efforts to dilute minority votes by

⁴ For example, in Bexar County, Texas in 2003, county officials sought to undermine Latino voting strength by failing to place polling places near those communities during a special election where a Constitutional amendment was on the ballot. Using the special provisions of the VRA, Latino advocates were able to obtain expedited relief from the local district court that prevented the Latino voters from being silenced in the election.

⁵ See e.g., *Department of Justice Objection Letter*, City of Freeport, Texas, August 12, 2002 (objection to change in method of electing city council members from single member to at large districts, explaining that “under [the single-member district method imposed by litigation settlement] minority voters have demonstrated the ability to elect candidates of choice in at least two districts. . .”)

⁶ See *supra* note 1, *Department of Justice Objection Letter*, Hemingway, South Carolina, July 22, 1994 (objection to annexation of town).

⁷ See *supra* note 3, *Department of Justice Objection Letter*, City of New York – Kings and New York Counties, New York, August 9, 1993 (objection to proposed city and city school district Chinese language program that failed to target 50% of Chinese-speaking voting age population of Kings and New York Counties). As recently as 2002, Cook County, Illinois purchased a voting system that used punch-cards with “voter error notification” capabilities that was incapable of notifying Spanish-speaking voters of problems with their ballots. Only by virtue of a lawsuit and a negotiated consent decree on behalf of Latino voters did the county agree to increase the number of Spanish-speaking poll workers and implement new training, monitoring, and hotline procedures.

depriving minority communities of the benefits of fairly drawn redistricting plans. Against this backdrop, in the wake of the Supreme Court’s reconceptualization of the Section 5 preclearance standard in *Georgia v. Ashcroft*, 539 U.S. 461 (2003), I wish to direct the remainder of my remarks to explaining several of the reasons why Congress should act to restore protection for the ability of minority voters to elect candidates of their choice as the touchstone of the retrogression analysis.

Judicial Development of the Retrogression Standard: Beer v. U.S. to Georgia v. Ashcroft

In *Beer v. United States*, the Supreme Court held that Section 5 required denial of preclearance to changes in voting practices or procedures if “the ability of minority groups . . . to elect their choices to office is . . . diminished.” 425 U.S. 130, 141 (1976)(quoting the House Report on extension of the Voting Rights Act in 1972). The relatively clear standard established in *Beer*, accepted without modification by Congress when it amended Section 2 and extended Section 5 in 1982, was significantly altered in *Georgia v. Ashcroft*, 539 U.S. 461 (2003).⁸

Georgia v. Ashcroft involved the question of whether the 2001 districting plan for the Georgia State Senate was entitled to preclearance under Section 5. According to the Supreme Court majority opinion, as compared to the benchmark 1997 plan, the post-2000 Census enactment “‘unpacked’ the most heavily concentrated majority-minority districts in

⁸ The Supreme Court’s pair of *Bossier* decisions also unreasonably limit the effectiveness of Section 5, but those precedents were addressed in prior testimony before the Committee.

the benchmark plan, and created a number of new influence districts.” *Georgia v. Ashcroft*, 539 U.S. at 470.

Georgia opted for a declaratory judgment suit before a three-judge court in the District of Columbia to seek preclearance. The Department of Justice objected because three state Senate districts from which African-American legislators had been elected were reduced from 60.58%, 55.43% and 62.45% Black Voting-Age Population (BVAP) percentages, respectively, to just above 50% each.

Two judges of the district court, observing that racially polarized voting continued to characterize elections in these districts, and predicting, in light of the evidence presented, that the percentage of white voters who would “cross over” to vote for black candidates was insufficient to preserve the preexisting opportunity of minority voters to elect their candidates of choice, denied preclearance.⁹ They wrote that the changes would “diminish African American voting strength in these districts” and that the state had “failed to present any. . . evidence” that gains in other areas of the state would offset this retrogression.¹⁰

The Supreme Court reversed, in an opinion by Justice O’Connor, which described the issue of retrogression as follows:

In order to maximize the electoral success of a minority group, a State may choose to create a certain number of “safe” districts, in which it is highly likely that minority voters will be able to elect the candidate of their choice. . . .

⁹ *Georgia v. Ashcroft*, 195 F. Supp. 2d 25, 94 (D.D.C. 2002).

¹⁰ *Id.* at 88.

Alternatively, a State may choose to create a greater number of districts in which it is likely — although perhaps not quite as likely as under the benchmark plan — that minority voters will be able to elect candidates of their choice.

Georgia v. Ashcroft, 539 U.S. 461, 480 (2003).

The opinion further suggests that “[i]n addition to the comparative ability of a minority group to elect a candidate of its choice, . . . a court must examine whether a new plan adds or subtracts ‘influence districts’ – where minority voters may not be able to elect a candidate of choice but can play a substantial, if not decisive, role in the electoral process.” *Id.* at 482. The opinion is imprecise and inconsistent in its definition and conception of what degree of influence preserves minority citizens’ “effective exercise of the electoral franchise.” *Id.* at 479 (quoting *Beer*).¹¹

Although the majority opinion in *Georgia v. Ashcroft* provides that “[i]n assessing the comparative weight of these influence districts, it is important to consider ‘the likelihood that candidates elected without decisive minority support would be willing to take the minority’s interest into account,’” *id.* at 482, it provides no meaningful standards for defining an acceptable level of “influence” that should properly be taken into account in the preclearance decision, either for three-judge courts in the District of Columbia or – more crucially – for the Department of Justice.

¹¹ At various points the majority suggests that BVAP’s between 25-30% or 30-50% may satisfy its notion of influence. *Georgia v. Ashcroft*, 539 U.S. at 487. However, at other points the Court suggests that districts above 20% may be sufficient. *Id.* at 489.

The majority opinion also proposes a more far reaching analysis in order to test the ability to participate in the political process, noting that:

one other method of assessing the minority group's opportunity to participate in the political process is to examine the comparative position of legislative leadership, influence, and power for representatives of the benchmark majority-minority districts. . . . Maintaining or increasing legislative positions of power for minority voters' representatives of choice, while not dispositive by itself, can show the lack of retrogressive effect under §5.

539 U.S. at 483-84.

The Need for Clarification of the Retrogression Standard

There are at least five reasons why Congress should clarify the retrogression standard to restore the emphasis on protecting minority voters' ability-to-elect.

(1) Georgia v. Ashcroft Permits Tangible Minority Gains to be Sacrificed

Contrary to the purposes of Section 5, the new retrogression standard allows a jurisdiction to decide whether or not it will protect hard-won minority political gains and opportunities to elect candidates of their choosing. Because *Georgia v. Ashcroft* permits a jurisdiction to choose among different theories of minority political representation, 539 U.S. 461, 483 (2003), it introduces a substantial element of uncertainty for minority communities into a statutory scheme that was specifically intended to block persistent and shifting efforts to limit the effectiveness of minority political participation. The benefit to minority communities of choosing the candidates who will represent them is as clear to those communities as it is to every other community. A decision which permits the

reconceptualization of minority representation every redistricting cycle will certainly yield some results that are at odds with the original purposes of Section 5 and the interests of minority communities.

(2) *Georgia v. Ashcroft Invites and Shields Vote Dilution*

Before the VRA was passed, and continuing to the present day, “cracking” or “fragmenting” geographically compact minority voting communities have been preferred methods for undermining the effectiveness of minority votes.¹² Prior to *Georgia v. Ashcroft*, the VRA, and Sections 2 and 5 in particular, stood as major safeguards against these practices. Because spreading minority voters among more districts dilutes the collective power of their votes, this technique remains a desirable goal for many and its use is likely to increase as a result of the endorsement of so-called “influence districts” in the *Georgia v. Ashcroft* opinion.

In approving such “influence,” the *Georgia v. Ashcroft* opinion reached well beyond the facts presented in the case to offer sanctuary even to those who intentionally seek to dilute minority voter strength, provided they cloak their conduct in the pretext of pursuing more “influence” for minority voters.

While packing can pose a separate and real harm to cohesive minority voters by limiting the reach of their votes to an area smaller than needed to preserve “ability-to-elect,”

¹² See *Gomillion v. Lightfoot*, 364 U.S. 339 (1960)(infamous Tuskegee gerrymander). See also, *Department of Justice Objection Letter*, Tangipahoa Parish, Louisiana, October 6, 2003 (2003 parish redistricting plan that proposed to eliminate one of two black majority districts).

a fair reading of the *Georgia v. Ashcroft* opinion suggests that it invites covered jurisdictions to adopt new rhetoric that the Supreme Court endorses to veil their dilutive intentions.

(3) *An Influence-based Section 5 Standard is Difficult to Administer*

During a recent Oversight Hearing before this Committee, all four witnesses on the panel (two called by Republican members and two by Democratic members), two experienced voting litigators, and two social scientists who have served as expert witnesses in several voting cases, testified, in substance, that they were skeptical that a workable standard of minority voters' "influence" exists, or could be devised and implemented. In contrast to the ability-to-elect standard that controlled the retrogression determinations of the Department of Justice and three-judge courts sitting in Section 5 matters for a quarter century, measuring "influence" is inherently and necessarily amorphous. Analysis of election returns sheds light on levels of racial bloc voting and the existence of realistic opportunity to elect. But that is not the case with "influence."

The opinion suggests more questions than it answers. How is "influence" effectively measured within DOJ's sixty-day administrative window? Does one look to roll call votes? Do those votes need to be on issues that have a discernible race element or just a discernible position preferred by minority group members? Is it enough if candidates for office campaign in minority communities? Must influence be consistently in evidence or is occasional influence sufficient?

But even if we assume that one can meaningfully measure influence, contrary to the cogent arguments that Justice Souter lays out in his dissent, *Georgia v. Ashcroft*, 539 U.S. at 495 (“[t]he Court’s ‘influence’ is simply not functional in the political and judicial worlds.”), how does the Department of Justice or a court establish a metric that indicates how much “influence” must be gained to trade off against a reduction in the ability-to-elect? Although the Supreme Court has very recently recognized that a standard without coherence makes little sense, see *Vieth v. Jubilier*, 541 U.S. 267 (2004), in *Georgia v. Ashcroft* it has invited incoherence where there had been coherent settled law. In these circumstances it is very likely that a level of indeterminacy, if not inconsistency, will undermine the effectiveness of Section 5 enforcement.

(4) *Georgia v. Ashcroft Undermines the Section 5 Benchmark Analysis*

As I have explained, the breadth of the decision and dictum in *Georgia v. Ashcroft* may result in tradeoffs that actually worsen the position of minority voters. The case arose at a time when minority voters in Georgia tended to align predominantly with one political party, which obscured the fact that in the long term, pursuing partisan interests for reasons of political expediency may adversely affect minority voters’ political strength should such partisan links weaken and shift, as they historically have done. For this reason, submerging the minority protection principles of Section 5 in favor of assuming a sustained identity between minority and partisan interests is contrary to the VRA’s original goals.

The effects of this course can be permanently harmful to minority voters because any partisan deal negotiated and approved under *Georgia v. Ashcroft* establishes the new benchmark against which subsequent voting changes are measured—whether or not the deal pays off in the way forecast for minority voters. In this way, the result of the decision could be that minority voters’ interests are sacrificed over the short and long term.

(5) *Minority Voters’ Interests Should Not Depend on any Single Officeholder*

The aspect of the majority opinion that makes the existence of positions of leadership within legislatures that are held by minority incumbents a key feature of the retrogression analysis is both troubling and inconsistent with other aspects of the decision. Reductions in minority voter percentages in the benchmark districts of minority legislators who have attained positions of “legislative leadership, influence, and power” put those very legislators, and their potential successors, at an increased risk of not being reelected. Moreover, the Court does not explain how to enforce the expectation that minority legislators who are reelected will continue in such positions of “leadership, influence, and power.”¹³

¹³ For example, if the Department of Justice preclears a plan based in part upon the assumption that minority officials elected in benchmark majority-minority districts will continue to serve in specific leadership positions, but that expectation does not come to pass, what remedy, if any, would be available? Preclearance by the Attorney General, once granted, cannot be reviewed or withdrawn by a court. *E.g., Morris v. Gressette*, 432 U.S. 491 (1977). And it is far from clear that a Section 5 court has authority to consider such an issue. The Supreme Court has held that “Changes which affect only the distribution of power among [elected] officials are not subject to § 5 because such changes have no direct relation to, or impact on, voting.” *Presley v. Etowah County Commission*, 502 U.S. 491, 506 (1992).

Conclusion

Unless the renewed Section 5 makes clear Congress' intent to negate or limit the rather amorphous, ill-defined, and theoretical portions of the majority opinion in *Georgia v. Ashcroft* by restoring ability-to-elect as the touchstone of Section 5, it will be far too easy for states and localities to justify preclearance by pointing to small increases in minority voting age population in so-called “influence” districts with 20%-minority voting populations, and to titled positions that may or may not carry significant authority for the individuals in them. Although the flexibility to allow reductions in minority percentages in majority-minority benchmark districts can be justified consistent with a properly construed Section 5, those reductions should be limited by the rule that opportunities to elect must be preserved.

As a practical matter, even prior to *Georgia v. Ashcroft*, DOJ's application of the Section 5 standard did not bar reductions in minority voting population. Indeed, DOJ did not object to all reductions in the proposed plan at issue in *Georgia v. Ashcroft*, but only to reductions in three Senate districts where plaintiffs failed to show that the opportunity to elect would remain. *See* 195 F. Supp. 2d 25, 56-62, 93-95 (D.D.C. 2002).

Decades of experience strongly suggest that in racially polarized environments – common in covered jurisdictions – minority communities that are within the range of “influence” contemplated in *Georgia v. Ashcroft* can be completely disregarded by hostile officeholders. There was no need for the Supreme Court to erode the minority opportunity

to elect candidates of choice standard that had brought fairness, consistency, and protection to minority communities. In light of the history and purposes of Section 5, an amorphous, ill-defined standard is a particularly poor substitute.