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**VIA E-MAIL AND OVERNIGHT MAIL**

The Honorable Arlen Specter, Chairman  
Attention: Barr Huefner, Hearing Clerk  
United States Senate  
Committee on the Judiciary  
Washington, D.C. 20510-6275

***Re: Written Questions Submitted by Senators Specter, Cornyn, and Sessions***

Dear Senator Specter:

Thank you again for giving me the opportunity to testify before the United State Senate Judiciary Committee regarding "An Introduction to the Expiring Provisions of the Voting Rights Act and Legal Issues Related to Reauthorization" on May 9, 2006. On May 19, 2006, I received a letter from the committee asking me to respond to questions from Senators Specter, Cornyn, and Sessions.

My responses appear on the attached pages. Please do not hesitate to contact me if I may be of further assistance to the committee. It is an honor to help the committee with the very important task of Voting Rights Act reauthorization.

Very Truly Yours,

A handwritten signature in cursive script that reads "Richard L. Hasen".

Richard L. Hasen

Enclosure

### Answers of Professor Richard L. Hasen to Questions from Senator Specter

- 1) What is the best evidence that shows that racial discrimination still exists in the covered jurisdictions?

**Answer:** There is evidence in the House record showing that racial discrimination in voting still exists in the covered jurisdictions. For example, there is evidence of continuing problems in Louisiana (summarized in Debo Adegbile, *Voting Rights in Louisiana: 1982–2006*, February 2006) and in South Dakota (summarized in Laughlin McDonald, “The Voting Rights Act in Indian Country: South Dakota, A Case Study,” 29 *Amer. Ind. L. Rev.* 43 (2004-2005)). Because I have not exhaustively reviewed the voluminous House record, I do not know that I can identify the “best” evidence showing that racial discrimination in voting still exists in the covered jurisdictions.

- 2) Is there anything that Congress can do to ensure that the reauthorization of the Voting Rights Act is upheld by the Supreme Court under the “congruence and proportionality” test articulated in *City of Boerne v. Flores*, 521 U.S. 507, 518 (1997)?

**Answer:** As explained in my earlier submitted testimony to this committee (available at <<http://electionlawblog.org/archives/hasen-testimony-final.pdf>>) and in my law review article, [Richard L. Hasen, Congressional Power to Renew the Preclearance Provisions of the Voting Rights Act After Tennessee v. Lane](#), 66 OHIO STATE LAW JOURNAL 177 (2005) (available at <<http://electionlawblog.org/archives/osu-final.pdf>>), there is much that Congress can do to increase the chances that the Supreme Court will uphold a reauthorized VRA under the *Boerne* standard.

First, although the House record is voluminous, there is much in it which does not show a pattern of unconstitutional discrimination by the states as required by *Boerne*. For reasons I’ve explained earlier, much of the evidence of section 2 violations and of objections by the Department of Justice does not show a pattern of unconstitutional discrimination. It would be very useful for someone to go through the House record and pull out *the best examples* of intentional discrimination on the basis of race in voting taking place in covered jurisdictions, and then contrast that evidence with the identified similar problems in non-covered jurisdictions. The Supreme Court could well require evidence that there is a greater problem with intentional discrimination in voting in covered jurisdictions than in non-covered jurisdictions.

In addition to a more careful presentation of the evidence, I proposed (in my earlier testimony) four possible changes to the current draft bill to help it survive constitutional challenge:

I recognize that this is politically difficult, but *Congress should update the coverage formula* based on data indicating where intentional state discrimination in voting on the basis of race is *now* a problem or likely to be one in the *near future*...

[Second], Congress should take steps to *make it easier for covered jurisdictions to bail out* from coverage under section 5 upon a showing that the jurisdiction has taken steps to fully enfranchise and include minority voters. The current draft does not touch bail out, and few jurisdictions have bailed out in recent years.

[Third], *Congress should impose a shorter time limit, perhaps 7-10 years*, for extension. The bill includes a 25 year extension, and the Court may believe it is beyond congruent and proportional to require, for example, the state of South Carolina to preclear every voting change, no matter how minor, through 2031.

[Fourth], Congress should more carefully reverse only certain aspects of *Georgia v. Ashcroft*. *Georgia v. Ashcroft* makes it easier for covered jurisdictions to obtain preclearance, meaning that the burden on covered jurisdictions is eased (and therefore the law looks more “congruent and proportional”). Reversing the case as a whole, as this bill apparently could do-though the language in this respect is very poorly drafted-could weaken the constitutional case for the bill. I would suggest tweaking, rather than reversing, the Ashcroft standard.

On the very important question of bailout, here is a proposed bailout mechanism that I believe could help save the constitutionality of a renewed section 5:

Amend section 1973(a)(1)(9) as follows:

~~(9) Nothing in this section shall prohibit~~

(a) The Attorney General shall regularly investigate and prepare a list based on such investigations of States and political subdivisions that, in the Attorney General's view, have complied with the requirements of subsection (a)(1) of this section. Beginning in 2007, the Attorney General shall cause to be published in the Federal Register by December 1 of each year a list of complying jurisdictions. The Attorney General shall promptly notify complying jurisdictions of their status and their ability to apply to the district court for bailout from the preclearance provisions of this Act.

(b) The Attorney General ~~from~~ shall consenting to an entry of judgment if based upon a showing of objective and compelling evidence by the plaintiff, and upon investigation, he is satisfied that the State or political subdivision has complied with the requirements of subsection (a)(1) of this section. Any aggrieved party may as of right intervene at any stage in such action. If the Attorney General consents and no aggrieved party intervenes, the court shall issue a declaratory judgment that the State or political subdivision has complied with the requirements of section (a)(1) of this section.

My proposal for easing bailout would put the onus on the Department of Justice to review each covered jurisdiction’s history, and to proactively take steps to inform jurisdictions that have met the requirements that they may bail out. If no one objects and the DOJ consents, the court would be instructed to grant a bailout to the jurisdiction.

How does this help with the constitutional problem? The argument is that the coverage formula, even back in 1965, was not a perfect way of capturing those jurisdictions with a history of discrimination in voting on the basis of race. But it was a good, rough substitute. Today, as well, because section 5 is such a good deterrent, it is hard to come up with a formula to separate out those jurisdictions that still should be covered from those that have made enough progress. The “proactive bailout mechanism” I am suggesting is tailored to the Court’s concern of tying remedies to evidence of discrimination. But rather than using coverage as the “opt in,” proactive bailout serves for the opt out.

Proactive bailout (especially if coupled with other measures, such as a shortened time frame for renewal) could save the constitutionality of a renewed section 5. The case would be especially strengthened if DOJ could put proactive bailout into effect for some time period before the Supreme Court would hear a challenge to the constitutionality of a renewed section 5. The government could then show it is making a careful attempt to separate out those jurisdictions that still should be subject to preclearance from other jurisdictions.

#### **Answers of Professor Richard L. Hasen 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.

**Answer:** I cannot answer this question because I have not undertaken an exhaustive review of the evidence presented in the House. But I agree with the implicit suggestion in your question that the Supreme Court could well require the government to make such a showing in order to sustain the constitutionality of a renewed section 5 of the Voting Rights Act attacked on *Boerne* grounds.

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?

**Answer:** As noted in my answer to Senator Specter’s second question, I believe that some updating of the coverage formula would be useful in defending a renewed Voting Rights Act from constitutional attack. Having said that, without doing substantial additional research I cannot express an opinion on whether updating the coverage formula to the elections of 2000 and 2004 would do a better job than the current formula in singling out those jurisdictions that continue to engage in intentional discrimination in voting on the basis of race from those which do not do so.

- 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?

**Answer:** See my answer to part a.

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?

**Answer:** I would not support removing 1964 from the coverage formula to satisfy a *Boerne* concern. The question about the coverage formula is whether or not the formula is successful in singling out those jurisdictions that continue to engage in intentional discrimination in voting on the basis of race from those which do not do so. If it is successful, I don't think the fact that the formula came from 1964 will persuade the Supreme Court to strike down the renewed Voting Rights Act against a *Boerne* challenge. It makes sense to remove 1964 from the coverage year only if Congress is convinced that the coverage formula is no longer successful at accomplishing its purpose.

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?

**Answer:** As my testimony and law review article cited in my answers to Senator Specter's first question indicate, I do not believe that the number of objections, standing alone, helps much to make the constitutional case that covered jurisdictions are still engaging in a pattern of unconstitutional racial discrimination in voting so as to justify a renewed section 5. But the *absence* of objections does *not* indicate that section 5 is no longer needed. *If in fact section 5 has been an effective deterrent to intentional discrimination in voting on the basis of race, we would not expect to see too many objections.* The relevant question is whether these covered jurisdictions would once again engage in unconstitutional discrimination in voting if the preclearance deterrent were removed.

Ideally, this is a judgment I believe Congress should make based upon a careful review of the record. However, I remain concerned that the Supreme Court is going to require proof of

such intentional discrimination in voting, proof that will be difficult to come by given how good a deterrent section 5 has been.

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?

**Answer:** I believe that for Congress to maximize the chances of the Supreme Court upholding a renewed Voting Rights Act, reauthorization should be limited to a 7-10 year period.

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?

**Answer:** I do not believe that the language stating that the Supreme Court “misconstrued” Congressional intent in *Georgia v. Ashcroft* or the new draft language for section 5 is sufficiently clear to be able to answer that question with any certainty.

#### **Answers of Professor Richard L. Hasen to Questions from Senator Sessions**

**Based on your review of H.R. 9 and S. 2703 and the relevant Supreme Court decisions, if the amendments proposed by the bills to section 5 of the Voting Rights Act were enacted, in your opinion would the amended section 5 satisfy the “congruence and proportionality” standard of *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997)?**

**Answer:** I would hope that the proposed bills would meet the constitutional standard, but I am not confident that they would, for reasons stated in my earlier testimony and my law review article, cited in my answer to Senator Specter’s first question.

**You have testified that “Congress should update the coverage formula based on data indicating where intentional state discrimination in voting on the basis of race is *now* a problem or likely to be one in the *near future*.” What information or evidence would you recommend using to update the coverage formula? What information or evidence should “trigger” coverage under section 4(b)?**

**Answer:** I have not examined this question in detail, so I cannot give you a definitive answer. If the committee is interested in updating the coverage formula, I suggest that it begin by examining Professor Michael McDonald’s work, “Who’s Covered? The Voting Rights Act Section 4 Coverage Formula and Bailout Mechanism.” The article is forthcoming in *The Future of the Voting Rights Act* (Russell Sage 2006), and a draft is posted on the Internet at <<http://elections.gmu.edu/McDonald%202005%20VRA%20Section%204.pdf>>. I would also

suggest that Congress cull through the voluminous House record to determine which jurisdictions currently present the potential for problems with intentional discrimination in voting on the basis of race. From that list, it may be possible to come up with a revised coverage formula to capture the jurisdictions that Congress believes should be covered.

**In your testimony, you also stated that “Congress should take steps to *make it easier for covered jurisdictions to bail out from coverage under section 5 . . .*” How would you suggest changing the bailout provisions in section 4(a)?**

Because I believe it will be politically difficult for Congress to change the coverage formula, I believe that bailout reform could provide the best way to save the renewed Voting Rights Act from constitutional challenge. In my answer to Senator Specter’s second question, I have set forth draft language explaining how I would change the bailout provisions.

**You also suggested that “*Congress should impose a shorter time limit, perhaps 7–10 years, for extension.*” In your opinion, would a shorter extension period help in defending the Act against a constitutional challenge under the “congruence and proportionality” standard of *City of Boerne v. Flores*?**

**Answer:** I believe that for Congress to maximize the chances of the Supreme Court upholding a renewed Voting Rights Act, reauthorization should be limited to a 7-10 year period.