

Chairman Patrick Leahy
Questions for the Record
Nomination of Mark Howard Cohen
To Be U.S. District Judge for the Northern District of Georgia
May 20, 2014

1. **Since the time of your representation of the Georgia State Board of Elections in the Georgia photo ID voting law litigation, several photo ID voting laws have been struck down by state or federal courts under various constitutional or statutory provisions. Specifically, courts that heard evidence about the operation of these newly-enacted voting measures invalidated photo ID laws in Texas, Pennsylvania and Wisconsin, among others.**

- (a) **In light of these rulings, do you acknowledge that certain contemporary photo ID voting laws can abridge, deny or interfere with the right to vote in violation of the law as various courts have held?**

Response: Yes. The judicial determination of whether a photo ID voting law unconstitutionally denies or interferes with the right to vote is a fact-intensive inquiry. Based upon the specific facts presented in several cases, some courts have upheld their particular state's photo ID laws but other courts have held their photo ID laws violated either federal or state constitutional provisions.

- (b) **During your hearing you testified, in essence, that different outcomes in photo ID voting cases can be explained by virtue of the State, statute and differing fact circumstances at issue. In both the state court case in Pennsylvania and the federal court case in Wisconsin identify, with specificity, the legal and factual bases that led to the invalidation of the laws there at issue and explain how the law and facts in those cases differed from the law and facts at issue in the Georgia photo ID voting case that you litigated?**

Response: In *Applewhite v. Commonwealth*, No. 330 M.D. 2012 (Pa. Commw. Ct. Jan. 17, 2014), the Commonwealth Court of Pennsylvania concluded that the Pennsylvania photo ID law violated provisions of the Pennsylvania Constitution. In *Frank v. Walker*, No. 11-CV-01128, 2014 U.S. Dist. LEXIS 59344 (E.D. Wis. Apr. 29, 2014), the court concluded that the Wisconsin photo ID law violated the Fourteenth Amendment and Section 2 of the Voting Rights Act. Included as factual bases for those decisions was credible expert testimony concerning the number of persons who lacked a photo ID and the negative impact those states' photo ID laws had on the right to vote, as well as other evidence that supported those plaintiffs' claims. In contrast, in upholding Georgia's photo ID law against a Fourteenth Amendment challenge, the federal courts found that the proffered expert testimony failed to satisfy the relevancy and reliability requirements of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), see *Common Cause/Ga. v. Billups*, 504 F. Supp. 2d 1333, 1370-71 (N.D. Ga. 2007), the data matches relied upon by plaintiffs to establish the number of persons who lacked a valid photo ID were "incomplete and unreliable" and "contain[ed] inaccuracies," and plaintiffs "failed to

identify a single individual who would be unable to vote because of the Georgia statute” *Common Cause/Ga. v. Billups*, 554 F.3d 1340, 1354 (11th Cir. 2009). In addition, unlike the heightened strict scrutiny standard used by the Pennsylvania state court in *Applewhite* in applying provisions of the Pennsylvania Constitution, the Georgia Supreme Court used the more flexible standard of *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983), and *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) in applying provisions of the Georgia Constitution. See *Democratic Party of Georgia, Inc. v. Perdue*, 288 Ga. 720, 728-29, 707 S.E.2d 67, 74-75 (2011).

2. What are your views of the legal analysis in *Frank v. Walker*, the Wisconsin federal photo ID opinion?

Response: The legal analysis in *Frank v. Walker* is supported by the court’s citation of the evidence as presented by the plaintiffs in that case.

3. Was Georgia’s photo ID law, as originally passed in 2005, constitutional? If so, why was Georgia’s 2005 photo ID law enjoined by a federal court in 2005; and, why, in your view, did the Georgia legislature then amend the law in 2006 to provide an alternative to the financial burdens that the 2005 law imposed upon some voters seeking to obtain acceptable forms of photo ID?

Response: The U.S. District Court for the Northern District of Georgia enjoined the implementation of the Georgia photo ID law as originally passed in 2005 because the plaintiffs showed a substantial likelihood of succeeding on the merits of their claims that the law unduly burdened the right to vote in violation of the Fourteenth Amendment and constituted a poll tax in violation of the Twenty-Fourth Amendment. See *Common Cause/Ga. v. Billups*, 406 F. Supp. 2d 1326, 1366, 1370 (N.D. Ga. 2005). I was not involved in the enactment of any of the photo ID legislation – neither the original 2005 photo ID law nor the 2006 amendment to that law by the Georgia General Assembly – so I do not know the specific reasons why the state legislature amended the 2005 law. (Unlike the United States Congress, the Georgia legislature has no reported legislative history.) A discussion of the provisions of the 2006 amendment is contained in *Common Cause/Georgia v. Billups*, 439 F. Supp. 2d 1294, 1305-08 (N.D. Ga. 2006), and *Common Cause/Georgia v. Billups*, 504 F. Supp. 2d 1333, 1343-46 (N.D. Ga. 2007).

4. During your hearing, you mentioned the Supreme Court’s ruling in *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008).

(a) Describe your role in Georgia Secretary of State, Karen Handel’s decision to file an amicus brief in *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008) where you appeared as counsel of record.

Response: The Georgia Secretary of State is a state constitutional officer who is required by Georgia law to be represented in court by the Attorney General of Georgia. After the Supreme Court granted certiorari in the *Crawford* case, the Georgia Secretary of State requested that the Attorney General of Georgia file an

amicus curiae brief in support of the respondents. Because I had been previously appointed by Georgia Attorney General Thurbert Baker to represent the Secretary of State in Georgia's photo ID litigation, Attorney General Baker directed me to prepare and file the *amicus* brief.

(b) What guidance, if any, does the ruling in *Crawford* case provide regarding photo ID cases brought under an “as applied” theory?

Response: *Crawford* concerned a facial challenge to Indiana's photo ID law. The opinion does not involve an analysis of how an “as applied” challenge to a similar law would be undertaken.

5. What factors are relevant to consider under a Section 2 of the Voting Rights Act challenge to a photo ID measure?

Response: Based upon *Chisom v. Roemer*, 501 U.S. 380, 394 (1991), plaintiffs can establish a Section 2 violation by “demonstrating that a challenged election practice has resulted in the denial or abridgement of the right to vote based on color or race,” and proof of discriminatory intent is not required.

6. Under the *Burdick v. Takushi*, 504 U.S. 428 (1992), balancing test, how much weight should be accorded to an asserted governmental interest that is largely or completely unsupported by evidence when balanced against voters' interests in avoiding new burdens on their right to vote which are supported by evidence?

Response: The Supreme Court in *Burdick* and *Anderson v. Celebrezze*, 460 U.S. 780 (1983), set forth a balancing test to determine the level of scrutiny to apply in evaluating a constitutional challenge to a state voting law. That balancing test weighs (1) “the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate” against (2) “the precise interests put forward by the State as justifications for the burden imposed by its rule.” *Anderson*, 460 U.S. at 789, *quoted in Burdick*, 504 U.S. at 434. In applying this balancing test, a court must consider both “the legitimacy and strength of each of [the State's] interests” and “the extent to which those interests make it necessary to burden the plaintiff's rights.” *Anderson*, 460 U.S. at 789, *quoted in Burdick*, 504 U.S. at 434. The interests must be “sufficiently weighty to justify the limitation.” *Norman v. Reed*, 502 U.S. 279, 288-89 (1992), *quoted in Crawford v. Marion County Election Bd.*, 553 U.S. 181, 190 (2008). Voting laws which impose a “severe” burden on the right to vote must be “narrowly drawn to advance a state interest of compelling importance,” *Burdick*, 504 U.S. at 434, but “reasonable, nondiscriminatory restrictions” which impose a minimal burden may be warranted by “the State's important regulatory interests,” *id.* (quoting *Anderson*, 460 U.S. at 788). This is an inquiry dependent on the circumstances of each case. *See Anderson*, 460 U.S. at 789-90 (stating that “[t]he results of this evaluation will not be automatic”). As the Supreme Court has explained, “only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.” *Id.* at 789.

7. **In his Senate confirmation testimony then-Judge John Roberts testified that “...I have no basis for viewing [Section 2 of the Voting Rights Act] as constitutionally suspect and I don’t.” Do you agree with this view that the now-Chief Justice Roberts expressed at the time of his Supreme Court confirmation hearing?**

Response: I am uncertain of the context of Chief Justice Roberts’ statement but, if I am confirmed as a district judge, I would be bound by and would follow Supreme Court and Eleventh Circuit precedent which has applied Section 2 of the Voting Rights Act in consideration of a number of voting practices and procedures.

8. **As lead counsel in the Georgia photo ID appeal you defended the argument that you advanced in the lower court that the NAACP, and individual minority voters in Georgia, did not have legal standing to challenge the state's photo ID law in court. Had your argument prevailed, contrary to precedent and the long history of the fight for voting rights in Georgia, access to justice in a core area of constitutional rights would have been closed for organizations and individuals that defend voting rights. The Eleventh Circuit rejected your position.**

- (a) How do you square the arguments that you advanced in that case both with the role that civil rights plaintiffs and intervenors have played over many decades enforcing voting rights in the face of discriminatory laws passed by legislatures, and with the Supreme Court and other court precedents on which the Court relied in rejecting your position?**

Response: When Attorney General Thurbert Baker appointed me to represent the state defendants in the photo ID cases, I was instructed to assert all potential defenses. At the time responsive pleadings were filed, plaintiffs’ lack of standing was raised as a viable defense. In its order upholding Georgia’s photo ID law, the U.S. District Court for the Northern District of Georgia sustained this defense, finding “that Plaintiffs have failed to prove, by a preponderance of the evidence, that they have standing to pursue this action.” *Common Cause/Ga. v. Billups*, 504 F. Supp. 2d 1333, 1374 (N.D. Ga. 2007). On appeal, the Eleventh Circuit concluded that the district court erred in its standing ruling but not in its ruling on the merits. *See Common Cause/Ga. v. Billups*, 554 F.3d 1340, 1349-52 (11th Cir. 2009). If confirmed as a district judge, I would be bound by and would apply the decisions of both the Supreme Court and the Eleventh Circuit with respect to standing.

- (b) Do you accept the analysis of the Court of Appeals for the Eleventh Circuit on its standing ruling rejecting your argument in the Georgia photo ID voting case? If so, why? If not, why?**

Response: Yes. The analysis is binding precedent and, if confirmed as a district judge, I would be bound by and would apply the decisions of the Eleventh Circuit and the Supreme Court with respect to standing.

(c) Do you recognize the role that non-governmental actors play under the nation's civil rights laws as "private attorneys general," and, if confirmed, would you respect the laws and precedents that keep the courthouse door open to parties seeking to vindicate civil and constitutional rights?

Response: Yes. I respect and would apply existing law and the precedents of the Supreme Court and the Eleventh Circuit Court of Appeals regarding standing or any other issue that would come before me.

9. In the past several years, the Supreme Court struck down a number of federal statutes most notably several designed to protect the civil rights of Americans, as beyond Congress's power under Section 5 of the Fourteenth Amendment, for example, *Flores v. City of Boerne*, 521 U.S. 507 (1997), *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000), *Board of Trustees v. Garrett*, 531 U.S. 356 (1999), and *Coleman v. Court of Appeals of Maryland*, 132 S. Ct. 1327 (2012). The Supreme Court also struck down statutes as falling outside the authority granted to Congress by the Commerce Clause in the case of *U.S. v. Lopez*, 514 U.S. 549 (1995), and *U.S. v. Morrison*, 529 U.S. 598 (2000). Similarly, a majority of the justices of the Court determined that core provisions of the Affordable Care Act were beyond the scope of the Commerce and Spending Clauses in *Nat'l Federation of Independent Business v. Sebelius*, 567 U.S. 1 (2012), and upheld the individual mandate under the taxing power. The Court struck down other federal statutes as violations of the 10th Amendment or the 11th Amendment, and part of a landmark Voting Rights Act, without articulating any clear basis for its unconstitutionality in *Shelby County v. Holder*, 133 S. Ct. 2612 (2013). These cases rely upon an expansive view of state's rights, and have been described as shifting powers to state governments as congressional authority is diminished.

(a) What is your view of these decisions? In your opinion, do they constitute "judicial activism"?

Response: If I am confirmed as a district judge, I would be bound to apply as precedent the decisions of the Supreme Court and the Eleventh Circuit Court of Appeals on these and other constitutional issues regardless of my personal views of these decisions.

(b) What is your understanding of the scope of congressional power under Article I of the Constitution, in particular, the Commerce Clause, under Section 5 of the Fourteenth Amendment, and Section 2 of the Fifteenth Amendment?

Response: The Supreme Court has held that the Commerce Clause authorizes the regulation of three categories of activity: (1) "the use of the channels of interstate commerce"; (2) "the instrumentalities of interstate commerce, or persons of things in interstate commerce"; and (3) "activities that substantially affect interstate commerce." *United States v. Lopez*, 514 U.S. 549, 558-59 (1995). In *Lopez* and *United States v. Morrison*, 529 U.S. 598, 613 (2000), the Supreme Court articulated

limitations to the reach of the Commerce Clause to certain non-economic activities. *See also Gonzales v. Raich*, 545 U.S. 1, 37 (2005) (Scalia, J., concurring) (“Congress may regulate even noneconomic local activity if that regulation is a necessary part of a more general regulation of interstate commerce.”).

Section 5 of the Fourteenth Amendment states that Congress shall have power to enforce by appropriate legislation “the constitutional guarantee that no State shall deprive any person of ‘life, liberty or property, without due process of law,’ nor deny any person ‘equal protection of the laws.’” *Morrison*, 529 U.S. at 619 (quoting *City of Boerne v. Flores*, 521 U.S. 507, 517 (1997)). Section 5 includes authority to “prohibit conduct which is not itself unconstitutional and [to] intrude into ‘legislative spheres of autonomy previously reserved to the States.’” *Id.* (quoting *City of Boerne*, 521 U.S. at 518); *see also Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 727 (2003). This “broad” congressional enforcement power, however, “is not unlimited.” *Id.* (quoting *Oregon v. Mitchell*, 400 U.S. 112, 128); *see also Tennessee v. Lane*, 541 U.S. 509, 518 (2004). Section 5 “legislation reaching beyond the scope of § 1’s actual guarantees must exhibit ‘congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.’” *Bd. of Trs. v. Garrett*, 531 U.S. 356, 365 (2001) (quoting *City of Boerne*, 521 U.S. at 520).

“The Fifteenth Amendment commands that the right to vote shall not be denied or abridged on account of race or color, and [Section 2 of that Amendment] gives Congress the power to enforce that command.” *Shelby County v. Holder*, 133 S. Ct. 2612, 2629 (2013); *see Rice v. Cayetano*, 528 U.S. 495, 511-12 (2000). “Section 2 of the Fifteenth Amendment is virtually identical to § 5 of the Fourteenth Amendment,” *Garrett*, 531 U.S. at 373 n.8. Accordingly, the analysis of the scope of congressional authority under Section 2 of the Fifteenth Amendment is similar to the analysis under Section 5 of the Fourteenth Amendment. *See City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 490 (1989) (citing *South Carolina v. Katzenbach*, 383 U.S. 301, 326 (1966)).

If confirmed as a district judge, I would follow Supreme Court and Eleventh Circuit precedent in deciding issues concerning the extent of congressional authority under the Commerce Clause, Section 5 of the Fourteenth Amendment, and Section 2 of the Fifteenth Amendment.