



June 15, 2006

The Honorable Tom Coburn, M.D.
U.S. Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

Re. Drafting an Opt-Out Provision for Covered Jurisdictions under Section 203 of the Voting Rights Act

Senator Coburn:

It was an honor to appear before the Senate Judiciary Committee and testify on the continuing need to provide bilingual election materials to citizens who are "limited English proficient" (LEP citizens) as defined by section 203 of the Voting Rights Act (VRA). I am pleased to respond to your question concerning whether section 203 should contain an opt-out provision for covered jurisdictions whose LEP citizens make little or no use of 203 materials.

This is a common sense proposal and has my support, in principle. Such an opt-out could cure section 203 of some of the constitutional defects identified in my testimony, and it would certainly alleviate significant administrative burdens and costs that section 203 imposes on localities, particularly where 203 materials confer no meaningful benefit to the identified LEP population.

Before I address the substance of your proposal, a cautionary note on drafting.

While opt-out provisions are consistent with the history and structure of the Voting Rights Act, they have not been successful in achieving their purposes. Technically, jurisdictions subject to section 5 preclearance have a "bail out" option. The report accompanying H.R. 9, the House Bill reauthorizing the VRA, acknowledges that "the expectation of Congress," when it liberalized section 5's bail out procedures in 1982, was "that a majority of covered jurisdictions would utilize [the procedures]..., such that few jurisdictions would remain covered 25 years later." H. Rpt. No. 109-478 (May 22, 2006). However, in practice, very few jurisdictions have availed themselves of this procedure, as noted in the House Report and explained by Professor Mike McDonald in *The Future of the Voting Rights Act*. "The reason," Professor McDonald postulates, "may lie either with a too difficult bailout mechanism - particularly the proactive steps a jurisdiction must take to improve minority participation - or a lack of information and resources among covered jurisdictions. If the latter were the reason, more jurisdictions could bail out if they were provided with aid in preparing their bailout litigation." *Id.* at 32-34,

citing Hancock and Tredway, *The Bailout Standard of the Voting Rights Act*, 17 URB. LAW. 379, 422 (1985:). Moreover, the record in the House speculates that up to 90% of covered jurisdictions may be eligible for bail-out, see *Oral Testimony of Gerald Herbert, Former Acting Chief, Civil Rights Division, U.S. Department of Justice*, October 20, 2005. However, according to the record, jurisdictions do not avail themselves of opt-out provisions for the reasons identified by Professor McDonald and potentially because of a political sensitivity to maintaining race relations. See *id.*, Comments of Representative Scott of Virginia.

Similar concerns apply in the context of 203. Any opt-out provision for 203 should be crafted with the history of section 5 in mind and endeavor not to repeat it.

One approach is to place the onus on the Attorney General to certify after a defined period of review that section 203, as applied to an LEP population within a covered jurisdiction, is both effective at providing voting access to a class of LEP citizens and remedies an identifiable pattern or practice of constitutional deprivations of the right to vote. If the Attorney General fails to certify the effectiveness 203 as applied to a covered jurisdiction, then an opt-out provision would trigger and 203's requirements would lapse with respect to that jurisdiction. Other details could be added-e.g., amending 42 USC Sec. 1973aa-6 (Voting assistance for blind, disabled or illiterate persons) to include LEP citizens as defined by 42 USC Sec. 1973aa-1a(3)(b); or giving covered jurisdictions a right of appeal from the Attorney General's certification.

There are other approaches to crafting an opt-out provision. But the approach sketched here would not only capture the common sense appeal of your proposal, but would also begin to redress the constitutional infirmities I detect in H.R. 9's flat reauthorization of section 203 for an arbitrary 25 year period.

Again, thank you for allowing me to respond to your question. If I may be of further assistance to you or your staff, please do hesitate to contact me directly.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Peter N. Kirsanow', followed by a stylized flourish and the text '/caj'.

/caj

Peter N. Kirsanow, Commissioner
U.S. Commission on Civil Rights