

Senator John Cornyn
Questions for Witnesses for ALL Voting Rights Act Hearings
May – June 2006

Response of Don Wright, General Counsel for the North Carolina State Board of Elections.

All of my responses are subject to the same caveat as in my written testimony. The opinions I have expressed are my own in my individual capacity, and do not necessarily reflect those of the North Carolina Board of Elections.

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. As General Counsel of the North Carolina State Board of Elections, I was asked to testify as to the practical aspects of dealing with Section 5 preclearance. Not being a political scientist or having other experience that would allow me fairly answer this question, I would respectfully decline to answer this question.
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?

No. The effect of these trigger changes would be to have no covered jurisdictions, thus in effect indirectly killing Section 5. Although legal racial discrimination/segregation is no longer in our laws and statutes, both covert and overt social and personal racial discrimination exists to the extent that effective Section 5 coverage should continue.

- 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?

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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?

I disagree with the underlying premise of the question, which does not accurately describe the *Boerne* test or the record supporting reauthorization of the Voting Rights Act. *Boerne* specifically cited the Voting Rights Act as the gold standard for a federal law meeting the congruent and proportional test, which the Supreme Court confirmed again post-*Boerne* in *Lopez v. Monterey County*. In addition, an extensive record of post-1982 discrimination in the covered jurisdictions has been developed for Congress. At the same time, Congress cannot and should not ignore pre-1982 voting discrimination, which provides a context for the discrimination that remains. In many jurisdictions, post-1982 objections and successful voting cases address discrimination against minority voters that even preceded the Voting Rights Act of 1965.

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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?

I disagree with the underlying premise of the question. The evidence in the record is not limited to mere “anecdotes,” but instead encompasses a substantial body of ongoing discrimination in the covered jurisdictions.

It is the presence of Section 5 that is causing the greater compliance with the Voting Rights Act. This low objection rate should be seen a positive, not a negative. Removing Section 5 could undo the current level of success. One only has to look at the number of discriminatory voting changes that were withdrawn after the USDOJ called the jurisdiction or sent the jurisdiction a More Information Request to see the importance of continuing Section 5.

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?

I disagree with the underlying premise of the question, which assumes that there is no difference between covered and non-covered jurisdictions. More than a century of Jim Crow and overt discrimination against blacks and Latinos in the South and Southwestern states shows that there is a substantial difference. The record also reflects that although there is less overt discrimination today, there is a continuing need for Sections 5 and 203 of the Voting Rights Act.

I do not support any of the proposed alternatives suggested in the question. I was born in 1950, a baby boomer. Until I was 14, I lived in North Carolina, which was legally, socially, and emotionally segregated. I worked for my father both on a poultry farm and in a restaurant where I was placed under the direction of older black men to learn work habits, yet received from the same older black men a deference I knew was based upon the fact I was white. I was a student in Goldsboro (N.C.) High School when the first black students entered. I was a student at UNC-CH when the first black played for their basketball team. I am saying this because, there are still many persons of the previous generations to the baby boomers who still live in the world of social and emotional racial segregation and discrimination. I sense that regularly in dealing with persons in my position as General Counsel to the North Carolina State Board of Elections. Because I grew up in a time where legal racial discrimination existed and then was outlawed, I feel I can recognize more easily the covert social and emotional discrimination that still exists. It is too early in the history of our country's civil rights reformation to eliminate the affirmative consideration of race in creating voting districts. Literally, in many cases, discrimination will have to die out.

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 disagree with the underlying premise of the question. The *Georgia v. Ashcroft* fix is constitutional because it was a statutory interpretation case in which the Supreme Court got that interpretation wrong. Congress is simply clarifying its intent, just as it has for prior amendments to the VRA such as the 1982 amendment to Section 2. The fix raises no constitutional concerns.

It is not possible to answer the question as posed. Under the bill's proposed change, the focus will return to what it was for a quarter century before the Supreme Court's misreading of Section 5: namely, an intensely localized assessment of whether minority voters have an equal opportunity to participate. The question assumes a categorical rule of decision that is inconsistent with how the Voting Rights Act has been interpreted and applied.