

Testimony of

# Professor Richard L. Hasen

May 9, 2006

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Senate Judiciary Committee  
Legislative Hearing on "An Introduction to the Expiring  
Provisions of the Voting Rights Act and Legal Issues Relating  
to Reauthorization"  
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## STATEMENT OF RICHARD L. HASEN

Richard L. Hasen  
William H. Hannon Distinguished Professor of Law  
Loyola Law School\*  
919 Albany Street  
Los Angeles, CA 90015-1211  
(213)736-1466 - voice  
(213)380-3769 - fax  
rick.hasen@lls.edu  
<http://www.lls.edu/academics/faculty/hasen.html>  
<http://electionlawblog.org>

\*Affiliation for identification purposes only.

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Chairman Specter, Ranking Member Leahy, and Senators on the Judiciary  
Committee:

Thank you very much for the opportunity to appear before you today to testify about Senate Bill 2703, concerning reauthorization of the expiring provisions of the Voting Rights Act. I come before you as a strong supporter of the Voting Rights Act who believes that the expiring provisions of the Act should be renewed in some form--but also as someone who, after studying this issue for a number of years, has deep concerns about the constitutionality of the proposed amendments. I believe the Act has been an unqualified success in remarkably increasing minority voter registration and turnout, increasing the number of African-American and Latino elected officials, and the ability of minority voters to effectively exercise their right to elect representatives of their choice. But I urge this Committee to spend the time to craft a bill that will both pass constitutional muster in the Supreme Court and do the important work of continuing to protect minority voting rights in this country.

The constitutional issue--which I have explored in a law review article that I have submitted to the committee-- is this: in recent years the Supreme Court has held that Congress has limited power to enact civil rights laws regulating the states. Beginning with the 1997 case, *City of Boerne v. Flores*, the Court has held that Congress must produce a strong evidentiary record of intentional state discrimination to justify laws that burden the states. In addition, whatever burden is placed on the states must be congruent and proportional to the extent of the violations.

Beginning in 1965, Congress imposed the strong preclearance remedy on those jurisdictions with what the Supreme Court called a "pervasive," "flagrant," and

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"unremitting" history of discrimination in voting on the basis of race. In South Carolina

v. Katzenbach the Court upheld section 5 of the Act as a permissible exercise of congressional power.

What has changed since 1965? Both the law and the facts. On the law, the Court--in my view wrongly--has placed a much higher burden on Congress to justify laws aimed at protecting civil rights. On the facts, we have an evidentiary problem: because the Act has been so effective it will be hard to produce enough evidence of intentional discrimination by the states so as to justify the extraordinary preclearance remedy for another 25 years.

I'm afraid that much of the evidence referenced in the bill's findings won't be enough for the Supreme Court. For example, the findings point to Department of Justice objections to preclearance requests by covered states. As you can see from Figure 3 in my article, in recent years objections have been rare. In the most recent 1998-2002 period, DOJ objected to a meager 0.05% of preclearance requests. Updating these data, DOJ interposed just two objections overall in 2004 and one objection in 2005. The problem with using objections as evidence of intentional state discrimination is unfortunately even worse than it appears. In the 1990s, DOJ adopted a policy of objecting to certain state actions that were perfectly constitutional--a policy the Supreme Court later rejected.

The House Judiciary Committee has put together a voluminous record to support renewal of section 5. Although I have not yet reviewed that entire record, my impression from what I have reviewed is that the record documents isolated instances of intentional state discrimination in voting; the vast majority of evidence relates to conduct that does

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not show constitutional misconduct by the state. Moreover, the House record seems to show that the problems that continue to exist occur across the nation: the Court may insist on evidence that the covered jurisdictions present greater problems than the rest of the nation to justify the geographically selective preclearance remedy.

I have heard the argument that the Court will give a pass on Congress's requirement to produce evidence because section 5 has been such a good deterrent. I hope that this theory is right, but I am not confident that the new Supreme Court would be inclined to agree on this point. The problem with such a theory is that it would justify preclearance for an undetermined amount of time into the future.

In addition to the problem of producing enough evidence of intentional state discrimination, there is the tailoring issue. The current Act uses a formula for coverage based on the jurisdiction's voter registration or turnout and its prior use of a discriminatory test or device for voting, such as a literacy test. The proposed amendments would not update this formula in any way. The Act relies on data from the 1964, 1968, or 1972 elections. Those turnout figures--and particularly turnout in minority communities--bear little resemblance to turnout figures today.

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. Here are three additional steps that Congress should carefully consider to bolster the constitutional case:

First, 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

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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.

Second, 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.

Third, 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.

Besides these changes there are ways to strengthen the bill to assure that the renewed provisions of the Act remain a crucial element in assuring political equality and the right to vote for all Americans regardless of race. At the top of my list, given recent troubling allegations of partisan manipulation of the preclearance provisions, is for Congress to reverse the Supreme Court's holding in *Morriss v. Gressette* (1977). This reversal would allow appeals of DOJ decisions to grant preclearance in controversial and politically charged cases such as those involving Texas redistricting and the Georgia voter identification law. Thank you for the opportunity to present these views.