

**Testimony Before the Senate Judiciary Committee
“The Right Side of History: Protecting Voting Rights in America”**

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Good morning, Mr. Chairman, Ranking Members, and Members of the Committee. Thank you for your invitation to speak with you today.

I am an attorney with the Public Interest Legal Foundation, a non-profit law firm devoted to promoting election integrity and preserving the constitutional decentralization of power so that states may administer their own elections.

For over twenty years, I served in the Civil Rights Division of the Department of Justice. Eighteen of those years were spent both as a Voting Section attorney as well as Senior Counsel to the Attorney General for Civil Rights. From August 2000 until the Supreme Court's decision in *Shelby v Holder*, my sole responsibility was to review changes in voting submitted for preclearance under Section 5. During my tenure at the Department, I have been the recipient of numerous awards.

Tremendous Power to Unelected Partisan Bureaucrats

If passed, the proposed Act will once again give tremendous power over the election procedures of every state and locality to partisan bureaucrats within the Voting Section. I have watched this power abused firsthand. I would like to share with you some of my experiences working in the Voting Section.

I began my employment in the Voting Section approximately 3 months prior to the 2000 Presidential election. When the Florida recount occurred, I personally observed Voting Section staff discussing strategies to assist the DNC in Florida and

observed several staff members receiving and sending faxes to Democratic National Committee and Gore campaign operatives in Florida.

I also witnessed twisted racialism. When George W. Bush appointed Ralph Boyd, an African American, to head the Civil Rights Division, I often heard from career Voting Section attorneys “he’s not really black”, adding that “no self-respecting Black man would be a Republican. These statements were accepted beliefs among many.

I would urge every senator here to read the DOJ Inspector General Report entitled, “A Review of the Operation of the Voting Section of the Civil Rights Division.” I have provided a link to the report in footnote 1. It provides instance after instance of bad behavior – often racially motivated – among section staff.

For example, when the Voting Section brought an action against an African American named Ike Brown, in Noxubee County Mississippi, to protect minority white voters, these partisan bureaucrats disagreed with the filing of the case and were hostile to it throughout the prosecution of the case. They engaged in unspeakable abuse of an African American paralegal deemed “not black enough” because he dared to work on the Noxubee County case. When you finish reading the report,

you will rightfully ask whether allowing this office to wield so much power over every election again, is wise.¹

But don't just take the word of the DOJ Inspector General on this point, listen to what the Justice Department itself has said about the abuse of power and its cost to taxpayers. The Office of Legislative Affairs detailed in a letter to Representative Sensenbrenner the millions of dollars in sanctions the Voting Section has incurred for bad behavior in Section 5 reviews and other matters. I have attached the letter to my testimony. (Exhibit A)

History of Abuses and Sanctions

The Voting Section has a long record of abuse by its lawyers. Their improper collaboration while reviewing Section 5 submissions has been sanctioned by courts.

Between 1993 and 2000, the Voting Section has been sanctioned \$2,358,687.31 For example, in *Johnson v. Miller* (864 F. Supp. 1354, 1364 (S.D. Ga. 1994)), the United States District Court sanctioned the Voting Section \$594,000 for collusive misconduct by DOJ Voting Section lawyers. Working in tandem with attorneys from the ACLU, the Department denied preclearance to the State of Georgia's redistricting plan on three separate instances. During this process, it

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<https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwib5dKmlbrxAhVBG80KHRquAv4QFjABegQIBRAD&url=https%3A%2F%2Foig.justice.gov%2Freports%2F2013%2Fs1303.pdf&usg=AOvVaw09dTbH3E3cEhHWZFmI48bw>

became clear to the State of Georgia that to receive preclearance from DOJ it would be required to adopt the plan favored by the DOJ and prepared by the ACLU. The plan by the ACLU was designed to maximize minority districts; something not required under Section 5's retrogression standard. Desperate for pre-clearance, Georgia adopted a plan essentially identical to that proposed by the ACLU. Of course, that plan received preclearance from the DOJ Voting Section. But the state was again sued because the legislature's dominant motivation in adopting the plan was based upon race, i.e. the dominant motivation in its creation was to maximize minority districts to obtain preclearance. The district court determined that the plan violated the 14th Amendment. Moreover, the federal district court noted that the ACLU was "in constant contact with the DOJ line attorneys." Pronouncing the communications between the DOJ and the ACLU "disturbing," the court declared, "It is obvious from a review of the materials that [the ACLU attorneys'] relationship with the DOJ Voting Section was informal and familiar; the dynamics were that of peers working together, not of an advocate submitting proposals to higher authorities." After a Voting Section lawyer professed that she could not remember details about the relationship, the court found her "professed amnesia" to be "less than credible." However, such abuse of power in the Section 5 process is not confined to *Johnson v. Miller*.

Despite the history of sanction for this collusive conduct, on more than one occasion I was instructed to contact and share information with advocacy groups including the ACLU when reviewing a submission for preclearance.

As recently as May 2013, the Justice Department Voting Section used the Section 5 process to extract legally indefensible concessions from states that a federal court would never impose. In places like Rock Hill, South Carolina, the Voting Section permitted blatantly unconstitutional district lines to survive to prop up the electoral success of multiple election officials based on their race.

A 2009 objection in Kinston, North Carolina, shows the outrageous, abusive, and legally indefensible positions the Voting Section will adopt using Section 5. Kinston, a majority black jurisdiction, in a referendum decided to dump partisan elections for town office and move to nonpartisan elections. The Voting Section, required that Kinston prove that this change, supported by the African American elected officials was not adopted with a discriminatory purpose or that it had a discriminatory effect. The logic of the Section 5 objection was that if black voters did not have the word Democrat next to candidate names, they would not know for whom to vote for during local elections.

The Town of North, South Carolina, submitted an annexation of two white homeowners to the city limits for pre-clearance. The white homeowners had requested annexation to the Town to obtain water and sewer. The Department

objected to the annexation, because the Town could not show that any African Americans had been annexed, despite their never having submitted a qualifying request for annexation. Furthermore, Congress relied on some of these meritless objections when it reauthorized Section 5 in 2006. These abusive and meritless objections polluted the record in 2006, but no plaintiff ever challenged them, and Congress took no testimony regarding their merits.

During a review of a statewide redistricting plan, I personally became aware of a demand made by the Front office to target the district of a white state legislator in South Carolina. The legislator represented a district with a large African American population. What did this State Senator do to incur the wrath of the Front office? One, he was a Republican. Two, he sponsored local legislation in response to requests from his minority constituents to bring accountability to a local school board, the majority of whom were African American. The school board was under investigation for misuse of funds and had fired 9 of the last 10 Superintendents. The school district was failing its students, the majority of whom were African American, and was rated second from last of all South Carolina' public schools. The local legislation proposed a fiscal review mechanism to monitor the board's spending. It also provided for the addition of two additional African American board members. The legislation was supported by the parents of the minority students. Unfortunately, the Front office backed the school board and issued an Objection to the changes. It

subsequently sought to punish the local Senator when the State submitted its redistricting plan for preclearance.

Practice Based Preclearance Triggers.

The proposed practice-based preclearance triggers will require most electoral changes to be submitted despite the inconsequential nature of the change. For example, a polling place change does not just include a change in physical address. It includes ANY change to the polling place. If a polling place is moved from the high school gym to its cafeteria, the change must be submitted for pre-clearance. Changes to election materials include changes in the design of the jurisdiction's polling signage. Simply changing the size of the signs/posters or the font would have to be cleared. A change to the location of the local registrar from the old city hall to the new city hall literally across the street will need to be submitted for pre-clearance. Election administration is difficult enough without the burdensome requirements proposed in the Act.

Notice Requirements Overly Burdensome

The new notice requirements will paralyze jurisdictions, especially those with limited resources. Many do not even have websites. They already have an extremely difficult time finding polling places and staffing them with poll workers. To require the posting of all the information required in the Act will change their focus from ensuring voter access to posting website materials and numbers.

Preclearance is not necessary in 2024

Section 5 was a temporary provision for a reason that no longer exists. The Supreme Court in *Shelby* not only determined that the formula for Section 5 coverage was unconstitutional, but it also questioned the justification for Section 5 in today's world. It made clear that only certain conditions would justify *any formula* for Section 5 coverage today. Among the touchstones listed by the Court are “blatantly discriminatory evasions of federal decrees,” lack of minority office holding, tests and devices, “voting discrimination ‘on a pervasive scale,” “flagrant” voting discrimination, or “rampant” voting discrimination. Such discrimination does not exist today. Indeed, this Committee could look long and hard and not find a single evasion of a federal decree – the central assumption of why preclearance was needed in 1965.

As the Supreme Court stated “Federal intrusion into the powers reserved by the Constitution to the States must relate to these empirical circumstances. Triggers that are built around political or partisan goals will not withstand Constitutional scrutiny.

Prior weaponization of the Retrogression Standard

The Department already has a history of weaponizing the retrogression standard. They resort to the use of miniscule statistical differences between white and non-whites when evaluating a proposed law's effect on minority voters. The

Department's objection to South Carolina's proposed voter ID legislation is a perfect illustration of this tactic. The Department compared the rates of white and non-white voters' possession of photo ID. It was found that white voters were 1.6% more likely than non-white voters to have a photo ID. A 1.6 % difference prevented the State of South Carolina from implementing the law and protecting the integrity of their elections. This is exactly the federal intrusion the *Shelby* decision was designed to prevent.

Moreover, this Act would add the "retrogression standard" to Section 2, despite the lack of need and the blatant federal overreach. The current attempts to use the retrogression standard disguised as a claim under Section 2 were rejected by the Supreme Court in the *Brnovich* decision. See (J. Christian Adams, *Transformation: Turning Section 2 of the Voting Rights Act into Something It Is Not*, Volume 31, Touro Law Review 2015)

Coverage Formula Will Not Survive Judicial Scrutiny

Furthermore, the proposed formula would subject jurisdictions to Section 5 preclearance who have violations occurring within the last 25 years. Obviously 25 years ago there were only certain states that were covered by the VRA Section 5 preclearance. It is only logical that those states who were under the auspices of preclearance and were required to submit ANY change in voting under Section 5 are

more likely to have a history of violations than states who were never covered. The proposed formula is unlikely to withstand judicial scrutiny.

Covered Practices

The covered practices portion of the proposed Act is destined to result in the targeting of specific states. During my employment it became obvious that Section 5 submissions by certain jurisdictions received heightened scrutiny by Voting Section staff and leadership. Often jurisdictions were targeted because their politics did not align with the Sections' unelected bureaucrats. Southern and rural jurisdictions were often described in derogatory terms. This bias was not only evident in conversations among staff, but also illustrated boldly within the office. There were signs that read "mess with Texas" on staff doors, photographs of favored political candidates for President were boldly hung in offices. The day after the presidential election in 2008, the official portrait of President George W. Bush, was shattered and a small photo of Barack Obama was taped to the destroyed glass. Trust me, this sentiment and targeting will occur again.

Tools Exist to Stop Discrimination

Permanent provisions of the Voting Rights Act such as the current version of Section 2 still prohibit discrimination and provide the Justice Department with the

ability to challenge election procedures. Since the *Shelby County* decision in 2013, the Department has only brought 9 Section 2 lawsuits. That's not even 1 a year! If rampant discrimination in voting exists why has DOJ not brought cases challenging these ills?

Section 3(c) the "bail in provision", allows a judge to order a state or subdivision to submit to the preclearance provisions, if it finds that the jurisdiction intentionally discriminated against minority voters. It is also consistent with the *Shelby* mandate that federal oversight of state or local elections be closely matched by need. The new allowable triggers do not require a showing of intentional discrimination and are inconsistent with permissible federal oversight as outlined in the *Shelby* decision.

New Preliminary Injunction Standards

The proposed "evidentiary standard" for obtaining a preliminary injunction sets federal law on its head. The Supreme Court has held that a plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest. *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20, (2008). The Court further noted that because a preliminary injunction is such an extraordinary remedy, it is NEVER awarded as a right, and that courts should pay particular regard

for the public interest. *Winter* at 24. The new standard contained in the Act essentially disregards the public interest held by the State. It limits the courts' consideration of the jurisdiction's interest and the considerations enumerated in the *Purcell* doctrine.

The changes clearly tip the scale in favor of the Plaintiff and against the jurisdiction. When a jurisdiction is sued over an election law and a plaintiff's request for a preliminary injunction is denied, then during the pendency of the litigation elections move forward under the proposed law. The litigated laws implementation often demonstrates that the proposed law has NO discriminatory effect. This of course is relevant evidence to the proclaimed discriminatory effect of the litigated voting change. These proposed changes will not only limit the jurisdiction's ability to oppose a preliminary injunction, but it will also necessarily prevent a state from showing in real time that the proposed law has no discriminatory effect.

Thank you for your time and attention.