

**July 14, 2021**

**Statement of Hon. Kenneth T. Cuccinelli, II  
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Chairman Blumenthal, Ranking Member Cruz and Members of the Subcommittee, thank you for inviting me today to discuss the quality and integrity of our voting systems. I am Ken Cuccinelli and I previously served as the Attorney General of Virginia. I currently serve as the national chairman of the Election Transparency Initiative, where we work every day to help improve the transparency, security, accessibility and accountability of elections in every state, so that every American – regardless of party or race – has confidence in the outcome of every election.

To begin with, as states seek to address the shortcomings in their own election systems, it would help to get beyond the hyperbolic, and libelous, rhetoric that each and every rule or procedure is not only an onerous restriction, but is allegedly knee-jerkingly racist, particularly given that in America today it is easier to vote than ever before.

Imagine an election with no rules. Just a table with a stack of empty ballots. Nobody is watching the table. Nobody is dispensing the ballots. Anyone who comes along can fill out a ballot (and since nobody is watching, as many as they choose), and drop those ballots into a drop box. For good measure we will mail a blank ballot to every single name listed in an outdated pollbook and let anyone return those ballots to unsecured drop boxes.

No one would trust the outcome of that "unrestricted," voting process.

We need rules. I.e., time, place and manner rules.

Only citizens can vote. A reasonable rule.

Citizens have to register and Registrars have keep pollbooks up to date. A reasonable rule.

One ballot per registered voter. A reasonable rule.

Enforceable transparency is required so everyone can see the election is clean and secure from start to finish – every step of the way. A reasonable rule.

Ensure each voter is who they say they are. A reasonable rule. The Carter-Baker Commission recommended it and overwhelming majorities of Americans support it.

Nevertheless, voter I.D. has been particularly politicized by the radical left propaganda machine. Yet despite 6 months of media-assisted assaults on the basic common sense need for voter I.D., the American people have been unmoved in their overwhelming support for this basic election integrity measure. It might explain why some very high profile propounders of the false “voter I.D. is racist” propaganda – like Stacey Abrams – have suddenly flip-flopped to get on the right side of the polling.

So, on the basic mechanics of how elections should best be run, when you take the discussion out of the overcharged political atmosphere of the day, Americans tend to agree on what it takes to run good elections.

We have seen that one does not need fraud to shake confidence in an election. Does anyone remember *Bush v. Gore*? In 2000, Florida’s election system was held up before the world as a sad joke – incompetence, election breakdowns, untrustworthy ballots and machines, and haphazard and inconsistent rules. Americans’ confidence was shaken.

In 2000, the left was screaming its lack of confidence in our elections. And again in 2016 and 2018 Democrats questioned election results.

Highly regarded pollster Scott Rasmussen wrote an article this year in which he recorded that while 31% of Americans lacked confidence that America swore in the correct person as President following the election of 2020, 26% held the same view in 2016 – and there is not much overlap between those two groups.

Here, in the U.S. Senate, you can learn from Florida. How did the people of Florida respond to the shocking revelation of just how poor their election system was in 2000? They set about fixing their laws and procedures, and in many parts of the state, they improved the quality of their personnel.

States can and are working to upgrade and improve their elections systems, but it is important that Washington not step in to dictate its own one-size-fits-all approach

that is really more about control of elections by one party than achieving the confidence of the American people in the outcome of our elections.

The first and most important thing the Senate can do, is stick with the Voting Rights Act in its current form to fight actual discrimination where it occurs, as noted in *Brnovich*, and not go beyond it to a partisan federal takeover of our elections.

One need only look back at Florida 20 years after *Bush v Gore*. When much of the country suffered election breakdowns in their states, Florida – the third largest state, and the largest swing state – smoothly tallied its votes with no significant complaints from either side.

Citizens can have confidence in their elections, but only if the federal government doesn't force them to eliminate basic rules of fair and accurate elections.

This hearing is reflecting on the *Shelby County* and *Brnovich* decisions by the U.S. Supreme Court. The simple reason the *Shelby County* and *Brnovich* decisions are right is because they are based on facts, not hysteria.

Given the pure volume of hysteria, I think that bears repeating: The reason the *Shelby County* and *Brnovich* decisions are right is because they are based on facts, not hysteria.

I would note that both HR1/S1 and the discussion of nation-wide preclearance with no objective basis both require an assumption that America is worse off today as it relates to voting access than it was in 1965 – a patently ludicrous assumption, and one directly at odds with the Supreme Court's conclusion in the *Shelby County* decision of 2013.

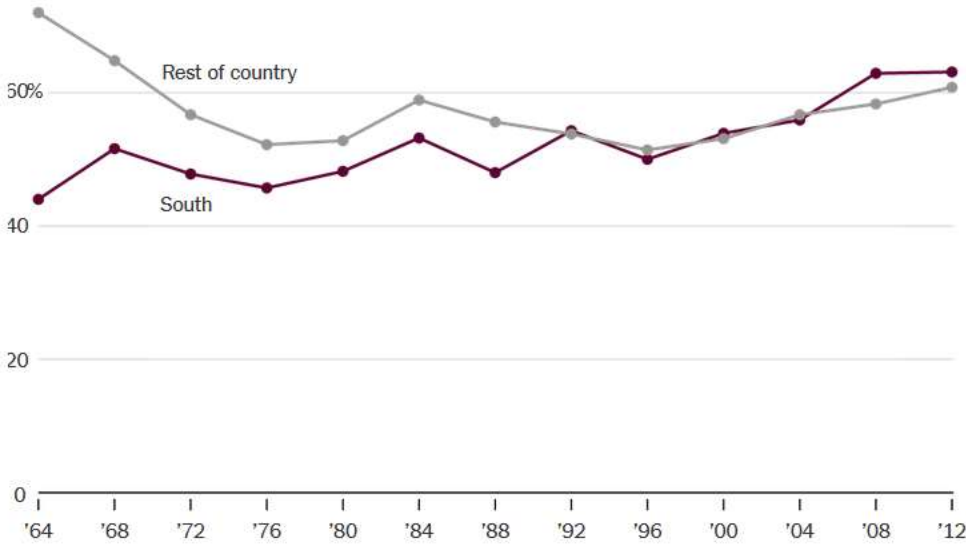
In *Shelby County*, the Supreme Court noted that the preclearance requirements of the Voting Rights Act constituted an “uncommon exercise of congressional power” that was warranted by the “exceptional conditions” existing in 1965, including tests and hurdles to registering to vote and voting in some parts of the country, particularly the South, including my home state of Virginia. The result of those obstacles was substantially lower black voter participation.

As you can see in the graph below (from the New York Times, using Census Bureau data), once the restrictions targeted in the Voting Rights Act were removed, black adults in the South began to engage in elections at rates that quickly approached the

rest of the country, actually surpassing black voters in the rest of the country by 1992.

### Voting Rights Act's Benefit Seen in South

The results of the presidential elections of 1964 and beyond clearly show the effect of the Voting Rights Act of 1965. In 1964, black turnout outside the South hit 72 percent, a level not seen since, but in the South it was only 44 percent. Since then, black turnout has converged in all regions of the country.



Source: U.S. Census Bureau

Beyond equalizing access to voter registration and voting, the Supreme Court noted that in 2013 “...discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels.” Under those circumstances, federal preclearance could not be constitutionally sustained as it was not based on “current political conditions.”

Those ‘current political conditions’ are shown in the steady, positive changes in the voting and registration data compiled by the Census Bureau over the years to see that while we are not perfect, America has – thankfully – left its days of racially suppressive voting laws behind. (References can be found at: <https://www.census.gov/topics/public-sector/voting.html>)

Last month, in the completely unsurprising *Brnovich* decision, the Supreme Court further noted that Section 2 of the Voting Rights Act is alive and well and available

to the federal government to use to attack actual instances of discrimination – as it should be.

I mention this because I am concerned that many leaders on the left talk about the *Shelby County* decision as if the federal government's authority to stop discrimination was held unconstitutional, which everyone on this Subcommittee knows is not the case. Only the outdated preclearance formula was found to be unconstitutional. But it seems that some on the left want to mislead the American people in an effort to build artificial pressure for a federal takeover of elections.

And to be clear about what we mean when we say a “federal takeover of elections,” it is hard to read many of the provisions of S.1. and conclude anything other than that its proponents want to make it easy to cheat and hard to prove. At the Election Transparency Initiative our goal is to make it easy to vote and hard to cheat.

To point to but one example, the provisions of S.1. that 1) require states to dump the names from their various databases onto their voter rolls, 2) combined with the vaguely-worded provisions that threaten state employees with federal criminal prosecution if they question whether any particular person might not qualify to vote, 3) combined with eliminating the penalties for non-citizens actually voting in our elections (in a bill full of integrity-destroying provisions, this one may be the most extraordinary of all), makes it impossible for a reasonable observer to conclude anything other than the proponents of S.1. intend for massive numbers of non-citizens, including illegal aliens, to be registered to vote and to actually vote in our elections.

As it relates to last Congress' version of the Voting Rights Act amendments (“the amendments”), let me start by noting what was NOT advanced in the last Congress. Specifically, Republicans unsuccessfully proposed that a version of the amendments be advanced that would utilize traditional metrics of accessibility of voting, i.e., voter registration and turnout (there are no more “tests” for voter registration), which the Supreme Court upheld in *Katzenbach* back in 1966 specifically because it relied on two measures that bore directly on the existence of racial discrimination. Specifically, 1) the then-recent existence in a state of tests or devices for voter registration, and 2) an abnormally low (compared to uncovered states) voter turnout. The Supreme Court determined that the tests and devices were the tools used to perpetrate disenfranchisement, while low voter turnout was the result, i.e., cause and result.

It is of further note that it is now well-established within the Department of Justice's titular Voting Rights Section, that extreme left-wing, ideological lawyers purposefully target Republican jurisdictions in an apparent attempt to obtain political advantages for Democrats. With Attorney General Garland announcing a hiring spree for that Section, this bad problem can be expected to get worse.

Recent evidence of the problem is the politicized lawsuit recently filed against Georgia by the Department of Justice (Voting Rights Section) asserting – in unusually political terms – that Georgia's recent modest reforms to its election system were enacted in order to discriminate against black voters in Georgia. In light of the complaints in Georgia about election administration – dating back to 2018 (by Democrats) – it should be no surprise to anyone that Georgia's General Assembly would seek to make improvements. That those improvements have been the subject of some of the most brazen and dishonest attacks seen in American politics in years, including by President Biden, indicates that cleaning up Georgia's elections is deemed by those doing the attacking, i.e., Democrats, to somehow disadvantage their “side.”

When someone thinks cleaner and smoother elections are disadvantageous, I am hard pressed to discern a defensible reason for such a position.

Finally, I would share a bit of my experience as an Attorney General of a covered jurisdiction – Virginia. We always had to struggle with the never-well-delineated demands of Section 2 and Section 5 of the Voting Rights Act when it came to redistricting. To put it in simple terms, Section 2 reasonably demands that a state's laws be developed and implemented without regard to race, while Section 5 required covered states to take into account race when drawing district lines, with the general goal of no retrogression. Needless to say, it is actually impossible to do both. It is possible to do both yet not discriminate, but the preclearance requirement made this arrangement subject to great arbitrariness on the part of the Department of Justice.

And that is just redistricting. With over 100 election jurisdictions in Virginia, the aggregate burden of complying with preclearance was enormous. I readily concede that burden made sense when the VRA was put in place, but it cannot be justified today.

Again, for those of you who have not had to contend with preclearance in your careers, it covers the smallest of trivia. For example, we have approximately 2,500 voting precincts in Virginia. They are in schools, churches, government buildings, and the list goes on. To do something as pedestrian as moving a voting location from

the local school to the local firehouse – for one, single precinct – a locality had to ask permission of the federal government for that change, and thus had to go through the preclearance process. While the overwhelming majority of such requests end up being approved, the process often comes with requirements for information and what amount to interrogatories. All for one of the simplest elements of election administration. Then multiply that through all of the different aspects of an election and you begin to see the extraordinary burden involved.

The term “federal takeover” describes such a situation very accurately, and it cannot be justified as achieving anything other than political control of elections, perhaps one of the only results that could actually take America’s shaky confidence in its elections to an even lower place. I would ask the Senate not to go down that path.