

**Testimony Before the Senate Judiciary Committee's Subcommittee
on the Constitution**

**Hearing on "Restoring the Voting Rights Act: Combatting
Discriminatory Abuses"**

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

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

I have been an attorney for approximately 35 years. For more than twenty of those, I served in the Civil Rights Division of the Department of Justice. Eighteen of those years were spent both as a Voting Section trial attorney and well as Senior Counsel to the Attorney General for Civil Rights. During my tenure at the Department, I have been the recipient of numerous awards.

From August 2000 until the Supreme Court's decision in *Shelby v Holder*, my primary responsibility was to review changes in voting submitted for preclearance under Section 5.

If passed, H.R. 4 will give virtually limitless power over the election procedures of every state and local election to partisan bureaucrats within the Voting Section. I watched this power abused firsthand. I would like share with you my experiences working in the Voting Section.

The Voting Section has a long history of partisan and ideological polarization. It should not be granted this virtually limitless power. I began my employment in the

Voting Section just prior to the 2000 election. When the Florida recount occurred, I personally observed Voting Section staff discussing strategies to aid the DNC in Florida and receiving and sending faxes to Democratic National Committee and campaign operatives.

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

I would urge every member here to read an DOJ Inspector General Report entitled “A Review of the Operation of the Voting Section of the Civil Rights Division.” It provides instance after instance of bad behavior – often racially motivated – among section staff. It includes abuse of an African-American paralegal deemed not black enough. When you finish reading the report, you will rightfully wonder if it is such a good idea to give this office so much power over every election.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. The Office of Legislative Affairs detailed in a letter to Representative Sensenbrenner the millions of

1

<https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwib5dKmlbrxAhVVG80KHRquAv4QFjABegQIBRAD&url=https%3A%2F%2Ffoig.justice.gov%2Freports%2F2013%2Fs1303.pdf&usg=AOvVaw09dTbH3E3cEhHWZFMl48bw>

dollars in sanctions the Voting Section has incurred for bad behavior in Section 5 reviews and other court cases. I have attached the letter to my testimony.

When the Voting Section brought an action against an African American named Ike Brown, in Noxubee County Mississippi, for violating the Voting Rights Act, these partisan bureaucrats disagreed with the filing of the case and were hostile to it throughout the prosecution of the case. They have disdain for the equal application of civil rights laws to all Americans. It is not wise to give such a place limitless power over states.

Past Abuse of Section 5 Powers

The Voting Section has a long record of abuse by its lawyers, for improper collaboration in reviewing Section 5 submissions, and 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. A federal 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.” Abuse of power in the Section 5 process is not confined to *Johnson v. Miller*.

Yet even after the imposition of these sanctions, on more than one occasion after receiving a submission to review for preclearance, I was instructed to strategize with these very same advocacy groups. Such unethical behavior has cost federal taxpayers too.

As recently as this 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 in order 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 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 be able to elect the candidates of choice they really supported. (Objection letter attached as EXH. B)

In another example of abuse, the Town of North, South Carolina, submitted an annexation of two white homeowners to the city limits for preclearance. 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 actually relied on some of these meritless objections when it reauthorized Section 5 in 2006 to fill the Congressional record. These abusive and meritless objections polluted the record in 2006, but no one ever drew attention to them, and Congress took no testimony regarding their merits. Additionally, these and other cases brought by the Voting Section have resulted in the Department of Justice paying 2, 358, 687.31 in sanctions for improper actions. (Please letter dated 2006 to Rep. Sensenbrenner letter detailing Voting Section abuses attached)

Every change no matter how small

H.R 4's practice-based preclearance triggers will require almost every small election change to be submitted to the federal government for approval, no matter how inconsequential the change may be. 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 moved from the *school gym to the school cafeteria*, under this proposal, the lawyers in the Voting Section would have to review and approve or reject the change. Voter registration changes include office hour openings from 8:30 to 8:25 would have to be approved. Any change in a polling place *signage font* would have to be approved. Changes in the location of the registrar from the old city hall to new city hall literally across the street, changes in the numbering of precinct numbers that do not affect location, all of these would have to be approved.

Additionally, every local town annexation must be submitted and approved. These types of changes represent the majority of those reviewed. The Attorney General does not have the burden of establishing a discriminatory purpose or effect to issue an Objection under Section 5. The burden is on the jurisdiction submitting the change to prove that the proposed change does not have a discriminatory purpose or discriminatory effect.

Preclearance is not necessary in 2021

Section 5 was a temporary provision for reasons that no longer exist. The Supreme Court made clear in *Shelby* 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.

I would ask Senators who support this bill to cite one single instance of an evasion of a federal decree in a voting rights case. Just one.

How about a lack of minority office holding? Quite the opposite. According to the National Directory of Latin Elected Officials, there were 6,682 Latin elected officials in the United States in 2019. According to the National Database of Non-White Elected Officials, at gmcl.org, there are over 10,000 Black elected officials in the United States and in some states significantly more than the percentage of minorities in the general population. 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.

According to information received from the DOJ through a FOIA request by the Public Interest Legal Foundation, from 2000 through 2013, the Voting Section received and reviewed 222,132 submissions and issued 81 objections. That means that only .036 of 1 percent of the submissions reviewed resulted in an objection. Do you think that number represents massive, blatant discrimination?

Tools Exist to Stop Discrimination

Permanent provisions of the Voting Rights Act such as Section 2 still prohibit discrimination and provide the Justice Department with the ability to challenge election procedures. When the Voting Section filed a lawsuit against Georgia a few months ago, the Department has only brought 5 Section 2 cases since the *Shelby* decision in 2013. If there is rampant discrimination in voting actually exists why has DOJ not brought cases challenging these ills?

Language minority provisions such as Section 203 and Section 4(3) were not affected by the *Shelby* decision.

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. However, H.R. 4 would also allow a jurisdiction to be subjected to the rigors of Section 3 for violations of H.R. 4, violations of Section 5, or when a jurisdiction has agreed to settle a case through a consent decree. None of the new allowable triggers require a showing of intentional discrimination and are inconsistent with permissible federal oversight as outlined in the *Shelby* decision.

Lastly, but of great importance is Section 11(b), which prohibits intimidation, threats, or coercion directed towards voters or those aiding voters. This section is also

available post Shelby, yet there has not been a case brought by the Department through 11(b) since the case against the New Black Panther Party in 2009.

Proposed Changes to Section 2 of the VRA

The proposed changes to Section 2 that are included in HR 4 turn Supreme Court precedents on their head. In *Bartlett v Strickland*, the Supreme Court held that “coalition districts” (those where a protected racial minority does not represent a majority, but voters of other races vote cohesively with the racial minority to allow the racial minority to elect a candidate of choice) were not protected by the VRA. The party asserting Section 2 liability must show that the racial minority population is greater than 50% and is geographically compact. Yet, the proposed bill mandates protection of “protected classes” that are politically cohesive as opposed to the protection of a racial minority group. Recognizing that a Section 2 claim where minority voters cannot elect their candidate of choice based upon their own votes without assistance from others would grant special protection to their right to form political coalitions which are not authorized by the VRA.

The Voting Rights Act protects racial minorities, not political parties. Once Americans begin to suspect otherwise, that the Voting Rights Act is a one way ratchet to protect political parties, they will stop supporting it. Once Americans think that this

incredibly successful civil rights statute is a partisan tool, you will see support for civil rights evaporate.

Furthermore, the proposed bill destroys – by design - the Supreme Court’s decision in the *Brnovich* case, by utilizing the Senate factors that are considered for vote dilution claims and applying them to other Section 2 claims.

The proposed bill now provides for a successful Section 2 claim based upon the expanded Section 5 “retrogression standard”. This would likely be unconstitutional.

Finally, the proposed “evidentiary standard” for obtaining a preliminary injunction proposed in H.R. 4 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 H.R. 4 not only disregards the public interest held by the State, H.R. 4 actually prohibits the court from considering the interest of the State in any application for the preliminary injunction. In doing so, the proposal wrecks the notion of due process.

Thank you for your time and attention.