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Before the

United States Commission on Civil Rights

February 2, 2018

Let me thank the Commission on Civil Rights for inviting me to participate in this briefing on the current challenges facing voting rights enforcement in the United States. My remarks today reflect my training as a historian who has worked on voting rights litigation for 37 years, first as a testifying expert in the 1980s when I was a history professor in Alabama, beginning with *Bolden v. City of Mobile*[1] on remand from the Supreme Court in 1981, and then for a quarter century as a social scientist in the Civil Rights Division of the Department of Justice.[2] At the Department my principal responsibility was, in my view, to see that voting rights cases were built on reliable social science evidence. This included identifying potential scholarly experts who could assist the courts in addressing key factual questions at issue in each case, and working with both experts and attorneys to ensure that we provided the best possible empirical answers to those questions. When opponents of the Voting Rights Act challenged the constitutionality of both Section 2 and Section 5, I helped attorneys marshal the

[1] *Bolden v. City of Mobile*, 540 F. Supp. 1050 (S.D. Ala. 1982). At that time the federal courts were still deciding vote dilution cases under the Fourteenth Amendment. In *City of Mobile v. Bolden*, 446 U.S. 55 (1980), the Supreme Court had ruled that plaintiffs would have to prove that an election practice was adopted or maintained for a racially discriminatory purpose. The African American plaintiffs prevailed under the new intent standard on remand from the Supreme Court under the intent standard.

[2] I joined the staff of the Civil Rights Division in August 1990 and retired from government service in December 2016.

legislative history of these provisions and the history of their implementation. After retiring from government service in December 2016, I continue to address the history of the Act in my scholarly writing and have begun to serve again as a testifying expert for private plaintiffs in new voting rights cases.

The focus of today's briefing is, as I understand it, to take stock of how the Department of Justice and the private voting rights bar have confronted the profound change in voting rights law wrought by the Supreme Court's 2013 decision in *Shelby County v. Holder*.[3] As participants in this briefing are well aware, the *Shelby County* decision effectively eliminated the preclearance requirement set forth in Section 5 of the Voting Rights Act. Since that decision in June 2013, states previously covered by Section 5 – Texas and North Carolina – have put in place laws that federal courts subsequently found to be racially discriminatory in both intent and effect. I want to share with you the kind of evidence which the Department and private plaintiffs put before the courts in these cases, primarily by expert testimony from social scientists. By understanding the difficulties faced in assembling this evidence you will better appreciate the challenges required to confront future attacks on minority voting rights.

North Carolina State Conference NAACP v. McCrory

The most dramatic change in election law affecting minority voters in recent years has been the adoption of laws that burden – designedly or otherwise – the ability of minority voters to vote in person. The most comprehensive of these changes is a law adopted by North Carolina shortly after the *Shelby County* decision.[4] The Republican

[3] 133 S. Ct. 2612 (2013).
[4] H.B. 589, 2013 N.C. Sess. Laws 381 (enacted as SL 2013-381).

Party had won control of the legislature in 2010 and the governorship in 2012. In 2013 the Republican leadership sought to reverse a tide of electoral reform enacted by Democratic legislatures over the preceding decade – which Democrats had justified as a way of expanding political participation by minority voters. These Democratic reforms included provisions expanding early voting, enabling prospective voters to register and cast their ballots on the same day during the early voting period, and on election day to vote regular ballots at precincts other than the precinct in which they resided. All these procedures had facilitated an extraordinary increase in minority registration and voting, which was further stimulated in presidential elections by the historic candidacy of Barack Obama, the first African American ever elected to the presidency.[5]

Following the *Shelby* County decision, the Republican legislature now adopted a law that, among other things, decreased the period for early voting and eliminated same-day registration and voting, as well as out-of-precinct voting. The proposed law also included a very restrictive photo identification requirement for in-person voting – only a small number of approved documents which many poor and minority voters did not possess would satisfy this photo id requirement.[6] Several public interest groups representing African American voters immediately challenged the new law, shortly thereafter joined by the Department of Justice.[7]

Assessing the racial effect of practices that deny or abridge the right to vote – such as the changes at issue in the North Carolina case – requires different types of

[5] *NAACP v. McCrory*, 831 F. 3d 204, 214-15 (2016). In fact, black voter registration and turnout was by 2008 at virtual parity with white participation rates.
[6] *Id.*, at 214-16.
[7] *Id.*, at 218.

quantitative analysis than used in vote dilution cases such as challenges to redistricting plans or at-large elections. Political scientists analyzing election administration have in recent years adopted sophisticated methods of linking individual records in large databases. The most direct evidence of the burden of the new photo id requirement on minority voters is obtained by matching the individual records from the state's voter registration database with individual records itemizing whether persons possess one of the documents with photos required by the new law – such as a state driver's license – and to determine the race of persons lacking any required photo id. In the North Carolina case three federal photo id documents would also satisfy the requirements of the new law. For this reason, it was necessary to coordinate data matching from state agency records with databases maintained by the federal agencies, a time-consuming and complicated process – even for the Department of Justice, which as a federal agency had a better chance of securing quick cooperation from other federal agencies – and virtually impossible for private plaintiffs. In each instance the matching process involved databases with millions of individual records.[8]

Data from the state board of elections made it possible also to determine the race of persons utilizing early voting, same-day registration, and out-of-precinct voting. The Department of Justice put on the testimony of political scientist Charles Stewart, whose analysis showed that there was a significant racial disparity in possession of one

[8] "Declaration of Charles Stewart III," April 11, 2014, United States v. North Carolina, C.A. No. 1:13-CV-861 (M.D.N.C.); "Surrebuttal Declaration of Charles Stewart III," May 2, 2014, United States v. North Carolina, C.A. No. 1:13-CV-861 (M.D.N.C.); "Supplemental Declaration of Charles Stewart III," June 28, 2014, United States v. North Carolina, C.A. No. 1:13-CV-861 (M.D.N.C.); "Declaration of Charles Stewart III, Amended" February 18, 2015, United States v. North Carolina, C.A. No. 1:13-CV-861 (M.D.N.C.); "Declaration of Charles Stewart III, Amended" December 10, 2015, United States v. North Carolina, C.A. No. 1:13-CV-861 (M.D.N.C.).

of the photo ids required by the new law, and that African Americans disproportionately used early voting, same-day registration, and out-of-precinct voting.[9] In short, Stewart's analysis showed that implementation of the new law would clearly have a racially discriminatory effect on the state's in-person voting.

The testimony of other social scientists, as well as Dr. Stewart, established that African Americans in North Carolina continued to have higher rates of poverty than whites and lower levels of education than whites. Such racial disparities in socio-economic status usually depress voter participation rates and – more relevant to this case – make it more likely that minority voters will lack a required photo id or be able to secure a replacement.[10] Because African American households in North Carolina had less access to automobiles than white households, they had less incentive to possess a driver's license – and getting to the Department of Motor Vehicles (DMV) to obtain a photo id was more difficult. In metropolitan areas bus transportation was readily available but an expert geographer's analysis demonstrated that, on average, getting from predominantly black neighborhoods to the closest DMV office by bus consumed far longer transportation time than driving a car. It is also likely that fewer minority voters have the documents – such as birth certificates – needed to obtain a driver's license.[11] For these reasons acquiring a photo id from this state agency – usually the easiest

[9] "Declaration of Charles Stewart III, Amended" February 18, 2015, United States v. North Carolina, C.A. No. 1:13-CV-861 (M.D.N.C.); "Declaration of Charles Stewart III, Amended" December 10, 2015, United States v. North Carolina, C.A. No. 1:13-CV-861 (M.D.N.C.).
[10] See, e.g., "Declaration of Allan J. Lichtman," February 12, 2015, North Carolina State Conference NAACP v. McCrory," C.A. No. 1:13-CV-00658 (M.D.N.C.).
[11] Declaration of Gerald R. Webster," February 12, 2015, United States v. North Carolina, C.A. No. 1:13-CV-861 (M.D.N.C.).

place to secure one of the required photo ids – was clearly more burdensome for African American than whites.

Two historians, Stephen F. Lawson and Allan J. Lichtman, independently presented detailed evidence documenting the racially discriminatory purpose of these changes. Both relied on legislative history documents, communications between the technical staff of the state board of elections and legislators, as well as studies reporting quantitative data about early voting, same-day registration, and out-of-precinct voting. Lawson and Lichtman also used newspaper coverage of the legislative process – source material historians routinely consult in their research on decision-making. They examined the historical background of the decision, such as the fact that the changes were designed to reverse the effects of prior electoral reforms that had contributed to the rise of minority registration and voting. The sequence of events leading to passage of the law was telling, especially the fact that a far less restrictive bill was replaced by a much more burdensome version once the Supreme Court eliminated preclearance review in *Shelby County*. It seemed clear to knowledgeable observers that the bill that passed would never have secured federal preclearance, either administratively by the Department of Justice or by a three-judge court in the District of Columbia, before *Shelby County* – and thus its provisions would never have been enforced.[12]

Lichtman and Lawson also took account of the evidence that African Americans overwhelmingly supported Democratic candidates, both white and black – and a substantial majority of whites were solidly Republican in their candidate preferences.

[12] "Declaration of Steven F. Lawson," April 11, 2014, United States v. North Carolina, C.A. No. 1:13-CV-861 (M.D.N.C.); "Declaration of Allan J. Lichtman," February 12, 2015, North Carolina State Conference NAACP v. McCrory," C.A. No. 1:13-CV-00658 (M.D.N.C.).

This well-known pattern made clear that the best way to increase the electoral advantage of Republican candidates was to diminish the voting strength of African Americans. In the view of Lawson and Lichtman – and their view was consistent with the case law on the intent question – knowledge of such a pattern was key to support for the final bill and revealed not just a partisan goal but also a racially discriminatory purpose.[13]

The Fourth Circuit Court of Appeals ruled on July 29, 2016, that the North Carolina omnibus election law – H.B. 589 – was adopted with a racially discriminatory purpose, had a racially discriminatory effect, and thus violated Section 2 of the Voting Rights Act and the Fourteenth Amendment.[14] Republican legislators requested and received from the State Board of Elections racial data on each of the provisions challenged in this lawsuit and thus knew that the changes they made would "target with almost surgical precision" the African American voters who utilized early voting, same-day registration, and out-of-precinct voting at significantly higher rates than whites.[15]

This victory for plaintiffs came at a high cost. Based on my experience in processing expert witness invoice for a quarter century, my best guess is that expert witness costs alone in this case were likely well into six figures for both the Department of Justice and most groups of private plaintiffs. Even when plaintiffs win a case, furthermore, they face years of waiting to recoup all these expenses. Had Section 5

[13] "Declaration of Steven F. Lawson," April 11, 2014, United States v. North Carolina, C.A. No. 1:13-CV-861 (M.D.N.C.); "Declaration of Allan J. Lichtman," February 12, 2015, North Carolina State Conference NAACP v. McCrory," C.A. No. 1:13-CV-00658 (M.D.N.C.).
[14] *State Conference of the NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2016).
[15] *Id.*, at 214.

review still been in place, these provisions in H.B. 589 likely would never have been implemented.

The Texas Cases

In 2011 Texas adopted a very restrictive photo identification requirement for voting – not unlike the photo id requirement in the North Carolina H.B. 589 – after four years of partisan battles in the legislature. A federal court denied preclearance to the Texas photo id requirement (SB 14) in 2012.[16] Immediately after the Supreme Court decision in *Shelby County v. Holder*, however, the state began to enforce the new law. Private plaintiffs, followed by the Department of Justice, then filed Section 2 lawsuits in the Southern District of Texas, charging that SB 14 was adopted with a discriminatory purpose and would have a racially discriminatory effect on the ability of minority voters to cast their ballots in person.[17]

As in the North Carolina case, the United States put on testimony utilizing database matching of individual records in state and federal databases as the most accurate way of measuring the degree to which voters lacked any of the photo id documents required by the state. Political scientist Stephen Ansolabehere's careful analysis demonstrated that over 600,000 Texas registered voters lacked any of the photo ids specified by SB 14. There was a marked racial disparity between African American and white registered voters – and between Hispanic and Anglo registered voters – on Professor Ansolabehere's "no-match" list.[18] Another political scientist

[16] *Texas v. Holder*, 888 F. Supp. 2d 113 (D.D.C. 2012).
[17] *Veasey v. Perry*, 71 F. Supp. 3d 627 (S.D. Tex. 2014).
[18] Declaration of Stephen D. Ansolabehere, September 16, 2013, Veasey v. Perry, C.A. NO. 2:13-cv-193 (S.D. Tex.). The findings regarding racial disparities in photo id possession are found at pp. 35-41. The

testifying for private plaintiffs, Matt Barreto, conducted a public opinion survey of Texas registered voters and reported similar findings.[19] That SB 14 would leave well over a half million registered voters without a required photo id and thus potentially unable to vote in person – out of over 13 million registered voters – is a staggering effect. Most importantly, the trial court found that "SB 14 disproportionately impacts both African Americans and Hispanics in Texas."[20]

Anthropologist Jane Henrici testified, based on her years of research among poor residents of Texas cities, that many found it difficult to obtain – and sometimes to retain over the years – documents containing photo identification.[21] Historian Vernon Burton testified about the pattern of racial disparity in socio-economic characteristics over the years, and the continued use of racial appeals in Texas elections.[22] Political scientist Barry Burden presented evidence about the degree of racially polarized voting in Texas, and veteran voting rights lawyer George Korbel pointed out that the state had conceded in recent litigation that voting patterns in Texas were racially polarized.[23]

In discussing the degree to which SB 14 was adopted with a racially discriminatory intent, historian Allan Lichtman recounted the four years of struggle by the Republican majority to pass a photo id bill, culminating in 2011 with the most restrictive bill yet considered, SB 14.[24] Judge Nelva Gonzalez Ramos examined as well

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trial court found that Ansolabehere's findings were buttressed by the testimony of statistician Yair Ghitza, and by a similar database matching analysis conducted by political scientist Michael Herron, an expert for private plaintiffs in the case. *Veasey v. Perry*, 71 F. Supp. 3d 627, 659-62. (S.D. Tex. 2014).

[19] *Id.*, at 662-63.

[20] *Id.*, at 663.

[21] *Id.*, at 664-65.

[22] *Id.*, at 633-36, 638, 654.

[23] *Id.*, at 637-38.

[24] *Id.*, at 654, 658-59; "Declaration of Allan J. Lichtman," June 27, 2014, Veasey v. Perry, C.A. NO. 2:13-cv-193 (S.D. Tex.).

a large quantity of documentation regarding the legislative history of each of the photo id bills between 2007 and 2011, and cited courtroom testimony from legislators on both sides of the issue. Judge Ramos noted that the primary rationale for adopting a photo id requirement offered by its proponents was to prevent in-person voter fraud, but that the state was unable to present evidence of such fraud.[25] After reviewing the evidence the court concluded that SB 14 was motivated "*because of* and not merely *in spite of* the voter id law's detrimental effects on the African American and Hispanic electorate," and thus violated Section 2 of the Voting Rights Act and the Fourteenth and Fifteenth Amendments.[26]

As with the fate of its photo id requirement for voting, Texas also failed to secure federal court preclearance of its redistricting plans for congressional and state legislative districts following the 2010 Census.[27] In the Section 5 trial the fact that Texas wanted a quick decision so that its proposed districts could be used in the 2012 elections gave the defendant United States a distinct advantage not ordinarily enjoyed by plaintiffs in Section 2 lawsuits. Due to the state's desire to secure quick approval of its redistricting plans for use in the forthcoming 2012 elections, the court ordered the state to provide the defendant United States copies of emails among legislators and staff persons involved in drawing redistricting plans. The court found that these emails, along with other documents detailing the plan-drawing process, made clear that Texas designed each of its redistricting plans to dilute the voting strength of both African

[25] *Veasey v. Perry*, 71 F. Supp. 3d 627, 645-59 (S.D. Tex. 2014).
[26] *Id.*, at 703 (following an analysis at 639-40).
[27] See the decision of the three-judge court in the District of Columbia, *Texas v. United States*, 887 F. Supp. 2d 133 (D.D.C. 2012).

American and Latino citizens – and that these plans had the intended discriminatory effect.[28]

The expert testifying about the intent of the redistricting plans for the United States was political scientist Theodore Arrington. Evidence from emails and from legislative history documents indicated that in devising new districts Texas used arbitrary demographic thresholds – 50 percent Hispanic citizen voting age population and 40 percent African American voting age population – to claim that such districts would provide minority voters an equal opportunity to elect their preferred candidates, while knowing that actual data from past elections showed that some of the proposed districts would likely elect Anglo Republican candidates instead.[29] Political scientist Lisa Handley, also testifying for the United States, analyzed voting behavior in past elections and demonstrated that the predictions of the state's plan drawers were largely correct; as a result of racially polarized voting and higher Anglo turnout, the key districts the state's plan drawers expected to benefit candidates preferred by Anglo voters would in fact usually result in the defeat of minority-preferred candidates.[30]

Shortly after the Supreme Court decided *Shelby County v. Holder* in June 2013, it vacated the decision denying preclearance of the Texas redistricting plans. The Department of Justice then intervened in the private Section 2 challenges to these plans filed by private plaintiffs in Texas two years earlier, and the court in that case agreed to incorporate the evidence from the Section 5 case into the record before it. Based on

[28] *Id.*
[29] Declaration of Theodore Arrington, T*exas v. United States*, No. 1:11-cv-01303 (D.D.C., October 25, 2011).
[30] Declarations of Lisa R. Handley, T*exas v. United States*, No. 1:11-cv-01303 (D.D.C., October 19, 2011). Dr. Handley filed separate reports for congressional and state house plans.

this voluminous record the three-judge court ultimately found in 2017 – as had the Section 5 court in the District of Columbia in 2012 – that the Texas redistricting plans for congressional and state house districts were intentionally discriminatory and would effectively dilute the voting strength of both Latino and African American voters.[31] The case is still pending in the courts – five years after the decision by the Section 5 court denying preclearance in 2012. These lengthy proceedings, unusually complex to be sure, illustrate that litigating a Section 2 case takes far more time than assessing voting changes under Section 5.

As with the North Carolina lawsuit, the two Texas cases required the Department of Justice and private plaintiffs to spend hundreds of thousands of dollars in expert witness fees, along with the other expenditures routinely needed to take a case to trial. All statewide cases brought under Section 2 of the Voting Rights Act require similar resources. Typically, a local case enlists only a single trial team – occasionally two, if there is an intervening party – and fewer expert witnesses, thus costing less to litigate. Even so, such cases often take at least two or three years from start to finish. The first case in which I testified, *Bolden v. City of Mobile*,[32] was in the courts for seven years.[33]

Many of the Section 5 objections by the Department of Justice when the preclearance requirement was still in effect, were to voting changes at the local level, often involving such matters as changing polling places from a location in a

[31] *Perez v. Abbott*, 250 F. Supp. 3d 123 (W.D. Tex. 2017), re: state house redistricting, and 253 F. Supp. 3d 864 (W.D. Tex. 2017), re: Texas congressional plan. The state senate redistricting plan had been settled by this time: *Davis v. Abbott*, 781 F.3d 207 (5th Cir. 2015).
[32] *Bolden v. City of Mobile*, 540 F. Supp. 1050 (S.D. Ala. 1982).
[33] See Peyton McCrary, "History in the Courts: The Significance of *City of Mobile v. Bolden*," in Chandler Davidson (ed.), *Minority Vote Dilution* (Washington, D.C., Howard University Press, 1984), 47-65.

predominantly minority neighborhood across a busy highway to a predominantly white neighborhood, or de-annexing African American neighborhoods so that minority voters can no longer vote in city elections.[34] In my experience it is unusual for local minority communities to find the resources to litigate such voting changes. For this reason, the inability to address discriminatory local changes represents the greatest single burden created by the elimination of Section 5 preclearance.

[34] Peyton McCrary, "How the Voting Rights Act Works: Implementation of a Civil Rights Policy, 1965-2005, *South Carolina Law Review*, 57 (Summer 2006), 785-825.