

Statement of Hon. Kenneth T. Cuccinelli, II

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Chairman Lofgren, Ranking Member Davis and Members of the Committee, 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.

Today it is easier to register and vote than ever before in our history, regardless of where you live, what color you are, or any political party you affiliate with. We should be celebrating this as a great accomplishment, while always looking to improve.

Instead, many in this body would like to impose a federal pre-clearance requirement nationwide – suggesting access to voting is actually worse today than it was in 1965, a patently ridiculous position.

Yet the lying demagoguery coming from the radical left – including the title of this hearing – is not constructive and represents a large-scale attempt to knowingly convince the American people of a false narrative. Namely, that since the Shelby County ruling by the Supreme Court in 2013, America has been suffering from a rash of voter suppression.

Thankfully, the data demonstrates that this narrative is blatantly false.

And rather than make general allegations, let me be specific about some of the radical leftists who are lying to the American people.

It starts at the top, with President Biden. Even the leftist Washington Post had to give President Biden their strongest liar rating of “four Pinocchios” for his blatantly false statements about Georgia’s recent election reform efforts.¹ And he is the highest voice shouting the now-familiar trope of “Jim Crow 2.0.”

Not to be left out, Vice President Harris recently flip-flopped from her anti-voter I.D. position in an interview on BET, an interview in which that flip-flop was overshadowed by her comment that people who live in rural communities aren’t capable, i.e., smart enough, to use voter I.D.s to conduct their voting.

Vice-President Harris’s “rural people are stupid” view is no less prejudiced than her view – shared implicitly by so many others on the left, including this committee – that minorities are somehow incapable of getting and using voter I.D.s like everyone else.

In addition to the data simply not supporting this prejudiced view, it is one of the most offensive aspects of the entire contemporary public discussion.

One of the most senior members of this body, Congressman Clyburn, recently not only flip-flopped on his previous position that requiring voter I.D.s is racist, but he even denied ever holding such a position. And beyond just that, he further denied that anyone in congress ever held such a position! Given that members of this very committee have suggested that requiring voter I.D. is racist, you all know Congressman

¹ See <https://www.washingtonpost.com/politics/2021/03/30/biden-falsely-claims-new-georgia-law-ends-voting-hours-early/>

Clyburn's denial was without foundation. And like President Biden, Congressman Clyburn also earned "four Pinocchios" from the leftist Washington Post for his lies on this subject.²

Off course, no listing of lying left-wing race-baiters would be complete without Stacey Abrams, who, like Congressman Clyburn both flip-flopped on her "voter I.D. is racist" position AND denied ever holding such a position.³

And most recently, Pennsylvania Governor Tom Wolf staged a spectacular flip-flop of his own, suddenly declaring he is now open to changing the state's voter I.D. laws. Less than three weeks earlier, Wolf enthusiastically vetoed common-sense voter I.D. provisions contained within the *Voting Rights Protection Act* passed by the state's General Assembly.⁴

What do the flip-flopping race baiters have in common? Two things: their timing and their polling.

What do I mean?

First, because of the political necessity of getting federal legislation through a 50-50 Senate, following West Virginia Senator Manchin's indication that he would require some kind of voter I.D. to support national legislation, President Biden, Vice-President Harris, Congressman Clyburn, Stacey Abrams and many others on the left, had to cast aside their false "voter I.D. is racist" mantra. As they could not be calling Senator Manchin a racist (at least for now), while they were

² See <https://www.washingtonpost.com/politics/2021/07/15/clyburns-false-claim-that-no-democrat-has-opposed-voter-id-laws/>

³ See <https://www.washingtonpost.com/politics/2021/06/21/democrats-voter-id/>

⁴ See <https://www.inquirer.com/politics/election/pennsylvania-voter-id-tom-wolf-interview-20210720.html>

trying to get his vote for their extreme H.R.1/S.1 legislation in the U.S. Senate or its likely follow-on, the soon-to-be introduced John Lewis Amendments to the Voting Rights Act.

Second, almost incredibly, even after six solid months of relentless, false, ad hominem attacks on election reform efforts, including voter I.D. requirements, by left-wing national leaders and their media puppets, the American people still overwhelmingly hold the position that voter I.D. requirements – and other ballot integrity measures – should be an integral part of the election processes in our states.

I will use Stacey Abrams as an example of the role of persistently positive polling in favor of election integrity reforms. Given that Stacey Abrams will likely run for Governor of Georgia again next year, being on the bottom side of issues that poll in the range of 2-to-1 in favor is not a comfortable place for any aspiring politician to be.

Abrams flip-flop/denial regarding voter I.D is very similar to her handling of first encouraging Major League Baseball to boycott her own home state of Georgia by moving the All-Star game out of Atlanta, then denying that she had done so.

In that case, amazingly, in the name of fighting alleged racism, Major League Baseball, with encouragement from Stacey Abrams and others, moved the All-Star game from the 51% black city of Atlanta to the 9% black city of Denver, doing incalculable damage to the black small business owners of Atlanta.

This example epitomizes – in one action – how far off the mark those opposing transparent election reforms have been in this entire debate. And the title of this very hearing only drives that point home.

Let's look at this from a different perspective.

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. And we find that when Americans just talk about the mechanics of what makes a good election – outside the umbrella of partisanship – there is broad agreement on good rules for elections.

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.

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. House, 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.

And given the atmosphere flowing from 2020 into 2021, it is worth recognizing that even though the Republican candidate won that contested election in Florida in 2000, it was largely Republicans – though by no means only Republicans – that set about to improve their election processes.

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 House can do, is stick with the Voting Rights Act in its current form to fight actual discrimination where it occurs, as noted by the Supreme Court 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 on election night 2020, 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.

Many on the left want to overturn the *Shelby County* and *Brnovich* decisions by the U.S. Supreme Court. It should be noted that 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.

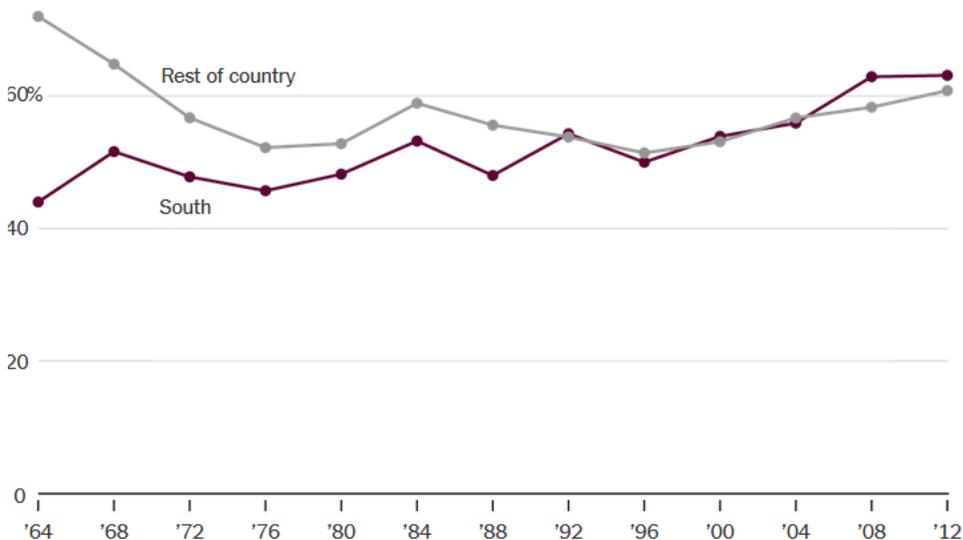
I would note that both HR1/S1 and the discussion of nation-wide preclearance with no objective basis both require an assumption that America is worse off today as it relates to voting access than it was in 1965 – a patently ludicrous assumption, and one directly at odds with the Supreme Court's conclusion 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.⁵

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 Committee 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

⁵ See <https://www.census.gov/topics/public-sector/voting.html>

criminal 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 (the 1965 "tests" for voter registration are long gone), 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.

As it relates to the last version of the John Lewis Amendments to the Voting Rights Act, H.R. 4 in the last Congress, the federal takeover via nationwide pre-clearance is clearly intended to position the extreme partisans in the Voting Section of the Department of Justice⁶ to block voting integrity efforts. In fact, it is these very efforts that are today histrionically referred to by members of this Committee and even the President of the United States as so-called "Jim Crow 2.0."

Recent evidence of the problem is the politicized lawsuit recently filed against Georgia by the Department of Justice (Voting 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

⁶ See <https://oig.justice.gov/reports/2013/s1303.pdf>, page 209

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 conflicting 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 completely agree that 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.

And when you realize that the extreme left-wing lawyers that inhabit the Voting Section at DOJ view every one of these as opportunities to negotiate a state or locality into election process positions that they – the unelected bureaucrats – want for your state, you can see the opportunities for mischief.

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 House not to go down that path.

Finally, given the outrageous propaganda being spewed by so many of you on the left about so-called “Jim Crow 2.0” election reforms, I thought it would be helpful for me to put into the record a number of items that are examples of real Jim Crow laws.

The 1902 Virginia Constitution imposed poll taxes, literacy tests and even a civics test as hurdles to voter registration and voting.⁷ All intended to deny as many black citizens access to voting as possible.⁸ One might also look at the other then-contemporary rewrites of other Southern States’ constitutions to see similar provisions.

In addition to the taxes, tests and hurdles of these constitutions, there were also devices to allow illiterate whites onto the voter rolls. These included going easy on the civics tests for prospective white voters who couldn’t

⁷ See https://vagovernmentmatters.org/archive/files/vaconstitution1902_6885e65b9d.pdf

⁸ See <http://www.virginiaplaces.org/government/constitution1902.html>

read, as well as so-called “grandfather clauses,” by which illiterate whites whose father or grandfather fought for either the union or confederacy (virtually always the Confederacy) would also be admitted to register to vote.

One example of the kind of civics tests used to bar black citizens from voting can be seen in the below footnote – a 1958 Georgia civics test that I am confident not one single member of this committee could get a 100% score on even if you had a localized version.⁹

And it was not only Southern States, California, Connecticut, Delaware, and the list goes on had either or both constitutional or statutory provisions to impede black citizens from voting.

This is a history we must never forget. But those who suggest that one side of what should be an honest debate about how best to run elections today are engaged in a new round of “Jim Crow” legislation either do not know their history, or more likely, are abusing that history for their own political ends. A sad commentary on those who engage in such abuse – regardless of their exalted rank.

⁹ See <https://dp.la/primary-source-sets/voting-rights-act-of-1965/sources/1387>