

Testimony of Irving Joyner
Professor of Law at NCCU School of Law,
NC NAACP Legal Counsel and Chair of Legal
Redress Committee

Prepared for Delivery Before the Subcommittee
on Election of the U.S. House Committee on
Administration

Delivered on April 18, 2019 at Centre at Halifax
Community College, Weldon, North Carolina

Introduction

I want to thank you for this opportunity to provide testimony to this Sub-Committee on Elections of the House Administration Committee regarding racial discrimination in the voting process within North Carolina. I am Irving Joyner, a Professor at the North Carolina Central University School of Law and the Chair of the NC NAACP Legal Redress Committee and its Legal Counsel. As a Professor, I teach courses on Race and the Law and Civil Rights and have engaged in extensive research of voting right issues. In my work with the NC NAACP, I am actively involved in the litigation of voting rights cases and in organizing, mobilizing and educating our membership and the larger community about political participation and related issues.

As a people, the most important right that we have is the right to vote. “It is beyond dispute that voting is of the most fundamental significance under our constitutional structure. . . Other rights, even the most basic, are illusory if the right to vote is undermined.” This point was most recently articulated in a decision issued by the Fourth Circuit Court of Appeals in the landmark case on NC NAACP v. McCrory when it determined that the State of North Carolina had intentionally enacted legislation which was designed to negatively impact the voting rights and political participation of African Americans. That Court concluded that the North Carolina General Assembly had, with “surgical precision” enacted “Monster Suppression” legislation which violated the Equal Protection Clause of the Fourteenth Amendment and Section II of the 1965 Voting Rights Act.

The NC NAACP v. McCrory decision is merely one in a long list of cases and actions in this State which have been intentionally designed to undermine legal protections for the rights of African Americans to register, vote and participate in the political franchise. I submit with this testimony a copy of a law review article, “North Carolina’s Racial Politics: Dred Scott Rules From The Grave,” which appeared in the Duke Journal Of Constitutional Law and Public Policy, Vol. 12:3, pp. 141-209 (2017)

I. Free Africans Voted In North Carolina Until 1835:

In that article, I discussed the long history of efforts by legislators in this State which were designed to negatively impact the right and opportunities for African Americans to engage in the political process. That history of voter suppression goes back to 1835 when the North Carolina General Assembly enacted legislation which prevented free Africans, who were real property owners, from voting. Even though North Carolina allowed for the bondage of a large number of Africans at that time, within the population was a large number of free Africans who owned property and businesses; as a result, they had a right to vote and did so. At the time, North Carolina had one of the largest free African populations in the United States and in some Eastern North Carolina counties, those free Africans constituted up to 15-20% of the county's inhabitants. In addition, North Carolina was one of six States and the only State in the South which allowed free Africans to vote.

The 1835 vote to disenfranchise free African was emotional and contentious as many White legislators fought a valiant battle to retain the right for these free Africans to vote. After two days of heated debate, legislators voted 66-61 to prohibit free Africans from voting. The chief complaints argued in support of the disenfranchisement effort was the fear by Whites of the possibility that an African could be elected or appointed to office and create the possibility of "Black Dominion" and that it was not intended by the founders that any African, free or slave, would become a citizen of the country. This is the view which was articulated by Justice Taney in the infamous Dred Scott v. Sanderford decision.

In 1835, there were no constitutional or statutory barriers to the participation of free Africans in the voting process. The enslaved population could not vote, but the White community was acutely aware of significant anti-slavery agitation that was evidence by the recent publication of the David Walker Appeal that was published in 1829 and was still widely circulated by a Wilmington native and the recently concluded Nat Turner uprising in Southampton County, Virginia. Both occurrences promoted fear of slave rebellions among the White population

and the thought that Africans would be elected to a political position in a White State was a possibility that had to be extinguished by every means necessary.

II. Post-Civil War Voter Enfranchisement Of African Americans:

The conclusion of the Civil War ushered in the opportunity for the creation of constitutionally protected voting rights for the newly enfranchised African American population. This right was forced upon North Carolina and other southern States that had seceded from the United States and formed their own separate country, The Confederate States of America. Among the conditions imposed upon the break-away states, in order to re-join the United States, were that the newly enfranchised African Americans be guaranteed the right to vote and that this community be active participants in the development of a new State Constitutions and the political re-birth of the rebellious southern States.

In North Carolina, this political birth for African Americans as citizens was led by able leaders like Abraham Gallaway, a former run-away slave from New Bern; James Harris, a carpenter, teacher, minister and barber from Raleigh; Bishop John Hood, the Presiding Bishop of the African Methodist Episcopal Church; Isham Swett; Henry Cherry; and Parker David Robbins. In 1865, these leaders convened the North Carolina Freedmen Convention in Raleigh and established an agenda that was designed to advance the interests and protections of the African American population. The convention was attended by 117 delegates who represented 42 North Carolina counties and the adopted agenda identified universal suffrage or the right to participate fully in the State's political process, free education, civil liberties, labor rights, prohibition against peonage, equal justice within the court system, women's rights and the care of the infirm, orphans and the disabled as the chief goals which were to be pursued on behalf of their community.

As a condition imposed by Congress in the Reconstruction Act of 1867 that established conditions for North Carolina to rejoin the United States, former high ranking confederate officers were barred from participating in the forming of the

new State government. The participation of African Americans was required and Congress imposed federal military control in the State in order to insure that violence and physical intimidation would not be used to prevent that political participation.

In January 1868, African American political leaders were elected as delegates to the State's Constitutional Convention where they were able to fully participate in its affairs and played major roles in the drafting and adoption of the State Constitution. Many of the provisions which were adopted during the 1865 Freedmen's Convention became a part of the newly developed State Constitution. Chief among these provisions were the right to vote and to fully participate in the political affairs of the State and the declaration that property qualifications would not bar a person from voting or seeking political office. During this drafting process, the aggressive input of Abraham Gallaway and Bishop John Hood, who served as Chairs or Co-Chairs of key committees, were critical factors in the enactment of the new Constitution.

Based upon the promises which were contained in the newly enacted constitution, African Americans, as a part of an imperfect democracy, sought to make citizenship and the quest for a democracy real. They registered to vote in large numbers, successfully sought political office, participated in a new fusion movement of convenience with Whites and fought to make this promise of democracy work. Along the way, African Americans were elected to national, State and local positions. In the first post-Civil War General Assembly, 17 African Americans were elected to the House of Representatives and three were elected to the Senate. Thereafter, four were elected as Congressional Representatives and large numbers were elected to County and municipal offices where they served as Magistrates, Sheriffs, school board members, town council people and county commissioners.

This successful, although imperfect, participation covered the period of 1868 through 1898 and, during that time, experienced high and low points in the pursuit of political success. Yet, through it all, African Americans registered and voted at 90% of its eligible population even though former White confederates

and their supporters systematically engaged in campaigns of violence, terror and intimidation in efforts to undermine African American political participation. These efforts increased after the Hayes-Tilden compromise resulted in the removal of federal troops from the South in 1877.

During this 1868 – 1898 Reconstruction period, 146 African Americans served in the North Carolina General Assembly; 121 were elected to the House of Representatives and 25 served in the North Carolina Senate. This electoral success and accompanying political influence which the African American community was able to obtain generated considerable resentment by confederate supporter and those Whites who viewed this participation as a blow to White supremacy. The backlash was vicious as a statewide race-based campaign emerged with the purpose of removing African Americans from participation in the political process.

III. Violent Responses To African Americans' Electoral Success:

Across North Carolina, the Democratic Party, under the leadership of Furnifold Simmons, the State Chair of the Party; Josephus Daniels, the owner, publisher and editor of the Raleigh News and Observer; Charles Aycock, a wealthy Goldsboro lawyer who became Governor in 1900, orchestrated a campaign of physical intimidation and racial antagonism which was directed to and designed to demonize African American leadership. The goal of this campaign was to disenfranchise African Americans and they attempted to justify it by creating negative and slanderous racist labels and images which were widely publicized and circulated by the News and Observers and other newspapers in the State. The stated goal of this campaign was the “redemption of North Carolina from ‘Negro Domination’.” In support of this goal, Daniels created and used this terminology to mean vigilante terror which was repeatedly advertised and promoted to his White readership that “[African Americans] had to be kept from the polls by any means necessary.”

In response to this campaign, White vigilantes were encouraged to and did engage in violent physical attacks against African Americans within their communities and at polling places. In addition to the use of terror, intimidation and physical violence, which included lynching, the Democrats mounted a

massive program of voter fraud and corruption which were designed to insure their victory in the 1898 political campaigns. In the State's newspapers, cartoons created by Norman Jennet and reproduced on the front pages as headlines depicted incendiary depictions of African American men committing some horrendous act against a white person, usually a woman, or against a group of Whites. The basic theme of the cartoons was an invitation to racially aroused Whites to overthrow "Negro Domination" over Whites in the State with force.

During the November 8, 1898 elections for the General Assembly, armed vigilantes were stationed at polling sites and physically attacked those African Americans who came to vote. Others were too frightened to go to the polls due to threats of violence which were broadcasted in African American communities. At some polling sites, ballots cast at large African American polling sites were confiscated and destroyed by vigilantes and, in other areas, ballot boxes were stuffed with bogus votes. As a result, Democratic candidates won overwhelming victories in legislative races.

IV. Wilmington Coup D'Etat:

In 1898, the port city of Wilmington represented the area of the State which more aggressively reflected the spirit of the Republican/Populist exercise of political power. In 1896, a bi-racial coalition had won control of the town's Board of Aldermen. Even though, Wilmington had a majority African American population, the Board of Aldermen consisted of four African Americans and six Whites. At the time, Wilmington was the most prosperous city in the State, had a vibrant and robust economy and African Americans enjoyed the highest standard of living than in any other area of the State. This prosperity included a large cadre of African American businesses and the Town boasted of having the only daily African American newspaper in the country.

Because of its tremendous success, Wilmington was targeted by the Democrats and confederates to be captured and used as a symbol of the overthrow or destruction of what it described as "Negro Domination." The organizing of the overthrow was left to the coordination of the "Secret Nine," a collection of White business people who decided that they wanted immediate

change in the Town's Board of Aldermen. The "Secret Nine" was led by Alfred Waddell, an unemployed lawyer, the former editor of the local White newspaper, who had been a Lieutenant Colonel in the Confederate Cavalry and formerly had been elected to three terms in Congress. Under Waddell's direction, an armed militia was organized to take control of the streets and a list of African American and White political leaders was created which called for their death or banishment.

On November 9, 1898, the "Secret Nine" prepared and circulated to the African American leadership a document which was entitled "White Declaration of Independence" and declared that Whites in New Hanover County would never again allow political participation by African Americans in the State and County. The document also articulated the intent to re-take political control of the Town and to enforce their rights as Whites.

The "White Declaration of Independence" was presented to the African American leadership along with a demand that they had twelve hours to accept their demands. The declaration also demanded that the African American newspaper stop publication and that its Editor, Alexander Manley, leave town immediately. When, on November 10, 1898, an answer had not been received within the allocated twelve hours, Waddell led a heavily armed group of military-trained Red Shirt and Klu Klux Klan members into the African American community and indiscriminately shot residents, burned down the African American newspaper and seized elected and appointed officials and escorted them to Thalian Hall, the Town's governmental offices. Once the elected officials were marched, one-by-one, into Thalian Hall, which was packed with more than 500 armed White vigilantes, each official was directed to either resign from their office or be shot on the spot. As each person resigned, a White person was appointed by Waddell as a replacement and then that individual was taken to the railroad terminal, placed on a train and driven out of town with a promise that they would be killed if they returned to Wilmington. With the approval of the "Secret Nine" and the vigilantes who had gathered in Thalian Hall, Waddell was designated as the new Mayor.

During this invasion, African Americans were not militarily prepared to resist this onslaught. It is unclear as to the actual number of citizens who were killed and injured during this overthrow, but the number ranged in the hundreds. In the face of this invasion, Governor David Russell, the Republican/populist Governor, refused to send any law enforcement into Wilmington to resist this attack or even to seek to hold any of the racist invaders accountable for their illegal actions.

V. Institution Of Jim Crow In North Carolina:

This White Supremacy campaign halted and destroyed all of the political success that African Americans had obtained during Reconstruction. Whites justified this illegal conduct as being necessary to “take back their State” and to prevent political domination by the African Americans who were never intended to be participants in the political affairs of North Carolina or the United States.

Beginning in 1899, the General Assembly enacted a series of law which were designed to cement the political victory over African Americans. A constitutional amendment was enacted to require every voter to re-register and it instituted a literacy test, poll taxes and other devices which were designed to make it impossible or difficult for African Americans to continue their participation in political affairs. Other Jim Crow laws were enacted which legalized segregation and stripped African Americans of the ability to participate, on an equal footing, with Whites in other social, business, education and housing areas.

The enacted literacy test required that everyone who re-registered to vote must be able to read and write, but made an exception for those White males who were the lineal descendant of any person who was able to vote prior to January 1, 1867. In addition, an exception was made for Whites to avoid having to pay the mandated poll taxes. These legal restrictions on voting were supplemented by a reign of terror which was allowed to occur against those African Americans who sought to register and vote. In a separate enactment, the General Assembly re-districted or gerrymandered the congressional boundaries of George H. White’s district for the sole purpose of making it impossible for him to

be re-elected. George H. White was the last African American who was elected during Reconstruction from the South.

The institution of Jim Crow laws, as intended, had a severe impact on the ability of African Americans to seek political, economic, educational or social parity with Whites and created an entrenched second class citizenship. As articulated in the infamous Dred Scott v. Sanderford case, African American s had no rights in North Carolina which Whites or the State were bound to respect. The destruction of the right to vote left African American defenseless against anything that Whites decided to do and did not provide a legal basis for the redress of any grievances which occurred during the Jim Crow era.

For many young African Americans, as they graduated from the State's segregated High Schools, escape from the State became a viable option and reality as they joined the Great Black Migration to other parts of the country which were not control by the strict Jim Crow laws, policies and social conventions which existed in North Carolina. For some of those who decided to stay in the South, efforts were made to challenge the restrictions of the law. These challenges always carried the possibilities of violent reactions from Whites, but slowly, they were made.

VI. Challenges To Jim Crow's Political Restrictions:

Where and when African American could join together to press for political purposes, attempts were made to challenge the restrictions imposed by the laws. For example, in 1947, African Americans in Winston-Salem were able to support the election of Rev. Kenneth Williams to a seat on that Town's City Council. This successful challenge occurred in a City with a large African American population that resided in a segregated community and was able to register enough African American voters to be able to outvote the Whites who lived in that single member city council district. The Williams victory represented the first time that an African American in a southern campaign had defeated a White opponent in a two person race. A concentrated voter registration campaign, spearheaded by the Congress of Industrial Organization (CIO) Labor Union, significantly increased the number of African Americans who were registered in that Winston-Salem council

district. The voter registration drive, which produced the Williams's victory, increased African American voters from 300 to over 3,000 and was a major accomplishment during the Jim Crow era.

Immediately after Williams' victory, the North Carolina General Assembly created multi-member political district in those areas where large African American populations resided or the municipality adopted an at-large voting plan in efforts that was designed to submerge the African American community into larger white districts. Williams served only one term on the City Council from 1947 to 1951. By 1954, another nine African Americans were elected to several political offices in local communities. This group consisted of:

- Fred Carnage, Raleigh Board of Education (1949)
- William Crawford, Winston-Salem City Council (1951)
- Dr. William Devane, Fayetteville City Council (1951)
- Dr. William Hampton, Greensboro City Council (1951)
- Nathanial Barber, Gastonia City Council (1951)
- Dr. G.K. Butterfield, Sr., Wilson City Council (1953)
- Nicholas Rencher Harris, Durham City Council (1953)
- Hubert Robertson, Chapel Hill Board of Aldermen (1953)
- Dr. David Jones, Greensboro School Board (1954)

In response to the adoption of multi-member districts in General Assembly campaigns and at-large election requirements for municipal and county commission elections, African Americans decided to use "single-shot" voting in these campaigns where they would only vote for their preferred African American candidates. This voting strategy resulted in the election of a number of African Americans until the General Assembly made it illegal to use this "single-shot" strategy.

African Americans were slowly becoming aware of the political power which they could exercise and began to create political and social organizations within their communities to challenge the prohibition on political involvement. Across

the political spectrum, African American leaders had an abiding faith in the constitutional promises of a diverse and fair democracy and, as a result, eagerly sought ways to participate in the governance of this State and country.

In pursuit of these ideals, legal actions were launched to challenge the bedrock principles which formed the foundation of discriminatory voting legislation. In *Lassiter v. Northampton*, an African American challenged the constitutionality of the literacy test. In an opinion written by Associate Justice William Douglas, a so-called liberal Justice, the U.S. Supreme Court concluded that the literacy test was race neutral and States had a right to require that “only those who are literate should exercise the franchise.” In a later legal challenge, *Bazemore v. Bertie County Board of Election*, which was framed under the North Carolina constitution, the North Carolina Supreme Court concluded that the literacy test required no more than the mere ability of a person to read and write any section of the State Constitution in the English language.

In an earlier legal challenge in 1937, *Breedlove v. Suttles*, the U.S. Supreme Court declared that the poll taxes requirement was constitutional because the Equal Protection Clause did not require absolute equality. This decision was later overturned by that Court in *Harper v. Virginia* where the Court concluded that a State could not condition the ability to vote on a person’s affluence or the ability to pay as an electoral standard.

The limited electoral successes and the legal challenges inspired local community efforts to organize and assert the right to participate in the political affairs of this State. As early as 1935, African Americans in the affluent City of Durham organized the Durham Committee on Negro Affairs which became a powerful political force in that City by challenging segregation and the political establishment in that City. Using the Durham Committee on the Affairs of Black People as a model, African Americans in other cities and towns also began to organize political action associations that regularly conducted voter registration drives, get out the vote campaigns, encouraged people to seek political office and endorsed or opposed candidates who sought to be elected within their local communities. As a result, voter registration and participation increased, but it was

a slow process in light of the physical and economic risks that people experienced as a result of becoming politically active.

VII. The Impact Of the 1965 Voting Rights Act:

When the 1965 Voting Rights Act was enacted, only 21% of constitutionally eligible African Americans in this state were registered to vote. Even after the passage of the Act, the registration percentages did not dramatically rise. At the time, too many African Americans had experienced a culture and history of not being allowed to vote and many, particularly those who lived in rural areas, were economically dependent upon White farmers, employers and landowners and did not want to incur their disfavor or animosity. The potential of violent retaliation against those who sought to exercise the right to vote was still a paramount fear among African Americans. It is to be remembered that, in November 1965, the homes and offices of Civil Rights Attorney Julius Chambers, Dr. Reginald Hawkins, a noted Charlotte Dentist and political activist, NC NAACP President Kelly Alexander and his brother Fred Alexander were bombed in the cosmopolitan City of Charlotte as a result of their efforts to increase voter participation.

Because of the long history of voting rights suppression and the results of it, forty North Carolina counties were identified as covered jurisdictions under Section 5 of the Voting rights Act. The forty identified counties covered the eastern portion of the State where more than 70% of the African American population in the State resided. This State was identified in the Act as one of those that had engaged in intentional efforts which were designed to prevent African Americans from voting. Along with outlawing intentional efforts to prevent African Americans from registering and voting and creating a pre-clearance process that required covered jurisdictions to insure to the Civil Rights Division of the U.S. Justice Department that any changes to a jurisdiction's voting processes and procedures would not negatively impact racial minorities, the Voting Rights Act outlawed use of the literacy test. The U.S. Supreme Court upheld the Act in *South Carolina v. Katzenbach* in 1966 and approved of the ban on the use of the literacy test in *Gaston County v. United States* in 1969.

Despite the fear of violent retaliation, efforts to increase voter registration and participation continued. In a 1968 attempt to place personal faces on efforts to fully participate in the political process, Dr. Reginald Hawkins became a candidate for Governor; Eva Clayton, a Civil Rights activist from Warrenton, became a candidate for Congress in the Old Black Second, the same congressional district from which George H. White was elected; Henry Frye in Greensboro, Mickey Michaux in Durham and Fred Alexander in Charlotte became candidates for the North Carolina General Assembly. These campaigns were designed to motivate and mobilize African Americans to register, vote and to confront the lingering fears of retaliation that many people continued to experience and expect.

Of the five candidates, only Henry Frye was successful when he became the first African American to be elected to the North Carolina General Assembly since 1896. [Frye was later elected to the State Senate, became the first African American to serve on the North Carolina Supreme Court in 1983 and was appointed as its Chief Justice in 1999 .] Once elected, the first bill that Frye introduced was one to place a constitutional amendment on the ballot to repeal the State's literacy test requirement. Soon after becoming an attorney and attempting to register to vote in his hometown of Ellerbee, Frye was denied the right to register because he did not interpret a provision of the state constitution to the satisfaction of the County's Election Registrar. That effort succeeded in the General Assembly, but was defeated in a 56% - 44% statewide general election vote. Today, the literacy test requirement is still a part of the North Carolina constitution, but can not be enforced because of the Voting Rights Act's prohibition.

In 1970, Frye was joined in the General Assembly by Rev. Joy Johnson, a Baptist Minister from Robeson County; Attorney Mickey Michaux was elected from Durham County in 1972 [In December 2018, Michaux retired from the General Assembly and was the longest serving House member in North Carolina history.] along with Fred Alexander who was elected to the State Senate from Charlotte. With these elections, the number of African Americans who were elected to the General Assembly increased. Yet, between 1968 and 1985, only four African Americans, out of 120 members, served in the House of

Representatives at the same time and only one of the fifty members of the State Senate was an African American.

By 1982, 52% of constitutionally eligible African Americans were registered to vote, a substantial increase from the percentage in 1965. By 1986, that percentage increased to 57%.

In the 1986 Supreme Court decision in *Thornburg v. Gingles*, the United States Supreme Court determined that the General Assembly's use of multi-member legislative districts was intentionally designed to suppress the ability of African American voters to elect representatives of their choice. The Court concluded that large African American populations had been submerged and this conduct violated Section 2 of the Voting Rights Act. In the *Gingles* decision, the Court condemned North Carolina's long history of using and encouraging overtly racially polarized campaigns and laws to suppress the vote and political participation of African Americans. Utilizing a "totality of the circumstances" test, the Court held that North Carolina had discriminated against African Americans from 1900 to 1970 with respect to the exercise of the voting franchise "by employing, at different times, a poll tax, a literacy test, a prohibition against bullet (single shot) voting and designated plans for multi-member districts." Additionally, it was determined that the low voter registration rate of African Americans was directly traceable to the State's long history of official discrimination in every area of life and that this reality had depressed the levels of political participation. The Court also found that White candidates, in their election campaigns, had successfully use racial prejudice, bias and unlawful invitations to "blatant, subtle and furtive racial appeals" in elections dating back to 1900 and up to the 1984 U.S. Senate campaign with Jesse Helms. These unlawful actions, concluded the Court, had continued right up to the issuance date of the *Gingles* opinion. As described by the Court, these racially inspired campaigns, after 1900, were not materially different than the appeal to racial bias and prejudice which were present in 1898 during the Wilmington overthrow.

The dismantling of the racist multi-member districts resulted immediately in an increase of African Americans elected legislators from four to sixteen in 1986.

During this same time period, Representative Kenneth Spaulding led an unsuccessful effort to create single member legislative districts.

As a part of the ongoing campaign to increase the political participation of African Americans and in response to litigation, legislators enacted legislation which change the method that had been used to elect District and Superior Court Judges. Prior to this legislation, only two African Americans, Judges Clifton Johnson and Terry Sherrill, had been elected as a Superior Court Judges in North Carolina. The former election procedure required that Judges be elected in a statewide ballot. This process changes and authorized the election of these trial level Judges by Districts in which they resided. After this legislation was enacted, the number of elected Superior Court Judges immediately increased from two to thirteen.

VIII. Enactment of The “Black Max” Plan:

In 1991, Representative Dan Blue was elected as the Speaker of the North Carolina House of Representatives. This election was the first time in the history of the South that an African American had been elected as the Speaker of a Legislative Body. Soon after his election, the 1990 population census for North Carolina was released and revealed that North Carolina was entitled to an additional congressional representative. The issue confronting Blue and legislative leaders was where to place this new district while maintaining the partisan balance which existed at the time.

The Blue Leadership Team decided upon and submitted a plan with one majority-minority district which was based in the same geographic area which was formerly represented by George H. White. Immediately, the Republican controlled Civil Rights Division rejected that plan and dictated that a new plan must be drafted which included two majority-minority districts. When the General Assembly drafted a new plan based upon the directive of the U.S. Justice Department, it was attacked by local Republicans as being in violation of the Voting Rights Act. In other States, which were faced with the same issue, the Justice Department also demanded that new race based plans be enacted in those states and, in each instance, the local Republican Party attacked them.

In North Carolina, Representative Eva Clayton was elected as the first African American to represent citizens of the old “Black Second” and Representative Mel Watt was elected to represent the new 12th Congressional District. In litigation which resulted from the drafting of these two districts, the U.S. Supreme Court, in *Shaw v. Hunt*, approved of the drawing of the 2nd Congressional District, but ruled that the Department of Justice’s “Black Max” plan that was used in response to the Justice Department demands for the 12th Congressional District, was unlawful because it was gerrymandered and was based upon illegal racial motivation. The U.S. Supreme Court reached the same conclusion with respect to each of the other race-based redistricting plans which had been imposed upon other States by the Justice Department.

The purpose of the “Black Max” plan was to isolate the vast majority of African Americans into a few congressional districts where they could only vote for an African American candidate, but would remove them from those districts where they might support White Democrats. This plan is called “stack and pack” and is just another form of gerrymandering or racial discrimination in redistricting. The review of this plan resulted in the Supreme Court concluding that the plan was deliberately drawn in order that it would have an effective majority of Black voters. As such, the plan violated the Constitution.

In addition, the Court rebuked the Justice Department for insisting upon the maximizing of the number of African Americans who were to be illegally packed majority-minority districts. The Court explained that “[i]n utilizing [Section] 5 to require the States to create majority-minority districts wherever possible, the Department of Justice expanded its authority under the [Voting Rights Act] beyond what Congress intended and [the Court] has upheld.”

IX. Expanding Opportunities To Register and Vote:

Increased voting registration and participation made it clear that the 1965 Voting Rights Act had limits as to its reach. So while the right to vote may be secured, there is a critical need to expand the opportunities for people to vote. This is particularly true for African Americans because many, who have the right, do not have the time due to work and other pressing issues which confront their

daily lives. For example, there are many people who can not get to the polling place to vote on a specific designated election day like the second Tuesday in November.

In that regard, several African American legislators, in conjunction with legislative colleagues, enacted legislation which was designed to make it easier for citizens to register and vote. In 1982, Representative Mickey Michaux led an effort to expand the opportunity for citizens to conduct voter registration drives in order to assist people to register. Legislation allows now for any citizen to assist people to register to vote. In addition, people can vote on the internet.

In a bi-partisan enactment which was led by Representative Michaux and Senator Ellie Kinnard, the General Assembly rewrote the absentee voting laws in 1999 by authorizing local boards of elections to create multiple election sites around the county to allow people to vote before Election Day. This legislation was expanded in 2001 when the General Assembly enacted a law which provided for seventeen days of early voting, authorized voting on weekends and required the counties to offer voting on the last Saturday before the General Election Day.

In 2003, the General Assembly expanded these opportunities further by authorizing out of precinct voting during the Early Voting period which would allow a voter to cast a vote at any open polling site. In 2005, the General Assembly expanded these opportunities to provide that voters could vote out of precinct on Election Day as well. In 2007, the General Assembly went further and authorized that a citizen could register and vote on the same day during the Early Voting period. Finally, in 2009, the General Assembly enacted legislation that allowed 16 and 17 year olds to pre-register to vote and this process would allow them to be automatically registered and placed on the voter rolls when they turned 18.

As a result of these voter friendly enactments, voter registration and participation rates rose and lifted North Carolina from being 43rd in the nation in voter participation to 11th for the 2008 Presidential Election. Of the 1.46 million voters who were added to the voters' rolls in North Carolina between 2000 and

2012, 35% were African Americans in a State where African Americans constituted 20% of the voting age population in 2000.

In 2008, for the first time in North Carolina history, African American participation in the electoral process surpassed that of White voters. That result occurred because of a decade of efforts by this State's General Assembly to provide significant opportunities and encouragement for people to vote. In response, people turned out at the polls to vote. That people could with enthusiasm come out in larger numbers than ever before is what the Voting Rights Act was designed to accomplish.

X. New Threats To The Destruction Of Voting Rights:

In 2010, a new General Assembly was elected and immediately conducted a concentrated attack on the many opportunities which had proven to be successful in motivating and allowing the largest number of people to vote for the candidates of their choice.

The first part of this voting rights attack was to conduct a state focus attack on a fair redistricting plan. Utilizing exactly the same plan that the U.S. Supreme court had already condemned in *Shaw v. Hunt (Reno)*, *Miller v. Johnson*, *Johnson v. DeGrandy*, *U.S. v. Hayes* and *Bush v. Vera*, the North Carolina General Assembly sought to "stack and pack" African Americans into a small number of Legislative and Congressional districts for the stated purpose of removing them from participation in elections being conducted in other political districts. In this way, the General Assembly, which is presently in office, was able to orchestrate a veto-proof majority which was then used to enact laws that were designed to undo the voter friendly legislation which was enacted by the previously elected General Assembly.

In *Covington v. North Carolina*, the federal District Court ruled that this redistricting plan violated the Voting Rights Act and the Equal Protection Clause of the 14th Amendment. Based upon the evidence which was reviewed by the Court, it was determined that race was the predominant fact which motivated the 2010 redistricting process and thus was a violation of the Voting rights Act and the

Equal Protection Clause of the 14th Amendment. This decision was upheld by the U.S. Supreme Court, but the litigation involved in that legal decision consumed over eight years.

After conducting an assault on the redistricting process, this General Assembly turned its attention to an attack upon those recently enacted voters' right opportunities which the General Assembly enacted between 1999 and 2007. The previously described enactments, which resulted in the significant increase in the voter registration and participation by African Americans, became a part of the "Monster Suppression Act," HB 589. That legislative attack focused on:

- Institution of stringent Voter Identification requirements which were designed to disproportionately impact African Americans.
- Elimination of a week of the Early Voting Period
- Elimination of Same Day Registration and Voting
- Prohibition of Straight Ticket Voting
- Elimination of Out-of-Precinct Voting
- Expansion of the ability of individuals to challenge Voters at Polling Sites
- Elimination of the early Registration of 16 and 17 year olds

In the landmark Fourth Circuit Court of Appeals decision, it was concluded that this legislative enactment intentionally violated the Voting Rights Act and the Equal Protection Clause of the Fourteenth Amendment. A review of the factual finding made by the federal District Court Judge provided a sufficient evidentiary basis to support the conclusion by the Fourth Circuit Court of Appeals that the General Assembly had, with surgical precision, targeted the specific voting provisions which had been relied upon and widely used by African Americans and that this motivation to eliminate those which African Americans used evidenced invidious racial discrimination. The Court observed that, as late as 2016, racially polarized voting continued to occur in North Carolina. It was concluded that "intentionally targeting a particular race's access to the franchise because its members vote for a particular party, in a predictable manner, constitutes discriminatory purpose."

XI. Conclusion

The race-based efforts to undermine the right and opportunities for African Americans to vote and participate in the political franchise, which began in 1835, continue to the present day in North Carolina. The history is stark with vivid examples of racial animus and racially polarized decision-making that point unerringly to an ongoing intent by the North Carolina General Assembly to prevent African Americans from participating in the political franchise in this State.

In every instance where the General Assembly has acted to disadvantage or suppress the political participation of African Americans, the Legislators knew what they were doing. When the General Assembly adopted the illegal 2010 re-districting scheme, they were told that the enactments had already been attempted and that the Supreme Court had previously declared those same acts to be unconstitutional. When the General Assembly enacted the provisions of the “Monster Suppression” statute, Legislators knew of its likely impact upon African Americans. Despite this knowledge, they did it anyway.

After federal courts have determined that this most recent conduct was illegal, the remedies adopted by the General Assembly did no more than attempt to develop another scheme to reach the same illegal goal. For example, since the Court decision in *NC NAACP v. McCrory*, this General Assembly has sought to constitutionalize the discriminatory photo ID requirement and has intentionally created barriers to the implementation of early voting. While these efforts are being fought in Court, a very costly and time consuming proposition after the fact, this General Assembly is allowed to continue legislating as if it is without sin.

For these transgressions, there needs to be a strong remedial response from our federal government in order to insure that this insidious racist conduct will not be permitted or tolerated in the future. The most effective remedy available thus far is to place the State under some legal restraints and require that all voting related enactments in the future must be pre-cleared by some independent federal watchdog agency. It is more efficient, less costly and time consuming if the burden of proof is placed on the States to establish that its

voting related enactments will not subvert the rights of African American and other racial minorities. In light of the instances of politicizing of the Department of Justice, this watchdog agency needs to be independent of that body. As we experienced during the 90s, that agency's role can be as perverted as the State's General Assembly.

The creation of a proactive process will also minimize the awesome danger that illegally constituted legislative bodies can continue to pass laws even when they are not legally constituted. In the past where there have been judicial determinations of illegal conduct, the offending legislative bodies have continued to operate as if they have done no wrong. Where a legislative body has illegally subverted the rights of its citizens to vote and participate equally in the political process, that body should be enjoined from engaging in any future legislating until the effects of their illegal activities have been cured. As such, this Congress should be able to invade this notion of State's right. A State should not be held harmless when it intentionally prevents its citizens from voting and participating in the political process. It is time for Congress to act with some force to protect the rights of citizens when the State has intentionally engaged in conduct which reduces a portion of its citizens to a second or third class status.

I thank you for your attention to my comments.