Testimony of

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Subcommittee on the Constitution and Civil Justice

The Voting Rights Act After the Supreme Court's Decision in *Shelby County*

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Subcommittee Chairman Franks, Ranking Member Nadler, and members of the Committee:

Thank you for the opportunity to testify in this important matter. Separating fact from fiction about the Supreme Court's recent decision in *Shelby County* is essential to chart future effective and constitutionally permissible civil rights enforcement. I served for five years as a career attorney in the Voting Section at the United States Department of Justice from 2005 through 2010. There, I investigated and brought a range of cases to protect minority rights under the anti-discrimination and minority language provisions of the Voting Rights Act, and also cases to enforce obligations under National Voter Registration Act/ Help America Vote Act. I reviewed preclearance submissions under Section 5 of the Voting Rights Act.

Reports of the demise of the Voting Rights Act have been greatly exaggerated. Those who say that the Supreme Court decision in *Shelby* means an end to protections in the Voting Rights Act are peddling hype. In fact, they are peddling the most dangerous and disingenuous sort of hype. Deliberately stoking fears, deliberately targeting certain racial groups for disinformation, deliberately ignoring the multiple protections which remain in the Voting Rights Act does a disservice to the nation and to civil rights.

In *Shelby County*, the Supreme Court characterized the Section 4 triggers as "extraordinary and unprecedented." By 2013, these 1965 triggers had stagnated into a scattershot rule to force 16 states to seek federal approval for thousands of small voting changes. Mississippi was captured, but so was New Hampshire. Alabama was subject to Section 5, but so were New York and Alaska. Arkansas, the epicenter of school desegregation in 1957 was not covered, but Michigan was. Some counties in North Carolina were covered, and neighboring counties weren't. Virginia, a state which elected a black governor and twice voted for President Obama was captured by Section 4.

By 2013, the Section 4 triggers appeared obsolete, and the Supreme Court agreed in *Shelby*.

When the coverage formula was written in 1965, My Fair Lady had just won the Oscar for Best Picture, My Girl by the Temptations topped the charts and Bonanza was the most watched show on television. The Supreme Court in *Shelby* recognized what most Americans now recognize and appreciate: elections in 2013 bear no resemblance to elections in 1965.

The Supreme Court's characterization in *Shelby* of the burdens imposed on a covered jurisdiction in 2013 is similar to the Court's characterization in 1966 in *South Carolina v. Katzenbach* of preclearance obligations as "stringent and

complex." The burdens are significant. Our Constitution vests states with the power to run their own elections. This diffusion of power is designed to protect individual liberty. The Founders knew that centralizing control of elections would eventually threaten individual freedom.

High Burden to Justify Federal Oversight

Yet in 1966, the Court properly justified Section 5's intrusion into state sovereignty because some states engaged in "widespread and persistent discrimination," which the Court characterized as an "insidious and pervasive evil." This language from *Katzenbach* demonstrates the heavy empirical burden necessary to justify federal intrusion into state sovereignty. Does "widespread and persistent discrimination" manifest as an "insidious and pervasive evil" in 2013? Obviously the Supreme Court thought the answer is no, at least as it pertains to the scattershot triggers of the invalidated Section 4.

In *Shelby*, the Supreme Court rejected the concept of so-called "second generation" structural racism to justify continued federal oversight of elections in 15 states. Congress should heed the warning. According to the Supreme Court, genuine, direct and immediate racial discrimination alone justifies federal intrusion into state sovereignty, not vague and attenuated so-called "second generational structural" discrimination.

The Court made it clear that only certain current conditions could justify a formula for Section 5 coverage. Among the touchstones listed in *Shelby* are: "blatantly discriminatory evasions of federal decrees," lack of minority office holding, tests and devices, "voting discrimination 'on a pervasive scale,'" "flagrant" voting discrimination, or "rampant" voting discrimination. Again, pay close attention to the Supreme Court. *Federal intrusion into powers reserved by the Constitution to the states must relate to these empirical circumstances.* Triggers built around political or partisan goals cannot withstand Constitutional scrutiny.

These extraordinary conditions in 1965 were what justified the extraordinary remedy of Section 5 oversight in 1965. Without such current extraordinary conditions, Congress may not impose modern extraordinary remedies on certain states.

2006 Reauthorization of Section 5 Weakened Constitutionality

The Court in *Shelby* also concluded that Congress weakened the constitutionality of the Voting Rights Act's preclearance requirements in 2006 when it altered the Section 5 standards. Beginning in 2006, submitting jurisdictions were forced to prove a negative. Congress required them to prove the absence of "any" discriminatory effect by inserting "any" into Section 5. Any

means any. The Justice Department Civil Rights Division has taken the 2006 amendments literally when reviewing submissions like Georgia's proof of citizenship requirement to register to vote, or South Carolina's voter identification law. The DOJ adopted a *de minimis* trigger for interposing an objection despite mitigating facts and objected in multiple instances – including in Georgia and South Carolina.

Stubbornly following the 2006 amendment to require an absence of "any" discriminatory effect also caused the Department to object to voter identification laws. The objection in South Carolina cost state taxpayers $3.5 million and federal taxpayers untold millions, after South Carolina was forced to seek court approval of voter identification laws. The Supreme Court plainly recognized that the extra hurdles Congress imposed in 2006 weakened the constitutionality of the preclearance regime.

DOJ's Abuse of Power Using Section 5

Some groups and activists who disagree with *Shelby* prefer that states run a gauntlet of Washington bureaucrats before they may implement voting changes. Unfortunately, some of those same groups have participated in abuses of power. These abuses tainted Section 5 enforcement before *Shelby*. Simply, the Justice Department has colluded with racial interest groups and behaved inappropriately

while conducting Section 5 reviews. This conduct has cost federal taxpayers millions of dollars in sanctions. Those who supported continued use of Section 5 are either unfamiliar with these abuses, or are comfortable with them.

For example, in *Johnson v. Miller* (864 F. Supp. 1354, 1364 (S.D. Ga. 1994)), the United States District Court sanctioned the Voting Section $594,000 for collusive misconduct by DOJ Voting Section lawyers. A federal court noted that the ACLU was "in constant contact with the DOJ line attorneys." Pronouncing the communications between the DOJ and the ACLU "disturbing," the court declared, "It is obvious from a review of the materials that [the ACLU attorneys'] relationship with the DOJ Voting Section was informal and familiar; the dynamics were that of peers working together, not of an advocate submitting proposals to higher authorities." After a Voting Section lawyer professed that she could not remember details about the relationship, the court found her "professed amnesia" to be "less than credible."

Abuse of power in the Section 5 process is not confined to *Johnson v. Miller*. As recently as this May, the Justice Department Voting Section used the Section 5 process to extract legally indefensible concessions from states that a federal court would never impose. In places like Rock Hill, South Carolina, the Voting Section permitted blatantly unconstitutional district lines to survive in order to prop up the electoral success of multiple election officials based on their race.

A 2009 objection in Kinston, North Carolina, shows the outrageous, abusive and legally indefensible positions the Voting Section will adopt using Section 5. Kinston, a majority black jurisdiction, in a referendum decided to dump partisan elections for town office and move to nonpartisan elections. The Voting Section, exploiting the burden shift and plain requirement that Kinston prove the absence of a negative, objected to the change. The objection was explicitly based on the morally and legally indefensible position that black voters would not know for whom to vote if the word "Democrat" was not next to a candidate's name.

The legally indefensible abuse of power in the Kinston and Georgia redistricting objections are just a couple of many others. Congress actually relied on some of these abusive and meritless objections when Congress reauthorized Section 5 in 2006. These abusive and meritless objections polluted the record in 2006, but no plaintiff ever challenged them, and Congress took no testimony regarding their merits.

Voting Rights Protections Are Alive and Well Post-*Shelby*

Contrary to the hype surrounding the *Shelby* decision, the Voting Rights Act remains alive and well. Multiple federal protections against discrimination in voting are still on the books. These permanent provisions of the Voting Rights Act

can still be utilized by private parties and the Justice Department to protect voting rights.

Section 2: Nationwide and Permanent Protections Remain in Force

Section 2 is the nationwide prohibition against racial discrimination. It remains in full force and effect.

If witnesses from the Department of Justice ask Congress to reverse the outcome in *Shelby,* Congress should ask them a few simple questions:

First, *why hasn't the Justice Department utilized Section 2 of the Voting Rights Act to initiate and bring a single lawsuit since President Obama was inaugurated?* Indeed, this administration's record of Section 2 enforcement is nonexistent.

Second, *if discrimination in voting is so pervasive and widespread justifying renewed Section 5 coverage,* why hasn't your Justice Department brought a single case to address a single instance of the problem that you purport exists using Section 2?

Third, since taking office, why has your administration effectively switched off Section 2 enforcement – *is it inefficient management, or a policy decision to ignore the law?*

While the Bush administration vigorously enforced Section 2, enforcement under the current administration has been essentially dormant. In fact, the current administration has *failed to initiate a single Section 2 investigation which resulted in an enforcement action since January 20, 2009.* I initiated and brought the very last Section 2 case in March 2009, *United States v. Town of Lake Park, FL*, (S.D. Fl. 2009).[1] This case was started under Attorney General Michael Mukasey in 2008. General Holder only inherited the case in the final stages of preparation for filing. Not a single Section 2 case has been filed by the Justice Department in the subsequent 52 months.

If discrimination in voting remains a problem, you would hardly know based on recent Section 2 enforcement activity. Either discrimination in voting doesn't exist anymore at levels necessary to justify federal oversight under Section 5, or, the Justice Department has decided not to vigorously enforce the law.

General Holder's failure to enforce Section 2 is noteworthy considering the loud (and in hindsight, completely disingenuous) criticism of the Bush administration's civil rights record. Consider Wade Henderson of the Leadership Conference on Civil Rights. On March 22, 2007, he complained to this Committee about the purported lack of Section 2 cases brought by the prior administration, complaining: "the [Civil Rights] Division must deal with and respond to growing

[1] Three other Voting Section lawyers also helped bring the case.

distrust among minority communities who feel increasingly abandoned and marginalized by the Division's litigation choices and priorities."

When Henderson made this complaint, the Division was in the process of litigating two Section 2 cases: *United States v. Osceola County, FL* (M.D. Fla 2005) and *United States v. Village of Port Chester, NY* (S.D.N.Y. 2006). In preparing this testimony, I could find no complaints to the media from Mr. Henderson about the fact the current administration has not brought a single Section 2 case since I filed *United States v. Town of Lake Park, FL* (S.D. Fla. 2009), when I was a lawyer at the DOJ in March of 2009. The investigation of the *Lake Park* case was approved by the prior administration. *Thus, the current administration has not initiated and brought a single Section 2 lawsuit.*

In December 2009, Assistant Attorney General Thomas Perez criticized the prior administration's Voting Section before the American Constitution Society: "Those who had been entrusted with the keys to the division treated it like a buffet line at the cafeteria, cherry-picking which laws to enforce."[2] The enforcement record three years removed from Perez's 2009 bravado at ACS paints a very embarrassing portrait of the Division's voting rights enforcement.

[2] Cited in Serwer, The Battle for Voting Rights, *The American Prospect*, January 8, 2010. http://prospect.org/article/battle-voting-rights-0.

The Holder Justice Department has abandoned the Section 2 field and forced private plaintiffs alone to bring cases.

It's not as if Section 2 cases don't exist. Why did the Justice Department refuse to bring a Section 2 case against Fayette County, Georgia, in 2010 that the NAACP eventually brought and won?[3] Certainly it wasn't for a lack of resources, as the Voting Section had plenty of capacity to add a single case to their docket. If a lack of resources is offered as a reason, then more effective and decisive managers should be installed.

Under Section 5, states had the burden to prove a negative and demonstrate a total absence of discriminatory intent or effect. Naturally, a Section 2 case shifts the burden to the plaintiff to prove a case. Given the fact millions of plaintiffs every year in thousands of courts carry this burden, it should prove neither shocking or insurmountable to Justice Department lawyers.

Finally, I am currently litigating a Section 2 case arising out of Guam. There, my client, a retired Air Force Major, was denied the right to register to vote on a government run political status plebiscite. He has publically stated that he begged the Department of Justice to help him, to no avail. Emails reveal that even

[3] Read the District Court judgment at http://www.naacpldf.org/files/case_issue/GA%20State%20Conference%20NAACP%20v%20Fayette%20County%20BofC%20Opinion.PDF.

an assistant United States Attorney on Guam opined that the challenged law is illegal.[4] Yet the Voting Section has failed to act. If Congress is looking to strengthen voting rights, it might look to Guam as a jurisdiction subject to federal civil rights laws that imposes limitations on the right to vote reminiscent of the racially motivated grandfather clauses from an era before the Voting Rights Act. Congress might also ask the Department of Justice why it has refused to enforce Section 2 and other civil rights laws in Guam.

Section 3 of the Voting Rights Act

Section 3 of the Voting Rights Act remains the law. This is the "opt-in" provision of the Voting Rights Act. A plaintiff, including the Attorney General, can ask a federal court to place a defendant under Section 5 oversight once a violation of the law has been established. What is most useful about Section 3 is that it would seem to satisfy *Shelby*'s mandate that federal oversight of state or local elections be closely matched with the need. In other words, the oversight is congruent and proportional with the problem.

Section 5 preclearance obligations triggered through Section 3 would certainly pass Constitutional muster post-*Shelby*. Oddly, plaintiffs have rarely

[4] The District Court of Guam denied Major Davis standing to sue. The Attorney General has unquestioned standing to sue under 42 U.S.C. Section 1971 (another cause of action) and it is my opinion that had the Voting Section vigorously defended his voting rights, this matter would already be resolved. The case is currently on appeal before the 9th Circuit Court of Appeals.

used this provision even though Voting Rights Act violations are now more common in jurisdictions not covered by the unconstitutional Section 4 triggers – including Osceola County (FL), Euclid (OH) and Blaine County (MT). If racial discrimination is as pervasive as some argue, then surely the Section 3 opt-in triggers will offer a way to resurrect Section 5 coverage for offending jurisdictions.

In *United States v. Ike Brown*, the United States District Court (S.D. Miss.) found that the Noxubee County Democratic Executive Committee, and its Chairman Ike Brown, engaged in conduct constituting voting discrimination in purpose and effect. No relief was sought under Section 3 because Noxubee County was already a Section 5 covered jurisdiction. Unfortunately, this chronology reveals the defects and obsolescence of the old enforcement of Section 5.

In 2010, the Department of Justice was unwilling to conduct a Section 5 review of a county legislative plan in Noxubee County (MS) to ensure that it had neither a discriminatory purpose nor effect. One problem with the plan is that it was written by the defendant in *U.S. v. Ike Brown*. *In any other Section 5 review, a redistricting plan created in part by a defendant who had been found liable for intentional discrimination would have tripped an extensive Section 5 review process. But because the defendant and plan author was black, and the victims of the intentional discrimination were white, the Justice Department Voting Section*

did not review the legislative redistricting plan as it would have if the races been reversed. Why? Because Assistant Attorney General Tom Perez has plainly stated that Section 5 does not protect white voters – even though in Noxubee County, the need for protection was acute.[5]

Congress should ensure that Section 3 opt-in triggers protect all Americans, not just some Americans.

Section 203 and 4(e) Minority Language Protections

After Shelby, Section 203 and Section 4(e) of the Voting Rights Act remain in full force and effect. Section 203 protects the electoral process for those who do not speak English well. Section 4(e) protects any Americans who were educated in Puerto Rico under the American flag, but now live in the United States. Whether or not minority language voters are protected will depend in large part on whether the Justice Department vigorously enforces the law.

During the Bush administration, the DOJ Voting Section brought a record number of cases to enforce Sections 4(e) and 203 of the Voting Rights Act. As with Section 2, enforcement of minority language protections has fallen off significantly in the last four years.

[5] See, http://www.justice.gov/oig/reports/2013/s1303.pdf, at 93.

The Bush administration brought 28 cases under Sections 203 and 4(e), and the Obama administration has, thus far, brought seven. Those concerned with vigorous protection of minority voting rights after *Shelby* should seek more vigorous enforcement of Section 2.

Section 11(b) of the Voting Rights Act

Perhaps the most important provision of the Voting Rights Act is Section 11, and it remains in full force and effect after *Shelby*. Section 11(b) is the provision of the law which prohibits intimidation, threats or coercion directed toward voters, or those aiding voters. The attempt to intimidate, threaten or coerce a voter is also actionable. This provision is the most basic part of the law passed in 1965. Simply, Americans are free to vote without threats of violence. The last Section 11(b) case brought by the Justice Department was filed January 7, 2009. It was *United States v. New Black Panther Party, et al*, (E.D. Pa. 2009).

Thank you for your time and attention.

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Respectfully submitted,

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J. Christian Adams is the founder of the Election Law Center Virginia. He served from 2005 to 2010 in the Voting Section at the United States Department of Justice where he brought a wide range of election cases to protect racial minorities in South Carolina, Florida, and Texas. He litigates election law cases throughout the United States. He successfully litigated the landmark case of *United States v. Ike Brown* in the Southern District of Mississippi, the first case brought under the Voting Rights Act on behalf of a discriminated-against white minority in Noxubee County. He received the Department of Justice award for outstanding service and numerous other Justice Department performance awards. Prior to his time at the Justice Department, he served as General Counsel to the South Carolina Secretary of State. He also serves as legal editor at PJMedia.com, an internet news publication. He has a law degree from the University of South Carolina School of Law. He is a member of the South Carolina and Virginia Bars.