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US COMMISSION ON CIVIL RIGHTS BRIEFING

"AN ASSESSMENT OF MINORITY VOTING RIGHTS OBSTACLES IN THE UNITED STATES"

FEBRUARY 2, 2018 – RALEIGH, NC

Ladies and Gentlemen:

Thank you for the opportunity to appear here today to discuss this important topic. I am particularly appreciative of the opportunity in light of the nature of today's proceedings and the apparent preconceived biased conclusions evidenced by the very title of the briefing. Rather than "assessing the state of minority voting in the United States…", this briefing is directed at assessing minority voting "obstacles" in the United States, with particular emphasis in the background materials, on the Supreme Court's decision in *Shelby County v. Holder, et al.* That presupposes that *Shelby* resulted in placing obstacles in the path of minority voting.

So let me begin with what I believe is the proper question that should be considered today:

"What is the current state of minority voting in 2018, based on a factual analysis of minority voting, turnout, and resulting electoral impact of minority voting in recent election cycles?"

This Commission, with all due respect, should be about the business of gathering facts, not perpetuating myths. This Commission should be looking forward, not hanging onto laws, biases, procedures, and tools that were developed more than FIFTY years ago…and which bear no resemblance or relationship to the needs, facts, attitudes, and realities today.

Old grudges die hard. The provisions of the Voting Rights Act of 1965 that the Supreme Court invalidated in *Shelby County* should have been invalidated. That was a good and proper decision. In fact, Congress should never have reauthorized the preclearance provisions in 2006. It was political cowardice of the first order that Congress was unwilling to confront the realities of how the covered jurisdictions had changed over a half century and it should have been Congress who removed the preclearance shackles from the covered jurisdictions. Absent that political will, the Supreme Court took the important and laudatory step of applying long delayed constitutional principles to the statute, and restored the proper federalism balance to Shelby County, Alabama and the other jurisdictions, removing the Mother-May-I obligations that had long since lost their reason for existence.

If the question before us today is whether the Supreme Court's decision in *Shelby County* somehow impacted the 2016 presidential election, the answer is no. It didn't. It is a preposterous suggestion. There is simply no evidence to support that liberal myth.

There is no evidence that changes to state election laws or procedures enacted since 2013 resulted in denying any person the right to vote. Anywhere. Any claims to the contrary have not withstood close scrutiny.

Moreover, it appears that claims that Shelby had any effect whatsoever on minority turnout are also weak at best and likely non-existent.

In North Carolina, for example, African-American turnout actually increased after various election procedures related to early voting and same day registration were changed in 2013.

According to a monograph published by The Heritage Foundation, *North Carolina Election Reforms and the Myth of Voter Repression*," the evidence is clear that there was an actual increase in minority turnout despite the fact that these changes were being challenged at the time as violations of the Voting Rights Act. Tellingly, those making the claim that these changes to North Carolina election procedures would impair the right to vote later admitted that minority turnout had increased post-Shelby, but then claimed that turnout would have gone up even higher had the changes to early voting and same day registration not been made."

Quoting further from the Heritage report:

> "The primary election in May 2014 was the first North Carolina election after H.B. 589's enactment. Thus, comparing the 2014 and 2010 primary elections provided a natural experiment on the effect of these election law changes because of similarities between these two elections: Both were held in May of a non-presidential election year. An analysis of the turnout of black voters by Dr. Steven Camarota, Director of Research at the Center for Immigration Studies, found that the number of blacks voting increased by 45,000 individuals from the 2010 primary election to the 2014 primary election, an increase of 29.5 percent. The turnout of whites also increased, but only by 13.7 percent, less than half the increase in turnout of black North Carolinians.
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> Camarota determined that blacks also "increased their share of those who voted from 17.2% of the total in the 2010 election to 19% in the 2014 election." In contrast, the share of voters who were white declined. Additionally, the percentage of "blacks registered in May 2014 relative to their population size was virtually unchanged from the May 2010 election." He concluded that the official turnout data from the North Carolina State Board of Elections "for the May 4, 2010 and May 6, 2014 elections show no evidence that H.B. 589 adversely impacted black participation."
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> The turnout data from the 2014 general election show the same result, which "tell[s] a different story" than the one opponents of the law had hypothesized. Though opponents accused lawmakers of discriminating against minorities and predicted a drastic decline in turnout among African–American voters, "[b]lack

turnout and registration for the November 2014 election increased by every relevant measure compared with November 2010, the last non-presidential general election."

Examining turnout as a whole, more than 2.7 million votes were cast in the November 2014 general election in North Carolina, "setting a record for a midterm election, according to the State Board of Elections." The Board of Elections data showed that:

- The percentage of age-eligible, black North Carolinians who voted in the 2014 election was 41.1 percent, compared to 38.5 percent in November 2010.
- At the same time, the number of registered black voters who voted increased from 40.3 percent in 2010 to 42.2 percent in 2014.
- The percentage of the total number of votes cast by black voters increased to 21.4 percent from 20.1 percent.
- In fact, "voters who self-identified as multiracial, Asian, or American Indian/Alaska Native participated at a rate 47% higher than in 2010."

I am attaching the Heritage Foundation report as part of my testimony so that it can be included in the record of this briefing.

Unfortunately, the 4th Circuit Court of Appeals determined that the factual evidence of increased minority voter turnout was irrelevant and nonetheless reversed the trial court's ruling, which had recognized the fact that the changes in NC's election laws had NOT produced a decline in voting by minorities. Instead, the Appellate Court decided that the evidence was not determinative and found, instead, in its July 2016 ruling that the legislature had a discriminatory 'intent' and thus, despite evidence that minority voting had increased, invalidated significant parts of HB 589.

Thus, North Carolina's efforts to halt same-day registration, shorten the period of early voting and barring the counting of ballots cast out-of-precinct were ordered abandoned.

Meaning, that the law reverted to the same provisions that had been in place in 2012. And the result? Not surprisingly, the percentage of black voters fell from the historic high when Barack Obama was on the ballot. Yet, the percentage of black voters was still higher than in 2004, the last election before President Obama was on the ballot.

There was no 'post-Shelby election law' obstacle to minority voting in North Carolina in 2016, because the interest groups successfully challenged and overturned the key provisions of the statute. The blame for the lower black turnout rests with the candidates, not the election laws.

Simpy, Shelby had nothing to do with the turnout in 2014 or 2016.

It is easy to forget the abuses of federal power associated with the Section 5 regime before Shelby. But in North Carolina, we shouldn't forget. Consider the flagrant abuse of federal power North Carolina experienced in a matter involving the Kinston, NC town council.

A 2009 objection under Section 5 in Kinston shows the outrageous, abusive and legally indefensible positions the Voting Section was willing to adopt relying on its broad powers under Section 5. Kinston, a majority black jurisdiction, in a referendum, decided to eliminate partisan elections for town office and move to nonpartisan elections. The Justice Department exploited the burden shift in Section 5 and objected to the change, demanding that Kinston prove a total absence of any statistical impact on minority voters. . 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. Section 5 was turned into a partisan weapon in the federal government's objections to the decision by the citizens of Kinston, NC.

Abuse by the federal government of its power under Section 5 was not confined to the case in Kinston, North Carolina. In the case of *Johnson v. Miller*, the Justice Department had to pay court sanctions of $594,000 for abuses in the Section 5 preclearance process. In that case, the Voting Section tried to impose an illegal, racially gerrymandered legislative redistricting plan on the state of Georgia.

Using Section 5 oversight powers – all exercised behind closed doors – the Justice Department leveraged Section 5 in an improper attempt to create as many black-controlled legislative districts as possible. The federal court was not amused and even noted that Justice Department lawyers may have committed perjury in the Section 5 process. The federal court noted that the DOJ seemed to be doing the bidding of the ACLU in the Section 5 process, which was "in constant contact with the DOJ line attorneys." The court found the communications between the DOJ and the ACLU "disturbing." The court ruled, "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." [1]

The court described the Section 5 review process in *Johnson* thusly, "The considerable influence of ACLU advocacy on the voting rights decisions of the United States Attorney General is an embarrassment. It is surprising that the Department of Justice was so blind to this impropriety." The DOJ appealed to the Supreme Court, which affirmed the lower court's findings.

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[1] See Johnson v. Miller, 864 F. Supp. 1354, 1368 (S.D. Ga. 1994). Miller v. Johnson, 515 U.S. 900, 924 (1995).

It is important to note that Shelby County struck down a bizarre, haphazard and outdated triggering scheme for federal oversight. Some parts of North Carolina were covered, but not others. Mississippi was covered, but so was New Hampshire. Alabama was subject to federal oversight, but so was Michigan. Some boroughs of New York City were covered, but others were not. Simply, the triggering formula struck down in Shelby was outdated, unfair, obsolete and frankly, crazy.

When the original 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 today bear no resemblance to elections in 1965.

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. 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.

In 2018, it's hard to imagine a state that would satisfy the high hurdle the Supreme Court has set for renewed coverage. Groups such as the Alliance of North Carolina Black Elected Officials, NC Conference of Black Mayors, the NC Black Elected Municipal Officials, the NC Caucus of Black School Board Members, and the NC Black County Officials represent the many, many black elected officials across the state of North Carolina. Nor is the State of North Carolina evading any federal decrees. It is difficult to point to any discrimination in voting much less discrimination "on a pervasive scale" or "rampant" discrimination.

If anything, the recent history of litigation involving North Carolina election laws shows that the present system is working, where interest groups and litigants are having their day in court and getting their way, even when the empirical evidence discloses that minority voter turnout is not harmed by enactment of voting integrity measures. Even without pre-clearance requirements, federal law and the US Constitution are wholly adequate to protect the right to vote.

In conclusion, the US Commission on Civil Rights is not asking the right questions and displays an inherent bias when it denigrates and describes as "obstacles"

the laws seeking to protect the validity of every vote and the right of every citizen NOT to have his or her vote diluted by unlawful votes. According to a Gallup poll in August 2016, even though many of the arguments against voter ID laws frequently cite minorities' voting access, nonwhites' views of the policy don't differ markedly from those of whites. Seventy-seven percent of nonwhites favor voter identification laws, while whites favor voter id laws by 81%.

The paternalistic, 'we-know-best' attitude of the professional interest groups who have historically controlled the Voting Section of the US Department of Justice flies in the face of the views and opinions of minority voters, and wholly disregards the facts and evidence related to minority voting post-Shelby.

It would behoove the Commission to consider whether it is doing a positive service to those it claims to represent when it perpetuates myths that are not based on factual evidence and which are contrary to the views of minority voters across the country.

Thank you. ###