

UNITED STATES HOUSE ADMINISTRATION COMMITTEE
SUBCOMMITTEE ON ELECTIONS

**Voting in America: A National Perspective on the Right to Vote,
Methods of Election, Jurisdiction Boundaries, and
Redistricting.**

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INTRODUCTION

Chairman Butterfield and Ranking member Steil and members of this Committee, I appreciate the opportunity to appear before this Committee. How our nation conducts our elections is the bedrock of our constitutional republic. Without every eligible voter having the ability to cast a vote and all citizens having confidence in the conduct and outcome of our elections, we the people would cease to govern our nation.

MY EXPERIENCE AND PERSPECTIVE

I have been involved in election litigation and legislation for more than two decades. I was legal counsel to President Bush in 2000 including lead counsel in *Bush-Cheney 2000 v. Evelyn Baker*, 34 S.W.3d 410 (Mo. Ct. App. 2000). I was President Bush's national election counsel in 2004. I served as legal advisor to Secretary of State James Baker and President Carter on the Commission on Federal Election Reform in 2005 (the Carter-Baker Commission). Virginia's Democrat Attorney General Mark Herring appointed me to defend Virginia's election reform legislation against a constitutional challenge. And the Commonwealth's election reforms including its voter identification requirement were

upheld in both the trial court and in the Fourth Circuit Court of Appeals. See *Lee v. Virginia State Board of Elections*, 188 F. Supp.3d 577 (E.D. Va. 2016), *affirmed* 843 F.3d 592 (4th Cir. 2016). I represented the leadership of the United States House and Senate as their counsel in the amicus brief in *Crawford v. Marion County Election Board* and I was also counsel for both Democrat and Republican election officials in another amicus brief in *Crawford*. In its decision upholding Indiana’s voter identification law, the Supreme Court heavily relied on the work and recommendations of the Carter-Baker Commission. See *Crawford v. Marion County Election Board*, 553 U.S. 181, 193 (2008) (in the Help America Vote Act and the National Voter Registration Act, Congress indicated its belief “that photo identification is one effective method of establishing a voter’s qualification to vote and that the integrity of elections is enhanced through improved technology[, which] conclusion is also supported by a report issued shortly after the enactment of [Indiana’s voter ID law] by the Commission on Federal Election Reform chaired by former President Jimmy Carter and former Secretary of State James A. Baker III, which is a part of the record in these cases.”). I was also the lead counsel represented voters including minority voters in the

federal redistricting litigation concerning St. Louis County, Missouri, in *Corbett v. Sullivan*, 202 F. Supp.2d 972 (E.D. Mo. 2002). In that *Corbett* we were successful in having the St. Louis County Council reapportioned in a manner that allowed minorities opportunity to elect members of the minority community to the County Council. I worked closely with the local NAACP to achieve a just reapportionment of St. Louis County government. Counsel for the NAACP told the court, “[Mr. Hearne carried] the burden of a substantial amount of the NAACP’s case.... [Mr. Hearne] provided great help to counsel for the NAACP during this fast-paced redistricting litigation. [And Mr. Hearne took] the leading role in this action and in incorporating the NAACP’s objectives.”

I mention this background, and note especially the bipartisan nature of my experience, because I firmly believe that, while political campaigns and elections are quintessentially a partisan endeavor, the manner in which elections are conducted and the laws governing the conduct of elections should rise above partisan interests. Our identity as Americans should transcend our partisan affiliations as a Democrat or Republican. As President Obama said in his speech to the Democratic National Convention in 2004, “there is not a liberal America and a

conservative America — there is the United States of America. There is not a black America and a white America and Latino America and Asian America — there's the United States of America.”

As Americans, we share a common interest in assuring our elections are fair, honest, and accessible to every eligible voter. We also share a common interest in assuring that the outcome reflects the will of the voters and was not engineered by disenfranchising some voters or by partisan manipulation of the election process.

Confidence in the outcome of an election is especially important when the election is close such as it was in 2000 and the *Bush v. Gore* litigation. It is untenable that a significant portion of the electorate would believe an election was rigged or tainted by fraud or incompetence. It is also unacceptable for any citizen to be denied the right to vote based upon the color of their skin or language.

Elections must be conducted according to clearly written laws that are faithfully followed and administered by election officials with transparency and without partisan bias. Every eligible citizen, irrespective of their race, color or heritage, must have equal opportunity

to cast a ballot, and every American must be confident that every lawfully cast ballot is accurately counted. It is always easy to convince the winning candidate that he or she won. But the test of a fair and honest election is when the losing candidate and his or her supporters accept the outcome as the will of the voters. The legitimacy of the rule of law depends upon the electorate's confidence in the conduct of our elections.

THE FUTURE OF THE VOTING RIGHTS ACT

In the aftermath of the Civil War our nation faced a daunting task of reconstructing a single nation that integrated the newly emancipated former slaves and African Americans into the political life of our nation. President Lincoln abolished slavery with the Emancipation Proclamation in 1863. In 1865, 1868 and 1870 the states adopted the Thirteenth, Fourteenth, and Fifteenth Amendments to our Constitution. These amendments did much to address the repugnant legacy of slavery. These amendments prohibited states from disenfranchising voters “on account of race, color, or previous condition of servitude.” These amendments provided all citizens with “equal protection under the laws.” And these amendments abolished slavery “within the United States, or any place subject to their jurisdiction.”

These Reconstruction Amendments to our Constitution enabled the first black members to be elected to United States Congress and to serve in other government offices and produced a dramatic increase in black citizens registering to vote and casting ballots. These amendments were successful in beginning to remedy the evil of slavery and insidious racism. But, more needed to be done.

The Civil Rights Movement arose in response to the Jim Crow laws and voting “tests or devices,” such as literacy tests and poll taxes, certain southern states adopted as a scheme to deny or abridge the right of some American citizens to vote on account of their race or color.

The Voting Rights Act of 1965 was adopted to address these invidious measures and to address entrenched racial discrimination in voting. The moral authority of the Voting Rights Act was due in part to the bipartisan nature of the law introduced by Senators Dirksen and Mansfield as the two co-sponsors. Senator Dirksen was of course the Republican minority leader and Senator Mansfield was the Democratic majority leader. Sixty-four other Senators cosponsored the bill, including forty-six Democrats and twenty Republicans. The Voting Rights Act passed the Senate with a seventy-seven to nineteen vote, with Democrats

voting forty-seven to sixteen in favor and Republicans voting thirty to two in favor of the Voting Rights Act..

3. The Voting Rights Act passed the House in August 1965 with a vote of three-hundred thirty-three to eighty-five with Democrats voting two hundred twenty-one in favor and sixty-one against and Republicans voting one hundred twelve in favor with twenty-four in opposition.

My point in recalling this history is to note that the Voting Rights Act was passed with broad bipartisan support. This bipartisan consensus is what gave the Voting Rights Act its moral authority.

As originally written, the Voting Rights Act included extraordinary and exceptional measures, including Section 5 and Section 4, which the Supreme Court found to be “strong medicine” and an exceptional departure from the constitutional principles of federalism in which the states enjoy equal sovereignty. This unusual departure from constitutional principles of state sovereignty and the extraordinary provisions of the preclearance sections of the Voting Rights Act were justified by the unique and exceptional circumstances of the day and the reprehensible legacy of the Jim Crow era. See *South Carolina v.*

Katzenbach, 383 U.S. 301, 309 (1966), *Northwest Austin Municipal Utility Dist. No. One v. Holder*, 557 U.S. 193, 203-204 (2009), and *Shelby County v. Holder*, 570 U.S. 529, 534 (2013).

But, as Chief Justice Roberts observed, the conditions in our nation in 2013 were no longer what they were in 1966. Voter registration and voting by black citizens have increased greatly, and registration and voting by black citizens in many jurisdictions now exceeds the percentage of white registration and voting. The number of African American and other minorities holding political office had greatly increased. In light of these changed conditions the Supreme Court struck down the Section 5 preclearance provisions as unconstitutional. The Court found that the original conditions that had justified subjecting certain states and jurisdictions to the extraordinary requirement of preclearance were no longer present.

The Supreme Court only struck down the preclearance formula in Sections 5 and 4. The Voting Rights Act, including Section 2 and Section 3, continue as the law of the land protecting the right of all citizens to vote and allowing the Justice Department and individuals to sue to enforce their right to vote

We all agree that an individual's right to vote and to have their vote accurately counted is a foundational constitutional principle. The current debate does not involve this foundational principle. Rather the current discussion concerns proposals to revise the Section 5 preclearance provisions declared unconstitutional in *Shelby County v. Holder*, 570 U.S. 529 (2013). As noted, the Supreme Court held the Section 5 preclearance provisions unconstitutional because the invidious discrimination and the extraordinary circumstances (such as literacy tests and poll taxes) that justified the 1965 preclearance formula were no longer present or justified in 2013. Black and minority communities were no longer underrepresented or not voting in parity with white voters. Indeed, in the recent Georgia Senate election and presidential election, the increase in participation by black and minority voters increased at a higher rate than white voters. To take Georgia and South Carolina as an example, both states are now represented by an African American Senator – Republican Senator Tim Scott of South Carolina and Democrat Senator Raphael Warnock of Georgia.

In short, the premise for which Congress adopted this extraordinary legislation was no longer present. Importantly, the

Supreme Court did not strike down the protections of Section 2 which prohibit discrimination. Rather, *Shelby County* addressed only the preclearance provisions the Court found to be premised upon a factual predicate that no longer existed.

Following the Court's decision in *Shelby County*, some now propose a new preclearance scheme. These proposals would recast the federal Justice Department as a national election board or super-state legislature rewriting or vetoing most state and local election laws and prevent states from adopting necessary election reforms unless the federal officials in the Department of Justice first approved these laws. The proposed preclearance scheme is flawed for three primary reasons.

First, preclearance is an extreme remedy that was only upheld due to the extraordinary circumstances from the Jim Crow era. Those circumstances no longer define American elections. There are no literacy tests, poll taxes, or similar devices that prevent any eligible voter from casting a ballot. And, as noted, voter registration and voting by minorities has increased dramatically since the 1960s.

Those who support a reinvigorated federal preclearance procedure overlook how the preclearance process has in fact worked. Preclearance empowers partisan bureaucrats in the Voting Section of the Civil Rights Division of the Justice Department to veto or rewrite state election laws. Chief Justice Roberts observed, “the preclearance process at the Department of Justice is famously opaque and usually the States and municipalities have to go through or had to go through several layers of back and forth, ... its sort of a bargaining process.” *Wesley Harris v. Arizona Independent Redistricting Comm’n*, 578 U.S. ___, 136 S.Ct. 1301 (2016), oral argument transcript, p. 7. In 2013 the Department of Justice Inspector General found the officials in the Voting Section of the Civil Rights Division hired its lawyers from essentially five left-leaning advocacy groups.¹ The point is this, the preclearance process, in practice, has proven to be an arbitrary, standardless (and now determined to be unconstitutional) intrusion into State’s constitutional authority to conduct elections. And, not only that, but the preclearance process has

¹ See U.S. Department of Justice, Office of the Inspector General, Oversight Review Division, *A Review of the Operations of the Voting Section of the Civil Rights Division*, March 2013, p. 203, available at: <http://org.justice.gov/reports/2013/s1303.pdf>.

been exploited for partisan and ideological ends that have nothing to do with the goal of protecting every citizen's right to vote irrespective of their race, color of their skin or their language. In short, preclearance devolved into a process that was arbitrary, partisan, and standardless.

Furthermore, when it comes to preclearance approval of districts drawn in the state and congressional reapportionment process, preclearance results in the racial slicing and dicing that divides or nation, not unites our nation. President Obama disparaged the racial division of our elections in his 2004 Democratic National Convention speech, saying, "The pundits like to slice-and-dice our country into Red States and Blue States; Red States for Republicans, Blue States for Democrats."

President Biden, when a candidate, infamously said to the African American Breakfast Club co-host Charlamagne, "If you have a problem figuring out if you are for me or Trump, you ain't black." This assumption that individuals can or should vote for a candidate based upon the color of their skin is the opposite of Dr. King's famous aspiration that "I have a dream that my four little children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character."

Second a draconian preclearance provision prevents meaningful election reform. Voters having the confidence that they will be allowed to cast a ballot and that all ballots will be equally and accurately counted increases participation. To gain this public confidence in our elections and to protect the integrity of the election process, the States need to adopt meaningful and necessary election reforms.

The Carter-Baker Commission was a highwater mark in bipartisan election reform and made a number of recommendations, including voter identification, elimination of ballot harvesting, and the maintenance of current and accurate voter rolls among other reforms. These recommendations will increase voter confidence in our elections and increase voter participation. Several of the Carter-Baker recommendations merit particular attention. I note these because these election reforms would be hindered or prevented (delayed at the least) should they be subject to preclearance review by the Voting Rights Section of the Justice Department's Civil Rights Division.

Voter Identification: The Carter Baker Commission recommended that,

To ensure that persons presenting themselves at the polling place are the ones on the registration list, the Commission recommends that states require voters to use the REAL ID card, which was mandated in a law signed by the President in May 2005. The card includes a person's full legal name, date of birth, a signature (captured as a digital image), and photograph and the person's Social Security number. This card should be modestly adapted for voting purposes to indicate on the front or back whether the individual is a U.S. citizen. States should provide an EAC-template ID with a photo to all non-drivers free of charge.

Requiring an individual to identify themselves with photo identification before casting a ballot is a commonsense measure to protect the integrity of elections. Of course, the state must provide the photo identification without cost. The constitutionality of requiring photo identification before an individual may cast a ballot has been reviewed by and approved as constitutional by the Supreme Court. See *Crawford*, 553 U.S. at 202. See also *Lee*, 843 F.3d at 607, in which Virginia's voter identification law was upheld against constitutional challenge. In *Lee*, the unanimous Fourth Circuit panel held, "just as Congress in HAVA found it beneficial to the voting process and the public perception of the voting process to require photo IDs, and just as the Carter-Baker Commission found similarly, Virginia found it beneficial to require photo identification in all elections." *Id.* Virginia's and Indiana's voter

identification laws are a model for a constitutional voter identification law that protects the integrity of the election and does not impose an impermissible burden upon any voter. Indeed, in the *Lee v. Virginia* litigation, those challenging Virginia’s law could not identify a *single person* in the entire Commonwealth who was denied the right to cast a ballot due to Virginia’s voter identification law. As the Carter-Baker Commission noted, and as the voter identification laws that have been upheld provide, the required identification must be available to any person who does not possess the required identification without cost.

Voter identification laws are supported by more than eighty percent of Americans, more than seventy percent of Democrats, and more than seventy percent of African Americans.² Prominent Democrats support reasonable voter identification laws, including former president Jimmy Carter, Civil Rights leader Andrew Young from Atlanta, former Congressman Lee Hamilton, who was a member of the Carter-Baker Commission, and others, including political journalist Juan Williams.

² Monmouth University Poll, “*Public Supports Both Early Voting and Requiring Photo ID to Vote* (June 21, 2021), available at: https://www.monmouth.edu/polling-institute/documents/monmouthpoll_us_062121.pdf.

The requirement that individuals identify themselves before casting a ballot increases confidence in the integrity of the election and prevents lawful voters from being disenfranchised by having their ballot canceled by an illegally cast ballot.

Prohibitions against ballot harvesting: The Carter-Baker Commission found that,

Absentee ballot and voter registration fraud: Fraud occurs in several ways. Absentee ballots remain the largest source of potential voter fraud. Absentee balloting is vulnerable to abuse in several ways: Blank ballots may be mailed to the wrong address or to large residential buildings might get intercepted. Citizens who vote at home, at nursing homes, at the workplace or in church are more susceptible to pressure, overt and subtle, or to intimidation. Vote buying schemes are far more difficult to detect when citizens vote by mail. States therefore should reduce the risks of fraud and abuse in absentee voting by prohibiting “third-party” organizations, candidates, and political party activists from handling absentee ballots. States also should make sure that absentee ballots received by election officials before Election Day are kept secure until they are opened and counted.

On the basis of this finding, the Carter-Baker Commission recommended that “State and local jurisdictions should prohibit a person from handling absentee ballots other than the voter, an acknowledged family member, the U.S. Postal Service or other legitimate shipper, or election officials. The practice in some states of allowing candidates or

party workers to pick up and deliver absentee ballots should be eliminated.” The Carter-Baker Commission continued, recommending that “All states should consider passing legislation that attempts to minimize the fraud that has resulted from ‘payment by the piece’ to anyone in exchange for their efforts in voter registration, absentee ballot or signature collection.”

Current accurate voter registration lists: An accurate and current voter registration roll is essential to an honest election and making sure that every eligible voter may cast a ballot and that no voter’s ballot is cancelled by an unlawfully cast ballot. The Carter-Baker Commission recommended, “All states should have procedures for maintaining accurate lists such as electronic matching of death records, drivers’ licenses, local tax rolls and felon records.” The Commission continued, “States need to effectively maintain and update their voter registration lists. ... When an eligible voter moves from one state to another, the state to which the voter is moving should be required to notify the state which the voter is leaving to eliminate that voter from its registration list.”

Transparency in the conduct of elections: Justice Brandeis introduced the phrase “sunlight is said to be the best of disinfectant.” See

Louis Brandeis, *Other Peoples' Money*, 1933, p. 62. The Carter-Baker Commission similarly observed that sunlight in the conduct of elections was critical to assure confidence in the results of the election. "All legitimate domestic and international election observers should be granted unrestricted access to the election process." Observers or challengers should be provided a meaningful opportunity to observe the conduct of elections and the processing of ballots.

CONCLUSION

Thank you for the opportunity to appear and to participate in this important discussion of how we conduct our elections. Because the right to vote is so important to every American citizen of every race, color or heritage legislation guaranteeing this fundamental right should rise above partisan interests and, just like the Voting Rights Act, be a broadly bipartisan consensus of measures that protect all American's right to vote, respects the constitutional role of the states in conducting elections and accommodates meaningful and necessary election reforms such as those recommended by the Carter Baker Commission that will increase public confidence in our elections.