

Senate Judiciary Committee Hearing
“From Selma to Shelby County:
Working Together to Restore the Protections of the Voting Rights Act”
Questions for the Record Submitted by Senator Al Franken for Justin Levitt

Question 1. In her dissenting opinion in *Shelby County*, Justice Ginsburg wrote the following:

Congress also received evidence that litigation under § 2 of the VRA was an inadequate substitute for preclearance in the covered jurisdictions. Litigation occurs only after the fact, when the illegal voting scheme has already been put in place and individuals have been elected pursuant to it, thereby gaining the advantages of incumbency. An illegal scheme might be in place for several election cycles before a § 2 plaintiff can gather sufficient evidence to challenge it.

Shelby County v. Holder, 133 S. Ct. 2612, 2640 (2013) (Ginsburg, J., dissenting) (internal citations to Congressional Record omitted).

(a) What are your thoughts about this passage?

* * *

I agree with its characterization.

Congress passed the Fannie Lou Hamer, Rosa Parks, Coretta Scott King, César E. Chávez, Barbara C. Jordan, William C. Velásquez, and Dr. Hector P. Garcia Voting Rights Act Reauthorization and Amendments Act of 2006 in overwhelmingly bipartisan fashion. And before Congress passed the law, it received plentiful evidence that § 2 of the Voting Rights Act—though a powerful tool—was insufficient to combat the most pernicious forms of racial and ethnic discrimination with respect to the franchise. Congress agreed then, as it had on four previous occasions, that § 2 was inadequate on its own. And though § 2 remains powerful today, it also remains, as presently constructed, inadequate on its own.

The principal limitation of § 2 is, as Justice Ginsburg noted, the fact that it authorizes only responsive litigation. While the preclearance regime was designed to stop discriminatory policies before they were ever implemented, § 2 litigation must necessarily wait for a practice to take lawful effect before it can be challenged. Indeed, a § 2 lawsuit brought to challenge an unsigned bill or potential but nonfinal policy proposal would be dismissed, correctly, as unripe.

Thus, § 2 litigation “occurs only after the fact, when the illegal voting scheme has already been put in place.”

Once a discriminatory practice has become law or local policy, successful responsive litigation requires several steps. Data sufficient to prove dilution of the vote in the totality of circumstances must be gathered; these data often include information under the jurisdiction's control that may only be gathered pursuant to public records requests or through litigation's discovery process. To the extent that the data include demographic and political information, they must be analyzed by experts, which means that an available expert must be located and retained.¹ And lawyers must be sought, which means that either the Department of Justice must be convinced to prioritize the deployment of its resources toward resolving the issue at hand or private attorneys must be found, either by raising sufficient funds or finding pro bono counsel willing and able to devote the time and resources to litigate an exceedingly complex case. (Indeed, as noted in my written testimony, the Federal Judicial Center recently determined that of 63 different forms of litigation, voting rights cases are the 6th most cumbersome: more cumbersome than an antitrust case, and nearly twice as cumbersome as a murder trial.)

There are some occasions when the local victims of discrimination can amass data, experts, and attorneys, and when a thoroughly prepared case can work its way through the courts on an expedited docket, between the time that a discriminatory practice becomes law and the next election to follow.

But often — particularly when a practice is changed shortly before an election or when the change occurs in a jurisdiction where the victims have fewer resources — it will not be possible to prepare and present a thorough case before an election is held on discriminatory terms. Sometimes the problem is simply insufficient time to amass existing data. In other circumstances, the change is sufficiently novel within the jurisdiction that victims may fear a dilution of their vote, but the impact cannot be proven to the certainty demanded by a court until after an election is held and those fears are realized.

The theoretical prospect of temporary relief for a partial case is insufficient in practice. The Supreme Court has instructed lower courts to be wary of enjoining state practices when there is “inadequate time to resolve . . . factual disputes” before an election takes place.² And given how complex responsive voting rights litigation can be, there will often be inadequate time to resolve factual disputes quickly. In those circumstances, as

¹ The availability of an appropriate expert should not be assumed. In 2012, an Alaska trial court described one of the factors contributing to some of its state redistricting body's delay:

It is also unclear whether the Board could have found a VRA expert to start sooner than [Lisa] Handley did. There was testimony that there are about 25 VRA experts [in the country]. These experts work on elections and voting issues around the country and around the world. Handley was chosen and officially hired while she was working on a project in Afghanistan. Had the Board chosen another candidate, it is possible that the candidate also would have been in the middle of another project in a different country or state.

In re 2011 Redistricting Cases, No. 4FA-11-02209 CI, at 102 (Alaska Super. Ct. Feb. 3, 2012), *available at* <http://www.akredistricting.org/Litigation/Superior%20Court%20Memorandum%20Decision.pdf>.

² *Purcell v. Gonzalez*, 549 U.S. 1, 6 (2006).

Justice Ginsburg explained, litigation will only reach a practical resolution after a discriminatory rule has produced a tainted election.

* * *

(b) Can you provide examples of situations in which elections have been held before an illegal voting scheme successfully could be challenged through § 2 litigation?

* * *

Yes.

Some of these examples concern litigation to challenge a recent discriminatory change to a voting practice. Others concern litigation to challenge a longstanding rule; though these battles might not have been resolved by a preclearance procedure, they nevertheless help to demonstrate the drawn-out nature of a potential § 2 case and its inability to supply swift relief to the most pernicious discrimination.

I hasten to add that the incidents that follow are but a few recent examples. They do not purport to either canvass or represent the universe of past § 2 litigation, either in the substance of the claims or the geographic scope; they also do not purport to represent the universe of litigation that will have to be brought under § 2 in the absence of a proactive enforcement regime like preclearance. Furthermore, they also do not purport to account for the discriminatory voting practices that in fact violate § 2 but have not been challenged because the victims lack the wherewithal to mount responsive litigation. Not all of these examples would have been prevented by a preclearance procedure as it had been configured in the past, even had the jurisdiction been required to preclear its laws.³ They are indicative only of the cumbersome nature of § 2 litigation, and of the fact that in some circumstances, relief under § 2 may arrive only after intervening elections have been held under discriminatory rules.

One example is the *Black Political Task Force v. Galvin* case, involving a discriminatory redistricting plan designed to favor a particular incumbent at the expense of minority voters.⁴ The complaint was filed on June 13, 2002. After a trial, the plan was enjoined in February 2004, and a remedial plan was implemented in April 2004. The 2002 elections, however, were held under discriminatory conditions, and the winning legislators remained in office under those conditions until new elections were held in 2004.

Another is the *Bone Shirt v. Hazelton* case,⁵ involving another discriminatory redistricting plan. The complaint was filed on December 26, 2001. After a trial, the court ruled in September 2004 that the plaintiffs had proven that the 2001 districts were unlawful. It was not until August 2005, however, that a remedial plan was imposed.

³ I have provided no examples of § 2 litigation to combat retrogressive changes within previously covered jurisdictions, because there should have been no need to file such litigation in previously covered jurisdictions: § 5 should have prevented the retrogressive practice from becoming law in the first place.

⁴ 300 F. Supp. 2d 291 (D. Mass 2004).

⁵ 336 F. Supp. 2d 976 (D.S.D. 2004).

That is, despite the fact that the complaint was filed in 2001, and the fact that plaintiffs had proven by the fall of 2004 that the 2001 districts were unlawful, both the 2002 and 2004 elections were held under discriminatory conditions, and the winning legislators remained in office under those conditions until new elections were held in 2006.

In my written testimony, I also urged an attention to local elections when assessing the adequacy of affirmative litigation. One example is the case of *New Rochelle Voter Defense Fund v. City of New Rochelle*,⁶ involving a discriminatory city council districting plan. The plan was adopted on April 29, 2003. A complaint was filed on May 27, 2003. Plaintiffs requested preliminary relief, but that relief was denied because the impending election was too close at hand. In December 2003, the court found for plaintiffs, and a remedial plan was imposed thereafter. The 2003 city council elections, however, were held under discriminatory conditions, and the winning legislators remained in office under those conditions until new elections were held; I believe that those new elections were first held in 2007.

Another example is the *United States v. Charleston County* case referenced in my written and oral testimony. It involved a challenge to the existing at-large election structure of a county council. The complaint was filed on January 17, 2001. Preliminary relief was sought on April 1, 2002; despite a finding that plaintiffs were ultimately *likely* to succeed, the preliminary injunction was denied, and local primaries proceeded in June. After a bench trial, another motion for preliminary relief was filed in September 2002 in advance of the general election, and again relief was denied, allowing the general election to take place. The court issued a decision in favor of plaintiffs in March 2003, with a remedial plan settled by August of that year; on appeal, the court's decision was affirmed in April 2004. Despite the fact that the complaint was filed in January 2001, the fact that both the Department of Justice and private plaintiffs were involved, and the fact that the plaintiffs convinced a court in April and May of 2002 that they were likely to *succeed* in demonstrating discrimination, the 2002 elections were held under discriminatory conditions, and the winning legislators remained in office under those conditions until new elections were held in June of 2004.

* * *

(c) Why is it significant that § 2 litigation can occur only after the fact, when the illegal voting scheme has already been put in place, whereas voting changes in jurisdictions covered by § 4 cannot go into effect until they have been approved?

* * *

Under the preclearance regime in effect up until the court's decision in *Shelby County*, discriminatory changes in election laws in any jurisdiction subject to preclearance were stopped before they could lawfully be implemented. As long as the Department of Justice or federal courts followed the law, no change for the worse in any covered area would have the opportunity to affect voters in the jurisdiction.

⁶ 308 F. Supp. 2d 152 (S.D.N.Y. 2003).

By contrast, § 2 and other responsive litigation tools are not available to victimized voters or to the government until a new policy takes legal effect. Given the complexity and expense of a § 2 case, some discriminatory policies — particularly ones affecting local jurisdictions — will take effect without the realistic possibility that a challenge can be mustered in the near future at all. Other discriminatory policies will be challenged, but the available data may not allow plaintiffs to meet their burden of proof to show dilution under the totality of the circumstances. Still other discriminatory policies will be challenged successfully, but as indicated above, relief may be granted only after an intervening election or elections.

When elections take place under discriminatory policies, all voters in the jurisdiction are deprived of their right to a fair election on lawful terms. Moreover, candidates who win such elections receive the practical benefits of incumbency; these may continue to provide undue advantage in future elections, even once the challenged discriminatory features of the election structure have been remedied.

Furthermore, even if discriminatory electoral features are eventually remedied and minority voters are able to achieve an equal opportunity to participate in the process and elect their candidates of choice, the elections that have taken place under discriminatory conditions install winning incumbents who are empowered to make policy until new elections are held. Those policies promulgated by the winners of an election held under discriminatory terms may one day be repealed or superseded, but they are never fully remediable. This is, perhaps, the most fundamental limitation of cumbersome responsive litigation, and a reason why responsive litigation is, on its own, less equipped to address the most pernicious election-related harms than it is to address discrimination in any other realm.

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Question 2. Does Congress have constitutional authority, pursuant to § 2 of the Fifteenth Amendment, to enact legislation that outlaws voting practices that are discriminatory in effect?

* * *

In *City of Rome v. United States*, the Supreme Court reiterated that “under the Fifteenth Amendment, Congress may prohibit voting practices that have only a discriminatory effect.”⁷

Congress may constitutionally do so pursuant to its expressly delegated and enumerated responsibility to enforce the prohibitions and secure the guarantees of § 1 of the Fifteenth Amendment. Section 1 has been interpreted to prohibit intentional discrimination.⁸ Of course, Congress may, in the exercise of its enforcement authority under § 2 of the Fifteenth Amendment, directly prohibit and provide a cause of action to enjoin

⁷ *City of Rome v. United States*, 446 U.S. 156, 175 (1980).

⁸ *Reno v. Bossier Parish School Bd.*, 520 U.S. 471, 481 (1997).

intentional discrimination. But the Court has also clearly stated that Congress may also, in the exercise of its enforcement power, remedy past discrimination, including “prohibit[ing] state action that . . . perpetuates the effects of past discrimination.”⁹ And the Court has further stated that Congress may also, in the exercise of its enforcement power, act prophylactically “to prevent and deter” intentional discrimination by prohibiting conduct that is not itself unconstitutional.¹⁰ Such Congressional action need not be confined to voting practices for which immediate proof of intentional discrimination is available.

Indeed, Congress has, in the past, determined that facts on the ground rendered it necessary and proper to outlaw voting practices that are discriminatory in effect, in order to ensure adequate remediation or prevention of the denial or abridgment of the right to vote on account of race, color, or previous condition of servitude. The Supreme Court has, without exception, upheld such legislation.¹¹

In ensuring that the exercise of its power is “sufficiently related”¹² to a present need to remedy or deter constitutional violations, Congress has not, to my knowledge, ever used its enforcement power under the Fifteenth Amendment to prohibit practices based purely on a statistical disparity. The preclearance regime of the Voting Rights Act, for example, prohibited discriminatory effects where context demonstrated past misconduct (in need of remediation) and present risk (in need of deterrence). The “results test” of § 2 of the Voting Rights Act is similarly not based purely on electoral results alone; instead, it relies on danger signs demonstrating enhanced risk of perpetuating past or present misconduct. The totality of the circumstances analysis, driven by (but not limited to) the “Senate factors” of the 1982 Senate Judiciary Committee report,¹³ perform this function.¹⁴

That is, when Congress has acted in the past to prohibit practices with a discriminatory effect, it has done so based on at least one of several different ties to the underlying substantive prohibition of the Fifteenth Amendment. Congress has outlawed voting

⁹ *Id.* at 176.

¹⁰ *Tennessee v. Lane*, 541 U.S. 509, 518-19 & n.4 (2004) (noting the existence of this power under both Fourteenth and Fifteenth Amendments); *see also Lopez v. Monterey County*, 525 U.S. 266, 282 (1999) (addressing Fifteenth Amendment enforcement power, relying in part on Congressional ability to deter or remedy violations of the Fourteenth Amendment, even if in the process conduct is prohibited that is not itself unconstitutional).

¹¹ *See, e.g., South Carolina v. Katzenbach*, 383 U.S. 301, 334 (1966); *Oregon v. Mitchell*, 400 U.S. 112 (1970) (literacy tests).

¹² The “sufficiently related” standard reflects language in *Shelby County*. *Shelby County v. Holder*, 133 S. Ct. 2612, 2622 (2013). The Supreme Court has not yet determined whether this standard is closer to the “congruence and proportionality” standard of the Fourteenth Amendment enforcement power, *see City of Boerne v. Flores*, 521 U.S. 507, 520 (1997), or the “rational basis” standard previously applied to the Fifteenth Amendment enforcement power, *see South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966), or indeed, whether there is a meaningful difference between the two. *See Shelby County*, 133 S. Ct. at 2622 n.1; *Nw. Austin Mun. Utility Dist. No. 1 v. Holder*, 557 U.S. 193, 204 (2009). Both standards reflect that there must be some relationship between Congressional enforcement power and the underlying constitutional harm, and that Congress has substantial latitude in choosing means to confront the constitutional harm but may not change the substantive definition of that which constitutes a constitutional violation. *See Justin Levitt, Section 5 as Simulacrum*, 123 *Yale L.J. Online* 151, 172-73 (2013).

¹³ S. REP. NO. 97-417, at 28-29 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 205-06.

¹⁴ Indeed, courts have recognized that, for these reasons, “calling section 2’s test a ‘results test’ is somewhat of a misnomer.” *United States v. Blaine County, Montana*, 363 F.3d 897, 909 (9th Cir. 2004).

practices that are discriminatory in effect based on the recognized difficulty of proving intentional discrimination, which leads to underenforcement of constitutional wrongs; based on the need to stop the perpetuation of the impact of past discrimination; based on the assessment of a contextual risk of present or future discrimination, often with reference to historical patterns; based on the unique and uniquely pernicious incentives that some incumbent policymakers may see in electoral discrimination as a means to preserve power (and a recognition that there are not similarly powerful incentives to discriminate in other arenas); or based on some combination of the above.