

Testimony of
Professor Justin Levitt,
Loyola Law School, Los Angeles

Answers to Supplemental Questions
From the
United States Commission on Civil Rights¹

An Assessment of Minority Voting Rights Obstacles in the United States

March 19, 2018

1. Do you agree with the determination by the DOJ that observers can no longer be sent to formerly-covered jurisdictions, considering the Shelby decision?
-

Regrettably, I feel that I am not at liberty to directly answer the question as to whether I personally agree or disagree with a decision that was made by the Department of Justice, for decisions during my service and in which I was at least partially involved. To do so would reveal details of the deliberation and decisionmaking process with respect to a particular final decision, to much the same degree as would disclosure of an internal memo written to provide considered legal analysis to other decisionmakers. I believe that such a memo would be properly subject to the protections of a deliberative process privilege that is not mine to waive. And I do not believe that it would be meaningfully different to reveal personal agreement or disagreement, an explanation of the grounds for agreement or disagreement, or personal recollection of the terms of any deliberation. I appreciate the spirit in which the question has been asked, but unless I am told that the deliberative process privilege for that decision has been waived or overruled by those with authority to do so, I do not believe that I am at liberty to state or explain either agreement or disagreement.

I do know that the determination regarding observers has been somewhat misrepresented in the press. While it does represent a significant loss for the Department of Justice in the scale and scope of tools available to observe and diagnose the failure to comply with federal law, it does not completely immunize formerly covered jurisdictions against oversight. As mentioned in the written testimony I submitted to the Commission, before *Shelby County*, there were three primary means for the DOJ to monitor the elections process at the polls:

¹ As with my written testimony previously submitted to the Commission, these supplemental responses represent my personal views, offered at the request of the U.S. Commission on Civil Rights and on behalf of no person other than myself, and are not necessarily those of Loyola Law School or any other organization with which I am now or have previously been affiliated.

First, the department sent our own personnel to watch the voting process. Second, the department sent federal election observers who are specially recruited and trained by the Office of Personnel Management (OPM), to jurisdictions that are subject to a pertinent court order. Third, the department sent these federal election observers from OPM to jurisdictions with a need certified by the Attorney General, based in part on the Section 4(b) coverage formula. Much of the federal election monitoring before Shelby County was in this third category.²

The first and second means to observe the elections process are still intact. Indeed, the DOJ may send its own personnel to watch for potential violations of the law, by mistake or malfeasance, anywhere in the country, including to areas formerly covered under Section 4(b) and formerly designated under the authority provided by 52 U.S.C. § 10305(a)(2). The difficulty is that the DOJ's determination in the wake of *Shelby County's* decision concerning the Section 4(b) formula removes the ability to send observers recruited and specially trained by OPM under 52 U.S.C. § 10305(a)(2) to jurisdictions necessarily chosen because they were formerly covered under Section 4(b).

DOJ's own personnel may be sent to these jurisdictions (or any others where there is indication of a need) without special statutory authority to engage OPM. But doing so requires a substantial diversion of resources from other ongoing civil rights enforcement activities, particularly in periods of deployment to many jurisdictions simultaneously. The observers recruited and specially trained by OPM were drawn from a much larger pool of volunteers, including individuals not otherwise presently employed by the federal government, and hence could be sent in greater numbers without significantly impacting other important federal enforcement work. And any limitation on the resources available to DOJ to watch the election process at the polls limits the degree to which the DOJ may develop evidence of legal violations, particularly with respect to violations of federal law that only become manifest (or most clearly become manifest) at the polling place. It also limits the degree to which DOJ presence at the polls may deter misconduct, and contribute to public confidence in the integrity of the election procedures.

2. Do you know why DOJ switched positions in the Texas voter ID and Ohio purge cases? How are these types of decisions normally made? Are career staff involved?

Since my departure from the Civil Rights Division, I have not been privy to decisions about enforcement matters or amicus filings, nor have I been privy to revealed discussions about enforcement matters or amicus filings. And so I do not know why the DOJ adopted its most recent decisions in litigation over Texas voter ID procedures and Ohio purge procedures, beyond general apparent disagreement of political leadership with litigation positions previously adopted by the Department.

² U.S. Dep't of Justice, Civil Rights Div., Fact Sheet on Justice Department's Enforcement Efforts Following *Shelby County* Decision (2016), <https://www.justice.gov/crt/file/876246/download>.

I can describe the (very) general process for such decisions, without breaching any privilege tied to a particular litigation or policy matter. In my primary written testimony to the Commission, I drew attention to several recent filings in ongoing litigation over Texas’s particular voter ID law. The filings I highlighted were filings in trial court; the United States was a plaintiff in the matter, with the litigation authority delegated to the Civil Rights Division in cooperation with the relevant Office of the U.S. Attorney. To the best of my knowledge, standard operating procedure when the United States is a plaintiff in a case primarily delegated to the Civil Rights Division is that trial matters are generally handled by the career attorneys in the appropriate litigating section or sections of the Division, often but not always with the consultation of or review by relevant personnel in the Office of the Assistant Attorney General (the “front office”). In my experience, the signature block on most filings reflects this shared responsibility for normal litigation: the career attorneys with responsibility for the case, including career management of the litigation section, appear on the case, as does the most senior official in the front office with responsibility for review. Reflecting the normal division of authority, the signature itself is most often the signature of one of the attorneys most directly involved in the case, usually a career attorney.

The Ohio purge case arose in a different procedural posture: the United States was not a plaintiff, and the Department of Justice participated solely as an amicus, both in the Sixth Circuit and at the Supreme Court. Such participation is relatively standard for cases involving one of the federal statutes enforced by the Department of Justice, particularly when litigation reaches the Supreme Court. In the Supreme Court, the Office of the Solicitor General has ultimate responsibility for the content of any brief (and for oral arguments, when the United States is granted argument time), whether party or amicus, but that Office will regularly consult the litigating component with primary enforcement responsibility in the development of both briefing and argument with respect to federal statutes enforced by the DOJ. For cases involving a statute enforced by the Civil Rights Division, career attorneys from the primary litigation section, career attorneys from the Civil Rights Division’s Appellate Section, and attorneys from the “front office” of the Civil Rights Division are often involved in assisting the Office of the Solicitor General with developing the government’s position.

As with trial briefs, it is rarely true that every individual in any way associated with a case is listed on the signature block of a brief filed in the Supreme Court. In my experience, the signature block on most Supreme Court filings involving a statute enforced by the Civil Rights Division, whether the United States is a party or participating in an amicus capacity, reflects the career attorneys in the Appellate Section, the career assistant or assistants to the Solicitor General primarily working on the matter, and the senior officials in the Solicitor General’s office and the Civil Rights Division front office with responsibility for review.

In my written testimony submitted to the Commission, I mentioned that the DOJ’s July 2017 interpretation of the scope of appropriate remedial relief for an act of intentional racial discrimination is before the court of appeal; we will know soon enough whether the court believes the DOJ’s argument to be correct. Similarly, the DOJ’s August 2017 interpretation of the protections of the National Voter Registration Act with respect to the purging of individuals without any affirmative evidence that they have become ineligible — an interpretation promulgated in a brief without the acknowledged participation of any career employees in the

Civil Rights Division,³ and which does not appear in the voting-related briefs acknowledged on the appropriate page of the Civil Rights Division's Appellate Section⁴ — is currently before the Supreme Court; we will know soon enough whether the Court believes the DOJ's argument to be correct.

But among these filings, it is worth drawing special attention to the DOJ's approach in a February 2017 filing in the Texas ID case, in part because the legal approach reflected in that filing is unlikely to be directly reviewed by an appellate court. I noted this filing in my written testimony to the Commission, and it is a flag worth raising once more. As you recall, the DOJ was participating as a plaintiff in the case, enforcing the Voting Rights Act against Texas's decision to enact a particular law requiring specific forms of photo identification before eligible citizens could cast a ballot that would count. The complaint sought relief from the statute, and also the imposition of preclearance on Texas under Section 3(c) of the Voting Rights Act, the predicate to which is a constitutional violation: in this context, a finding of intentional discrimination. Career attorneys at DOJ vigorously litigated the intentional discrimination claim for years, including a determination by the trial court that the legislature had, in fact, intentionally discriminated on the basis of race in promulgating the statute.⁵

On February 27, 2017, the DOJ voluntarily dismissed its claim that the statute had intentionally discriminated on the basis of race.⁶ It withdrew from this portion of the case unilaterally, ostensibly because a bill to modify the problematic Texas statute had been introduced in the Texas legislature six days before. At the time that the DOJ voluntarily dismissed this claim, the bill had not yet had a single hearing in the Texas legislature or been considered by a single committee.⁷ Further action on the bill was at the time speculative at best (indeed, it was three months before any action in fact occurred); the bill could have been amended or withdrawn or killed in committee or on the legislative floor at any point. The filing requesting voluntary dismissal of the claim is itself rife with hypothetical possibilities about the speculative potential curative nature of the introduced legislation.⁸ I am not aware of any other circumstance in which the United States government has abandoned a fiercely litigated claim of intentional racial discrimination based on the potential prospect of eventual hypothetical

³ Brief for the United States as Amicus Curiae Supporting Petitioner, *Husted v. A. Philip Randolph Institute*, No. 16-980, 2017 WL 3485554 (U.S. Aug. 7, 2017).

⁴ U.S. Dep't of Justice, Appellate Briefs and Opinions, Voting, <https://www.justice.gov/crt/appellate-briefs-and-opinions> (last accessed Mar. 19, 2018).

⁵ *Veasey v. Perry*, 71 F. Supp. 3d 627, 703 (S.D. Tex. 2014). The decision was vacated and remanded in relevant part for the court to re-evaluate the evidence presented, 830 F.3d 216, 234-35 (5th Cir. 2016) (en banc), and the district court, upon re-weighing, again found that the law had been enacted with discriminatory intent, 249 F. Supp. 3d 868, 871-72 (S.D. Tex. 2017).

⁶ United States's Motion for Voluntary Dismissal of Discriminatory Purpose Claim Without Prejudice, *Veasey v. Abbott*, No. 2:13-cv-00193 (S.D. Tex. Feb. 27, 2017).

⁷ Texas Legislature Online, Actions: SB 5, <http://www.capitol.state.tx.us/BillLookup/Actions.aspx?LegSess=85R&Bill=SB5>.

⁸ Because the United States' motion for voluntary dismissal was unopposed, the district court granted the motion, but in the same order rejected the purported legal basis for the dismissal. *See* Order on Government's Motion for Voluntary Dismissal of Discriminatory Purpose Claim and Assertion of Mootness, *Veasey v. Abbott*, 248 F. Supp. 3d 833 (S.D. Tex. 2017).

legislation, much less a claim of intentional racial discrimination validated by the findings of a federal court.

The brief seeking voluntary dismissal of the claim formerly litigated by the career attorneys of the Voting Section was signed by political appointee John Gore, then just over one month into his service as a Deputy Assistant Attorney General in the Civil Rights Division. The statement certifying that the United States conferred with other counsel in the case before filing the motion was also signed by Mr. Gore. The statement certifying that the document was filed and served via the court's ECF filing system was signed by a career attorney in the Voting Section.