

Questions for the Record Chairman Jerrold Nadler (D-NY)

Hearing on “The Need to Enhance the Voting Rights Act: Practice-Based Coverage”

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1. What constitutional basis does Congress have to pass practice-based coverage that would survive scrutiny from the current Supreme Court?

There are numerous constitutional bases of authority to enact practice-based coverage. The most important of these are the congressional implementation provisions of the Fourteenth and Fifteenth Amendments of the Constitution, and the Elections Clause of the Constitution. The Elections Clause plainly would support practice-based pre-clearance, but only in application to federal elections.

As explained in my written testimony, under its Fourteenth and Fifteenth Amendment authority, Congress could enact practice-based coverage because the formula responds directly to the federalism and equal sovereignty concerns expressed in the Supreme Court decision in *Shelby County v. Holder*, 570 U.S. 529 (2013). By restricting the pre-clearance obligation to specified changes – changes that have historically correlated with efforts at suppression of minority voters -- rather than to all elections-related changes, practice-based coverage limits the intrusion on state policymaking and elections administration, answering the *Shelby County* majority’s federalism concerns.

In addition, by applying to all jurisdictions, rather than to specifically identifiable states or other jurisdictions, practice-based pre-clearance coverage responds to the equal sovereignty concerns expressed by Chief Justice Roberts in *Shelby County*. No stigma would even theoretically attach to any state based on its history or previous policymaking. The only limitation of coverage is based upon demography, which is largely beyond the scope of voluntary policymaking of the jurisdictions that meet the threshold for coverage of specified changes in elections practice. This threshold is a necessary bow to efficiency and cost. It rationally relates to where voter suppression is more likely by excluding jurisdictions that are overwhelmingly comprised of a single racial group.

Some have raised concerns about this threshold because it relies on measures of population by race. These concerns are unwarranted; our Constitution does not

require ignorance of matters like racial differences and their correlation with differences in voting preferences; indeed, the Supreme Court has acknowledged this correlation in its Voting Rights Act Section 2 jurisprudence. Unlike in that context, however, no liability rests in whole or in part on any assumption (versus proof) of that correlation; it merely triggers the application of pre-clearance review, a less costly and more efficient means of addressing potential vote suppression. Moreover, the threshold does not distinguish among the races; all that is required is two racial groups each comprising a significant proportion of those potentially eligible to vote in the near future in the jurisdiction. Although today, one of those two groups, in virtually every jurisdiction, is most likely to be whites, that will almost certainly change over time. Eventually, the threshold will be satisfied by other combinations of two racial groups in a jurisdiction, like Latino-Native American (in New Mexico, perhaps), or Asian American-Latino (in Hawaii, perhaps), or Black-Latino (in Georgia perhaps), or Black-Asian American (in Virginia, perhaps) in specific states or sub-state jurisdictions.

2. How widespread is voter suppression in our country today and, in your opinion, are such efforts increasing? Are the remaining enforceable provisions of the Voting Rights Act adequate to counteract voter suppression measures?

Comparative rates of voter registration and voter participation among racial groups continue to demonstrate that voter suppression – through vote denial, as well as vote deterrence – remains a salient flaw of our democracy. It is one of the unexplained ironies of our national discourse that an election -- the 2020 presidential general election -- that showed unprecedented numbers of voters participating and rates of eligible participation unseen in a century, has not been universally celebrated as a milestone in reducing voter suppression, but has instead been used to justify increased efforts to reduce voter participation in future elections.

The fact that one presidential candidate has refused to date to accept the legitimacy of his own substantial defeat at the polls is currently being used to justify new voter suppression proposals in too many states across our country. The unprecedented egotism of Donald Trump, despite positive past examples from presidents of both parties in graciously accepting electoral defeat, has led to an attempted insurrection and is currently catalyzing too many attempts at suppression of minority voters.

Unfortunately, this continues a recent pattern of increasing voter suppression efforts. This longer-term increase stems from ongoing demographic changes,

including in particular the unprecedented growth of the Latino voting community. These changes are perceived as threatening to the long-term privilege of those currently in power who have not garnered support among ascendant minority voter groups. The reaction of too many is not to change policy positioning to appeal to the voter groups in ascendance, but to engage in expanded efforts at voter suppression. These suppression efforts have taken the form both of new or revamped mechanisms to obstruct, such as restricting access to food and water while waiting in line to vote, as well as through the proliferation of longstanding mechanisms to suppress meaningful participation, such as targeted voter purges, creation of at-large elected positions, and precinct changes that do not respond to recent experience. The expected continued national demographic change, affecting more and more parts of the country, does not present reason for optimism that voter suppression will diminish nationwide in ensuing years.

While litigation, by private parties and by the Department of Justice, under Section 2 of the Voting Rights Act remains a powerful means to stop voter suppression that has significant effects on minority voters, such litigation is not sufficient to face the current and future potential for elections changes tied to voter suppression. As explained in my written testimony, litigation under Section 2 is costly – in direct resources and opportunity costs – and time-consuming. The alternative dispute resolution (ADR) mechanism of pre-clearance review benefits jurisdictions by dramatically reducing their costs in defending potential elections changes, and benefits voting rights by yielding more timely resolution of voting rights disputes. Litigation under Section 2 is too often unable to secure resolution before any election moves forward with the taint of voting rights violations attached.

Resources are simply insufficient to challenge all voter suppression measures under Section 2. When resources are insufficient, too many jurisdictions will gamble that they can violate voting rights without ever being restrained or at least not until numerous elections have occurred, with the attendant damage of voter suppression affecting the outcomes. Such gaming of the system, catalyzed by inadequate resources to challenge all instances of voter suppression nationwide, would undermine confidence in our democracy and present a clear constitutional crisis.

3. How widespread is voter fraud in our country today? Does the amount of voter fraud in the United States justify current state-based efforts to restrict the vote?

There is no credible evidence of widespread voter fraud, in any form, in the United States going back many decades. Isolated instances of voting by ineligible persons

have never emanated from any proven conspiracy and have never amounted to quantities sufficient to remotely affect the outcome of elections. The absolute absence of any evidence of significant voter fraud is undoubtedly what led to the early termination of the much-vaunted Trump administration Presidential Advisory Commission on Election Integrity, led by Mike Pence and Kris Kobach, which pursued its work in a very non-public manner and then was swiftly disbanded without producing any public finding. Furthermore, with respect to the 2020 presidential election, absolutely no evidence supports the Big Lie. Despite review in multiple federal courts, no credible evidence of fraud has emerged with regard to the unprecedented turnout in the November 2020 election.

Available evidence of voter fraud, or more accurately the complete absence of evidence, does not remotely justify substantial changes in the process of voting in any state of the nation. Instead, these state-based efforts seem to be grounded in the worst sort of bootstrapping: proponents perpetuate false narratives of voter fraud that undermine public confidence in election integrity; then, the reduction of public confidence in election integrity is used to justify measures that suppress voter participation, particularly among new and infrequent voters. To be clear, evidence of voter fraud does not support any of these measures; false narratives intended to undermine public confidence create a very thin and flimsy facade of legitimacy for these measures as needed to bolster public confidence in election integrity.

4. How do voter suppression measures today compare to the Jim Crow era?

I am aware of no one who would suggest that voter suppression anywhere in the country today has reached the level of the Jim Crow era, when huge proportions of the legitimate electorate were completely barred, on the basis of their race, from casting an effective vote, through multiple suppressive mechanisms, formal and informal. But, this issue is a canard put forward by those interested in perpetuating voter suppression that, while not as complete in effect as during the Jim Crow era, would still have outcome-determinative impacts on local, state, and even national elections.

The Fourteenth and Fifteenth Amendments of the United States Constitution do not solely protect against a resumption of the Jim Crow era. They exist to protect against any deprivation of the right to vote on the basis of race or ethnicity, including deprivations that could affect the outcome of democratic elections. Because both amendments predate the Jim Crow era, it is certainly true that congressional inaction to enforce the amendments following the notorious

Compromise of 1877 contributed to the initiation and continuation of the Jim Crow era; however, that failure to act does not mean that congressional action to enforce is only appropriate when depredations of right approaching the level of Jim Crow are threatened.

Congress can and should step in whenever the right to vote is threatened on the basis of race. Today, we face both new and crafty means to discourage, deter, and prevent voters of color from casting an effective vote, as well as the further proliferation of long-used mechanisms to stem the growing power of ascendant minority group voters. Congress can and should act in response to these developments whether or not they come close to the voter suppression practiced during the Jim Crow era.

5. Why does the Voting Rights Act allow private parties to enforce preclearance obligations?

To be clear, the pre-clearance system is largely driven by the jurisdictions submitting elections-related changes, including identified practices, for pre-clearance, and by the Department of Justice (DOJ) and its Voting Section, which conducts pre-clearance review. While there is opportunity for interested private parties to provide input during the DOJ review process (and this is why pre-clearance constitutes a powerful and efficient mechanism of alternative dispute resolution (ADR)), the Department weighs that input and makes an independent determination of whether the submitted change satisfies the Voting Rights Act (VRA) criteria for pre-clearance. Thus, private parties have a limited role in pre-clearance as determined by DOJ. Private parties cannot enforce pre-clearance obligations, for example, by themselves submitting a change contemplated by a jurisdiction and asking DOJ to disapprove it.

Certainly, where a jurisdiction exercises its VRA-granted right to seek pre-clearance, *see* 52 U.S.C. § 10304(a), from the U.S. District Court for the District of Columbia rather than from DOJ, private parties may, and frequently do, intervene to participate in those court actions to present evidence and legal argument about the presented change. Still, the decision to forego the ADR process of DOJ review and instead to seek court adjudication belongs entirely to the jurisdiction. A private party may not, for example, decide that it does not trust the DOJ and its pre-clearance review and seek to transfer the process to the D.C. court; private parties have no rights in this regard. The decision to go to court belongs solely to the jurisdiction seeking to implement the change that is subject to pre-clearance review.

In fact, the only way that private parties “enforce” pre-clearance obligations is through the right to file a federal-court action when a jurisdiction implements an elections-related change without obtaining pre-clearance where the law requires it to do so. In these actions, the sole questions are whether the change required pre-clearance review and approval, and if so, whether the approval had been obtained before implementation of the contemplated change. This very limited private involvement in enforcement is a recognition that DOJ could not possibly monitor all elections-related changes being implemented in thousands of jurisdictions nationwide. We must rely on private parties to surface changes not presented for pre-clearance review, or too many jurisdictions would simply ignore the pre-clearance obligation and take the gamble that DOJ would not catch them in a timely fashion.

6. How can the Congress best address any diminution in public confidence in the integrity of elections?

The main driver of any diminution in public confidence in the integrity of elections is the perpetuation and propagation of false narratives about the existence and dangers of voter fraud in our current elections systems. Under the First Amendment, of course, Congress can do nothing to restrict the trafficking in false information that we see from political leaders as well as from irresponsible media, including social media, outlets and platforms. Efforts in this regard must be hortatory and emanate from groups of leaders rather than from Congress as a body.

Of course, some of what drives the success of these false narratives is confirmation bias; people are too ready to accept election fraud as an explanation for why the candidate that they favored lost, no matter how badly he or she may have lost. Congress can do nothing formally in this regard, but its leaders can model better behavior, by accepting electoral loss with grace and with an intent to move forward as critical opposition in bipartisan lawmaking, rather than as mindless obstructors of any and all policy initiatives of those who won. As a body, Congress can do what it can to bolster the public availability of evidence that demonstrates strong reason to have confidence in election integrity. These efforts must be bipartisan and consistent, perhaps in the form of a blue-ribbon task force to (again) review election integrity issues.

Lack of familiarity with various specific election processes also permits false narrative to take stronger hold. Donald Trump, who had himself used remote voting in the past, was only able to undermine confidence in remote voting through his onslaught of lies because too many in the electorate are unaware of the specific

mechanics of remote voting. This is because, in too many states, vote-by-mail is unduly restricted to the elderly and some of the disabled. Thus, Congress can increase the overall level of experience with specific electoral processes by working to broaden the availability and use of such specific processes.

In a related vein, widening divergence in voter experience between states contributes to the public lack of familiarity with electoral processes. As the chasm in voter experience between states increases, voters will find it more and more difficult to accept election integrity with regard to other states' processes that are increasingly unfamiliar and dissimilar to their own voter experience. Congress can address this problem by working, through its Elections Clause authority, for example, to introduce greater uniformity in voter experience from state to state. The National Voter Registration Act (NVRA) made strides in this regard, at least with respect to the registration process. Congress needs to attempt more of this greater uniformity, and therefore common familiarity, with respect to other aspects of the voting experience.

Finally, anything that increases eligible voter participation will increase public confidence in election integrity by increasing those who have experience with complete, unobstructed participation and by increasing the perspective that our elections do in fact reflect the preferences of all the people. In this regard, steps like enacting the John Lewis Voting Rights Advancement Act would itself increase, over time, public confidence in the integrity of elections.