

RESPONSE TO QUESTIONS FOR THE RECORD
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For a Hearing On

Modern-Day Voting Discrimination in Alabama

Submitted to the Subcommittee on the Constitution, Civil Rights, and Civil
Liberties of the U.S. House Committee on the Judiciary

Hearing on March 1, 2024

Submitted on March 25, 2024

QUESTIONS FROM SENATOR BOOKER

1. You have litigated numerous voting rights cases. Based on that experience, what are some of the limitations of relying on case-by-case litigation to address discriminatory voting practices, compared to the proactive preclearance regime that existed before the Supreme Court's decision in *Shelby County*?
2. You noted that Alabama continues to enact policies that exploit racial disparities in socioeconomic status, transportation access, and other areas to create barriers to voting. How do these types of issues interact with and magnify the impact voter suppression tactics?

RESPONSE TO QUESTION ONE

Question: You have litigated numerous voting rights cases. Based on that experience, what are some of the limitations of relying on case-by-case litigation to address discriminatory voting practices, compared to the proactive preclearance regime that existed before the Supreme Court’s decision in *Shelby County*?

Answer:

Prior to the Supreme Court’s decision in *Shelby County v. Holder*, the state of Alabama was subject to the “preclearance” requirements¹ of Section 5 of the Voting Rights Act.² Under Section 5, before a state could implement any new law or change in voting, they had to submit the proposed change for “preclearance” approval to either the Attorney General or a three-judge panel.³ The State had to demonstrate that the proposed change did not have the purpose or effect of “diminishing the ability” of voters to vote or denies or abridges their ability to elect candidates of choice on account of race or color,”⁴ If the State did not get approval, they were not able to implement the new law or procedural change.

Alabama had a variety of proposed voting laws or procedures blocked through the Section 5 preclearance regime, including redistricting plans, changes to method of election, candidate qualifying procedures, voter registration procedures, voter purge and reidentification procedures, candidate nominating procedures, and even the annexation of a school district.⁵ However, the employment of pre-clearance

¹ Section 4 of the Voting Rights Act outlined the “coverage formula,” which defined which states or political subdivisions had to submit to Section 5 preclearance. The formula identified jurisdictions which had a history of racial discrimination in voting. Specifically, the formula looked at the voting patterns, practices, and procedures in 1964, 1968, and 1972. “The Voting Rights Act of 1965: Background and Overview,” Congressional Research Service, Updated July 20, 2015, access on February 26, 2024,

<https://crsreports.congress.gov/product/pdf/R/R43626/15#:~:text=The%20Voting%20Rights%20Act%20was,preclearance%20of%20new%20laws%20in.>

² James Blacksher, Edward Still, Jon M. Greenbaum, Nick Quinton, Cullen Brown & Royal Dumas, Voting Rights in Alabama: 1982-2006, 17 S. CAL. REV. L. & SOC. JUST. 249 (2008).

³ “The Voting Rights Act of 1965: Background and Overview,” Congressional Research Service, Updated July 20, 2015, access on February 26, 2024, <https://crsreports.congress.gov/product/pdf/R/R43626/15#:~:text=The%20Voting%20Rights%20Act%20was,preclearance%20of%20new%20laws%20in.>

⁴ 52 U.S.C. § 10304(b)–(d).

procedures, which had prevented Alabama from implementing discriminatory voting laws or procedures for years, abruptly ended when the Supreme Court handed down their 5-4 decision in *Shelby County, Ala. v. Holder*.

Since the decision in *Shelby County*, the main protection the Voting Rights Act affords is found under Section 2. Section 2 prohibits jurisdictions from imposing qualifications, standards, practices, or procedures to deny or abridge the right to vote on account of race, color, or membership in a language minority group.⁶ While Section 2 applies nationwide, and does not have a sunset provision, it is a markedly different tool – and no substitute for – Section 5 preclearance.

First, unlike Section 5 preclearance, plaintiffs may only raise a challenge *after* the potentially discriminatory law or procedure is enacted. This means that even if a lawsuit is filed, the law or procedure may remain in place during election cycles, unless a preliminary injunction is granted, or the lawsuit is eventually resolved. This is even more likely over the last decade due to the expansion of the so-called *Purcell* doctrine, where the Supreme Court has repeatedly blocked lower court orders enjoining discriminatory election laws enjoined within a few months of an election.⁷

Relatedly, even successful case-by-case litigation in the voting rights context is unable to provide full and adequate remedies. Unlike other forms of civil rights litigation, in which impacted persons can be made whole through monetary damages, elections are different. If an election occurs under unconstitutional conditions, the rights of citizens who were impacted by the discriminatory regime have been permanently compromised because an election cannot be re-done. Officials, elected when discriminatory laws and procedures are in place, are not only able to make policy while in office, but also gain the benefits of incumbency. Unlike preclearance regimes, case-by-case litigation can only combat discrimination in future elections: it is unable to provide remedies to victims of an already enacted discriminatory voting regime.

Next, case-by-case litigation requires plaintiffs to go to court to litigate their claims – a process which may take years and often cost millions – to even have an opportunity for a judge to strike down the law or order that the practice must temporarily stop. This is a reality that even the Supreme Court has recognized: “§ 2

⁶ “The Voting Rights Act of 1965: Background and Overview,” Congressional Research Service, Updated July 20, 2015, access on February 26, 2024, <https://crsreports.congress.gov/product/pdf/R/R43626/15#:~:text=The%20Voting%20Rights%20Act%20was,preclearance%20of%20new%20laws%20in.>

⁷ See, e.g., Emily Rong Zhang, *Voting Rights Lawyering in Crisis*, 24 CUNY L. Rev. 123, 137–38 (2021).

litigation in recent years has rarely been successful” and “[s]ince 2010, plaintiffs nationwide have apparently succeeded in fewer than ten § 2 suits.”⁸

Voting rights litigation is resource intensive. It is particularly onerous today because modern voting discrimination is often more subtle than the methods employed when the Voting Rights Act was first enacted. Accordingly, modern voting rights litigation requires expansive investigation, election data, experts versed in complex statistical analysis, historians, social scientists, witnesses – including candidates, elected officials, and community members, in addition to attorneys and plaintiffs. It is therefore common for litigation costs to range from hundreds of thousands of dollars to millions. While costs may eventually be recovered, resource-strapped communities, non-profit legal organizations, and local civil rights attorneys still have to pay these expenses up front, with no guarantee that these expenses will be recouped. Beyond the parties themselves, the Section 2 litigation process can be costly for taxpayers, who must foot the bill if congressional maps are struck down.

Even if impacted voters can muster the resources to bring a lawsuit, these lawsuits regularly take years to be resolved. For example, *Allen v. Milligan* was originally filed on November 16, 2021.⁹ Although the plaintiffs obtained a preliminary injunction against the law in advance of the 2022 elections, the Supreme Court stayed that order while reviewing the case on the merits.¹⁰ The Court ultimately affirmed the preliminary injunction on June 8, 2023,¹¹ but in the meantime an entire election cycle passed in which Black Alabamians voted in racially dilutive districts. Even still, the clock continues to run on this litigation as it took over a year to resolve the question of preliminary relief: the case has not even gone to trial yet. Case-by-case litigation is not well-suited for an urgent political process, which – irrespective of pending litigation – holds annual elections. Both the cost and time-intensive nature of these cases, make case-by-case litigation an insufficient tool to protect voting rights and stop jurisdictions from discriminating against its minority citizens.¹²

⁸ *Allen v. Milligan*, 599 U.S. 1, 29 (2023).

⁹ Compl., No. 2:21-cv-01530-AMM, ECF No. 1 (N.D.A. Ala. Nov. 16, 2021).

¹⁰ *Merrill v. Milligan*, 142 S. Ct. 879 (2022).

¹¹ *Allen v. Milligan*, 599 U.S. 1 (2023).

¹² *South Carolina v. Katzenbach*, 383 U.S. 301, 314 (1966) (“Voting suits are unusually onerous to prepare, sometimes requiring as many as 6,000 man-hours spent combing through registration records in preparation for trial. Litigation has been exceedingly slow, in part because of the ample opportunities for delay afforded voting officials and others involved in the proceedings. Even when favorable decisions have finally been obtained, some of the States affected have merely switched to discriminatory devices not covered by the federal decrees or have

Third, the victims – not perpetrators – of voting discrimination have the burden of proving their claims in case-by-case litigation. This is a marked departure from the prior preclearance regime. Under the previous Section 5 preclearance regime, covered jurisdictions had the limited burden of proving that their proposed changes in voting laws or procedures did not have the purpose or effect of discriminating against minority voters. However, in case-by-case litigation, the burden is on the victims of discrimination to prove that the challenged practice resulted in a denial or abridgment of the right to vote based on race, color, or membership in a minority language group: shifting the “advantage of time and inertia” back to the perpetrators of discriminations.¹³

In sum, case-by-case litigation is insufficient to address and remedy discriminatory voting laws and procedures due to the financial, legal, and time burdens imposed on the victims of discrimination to adjudicate their claims. Even successful Section 2 litigation is inadequate to remedy the impact of discriminatory voting regimes, as – unlike relief which can be quantified in monetary terms – there is no relief for the irrevocable impact of multiple election cycles which may have taken place under unconstitutional conditions.

enacted difficult new tests designed to prolong the existing disparity between white and Negro registration.¹⁹ Alternatively, certain local officials have defied and evaded court orders or have simply closed their registration offices to freeze the voting rolls.”).

¹³ *South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966).

RESPONSE TO QUESTION TWO

Question: You noted that Alabama continues to enact policies that exploit racial disparities in socioeconomic status, transportation access, and other areas to create barriers to voting. How do these types of issues interact with and magnify the impact voter suppression tactics?

Answer:

Political scientists have repeatedly affirmed that access to resources is an important factor in whether an individual votes because “socioeconomic status is related to the available time, money, and civic skills an individual can devote to overcoming the cost of voting.”¹⁴ It is both a historic and contemporary reality¹⁵ that the state of Alabama has intentionally constructed systems which “keep its black citizens economically, socially, and politically downtrodden, from the cradle to the grave.”¹⁶ These well-documented disparities in educational attainment, socioeconomic status, and access to transportation are further exploited by voting laws and procedures, which suppress and dilute the voting power of Black Alabamians.

In a decision affirmed by the Supreme Court, a three-judge court credited testimony that “because white Alabamians tend to have more education and therefore higher income than Black Alabamians, they tend to be better able than Black Alabamians to afford a car, internet service, a personal computer, or a smart phone; ... take time off from work; ... afford to contribute to political campaigns; ... afford to run for office; ... [and to] have access to better healthcare,” and (2) that “[e]ducation has repeatedly been found to correlate with income [and] independently affects citizens’ ability to engage politically.”¹⁷

¹⁴ Expert Report of Dr. Traci Burch in *Stone v. Allen*, No. 2:21-cv-01531-AMM (N.D. Ala. Feb. 2, 2024).

¹⁵ Mann, Bryan. and Rogers, Annah. (2021), Segregation Now, Segregation Tomorrow, Segregation Forever? Racial and Economic Isolation and Dissimilarity in Rural Black Belt Schools in Alabama. *Rural Sociology*, 86: 523-558 and “Justice Department Secures Resolution in Madison County, Alabama, School Desegregation Case.” Available online <https://www.justice.gov/opa/pr/justice-department-secures-resolution-madison-county-alabama-school-desegregation-case>. Accessed 29 Jan 2024.

¹⁶ *Dillard v. Crenshaw Cnty.*, 640 F. Supp. 1347, 1357 (M.D. Ala. 1986), order dissolved, No. CIV.A.2:85CV1332-MHT, 2006 WL 3392071 (M.D. Ala. July 31, 2006), and order dissolved, No. CIV.A. 2:85CV1332MHT, 2006 WL 3923887 (M.D. Ala. Oct. 3, 2006).

¹⁷ *Milligan v. Merrill*, 582 F. Supp. 3d 924, 1022 (N.D. Ala. 2022), *aff’d sub nom. Allen v. Milligan*, 599 U.S. 1 (2023).

Statewide, Black Alabama households are “more than twice as likely to lack access a vehicle than White Alabama households.”¹⁸ In many states, no-excuse absentee voting offsets the issues individuals’ without transportation face in being able to cast their ballot. Despite the lack of public transportation infrastructure and marked disparities in access to a vehicle, Alabama is just one of fourteen states without no-excuse absentee voting and one of just four states without early in-person voting. Rather than provide a broad right to vote absentee for elderly individuals or for all individuals with a disability, Alabama restricts absentee voting to a limited category of voters.

Alabama’s voting laws not only fail to consider and provide remedies for the socioeconomic disparities which impact voting ability, but actively exploit these disparities. In 2014, Alabama implemented strict voter ID laws, which required citizens to show a limited number of state-issued photo IDs to vote. At the same time, Alabama proposed the selective closure of 30 licensing offices, where Alabamians could obtain these IDs.

An investigation by federal transportation officials concluded that the office closures would disproportionately impact Black residents in the Black Belt region.¹⁹ Alabama’s Black Belt region is predominately rural. The lack of transportation infrastructure in the region already impacted its resident’s ability to access the ballot, but the proposed office closures would have left 12 to 15 counties in the region with no place to obtain the most common form of identification used at the polls.²⁰

In 2020, a federal court explained how Alabama’s restrictive absentee voting laws “disproportionately disadvantaged the rural Black citizens who historically relied on absentee voting . . . [b]ecause these citizens regularly worked long hours outside their counties and often lacked access to vehicles, they struggled to reach ‘far-flung polling places’ on Election Day.”²¹

A February 2020 report by the Alabama Advisory Committee to the United States Commission on Civil Rights echoed these findings:

¹⁸ Burch Expert Report.

¹⁹ Melanie Zanona, “Feds: Closing driver's license offices in Ala. violates civil rights,” *The Hill*, Dec. 28, 2016.

²⁰ Kyle Whitmire, “Voter ID and Driver’s License Office Closures Black-Out Alabama’s Black Belt,” *AL.com* (Sep. 30, 2015).

²¹ *People First of Alabama v. Merrill*, 491 F. Supp. 3d 1076, 1107 (N.D. Ala. 2020) (internal citations omitted).

The impact of this law on marginalized populations becomes apparent when considering how one might acquire a form of identification the law requires. Recent efforts by the state to close or limit hours at MVD offices, courts, libraries, and other public places where voters might acquire the necessary identification to vote has rendered the photo identification law in Alabama a significant barrier for poor, minority and rural populations in the state.²²

It is not merely that these socio-political disparities exist, or that they alone contribute to disparities in voter access and turnout, but also that the Alabama legislature continues to implement facially neutral laws which further entrench and exploit these factors to suppress Black voting power.

²² “Barriers to Voting in Alabama,” Alabama Advisory Committee to the United States Commission on Civil Rights (Feb. 2020), <https://www.usccr.gov/files/2020/2020-07-02-Barriers-to-Voting-in-Alabama.pdf>.