

Senate Committee on Homeland Security and Governmental Affairs

Testimony of Judge Ken Starr

December 16, 2020

Chairman Johnson, Ranking Member Peters, and Members of the Committee:

“We the People...”

These are the elegant words that introduced the world to America’s Constitution. Launched in Philadelphia in the late 18th Century was a bold experiment in government of and by and for the people. At the time, in the most democratic founding document in human history, the Constitution of the United States looked ahead to ever-expanding participation in the fundamental act of the American experiment. – the right of “We the People” to vote. As the Supreme Court has aptly put it, “the right to vote is...a fundamental political right...preservative of all rights.”

As our nation’s experiment in participatory democracy continued, America’s Founding document provided the vehicle for ever-greater inclusion. Under the authority of Article V, the post-Civil War Congress proposed a far-reaching expansion of the franchise to welcome those who had previously suffered through the unspeakable scourge of slavery. The 15th Amendment served as the capstone of the trio of post -Civil War Amendments, abolishing slavery; guarantying equal protection and due process to all persons; and finally, conferring the right to participate in our constitutional democracy on the newly-freed slaves.

With the franchise expanding came – one hundred years ago -- the inclusion of women-- in 1920 -- by virtue of the 19th Amendment; the elimination of financial impediments to vote (the 24th Amendment in 1964); and finally, in the wake of the Vietnam War, the expansion of the vote in federal elections to welcome 18 year-olds (the 26th Amendment in 1971). Along the way,

Congress acted to foster the values of the 15th Amendment through passage of the Voting Rights Act of 1965 and its various extensions over time.

From the beginning, the structure of federal elections, including the election of the President, was a matter primarily entrusted to the States, and specifically to state legislatures. It was not to Governors or other state administrative officials, but to the Legislatures, that the Constitution looked, including the manner of choosing Electors who would convene to determine the next occupant of the White House.

Thus, both Article I and Article II of the Constitution single out state legislatures as the authoritative source of power in framing the architecture of voting. In particular, Article II, section 1, cl. 2, provides: “Each State shall appoint, in such Manner as the Legislatures thereof may direct, a Number of Electors....” That authority, the Supreme Court reminded us in *Bush v. Gore*, is “plenary” in nature. What the legislature says, goes. As we saw dramatically in the *Bush v. Gore* litigation, States – and their subdivisions – are where the action is.

Underlying America’s story of ever-expanding voting rights was an assumption – one of integrity in the electoral process. Recall the scene in the Academy Award winning film, *Selma*, as the would-be voter, portrayed by Oprah Winfrey, was unconscionably stymied in her effort to register to vote. Dishonesty caused disenfranchisement – and moral outrage.

As in much of life, guardrails are needed in the election process. Or in the words of the United States Supreme Court, “procedures and safeguards are necessary” to enforce this fundamental right, including – again in the words of the Supreme Court – “prevention of fraud and corrupt practices.”

The idea of removing artificial barriers to citizen participation was thus undergirded by the assumption of honest and honorable elections. Under the Constitution, how can the American public be assured of honesty and integrity in the election process? Once again, it is up to the States through their legislatures to erect appropriate checks and balances to keep the voting process – and the counting of the votes -- honest.

Among these guardrails of integrity is the simple idea of proof of voter eligibility. Or, on Election Day, the familiar scene of poll watchers, which Michigan calls “challengers.” As the U.S. Supreme Court has succinctly put it, “confidence in the integrity of our electoral process is essential to the functioning of our participatory democracy.” The Court went on to say: “Voter fraud drives honest citizens out of the democratic process and breeds distrust of our government.”

Time and again, courts have warned – and in the strongest terms-- that assuring honesty and integrity in elections is a compellingly important government interest. Indeed, Justice Sandra Day O’Connor – who herself had been elected to state office in Arizona – specifically warned that judicial intervention may be required in order to protect the integrity of the election process.

The presidential election of 2020 – with its unusual and indeed unprecedented features – provides an important occasion for lawmakers to pause and to ponder safeguards of honesty. By way of example, one Pennsylvania judge concluded that state law required poll watchers to be present (within six feet) in order to meaningfully to observe the ballot-counting process. In Philadelphia, election officials had indisputably violated this pro-integrity measure. This is a clear and undisputed instance where a crucial safeguard – ensuring the integrity of the ballot-counting process – was thrown by the wayside.

Likewise, the Pennsylvania General Assembly's duly enacted law governing the timing for receipt of mail-in ballots across the Commonwealth was entirely ignored. The Supreme Court, through Justice Samuel Alito, issued a strong condemnation of the Pennsylvania Supreme Court's actions in extending the deadline contrary to state law.

Other witnesses will describe additional factual scenarios that merit careful consideration as we seek to foster confidence in the integrity of the process. These examples all raise troubling questions, especially in the context of the unprecedented use of mail-in ballots during last month's election. After all, it was the Jimmy Carter-James Baker commission, formed in the wake of the 2000 election, that issued a warning about the use of mail-in ballots. That method of voting, they warned, provides fertile ground for a harvest of fraud and abuse. In the spirit of President Carter and Secretary Baker, it is not only useful, but it is important to reflect on the election just past and, with an open mind, soberly assess whether the appropriate safeguards were effectively in place and whether improvements are now called for.

As the Governor of my home State, Greg Abbott, aptly stated one week after the election: "Regardless of party affiliation, or no party affiliation, all Americans must have confidence in the accuracy and transparency of our elections. That can be achieved and must be done...."

Thank you, Mr. Chairman. I look forward to the Committee's questions.