WAS IT RACE OR REFORM?
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On July 29, 2016 a three judge panel of the Fourth Circuit Court of Appeals threw out five election reforms, just in time for the November 2016 elections. The Court threw out voter ID, fewer early voting days but more convenient hours, an end to precinct voting, same day registration and preregistration for 16 and 17-year-olds. (The Court never mentioned that 17-year-olds who will be 18 before the general election not only preregister but also vote in primaries while still 17.)

Governor Pat McCrory has asked the U.S. Supreme Court to stay (stop) this decision (here). Attorney General Roy Cooper has refused to assist the State in this appeal. Let's look at the merits of the appeal:

Courts of Appeals are not supposed to "find" facts. Their job is legal conclusions. The Fourth Circuit instead made findings that all these election reforms were motivated by the intent to discriminate against African-Americans.

On Saturday, July 30 I read in the New York Times of the "scurrilous attempt by North Carolina Republicans to suppress the rising power of black voters." It made me feel bad that maybe I had missed something in the 25,000 pages of exhibits or in the 479 pages of the trial judge's analysis of the evidence. But I had not yet read the decision. After reading the decision a few days later I was perplexed, amused, and angry. I was perplexed because the appeals court decision ignored Supreme Court precedents, amused because the "evidence" marshaled by the Fourth Circuit to support its "fact-finding" was in turns ludicrous or logically fallacious. I was angry because the overwhelming will of the people had been thwarted under the guise of combating racism.

What was the proof that the Fourth Circuit found of legislative racism? Not much. On page 56, the opinion makes clear that

> "[O]ur conclusion does not mean, and we do not suggest, that any member of the General Assembly harbored racial hatred or animosity toward any minority group."

In other words, without any evidence that any of the 170 members of the General Assembly, Republican or Democrat, black, white or Indian, men or women, were intending to discriminate against African-American voters, the Fourth Circuit pinned on the collective body an intent which there was no evidence that any member harbored.

The Court marshalls one argument on page 47, footnote 7. At one of the public hearings Don Yelton, a GOP precinct chair, delivered a baldly racist statement. The Court even cited his call-in to the Daily Show!! The court said:

> "The statements do not prove that any member of the General Assembly acted with discriminatory intent. But the sheer outrageousness of these public statements by a party leader does provide some evidence of the racial and partisan political environment in which the General Assembly enacted the law."

With over 150 statements made at the public hearings, that was the best evidence they could find. If a "party leader" such as the chairman of the state party had made such a statement it would have been grounds to remove that leader from her position. But under no circumstances can the statement by a party leader mean that any member of the assembly paid any attention to it. Guilt by association is McCarthyism at its worst. In this case the "party leader" was a precinct chair. How many votes does it take to be elected as a precinct chair? In most cases your own one vote is sufficient. Occasionally the vote required may be yourself and your spouse or one friend. This particular "party leader" is known to be constantly at odds with real party leaders for many years. The idea that his statement should be attributed in any respect whatsoever to the General Assembly is ludicrous.

The second piece of evidence is found at page 48, the smoking gun. The sponsors of the bill requested racially disaggregated data of various election methods. This request was made pre-Shelby, before the US Supreme Court declared unconstitutional certain provisions of the Civil Rights Act that required preclearance by North Carolina to changes in election law. It would have been legislative malpractice for the sponsors of the bill to have not requested this data prior to Shelby. The District Court carefully explained this in its 479 page opinion but the Court of Appeals, which is not supposed to find facts, ignored this obvious fact found by the District Court.

A third "evidence" of discriminatory intent was the passage of the bill right after Shelby. The house bill was filed and considered well prior to Shelby. Although they spoke against it Democratic leaders in the House complemented the Chair of the Election Law Committee, Representative Lewis, for a thorough and proper process. After Shelby the Senate rules chair said there would be an "omnibus bill." The Fourth Circuit apparently thought the word "omnibus" had the same meaning as "ominous" and that it suddenly sprang out of the sea foam of the Aegean, like Aphrodite. But that is not what happened at all. The legislation which the Senate added to the House bill had been filed in the Senate for months.

The Fourth Circuit, engaging in the logical fallacy identified by Aristotle 2500 years ago as "post hoc ergo propter hoc," decided that the bill was passed because of the unprecedented gains of African-Americans in electing Democrats in 2012 and that suddenly this bill became law in 2013 when Shelby gave the green light. But nothing of the sort happened: first, there were unprecedented gains of African-Americans in the elections to the state House and Senate in 2012. But that did not help Democrats. In

fact Democrats had their worst election in 144 years, losing to super majorities in the House and Senate and the governorship, and with Republicans retaining a majority on the Supreme Court. Neither did these reforms come because of Shelby. In fact voter ID, in particular, came out of the 2000 Bush/Gore razor thin election in Florida, which was followed by the Jimmy Carter/James Baker report in 2005 which advocated photo ID, Republicans filed voter ID bills in 2003 HB 100, filed in 2005 HB 794, filed in 2007 HB 185, in 2009 HB 430.

To say that voter ID photo came because of Shelby is ludicrous. In 2010 House and Senate Republicans, then in the minority, made, as part of their 10 point campaign platform, photo voter ID as one of the laws they would pass within the first hundred days if they were given a majority. In 2011 House Bill 351 "Restore Confidence in Government" was passed by the House and Senate and vetoed by Governor Perdue, a Democrat. Voter ID in 2013 was passed then because its supporters finally had a governor who would sign it.

Interestingly in April 19 of this year (2016) the Elon University poll confirmed that North Carolinians overwhelmingly support voter ID legislation. This includes two thirds of African-American voters and three fourths of Democratic voters as well as even larger majorities of Republicans and unaffiliated voters.

Strangely the Fourth Circuit threw out the reform of voting hours for early voting. This made early voting much more convenient for voters, especially African-Americans, and reform resulted in large increases (while white participation was much less) in African American participation in 2014 compared to the 2010 equivalent elections. But the Fourth Circuit did not even acknowledge that the hours were kept equivalent, until Footnote 9 on page 52 rejected this aspect of reform stating

> "A critical problem with the state's argument is that the law provided that any county could waive out of this requirement, and, in 2014, about 30% of the counties did waive out of the requirement."

The Fourth Circuit was apparently unaware of the law that required that any waiver be supported by a unanimous vote of the county board of elections and a unanimous vote of the State Board of Elections. This means that the local Democrat party and the state Democrat Party would have had to agree that in that particular circumstance a waiver was appropriate.

The matter is now before the US Supreme Court. We will see if that court has the willingness to cut through the chaff published by the Fourth Circuit and restore some sanity and predictability to the 2016 election.

No thanks to Roy Cooper, who threw his client, the State of North Carolina under the bus in the fourth quarter. It is time for him to resign since he has neither the time nor the inclination to do the job he is paid to do.