

U.S. COMMISSION ON CIVIL RIGHTS

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BRIEFING

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FRIDAY, JUNE 6, 2008

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The meeting convened in Room 540 at 624 Ninth Street, N.W., Washington, D.C. at 9:30 a.m., Abigail Thernstrom, Vice Chairman, presiding.

PRESENT:

ABIGAIL THERNSTROM, Vice Chairman
TODD GAZIANO, Commissioner
GAIL L. HERIOT, Commissioner
PETER N. KIRSANOW, Commissioner (via telephone)
ARLEN D. MELENDEZ, Commissioner
MICHAEL YAKI, Commissioner

MARTIN DANNENFELSER, Staff Director

STAFF PRESENT:

DAVID BLACKWOOD, General Counsel
CHRISTOPHER BYRNES, Chief, Programs Coordination Unit
DEMITRIA DEAS
PAMELA A. DUNSTON, Chief, Admin. Services and
Clearinghouse Division
SAMUEL ENNIS (Intern)
DANIELLE GALLEN (Intern)
ROBERT LERNER, Assistant Staff Director for OCRE
EMMA MONROIG, Solicitor
LENORE OSTROWSKY
CANDYCE PHOENA (Intern)
ANDREW SCHWARTZ (Intern)
KIMBERLY TOLHURST
AUDREY WRIGHT

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COMMISSIONER ASSISTANTS PRESENT:

TIM FAY
DOMINIQUE LUDVIGSON
RICHARD SCHMECHEL
KIMBERLY SCHULD

PANELISTS:

CHRISTOPHER COATES
WILLIAM WELCH
DANIEL TOKAJI
HANS A. VON SPAKOVSKY
PAUL F. HANCOCK
ROGER CLEGG

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TABLE OF CONTENTS

Briefing Agenda:

Topic: Review of the Department of Justice's Plans to Monitor Voting Rights Enforcement for the 2008 U.S. Presidential Election

I.	Introductory Remarks by the VICE CHAIR.....	4
II.	Speakers' Presentations.....	7
III.	Questions by Commissioners and Staff Director.....	126
IV.	Adjourn Briefing	

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P R O C E E D I N G S

9:40 a.m.

VICE CHAIR THERNSTROM: I am going to call the meeting to order and I assume Commissioner Heriot -- who is here now, I would like to say will join us immediately.

I. Introductory Remarks by the Vice Chairman

Good morning. I'm Abigail Thernstrom, the Vice Chair of the U.S. Commission on Civil Rights. And on behalf of the Commission, I welcome everyone to this briefing on the Justice Department's efforts to monitor voting rights enforcement for the 2008 Presidential Election.

This project is designed to examine the extent of adequacy of the Justice Department's preparation to monitor the coming Presidential Election for voting irregularities, including wrongful deprivation of the right to vote and voter fraud.

There will be two panels for this briefing and before I introduce the first panel, let me say that the record will be open until Monday, July 7th, 2008. All interested parties are invited to submit comments and materials for the record. Public comments may be mailed to the U.S. Commission on Civil Rights, Office of Civil Rights Evaluation, Room 740,

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1 624 9th Street, Washington, D.C. 20425.

2 For our first panel, we welcome two
3 officials from the Justice Department, Christopher
4 Coates, Chief of the Voting Rights Section of the
5 Civil Rights Division and William Welch, Chief of the
6 Public Integrity Section of the Criminal Division,
7 both of whom will discuss the Department of Justice's
8 plans to monitor the 2008 Presidential Election.

9 Christopher Coates, as I just said is
10 chief of the Voting Rights Section, Civil Rights
11 Division. This section is responsible for the
12 enforcement of statutory provisions designed to
13 safeguard the right to vote of citizens including
14 racial and language minorities, disabled and
15 illiterate persons, overseas citizens, and military
16 personnel.

17 Mr. Coates first went to the Voting
18 Section in 1996 as a trial attorney. He was named
19 Acting Chief of the Voting Section in December 2007,
20 and subsequently attained the position of Section
21 Chief. While at the Department he has participated in
22 a number of high profile voting rights cases and is
23 the recipient of the Civil Rights Division 2007 Walter
24 Barnett Memorial Award for excellency in advocacy.

25 William Welch, a second speaker on this

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1 first panel is Chief of the Public Integrity Section
2 of the Criminal Division. The Elections Crime Branch
3 of the Public Integrity Section of the Criminal
4 Division supervises the Justice Department's
5 nationwide response to voter fraud, campaign financing
6 offenses, and other election crimes. Mr. Welch was
7 appointed Chief of the Public Integrity Section in
8 March 2007. Prior to joining this division, he was an
9 Assistant U.S. Attorney, first in Reno, Nevada, and
10 then in the District of Massachusetts.

11 As a federal prosecutor for more than 16
12 years, Mr. Welch has tried approximately 50 trials and
13 successfully led teams of investigators in a variety
14 of cases.

15 Can you come to the table and then please
16 swear or affirm that the information you are providing
17 is true and accurate to the best of your knowledge and
18 belief.

19 (Whereupon, the witnesses were sworn.)

20 MR. WELCH: I do affirm.

21 VICE CHAIR THERNSTROM: Thank you very
22 much. I welcome you on behalf of the Commission and
23 I'll call you according to the order you've been given
24 for the record and ask that you please speak into your
25 microphones so that Commissioners participating by

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1 phone, that is actually a single Commissioner,
2 Commissioner Kirsanow, can hear your presentation
3 fully. So --

4 COMMISSIONER YAKI: Mr. Welch, I think
5 your microphone will be hidden by your coat. If you
6 could put it on the outside or on your tie would
7 probably be the best.

8 VICE CHAIR THERNSTROM: Mr. Coates, thank
9 you very much.

10 **II. Speakers' Presentations**

11 MR. COATES: Thank you. Before I make a
12 short opening statement, I would like to introduce
13 three members of my staff who are here. Rebecca
14 Wertz, who is my Principal Deputy Chief, a 24-year
15 veteran of the Voters Section; Chris Herren, acting
16 Principal Deputy Chief, a 15-year veteran of the
17 Voting Section; and Tim Mellett, Acting Chief of the
18 Section Five Unit Voting Section, a 12-year veteran.

19 VICE CHAIR THERNSTROM: We welcome the
20 presence of all of you and thank you for coming.

21 MR. COATES: Thank you, Madam Chairman,
22 and Members of the Civil Rights Commission. It is an
23 honor and pleasure to appear before you to represent
24 the Department of Justice and the dedicated
25 professionals of the Voting Section of the Civil

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1 Rights Division. I am honored to serve the people of
2 the United States as Chief of the Voting Section.
3 I've been actively involved in voting rights
4 litigation since 1976, as a staff attorney for the
5 Voter Rights Project of the American Civil Liberties
6 Union during the period '76 to '85, as an attorney in
7 private practice in Millersville, Georgia, who
8 regularly represented minority voters in voting cases
9 during the period '85 to '96, and as attorney with the
10 Voting Section since 1996.

11 I am pleased to report that the Voting
12 Section, the Civil Rights Division, remains diligent
13 in protecting voting rights. I would like to share
14 with you some of the highlights of our work done in
15 preparation for the 2008 Presidential Election.

16 As the Commission knows, the Department
17 strongly supported the recent reauthorization of the
18 Voting Rights Act. The Civil Rights Division
19 vigorously defended the statute's constitutionality in
20 the Federal Court here in the District of Columbia
21 which resulted in last Friday's ruling in the
22 Northwest Austin case. That decision upheld the
23 constitutionality of Section 5 of the Voting Rights
24 Act as a valid exercise of congressional authority to
25 enforce the protections of the 15th Amendment.

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1 The Voting Section is proud of the part it is playing
2 in defense of this important voting rights statute.

3 In addition, we have had meaningful
4 success recently in all of the voting statutes that we
5 enforce. In the last two years, the Voting Section
6 has brought a successful conclusion to six cases in
7 the Federal District Courts filed over the anti-
8 discrimination provisions of Section 2 of the Voting
9 Rights Act. In a case brought by the Voting Section
10 arising in Osceola County, Florida, the Court ruled at
11 the at large method of election for the County
12 Commission there diluted minority voting strength, and
13 in that case, Hispanic voting strength.

14 In another case brought by the section
15 arising in Euclid, Ohio, the Federal Court ruled that
16 the at large seats in the City Council diluted
17 African-American voting strength.

18 In Port Chester, New York, the Voting
19 Section brought a suit challenging at large elections
20 of the City Council and the Federal Court ruled there
21 as well that Hispanic voter strength was being diluted
22 in violation of Section 2.

23 In Noxubee County, Mississippi, the Voting
24 Section brought a suit against local officials
25 alleging that those officials had intentionally

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1 discriminated against white voters and candidates
2 preferred by white voters in violation of Section 2.

3 In 2007, the District Court in the Noxubee
4 case ruled in favor of the Department and in doing so
5 upheld the principle that Section 2 is a race neutral
6 prohibition against discrimination in voting
7 regardless of the race of the perpetrator or the race
8 of the victim.

9 This year, the Voting Section has already
10 filed and resolved two cases brought under Section 2
11 of the Voting Rights Act. In Georgetown County, South
12 Carolina, we successfully challenged the at large
13 method of election for the School Board on grounds
14 that it diluted African-American voting strength.

15 And in Oceola County, Florida, we
16 successfully challenged a District Plan for the School
17 Board there that contained no majority Hispanic
18 districts and diluted Hispanic voting strength.

19 The Voting Section has also been active in
20 bringing lawsuits to enforce Section 208 of the Voting
21 Rights Act. As the Commission knows, Section 208
22 assures all voters who need assistance in marking
23 ballots that they have the right to choose a person
24 they trust to provide assistance. During the past
25 seven years, we have brought 9 of the 11 suits ever

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1 brought by the Department under Section 208, including
2 the first case, to protect the rights of Haitian
3 Americans.

4 We are presently in negotiations now with
5 another jurisdiction concerning what the Voting
6 Section believes to be evidence of violations of
7 Section 208 concerning citizens of Puerto Rican
8 ancestry. Suits brought over 208 are important in
9 combatting attempts to suppress the right to vote.
10 All those cases were brought under Section of the
11 Language Minority provisions of 203 and under Section
12 11B of the Voting Rights Act.

13 The Voting Section remains committed to
14 enforcing the language minority requirements of the
15 Voting Rights Act as well. During the past seven
16 years, the Civil Rights Division has brought more
17 cases under the language minority provisions, 27 in
18 total, than in all other years combined since 1965.
19 These include the first ever cases on behalf of
20 Korean, Vietnamese and Filipino persons.

21 We are presently involved in negotiations
22 in a language minority case and have a number of other
23 jurisdictions under active investigation concerning
24 whether those jurisdictions are in violation of the
25 language minority provisions.

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1 In addition, since the 2004 Presidential
2 Election, the Voting Section has investigated and
3 resolved by consent decree or settlement agreement ten
4 cases that involved claims under the Help America Vote
5 Act; four cases involved were closed under the
6 Uniformed and Overseas Citizens Absentee Voting Act;
7 and seven cases under the National Voter Registration
8 Act. These statutes provide important safeguards that
9 guarantee to all Americans access to the ballot and
10 the Voting Section has given and will continue to give
11 high priority to the enforcement of these federal
12 laws.

13 Finally, the Department is preparing for
14 the 2008 elections. As we have in the past, we will
15 implement a comprehensive election day program to
16 ensure access to the ballot. As in previous years, we
17 will coordinate the deployment of hundreds of federal
18 government employees in counties, cities, and towns
19 across the country to ensure access to the polls as
20 required by federal law. In identifying the
21 locations, the Civil Rights Division and the Voting
22 Section will seek out the views of many organizations
23 including civil rights organizations that advocate on
24 behalf of minority voters and voters with disabilities
25 as well as abuse of state and local officials and

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1 other interested citizens.

2 The Division looks forward to continue to
3 work close and cooperatively with these officials and
4 with the civil rights groups as well as other
5 interested parties in an effort to protect the rights
6 of all Americans in future elections including the
7 2008 Presidential Election. I look forward to your
8 questions that you may want to ask me.

9 Thank you very much for your time.

10 MR. WELCH: Good morning, Madam
11 Chairperson and Members of the Commission. As noted,
12 my name is William Welch, and I serve as Chief of the
13 Public Integrity Section. It is a pleasure and honor
14 to appear before you to discuss the role of the
15 Criminal Division in the Public Integrity Section in
16 these upcoming elections.

17 I probably serve the approximately 29
18 trial attorneys and 13 support staff who comprise the
19 Public Integrity Section as their Chief. Prior to
20 becoming Chief, I was the Deputy Chief of the Section,
21 beginning in August of 2006. Before that, from 1995
22 to August of 2006, I worked as an Assistant U.S.
23 Attorney in the District of Massachusetts where I led
24 the U.S. Attorneys' Public Corruption Initiative in
25 Springfield Massachusetts. Our investigations

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1 included those relating to election crime in fraud.

2 As noted, prior to that, I served as an
3 Assistant U.S. Attorney in Reno, Nevada.

4 The Public Integrity Section's law
5 enforcement responsibilities concerning elections are
6 confined to all federal election crimes other than
7 those involving civil rights violations which are
8 handled by the Voting Rights Section in the Civil
9 Rights Division. The majority of election crimes that
10 we prosecute involve election or ballot fraud such as
11 vote buying or ballot stuffing and campaign financing
12 crimes.

13 Under longstanding Department procedures
14 dating back to 1976 when this section was created, the
15 section is responsible for assisting in the
16 Department's nationwide oversight of the handling of
17 election crime investigations and prosecutions filed
18 in United States Attorneys' field offices throughout
19 the country.

20 I am proud to serve with two senior trial
21 attorneys who discharge this supervisory
22 responsibility who comprise the Election Crimes
23 Branch, one of whom has spent over 38 years overseeing
24 election crime offenses, the other whom has done so
25 for over 30 years. These two individuals are two of

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1 the most dedicated, nonpartisan professionals I have
2 encountered within the Criminal Division.

3 The Criminal Division's oversight of
4 election crime matters is designed to ensure that the
5 Department's nationwide effort to combat election
6 fraud and other election-related offenses, are
7 consistent, impartial, uniform, and effective. The
8 Public Integrity Section does not have formal approval
9 authority over the investigation and prosecution of
10 election crimes, rather we serve in a mandatory
11 consultative capacity to the United States Attorney's
12 Offices throughout the country. We provide advice and
13 guidance to the field on the handling of election
14 crime investigations and prosecutions based on the
15 extensive experience of the section prosecutors in our
16 office.

17 Consultation by way of our section is
18 required in the event that a U.S. Attorney's Office
19 wants to open a whole field investigation or a Grand
20 Jury investigation into election fraud matters. And
21 similarly, consultation is required with respect to
22 charging decisions.

23 On the rare occasion that there is
24 disagreement between the advice and guidance given by
25 our section, the disagreement is resolved by the head

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1 of the Criminal Division as well as by the Deputy
2 Attorney General.

3 The Criminal Division of the Public
4 Integrity Section and the Department's federal
5 prosecutors in the field complement the role of the
6 Civil Rights Division in election matters. The Civil
7 Rights Division is responsible for protecting the
8 right to vote, while the Criminal Division's Public
9 Integrity Section and other Department prosecutors
10 throughout the country seek to protect the value of
11 each person's vote by prosecuting those who corrupt
12 the elections.

13 In short, the Civil Rights Division has a
14 more proactive role while the Criminal Division takes
15 a more reactive role in the hearing of election crime
16 matters. It is our hope and belief that the
17 Department's election crime prosecutions deter at
18 least some election fraud and thus enhance the
19 integrity of future elections.

20 In 2002, the Attorney General established
21 a Ballot Access and Voting Integrity Initiative to
22 spearhead the Department's efforts to combat election
23 fraud and civil rights violations involving voting.
24 And to further those goals, the initiative requires
25 annual training of federal prosecutors in the areas of

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1 voter fraud and voting rights and coordinates with
2 state law enforcement and election officials before
3 federal general elections. And since the initiative
4 began, the Department has charged 148 persons with
5 election fraud offenses and convicted 111 defendants.

6 Non-citizens have been convicted of voting-related
7 offenses in Florida, Colorado, North Carolina, and
8 Oregon. Vote buying schemes have been successfully
9 prosecuted in Illinois, Kentucky, and North Carolina.
10 And persons have been convicted for multiple voting in
11 Kansas and South Dakota.

12 I thank you for the opportunity to provide
13 the Commission with information about the Criminal
14 Division's role in its Public Integrity Section's
15 efforts to combat election fraud and I look forward to
16 answering any questions that you may have.

17 Thank you.

18 **III. Questions by Commissioners and Staff Director**

19 VICE CHAIR THERNSTROM: Thank you, Mr.
20 Welch, very much. I thank both of you. And we now
21 open it to questions, comments. From Commissioner
22 Yaki, we have the first question.

23 COMMISSIONER YAKI: Yes, thank you very
24 much, Madam Chair. Thank you very much for having
25 this briefing on short notice. This is one that I

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1 called in contemplating sort of what we as a
2 Commission should be doing with regard to the upcoming
3 2008 elections. I think most of my questions will
4 probably aimed at Mr. Coates, so Mr. Coates, if there
5 are members of your staff who you wish to bring up to
6 supplement any answer, please feel free to do so.

7 The first question I have goes with --
8 deals mainly more with the preparation for the 2008
9 election. I commend you for all the great work that
10 you've done with Section 2, Section 5 and 208,
11 lawsuits that you've been bringing. I really want to
12 sort of focus -- the purpose of this hearing really
13 was to see what you were doing with regard to getting
14 ready for November 2008.

15 I think it's any news to anyone that
16 obviously what the Department does in this election
17 will be very important and I think it's no surprise to
18 anyone that because of past controversies in the last
19 two Presidential Elections that we hope that that past
20 has not prolonged further discussions after the fact.
21 So proactively in determining, for example, the
22 criteria that you use to assign election observers and
23 monitors, what is it that the Department is reviewing
24 in terms of making those decisions and what kind of
25 consultation processes are you involved in?

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1 MR. COATES: Thanks for that question.
2 First, in terms of what type of activities, might
3 calls a need for a federal presence at the polls and
4 the locations where monitors should be sent. We are
5 in active consultation with civil rights organizations
6 to determine both the type of problems that they
7 anticipate and the locations that they may occur. My
8 staff and I have met with representatives of civil
9 rights organizations in April of this year concerning
10 their concerns about whether or not jurisdictions are
11 complying with Section 7 of the National Voter
12 Registration Act and in May, my staff and I met with
13 19 members of civil rights organizations across the
14 country and heard from them their concerns about
15 upcoming 2008 elections and what type of activities
16 they're concerned about and we welcomed at that time
17 input from those representatives about jurisdictions
18 that they feel will need federal monitoring at the
19 time of the Presidential Election.

20 I am also in the process along with other
21 members of the Civil Rights Division of meeting with
22 staffers from the House and Senate. We had a meeting
23 in April of this year, talking about various matters
24 including the monitoring that the Department intends
25 to do at the time of the 2008 election. We will have

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1 another meeting with those staffers from the House and
2 Senate in either June or July, as I understand it, and
3 then another meeting some time in the early fall where
4 those types of issues will be discussed.

5 I am also in constant contact with state
6 and local officials. I made a presentation to the
7 National Association of Secretaries of State in
8 January of this year, along with Mr. Herren, and in
9 April of this year, I attended a couple workshops put
10 on by the National Association of State Legislators
11 here in Washington and had an opportunity to meet with
12 various persons to hear their concerns. Those are
13 some of the major things that we're doing in terms of
14 gathering information that will help us focus on how
15 many monitors we need and where those monitors need to
16 be sent.

17 On a daily basis, in our enforcement
18 activities under Section 2 and 203 and 208, we're in
19 contact persons who have made complaints about the
20 violations of federal law in their own individual
21 jurisdictions and we hear from them as well. And
22 we're also, of course, in contact with people who are
23 not members of organizations who may not have made
24 complaints about violations of federal law, but just
25 want to communicate their concern. So those are the

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1 type of things that we have done to try to gather as
2 much information as we can to make the best decisions
3 for November.

4 COMMISSIONER YAKI: That's very
5 commendable. Having gathered that information though,
6 then what goes into the ranking, prioritization
7 system, how do you then decide to choose we're going
8 to send one hundred election observers to Louisiana or
9 to California or to New York or what have you? What
10 is it that in the end, how do you determine how you're
11 going to allocate those resources, number one. And
12 number two, do you have sufficient resources to
13 allocate? In other words, is there at some point in
14 your decision making that you say well, it's a choice
15 between Ohio and New Mexico or Colorado and South
16 Dakota, we only have X number of people left that we
17 can send out. Or -- I want to know if there's a
18 limitation on your ability to respond as the second
19 part, but the first one, how do you choose where
20 you're going to send people?

21 MR. COATES: I'll respond to the second,
22 the resource question first?

23 COMMISSIONER YAKI: Sure.

24 MR. COATES: There is no limitation. The
25 resources that will be available. But what has been

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1 communicated to me, my understanding is that what
2 we're supposed to do is to tell the Division what
3 numbers we think are necessary to attempt to ensure
4 that federal law is complied with at the time of the
5 federal election and those resources would be made
6 available.

7 At the time of the 2004 Presidential
8 Election, not in 2004 Fiscal Year or Calendar Year,
9 but just on election day, we have over 800 people in
10 the field. Those would include federal observers
11 under the Voting Rights Act that are under the direct
12 supervision of the Office of Personnel Management and
13 employees of the Department of Justice who work as
14 monitors. Whether that number in 2008 will be
15 necessary, it is too early to tell, but whether we
16 exceed that 800 or come below the 800 will be based
17 upon a determination as to what we feel is necessary
18 to get the job done.

19 Now there is a number and again, I
20 emphasize that I have -- no one has communicated to me
21 that there would be any restriction either with
22 regards to funds or with regards to the number of
23 observers that we might request.

24 COMMISSIONER YAKI: Okay. How do you pick
25 where you send them?

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1 MR. COATES: The criteria that we would
2 use would be multi-faceted. First, we would try to
3 determine when we receive complaints in a pre-election
4 survey or interviews, we will try to determine whether
5 or not the concerns that have been expressed are
6 meritorious. We will talk with state and local
7 officials and other persons in the community, to
8 determine whether or not there is a reasonable need or
9 belief that improper and illegal activity will occur
10 on election day. And then we make a determination as
11 to whether or not federal observers, the presence of
12 federal observers would be likely to stop that type of
13 activity at the polls.

14 If we make the determination that it would
15 have that deterring effect, then certainly that would
16 weigh in favor of sending federal observers or
17 monitors to that location.

18 Another criteria that we have used in the
19 past is that in local elections involving minority
20 candidates and white candidates, many times that kind
21 of black, white, Hispanic, anglo contests will create
22 antagonisms, frictions, tensions in a community and we
23 would weigh that kind of evidence to determine whether
24 or not observers or monitors would be sent.

25 Another --

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1 COMMISSIONER YAKI: Just as an
2 interruption then, given the fact that the
3 presidential nomination will be contested between an
4 African American and a white American, does that in
5 and of itself make you think that you're going to be
6 needing more of that kind of activity? If you're
7 already seeing that on a local level, you make these
8 kind of determinations. If on the national ticket
9 that indeed is going to be the case, does that send
10 any signals, alarm bells, or extra heightened warning
11 about what we're going to be needing to do for 2008?

12 MR. COATES: I'm not prepared at this time
13 to conclude that we would need more observers than we
14 did in 2004, because the presidential race will be one
15 involving an African American person and a white
16 person, but we should be mindful of the fact that
17 there have been jurisdictions in the past where bi-
18 racial contests have caused some frictions and
19 tensions, be mindful of that and that will be
20 something that we will be looking at along with other
21 factors in making determinations about what we should
22 do in 2008.

23 Now another consideration is the consent
24 decrees that we have particularly in the language
25 minority cases. In those cases, there are consent

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1 decrees that require that the people working at the
2 polls that saw them be bilingual poll workers so as to
3 assist persons of limited English proficiency, when
4 they come to the polls so that they're able to
5 negotiate the electoral process in a meaningful way.
6 And we will be doing some monitoring in that regard to
7 make sure that jurisdictions that have promised in
8 consent decrees filed in the Federal Court or in
9 settlement agreements with us that those provisions
10 for bilingual workers will be honored.

11 Another consideration --

12 COMMISSIONER YAKI: Just a quick
13 interruption.

14 MR. COATES: Yes, sir.

15 COMMISSIONER YAKI: In ensuring that that
16 happens, do we send observers who may be conversant in
17 the languages involved so that they can speak to a
18 voter to determine whether or not that person who
19 allegedly speaks Tagalog, Chinese, Russian, what have
20 you, really does speak it coherently and in a literate
21 way that can help someone fill out a ballot?

22 MR. COATES: Yes, sir. And that's the
23 exact approach that we use. The best observer to
24 observe whether or not the minority language
25 provisions of Section 203 are being complied with and

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1 the terms of a consent decree are being complied with
2 is to have a speaker there, a monitor there, who
3 speaks the minority language. And that's really the
4 criteria that we use in terms of choosing people to go
5 do election coverage. There are a number of people
6 who are bilingual who are attorneys and other
7 employees for the Department and we use that resource
8 regularly to meet just the need that you have
9 identified.

10 Another criteria will be whether or not
11 the jurisdiction has a past history of bad behavior at
12 the polls that might deny the right to vote to any
13 citizen including the type of activity that would be
14 aimed at minority voters, minority language voters.
15 And the reason that we're going to look at that is
16 that many times where that has occurred there has been
17 a failure of poll officials to take adequate action,
18 to tell people who are using racial slurs or treating
19 voters at the polls insensitively that they have to
20 stop that. Some of these people may be reassigned to
21 the polls and therefore we want to make sure that that
22 same pattern of misconduct does not repeat itself.

23 Another consideration in jurisdictions of
24 that kind would be that there have been individuals
25 who have misbehaved in the past, who have racist

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1 attitudes and who may have been at the polls in 1996
2 and therefore they show up in 2008, so if you have a
3 jurisdiction that has had bad actors, private citizens
4 at the polls who have participated in acts that would
5 be potentially in violation of the Voting Rights Act
6 or election officials who have not done their jobs in
7 making sure that that type of activity does not occur,
8 then those factors would weigh in favor of some
9 coverage in 2008.

10 So those are the types of considerations
11 that we consider in choosing where to send our
12 monitors and federal observers.

13 VICE CHAIR THERNSTROM: Mr. Melendez -- I
14 was going to say, can we let other people get in here?

15 COMMISSIONER YAKI: Yes.

16 VICE CHAIR THERNSTROM: Commissioner
17 Melendez?

18 COMMISSIONER MELENDEZ: Yes, thank you
19 both for being here this morning. Just finishing up
20 on the criteria for sending monitors. Will expecting
21 a closeness of a given election be a factor whether
22 monitors are sent or not a factor?

23 MR. COATES: If it's a highly contentious
24 election where the election is probably going to be
25 very, very close and therefore -- if the wrongdoing at

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1 the polls might make a difference in the outcome of
2 elections, then certainly the anticipated closeness of
3 an election would be something that we would consider
4 and would weigh in favor of that being a jurisdiction
5 that might need a federal presence.

6 Clearly, in terms of bad conduct at the
7 polls, it's much more likely that that conduct is
8 going to occur where there is a hotly contested race
9 than one where a candidate is not opposed.

10 COMMISSIONER MELENDEZ: Thank you. Mr.
11 Welch, let me ask you a question. I understand that
12 prior to 2006 it was the Public Integrity Section's
13 position that they would not open public
14 investigations or issue indictments immediately prior
15 to elections. The rationale seemed to be that the
16 Department must be extremely careful to avoid
17 influencing elections.

18 I understand that the policy was changed
19 in 2006 and indictments were sought in Missouri just
20 prior to the election. Can you please explain more
21 fully how and why this policy shift occurred and what
22 your intentions are for this fall?

23 MR. WELCH: First of all, there has been
24 no policy shift. I believe that your question may
25 arise from some confusion about the wording that

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1 existed previously and what is now an outdated
2 election crimes book, commonly known as the Red Book
3 versus the most recently revised book, commonly known
4 as the Green Book.

5 What transpired between the publication of
6 the Red Book in 1995 and the publication of the Green
7 Book in 2007 is that it was seen as outdated, the
8 language was seen as confusing, and the goal of
9 drafting the Green Book was to make it more reader
10 friendly, to encourage more consultation from the
11 field so that at a minimum, we could at least provide
12 more advice and possibly develop more cases in the
13 area of election crime.

14 But the underlying policy, meaning the
15 noninterference policy that the Criminal Division has,
16 has not changed. And we continue to remain cautious
17 during the period immediately preceding the election
18 with respect to engaging in overt, investigative
19 techniques as well as bringing charges.

20 With respect to, I believe the charge that
21 you're referring to that occurred in 2006, that charge
22 in and of itself did not impact the manner by which
23 votes were cast and counted which is the underlying
24 policy rationale behind the noninterference policy.
25 In other words, that case involved false voter

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1 registration cards that had not made their way into
2 the registration stream and the information was
3 brought to our attention by the entity that was deemed
4 as the victims of the false registration scheme. And
5 so because these were false registration cards, no
6 voters needed to be interviewed. It was seen as not
7 being in contradiction to the policy that we had.

8 COMMISSIONER MELENDEZ: Just one quick
9 question. As I understand it, there used to be a
10 policy or a practice that the Criminal Division would
11 prioritize investigation of voting crimes that
12 involved conspiracies, large schemes, or other group
13 wrongdoings. Has there been a shift in the Division
14 where it's monitoring and investigating criminal
15 conduct in voting by individuals rather than these
16 larger schemes or groups?

17 MR. WELCH: I would say no. I think it's
18 important to know that there's never been a per se ban
19 against prosecuting individual voter cases. That once
20 going back to the older election crimes handbook that
21 our section had published, there in fact was a
22 provision that permitted the prosecution of individual
23 voters to seek cooperation in building cases against
24 larger schemes that you're referencing.

25 Between '95 and 2007, not only was there

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1 the 2002 initiative of the Attorney General, but I
2 think our collective experience also began to show
3 that by not doing individual voter cases and by not
4 giving more discretion to field prosecutors, to see
5 whether or not individual voter cases may lead to
6 larger schemes. We could have been missing those
7 opportunities to build those types of cases.

8 And so I think in the end we sort of view
9 election crimes as crimes that don't leave bodies on
10 the street, if you will. They don't have identifiable
11 victims. They don't have identifiable property
12 infractions and so when we run against individual
13 voter cases, we're never sure whether or not that case
14 is a stepping stone to a bigger case. So we leave it
15 now more to the discretion of the field, again,
16 knowing that they'll be seeking our advice and
17 guidance and being able to at least ensure or try to
18 ensure uniformity in the prosecution of these cases.

19 VICE CHAIR THERNSTROM: Commissioner
20 Gaziano.

21 COMMISSIONER GAZIANO: A few questions to
22 start out with for each of you, first, I think to Mr.
23 Coates.

24 I've seen some Department testimony from
25 others I think in Civil Rights Division regarding what

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1 looks to me to be a pretty large increase in the
2 number of monitors that the Federal Government employs
3 over the Presidential Elections, '96 through 2004.
4 Just for our record, do you remember some of those
5 numbers or are you able to give us a kind of ballpark
6 figure? This relates in part to your answer to
7 Commissioner Yaki on the resource allocation.

8 MR. COATES: Yes, sir. Well, part of
9 that, the figures are set out in the final statement
10 that are filed with the Commission, but --

11 COMMISSIONER GAZIANO: For the CSpan
12 audience it would help if you repeat some of that.

13 MR. COATES: In 2002, 2004, and 2006, the
14 Department used -- it's my understanding -- a greater
15 number of monitors and federal observers than had been
16 used in the past. An example of that would be
17 calendar year 2004, a record of 1463 federal observers
18 and 533 Department personnel were sent to monitor 163
19 elections in 106 jurisdictions and in 29 states. Now
20 this compares the number 1463 compares with 640
21 federal observers that were used during the year 2000
22 and the 553 Department personnel who were sent to
23 monitor elections would compare with 110 Department
24 personnel deployed during the 2000 year.

25 So we are sending more people than --

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1 COMMISSIONER GAZIANO: That's a dramatic
2 increase.

3 MR. COATES: It is a dramatic increase,
4 and we feel that it is necessary because of complaints
5 that we have received on behalf of large numbers of
6 groups of voters. Many state and local officials have
7 told us that a federal presence at the polls has a
8 detering effect upon problems that arise there and
9 we're mindful of those problems if they potentially
10 involve a violation of federal law. We're not
11 authorized to monitor an election or to ask for
12 federal observers if state law violations are
13 anticipated, but federal law violations and for us,
14 the violations of the civil violations of the Voting
15 Rights Act and the other federal statutes that we
16 enforce. And we intend in 2008 to continue the same
17 philosophy. We're not out to set records or simply
18 rely on numbers, but we're out to use the number of
19 people that will be necessary to ensure fair elections
20 in 2008.

21 COMMISSIONER GAZIANO: Sure, and if I just
22 -- just to fill in a few of the other gaps, in the
23 2006 election you had more than the 2002 congressional
24 election. I think 2006, you had even more than 2004.
25 Is that not the case?

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1 MR. COATES: In 2006, we -- I don't think
2 that we used quite as many in 2006, but in 2006, we
3 used -- well --

4 COMMISSIONER GAZIANO: Certainly more than
5 in 2002.

6 MR. COATES: In 2006, we sent over 1500
7 federal personnel to monitor elections, so we did
8 exceed the 2004 number by a few dozen and that 1500
9 federal personnel who monitored elections in 2006
10 would double the number sent out in 2000.

11 COMMISSIONER GAZIANO: And so given -- I'm
12 going to put your answer to I think to Commissioner
13 Yaki in a little bit of context. If you all concluded
14 in your section that you needed 25 percent more, your
15 understanding is that there's no limit to the number
16 that the Department could send to the different
17 jurisdictions?

18 MR. COATES: That's right. Nor have my
19 supervisors ever articulated to me that there is some
20 limit and that you cannot ask for more than 2500 or
21 3000 regardless of the type of complaints you receive.

22 COMMISSIONER GAZIANO: Thank you. And if
23 I could just ask one or two questions of Mr. Welch.
24 I'm intrigued whenever there's these fraud scandals
25 that are uncovered, prosecuted. It's usually some

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1 serendipitous tip that leads you to the first, or
2 leads some prosecutor to the first reason to
3 investigate. If you might concentrate on some of the
4 vote-buying schemes that you mentioned in your
5 testimony, could you describe one or more of them just
6 a little bit more, what it was that led you to uncover
7 the particular vote-buying scheme?

8 MR. WELCH: Unfortunately, I don't think I
9 have the information available about each one of the
10 cases, but I agree that as a general rule, many
11 election fraud cases, including many public corruption
12 cases are led by small, innocuous tips that lead to
13 larger cases. The example I use although not an
14 election fraud example, is the conviction of Governor
15 Ryan. Many people forget that the incident that
16 ultimately led to Governor Ryan being investigated and
17 convicted was because a single commercial driver who
18 had paid \$500 for a fraudulent commercial license had
19 hit a van filled with a family and it was the public
20 outrage behind that event that three years later led
21 to the cumulation of evidence that ultimately caused
22 the conviction of Governor Ryan. That is an example
23 of how one small event leads to a larger chain that
24 may uncover a fraud or corruption scheme, whether you
25 call it election fraud or public corruption.

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1 COMMISSIONER GAZIANO: Sure. And given
2 that there are very long prison sentences and other
3 consequences to an elected official which may be even
4 more serious than a prison sentence like losing their
5 job, let me just pause there. What does federal law
6 provide? What's the range of prison sentences for
7 certain intentional fraud crimes?

8 MR. WELCH: Generally, they're driven by
9 the guidelines and the ranges can be anywhere from
10 probation to 18 to maybe 24 months in jail, much of
11 it, for example, in dealing with false registration
12 cases will depend upon the number of false
13 registrations that an individual may perpetrate. But
14 by way of example, one of the individuals who engaged
15 in the false registration in the Missouri case from
16 2006 received an 18-month prison sentence and that was
17 an individual who had submitted a number of false
18 registrations to local elected officials and at least
19 that Federal Judge deemed his conduct sufficiently
20 worthy to give him 18 months in jail which was a much
21 harsher sentence sometimes than elected officials
22 convicted of other corruption crimes.

23 COMMISSIONER GAZIANO: Sure, and my last
24 point or question if it amounts to one is that given
25 the prison sentences and other consequences, you

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1 assume that most of these people who engage in this
2 think they can get away with it and do you have any
3 idea, guess, as to how many of these schemes don't go
4 -- don't come to light?

5 MR. WELCH: I think it's really impossible
6 for me to do that. I can say that one of the inherent
7 difficulties in prosecuting election fraud schemes,
8 whether individual voter cases or larger cases is that
9 generally you have two forms of participants, one who
10 is culpable and therefore more than likely not willing
11 to report the crime; and the other would be the
12 unwitting, unknowing dupe such as, for example, a
13 deceased individual who is still on the rolls, the
14 college student --

15 COMMISSIONER YAKI: Definitely unknowing.

16 MR. WELCH: The college student who has
17 moved away for the semester, but nonetheless someone
18 votes in that person's name, a military service
19 officer who is away in Iraq, but nonetheless, someone
20 is voting in that person's name. So it is extremely
21 difficult to quantify or even estimate what the scope
22 or the degree of the problem is.

23 COMMISSIONER GAZIANO: Thank you. That's
24 why I thank you and the Division's vigilance in
25 investigating these matters. They're not necessarily

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1 the most sexy and rewarding types of prosecutions to
2 investigate. So thank you for your effort.

3 COMMISSIONER YAKI: Point of order, I
4 think that the CSpan person needs to put the mics in
5 front of the two speakers. They need to do it really
6 quickly. Is that a problem?

7 (Pause.)

8 COMMISSIONER GAZIANO: You mean my
9 eloquent line of questioning and yours were not picked
10 up?

11 VICE CHAIR THERNSTROM: I'm not worried
12 about you, I'm worried about whether our speakers have
13 been lost to us. You can reconstruct.

14 COMMISSIONER GAZIANO: I understand, Madam
15 Chairwoman. Thank you.

16 VICE CHAIR THERNSTROM: You can call me
17 Chairman, that's fine. I regard it as a gender
18 neutral term.

19 I actually have some questions myself for
20 both of you.

21 Mr. Coates, I was -- this is more perhaps
22 in the way of a comment than it is a question. I was
23 a little bothered by your description, partly
24 historical here, of what the Voting Section has been
25 engaged in in terms of defending Section 5. You say,

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1 for instance, in the first place you haven't been
2 entirely successful. I mean the LULAC v. Perry, yes,
3 in one district you won, but basically the Supreme
4 Court threw out that staff attorney's memo, threw out
5 the reasoning of the staff attorney's memo that made
6 -- that got considerable publicity as in opposition to
7 the political appointments. But in a statement you
8 say the Department is currently vigorously defending
9 the statute's constitutionality in Federal Court here
10 in the District of Columbia and you refer, of course
11 to the Northwest Austin Municipal Utility District
12 Number One, v. Mukasey and pleased that the three-
13 Judge Panel and I would say very predictably given the
14 panel that the plaintiff's drew, agreed with the
15 Justice Department's position. But it seems to me
16 very much an open question whether if that decision is
17 appealed and of course that decision as far as I know
18 hasn't been made whether to appeal it or not, but if
19 it's appealed to the Supreme Court, it's far from
20 clear that the Supreme Court is going to agree with
21 the three-Judge Panel in that Court.

22 And indeed, it seems to me that you have
23 really whitewashed the vigorous debate that went on in
24 the summer of 2006 over the continuing
25 constitutionality of the pre-clearance provision, its

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1 congruence in proportionality to the current threats
2 to voting rights given the degree of racial change.
3 Section 5, after all, was emergency, an emergency
4 provision in 1965, and that emergency has long passed.

5 And there was a vigorous debate not in
6 Congress because of obvious political reasons, Members
7 of Congress would prefer not to debate a civil rights
8 issue, but certainly within the academic community
9 that focusing on voting rights, there were many
10 questions about whether the straight reauthorization
11 and indeed, the strengthening of in some ways by
12 overturning a key Supreme Court decision, but the
13 renewal of Section 5 as if America had not changed was
14 constitutionally legitimate and would survive a
15 constitutional challenge. These were very
16 distinguished scholars within the academic community,
17 all voting rights experts, who are extremely nervous
18 about this case that's coming, if it's appealed, that
19 is on the horizon.

20 And so it does seem to me that your
21 implication here is look folks, we are just doing a
22 splendid job here, enforcing a morally clear law which
23 was, of course, morally clear in 1965, but is now a
24 bit complicated. And the complexity, of course, has
25 grown with the fact that we do have a standard bearer

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1 for the Democratic nomination, that is African-
2 American. I mean it does seem to me a little more
3 nuanced discussion of Section 5 today, I at least
4 personally would have liked to have heard. And of
5 course there are other -- there's another extremely
6 important case coming down the pike, Strickland also.
7 So that's really more of a comment than a question.

8 For Mr. Welch, I have -- I do have a
9 couple of questions. I would like -- you have --

10 MR. COATES: Madam Chairman, may I
11 respond?

12 VICE CHAIR THERNSTROM: Absolutely.

13 MR. COATES: If I created the impression
14 that I thought that the issue concerning the
15 constitutionality of Section 5 in the 2006
16 reauthorization is just a simple issue that everybody
17 had to agree on, I apologize. I did not mean to
18 create that impression. I think that the people of
19 good will can disagree about whether or not Section 5
20 needs to be continued or whether or not its time has
21 passed. And I don't attack the good faith of anyone
22 who has taken the opposite position.

23 I'm willing to point out to the Commission
24 that the Civil Rights Division had been busy in
25 defending the constitutionality of Section 5

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1 particularly in light of the fact that there have been
2 so many claims in the recent years that the Civil
3 Rights Division is not doing its job or not doing
4 anything to protect the rights of minority voters.
5 There is nothing in my opinion today that is more
6 essential to the enforcement of the voting rights of
7 minority voters in the United States than the
8 continuation of the Section 5 pre-clearance
9 requirements. And we have been busy in that case.
10 We're very, very happy with the District Court
11 opinion. We will be involved in the case if it's
12 appealed to the Supreme Court.

13 It was in that light of pride that we --

14 VICE CHAIR THERNSTROM: I see.

15 MR. COATES: -- of winning that decision
16 and because we think that that shows that the
17 criticism that we don't do anything for minority
18 rights is simply not true, that I pointed it out.

19 I am very proud to work for the
20 Administration and President Bush who signed the 2006
21 law and we are committed to the defense of the
22 constitutionality of the 2006 reauthorization and that
23 is another reason that I mentioned in the opening
24 statement.

25 As I mentioned, I've been involved in

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1 voting rights since 1976. A good portion of that has
2 been in the South, but since working with the
3 Department I have had an opportunity to go to other
4 states outside of the South and particularly to the
5 covered jurisdiction and I have no problems in
6 advocating the constitutionality of the
7 reauthorization of the Act because it is my firm
8 belief that if Section 5 were to be terminated, that
9 that would have a dramatic and serious impact on the
10 voting rights of minority people throughout the
11 covered jurisdictions. There will be backsliding, I
12 fear, if Section 5 is taken away. And I say that from
13 the experience of suing a number of local officials in
14 various parts of the country. So I respectfully
15 submit that even though this is not the America of
16 1965, there's no question about that. There has been
17 great progress made and minorities have a
18 substantially greater access to the political process
19 than they did at the time of the Act.

20 I think that the prophylactic measures of
21 Section 5 play an important role and I am proud to
22 play a part and our section is proud to play a part in
23 the constitutional defense of it.

24 VICE CHAIR THERNSTROM: Well, I very much
25 appreciate that response, but it seems to me and tell

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1 me if I'm being unfair here that what you've just said
2 is that the critics of the Voting Section who have
3 attacked -- who have raised questions about its
4 dedication to upholding the Voting Rights Act are
5 wrong because, in fact, the Voting Section under your
6 leadership very much reflects the views of the ACLU?

7 COMMISSIONER YAKI: I think I am going to
8 ask the witness not to respond to that and just say
9 that --

10 COMMISSIONER GAZIANO: Speaking as his
11 attorney, Commissioner Yaki? Has he engaged you?

12 (Laughter.)

13 COMMISSIONER YAKI: We had this debate
14 during the discussion R&D reauthorization of a
15 temporary --

16 VICE CHAIR THERNSTROM: Wait a minute,
17 there's no reason why he can't respond to that --

18 COMMISSIONER YAKI: I'm speaking, Madam
19 Chair. And that -- I mean first of all, it's not at
20 this point exactly germane to the question you're
21 asking Mr. Coates. Mr. Coates wanted to respond and
22 now I'm responding back so he has some context for
23 what's going on here. And this Commission, despite
24 the overwhelming majority of Congress acting several
25 weeks later, chose not to endorse despite the sense of

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1 Commissioners Melendez and myself, the reauthorization
2 of the temporary sections of the Voting Rights Act.

3 I think it's unfair to say to our witness
4 that his views are those of an outside agency when I
5 think he's clearly expressed that these are the views
6 of the actions taken by the Voting Rights Section
7 which I assume was approved by people further up than
8 him, all the way to the Attorney General to this
9 President of this United States.

10 VICE CHAIR THERNSTROM: Commissioner Yaki,
11 I'm a little astonished that you have such little
12 faith in our witness that you don't think he can
13 answer a question. I was simply responding --

14 COMMISSIONER YAKI: I just felt that
15 question was an unfairly loaded gun.

16 VICE CHAIR THERNSTROM: It wasn't a loaded
17 gun. I'm simply --

18 COMMISSIONER YAKI: Hold on for a second.
19 I think it may be unfair to say that basically you're
20 giving the views of the ACLU. And I just want to say
21 yes, it is unfair. If you choose not to answer it, I
22 don't care.

23 VICE CHAIR THERNSTROM: I don't either.
24 That last statement stands. Either Mr. Coates can
25 answer it or he can choose not to answer it.

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1 (Simultaneous speakers.)

2 COMMISSIONER YAKI: We can go up and down

3 --

4 VICE CHAIR THERNSTROM: I understand you
5 can name all the acronyms of the mainstream civil
6 rights groups. I understand that perfectly.

7 Mr. Coates, you do not have to answer my
8 comment. I was simply responding to what I heard you
9 say and I would be delighted to hear that I misheard,
10 always delighted to hear that I have misheard. But I
11 didn't really think you needed help from somebody else
12 in defending yourself.

13 MR. COATES: Madam Chairman, I'll be glad
14 to respond to your question. On the issue of the
15 constitutionality of Section 5, reauthorized Section
16 5, is that on that particular issue, the
17 Administration, through its defense and various other
18 civil rights groups, including the ACLU, have a
19 similar view. The arguments are not the same, but
20 they have a similar view that Section 5 reauthorized
21 is constitutional, that it's a constitutionally valid
22 exercise of congressional power to enforce the
23 protections of the Fifteenth Amendment, but my
24 articulating that here today is not articulating the
25 view of the ACLU, articulating the view of the present

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1 Justice Department.

2 VICE CHAIR THERNSTROM: Thank you very
3 much.

4 Mr. Welch, let me just ask you a couple of
5 questions. One, how large a problem is noncitizen
6 voting in your view?

7 MR. WELCH: I really cannot give you an
8 estimate of either how small or how large it is. It
9 simply is an unquantifiable figure as far as we're
10 concerned.

11 VICE CHAIR THERNSTROM: Right, but a
12 problem, not a problem? A problem you're concerned
13 about, not concerned about?

14 MR. WELCH: I think we're concerned any
15 violation of any of the statutes that we enforce. So
16 I mean we treat that particular statutory infraction
17 like we would anyone else.

18 VICE CHAIR THERNSTROM: And in terms of --
19 and I may have missed whether you already answered
20 this and forgive me if I did. My attention for a few
21 minutes wandered, but have you given us specific
22 examples of voting fraud that you have prosecuted and
23 can we get a handle on the dimensions of this problem?

24 I mean it seems to me in terms of the
25 literature on both the political left and political

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1 right and those in between that one of the problems
2 here is a lack -- I'm a data person -- one of the
3 problems here has been a lack of really solid data on
4 the dimensions of the voter fraud problem. And I
5 wondered what, in your prosecutorial role, you have
6 seen prosecuted and what's your sense is of how large
7 the problem is and if one is trying to quantify it,
8 how does one do so?

9 MR. WELCH: Well, as far as the first
10 question which is the number of cases that we have
11 prosecuted, I just want to clarify that the majority
12 of bulk of the election fraud crime cases that get
13 prosecuted get prosecuted by the U.S. Attorney's
14 offices throughout the field. So our resources, by
15 and large, are largely in the consultative capacity
16 sentence.

17 Occasionally, our trial attorneys will go
18 out and prosecute a case. I think the most recent one
19 we did was a vote-buying case in January of '06 down
20 in Alabama. With respect to the size and degree and
21 scope of the problem, I think I go back to my earlier
22 answer which is that I don't think that anyone can
23 quantify the problem through simply looking at
24 criminal convictions and trying to equate the scope of
25 the problem with the number of convictions. And I use

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1 this analogy hopefully, to enforce that point.

2 I believe in either '05 or '06, I actually
3 read this in the post, the Department of Justice had
4 either 95 or 96 perjury prosecutions. And I just
5 don't think that anyone in this room would reasonably
6 believe that there are only 96 instances of perjury in
7 the country in either '05 or '06.

8 VICE CHAIR THERNSTROM: Right.

9 MR. WELCH: So that's why I think it's
10 just very difficult, for example, to rely on criminal
11 convictions to quantify the problem. As far as data
12 collection, I think it's really out of my purview. I
13 don't know that I could assist you in that.

14 VICE CHAIR THERNSTROM: I mean on a
15 personal note here, I'll reiterate what I just said.
16 I find it very frustrating in the conversations about
17 voter fraud, big problem, little problem, well, I like
18 numbers and it's just -- I just have never been able
19 to figure out a way of getting a handle on exactly how
20 to pin down or how -- a route to both sides standing
21 on the same factual ground and then you can argue over
22 the interpretation.

23 MR. WELCH: I don't disagree with you at
24 all. It's a laudable goal. It's just, unfortunately,
25 I don't think I could help you in that regard.

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1 VICE CHAIR THERNSTROM: Right, right.

2 MR. WELCH: Because I lack the impetus in
3 that area.

4 VICE CHAIR THERNSTROM: Fair enough.
5 Thank you very much.

6 Commissioner Kirsanow, are you still on
7 the phone? Do you have questions?

8 COMMISSIONER KIRSANOW: I'm still here.
9 Thank you very much, Madam Chairman.

10 I do have two questions. One is to Mr.
11 Coates, a very quick question. Although the Voting
12 Section is not charged with enforcement of state law
13 is the Section's approach to the 2008 election
14 nonetheless affected at all by the Supreme Court's
15 recent decision upholding the Indiana Voter ID law?

16 MR. COATES: The way that Voter ID may
17 play a part of coverage would be that, for example, if
18 there was evidence that indicated that an ID
19 requirement that is enforceable under state law had
20 been enforced in a racially discriminatory fashion or
21 an ethnically discriminatory fashion so that only
22 Hispanic voters or only African American voters had
23 been asked for ID and no white voters had been asked,
24 then that would be the kind of activity that -- an
25 intentional discriminatory activity in the enforcement

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1 of a state law requirement that would weigh in favor,
2 perhaps of some federal presence at the polls to make
3 sure that that kind of discriminatory enforcement does
4 not occur, because the enforcement of any state law
5 requirement in the case that you asked about, the ID
6 requirement, the enforcement of that requirement in
7 the discriminatory fashion could have a deterring
8 effect upon minority voters' inclinations to
9 participation in elections and that does raise a
10 question under the Voting Rights Act. So that's how
11 the decision -- there are predictions by people that
12 the fact that the Indiana case found that ID
13 requirements are facially constitutional may encourage
14 other legislatures in other states to enact such
15 requirements. And if there is an indication that they
16 were not going to be enforced in a racially fair
17 manner, then that would be a factor that we would
18 consider.

19 COMMISSIONER KIRSANOW: Thank you. Also,
20 and this could be directed either Mr. Welch or Mr.
21 Coates, I'm wondering if there's any role to play by
22 either the Voting Section or Criminal Division related
23 to the issue of multiple registrations or registration
24 in multiple districts. I think as I recall during
25 congressional testimony you related to reauthorization

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1 of the Voting Rights Act. There was testimony that
2 there are hundreds of thousands of individuals
3 registered in multiple jurisdictions, 140,000
4 Floridians, for example, are registered in either New
5 York or New Jersey and about 60,000 Kentucky residents
6 are registered also in Tennessee. Is there anything
7 that is done to make sure that multiple registrations
8 don't evolve into an opportunity for fraud?

9 MR. WELCH: Well, this is William Welch
10 speaking. You are correct that multiple registration
11 can be an issue, due to for example, the winter birds
12 from New York who end up migrating to Florida in the
13 winter. We view multiple registrations through the
14 same sort of criminal lens as we would any other
15 registration scheme which is is there an underlying
16 intent to defraud and very often people simply don't
17 understand or make a mistake and register in two
18 different districts.

19 And so, for example, from a criminal
20 perspective, that would be something that we would
21 take into consideration and most likely because the
22 intent is not one to defraud. It would not be
23 something that we would criminally pursue. But we
24 would certainly look at multiple registrations if it
25 was part of a larger scheme to defraud, the right to

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1 vote, or even on an individual basis where it was
2 shown to be consistent with someone trying to defraud
3 the system.

4 MR. COATES: This is Chris Coates, and
5 from a civil point of view, multiple registrations is
6 a problem that arises under the National Voter
7 Registration Act and the purge requirements under
8 Section 8. Many times jurisdictions that have persons
9 who are not legally entitled to vote in their
10 jurisdiction are on the voter registration list
11 because people who have died and also people who have
12 moved away and registered in other places still have
13 their name on the old place of residency. This
14 creates a potential that should a person fraudulently
15 vote using the name of the person who has moved and
16 that's the reason that we have brought cases under
17 Section 8 of the AVRA in an attempt to address this
18 type of problem.

19 COMMISSIONER KIRSANOW: Thank you,
20 gentlemen.

21 VICE CHAIR THERNSTROM: I believe that
22 Commissioner Yaki has a very brief question, he's
23 promised me, and then I would like to turn to the
24 Staff Director who also has questions.

25 COMMISSIONER YAKI: I'm still formulating

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1 my question, so why don't you go to the Staff
2 Director.

3 VICE CHAIR THERNSTROM: Okay.

4 STAFF DIRECTOR DANNENFELSER: A question
5 for Mr. Coates. You talked earlier about outreach to
6 different groups and so on. Have you done any
7 outreach to the national or state political parties in
8 terms of them identifying any patterns of voter
9 suppression or voter fraud, their concerns about
10 possible patterns?

11 MR. COATES: We have not.

12 STAFF DIRECTOR DANNENFELSER: Is that
13 something that you're precluded from doing or have you
14 made a policy decision not to?

15 MR. COATES: We are not precluded from
16 doing that. We have not done so during the primary
17 campaign. If either national political party or any
18 national political party wanted to provide us
19 information that pertained to their concerns about
20 jurisdictions in which there might be violations of
21 federal law at the time of the general election, we
22 would certainly be receptive to receiving that
23 information and consider it in our deliberations.

24 STAFF DIRECTOR DANNENFELSER: And I guess
25 just one other. Does any of your monitoring

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1 potentially involve what happens after the polls close
2 in terms of from the point that the polls close until
3 the votes are recorded?

4 MR. COATES: Yes, sir. On a number of our
5 monitorings, persons from the Department of Justice go
6 to the campuses and to the vote counts, whether
7 they're held on the night of the election or they
8 canvass to the extreme jurisdictions for a couple of
9 days and go to a canvass a couple of days later. If
10 circumstances indicate that there might be activities
11 of an irregular nature that would draw into question
12 federal law and that we need to be there to collect
13 the information that occurs.

14 STAFF DIRECTOR DANNENFELSER: Thank you.

15 VICE CHAIR THERNSTROM: I believe
16 Commissioner Yaki --

17 COMMISSIONER YAKI: Go ahead.

18 COMMISSIONER MELENDEZ: Thank you again.
19 I have another question. This has to do with some of
20 the areas having to do with Native American citizens.

21 As you know, there have been many reports of language
22 access, intimidation and other problems --

23 VICE CHAIR THERNSTROM: Excuse me,
24 Commissioner Melendez, just for the reporter, I don't
25 think I said this is Commissioner Melendez.

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1 COMMISSIONER MELENDEZ: Okay.

2 VICE CHAIR THERNSTROM: Go ahead.

3 COMMISSIONER MELENDEZ: But anyway, I
4 wanted to talk about and I was very pleased to learn
5 this past week that the Department of Justice and
6 observers to five counties in South Dakota and two in
7 New Mexico also the State of Alaska is a real concern
8 as far as being such a vast area and a number of
9 Native Americans and Alaskan Natives that live there.

10 There's been an issue of lack of polling
11 places and smaller villages and the failure to provide
12 translation and language assistance to those unable to
13 read, but almost very little has been done. Just an
14 example, a preliminary injunction was filed by the
15 ACLU and a Native American Rights Fund just last month
16 against the State of Alaska to enforce compliance with
17 Section 203 and 208 of the Voting Rights Act by
18 providing materials and assistance in the Yupik
19 language to residents of the Bethel census area. Over
20 85 percent of the 16,000 people there are American
21 Indian and Alaska Natives and it is one of the three
22 county-level jurisdiction in the United States where a
23 majority speak American Indian or Alaska Native
24 language at home.

25 The language there is predominantly Yupik.

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1 The illiteracy rate among those with limited English
2 proficiency is over 20 percent, yet the state has
3 continued to provide only notices and voter
4 registration materials and basically disregarded the
5 native community in its voter registration drives and
6 failed to provide qualified translators at the ballot
7 box.

8 Although this case is just one of the
9 examples what is suffered by Alaska natives, so could
10 you two tell me what your monitoring plans are for
11 Alaska and what, if any, steps you are planing to
12 ensure compliance with language and voter assistance
13 required by the Voting Rights Act in Alaska primarily,
14 but also in South Dakota and New Mexico.

15 MR. COATES: Yes, to all three states, we
16 have not made final determinations as to where --
17 we're not in a position to making final determinations
18 as to whether or not we would send monitors to any of
19 the states, but you are correct in noting that this
20 Tuesday, called Primary Election Day, we had monitors
21 in several counties in South Dakota that have
22 substantial Native American populations.

23 Pending before us now, under Section 5,
24 pre-clearance, is the Alaska language program and we
25 have received information both from the state and from

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1 representatives of Native American people in Alaska on
2 that pending issue and so we're in the process of
3 receiving information from the various parties.

4 I can't tell you, as I sit here right now,
5 as to whether or not we intend to send monitors to
6 South Dakota to the general election, to send monitors
7 to New Mexico or Alaska at the time of the general
8 election.

9 COMMISSIONER MELENDEZ: And just
10 concluding, does the Voting Rights Section intend to
11 intervene in this legislation or take other steps to
12 ensure compliance by the State of Alaska?

13 MR. COATES: The only way that we would
14 intervene is if after a thorough investigation, if we
15 determine that the language minority program that has
16 been submitted to the state should be objected to
17 under Section 5 because of discriminatory purpose for
18 discriminatory effect under the reauthorized statute,
19 then we would interpose objection. If we find to the
20 contrary, then we would pre-clear, but that would --
21 that is the way in which that matter is before us now.

22 COMMISSIONER MELENDEZ: Thank you.

23 MR. COATES: You're welcome.

24 VICE CHAIR THERNSTROM: I have two very
25 fast questions myself. Oh, you have a question.

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1 COMMISSIONER HERIOT: I have a very quick
2 question and that was just brought up by Commissioner
3 Melendez, this question.

4 How many different languages have election
5 officials across the country have been required to
6 provide ballot information in? How many different
7 languages?

8 MR. COATES: Under Section 203, I think
9 there are five languages that are covered. There can
10 arise other situations where intentional
11 discrimination against a group that may speak an
12 uncovered language, for example, that would involve
13 intentional discrimination under the prohibitions of
14 Section 2 of the Act.

15 COMMISSIONER HERIOT: How many languages
16 have been involved in that section?

17 MR. COATES: Well, I can give you some
18 examples. I can't give you a total number, but the
19 situation that I speak about is that for example,
20 there are a number of jurisdictions where there are a
21 number of Korean Americans living, but they're not
22 sufficient numbers of Korean Americans in the
23 jurisdiction to trigger the protections of Section 203
24 of the Voting Rights Act.

25 VICE CHAIR THERNSTROM: Or French

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1 Canadians, for instance, who might speak French,
2 primarily.

3 COMMISSIONER YAKI: You mean French
4 Canadian Americans?

5 VICE CHAIR THERNSTROM: Yes.

6 MR. COATES: In some cases, there have
7 been -- we have looked at whether or not, for example,
8 the use of racial slurs at the polls, either by poll
9 officials or made by private parties that was allowed
10 to go on by poll officials directed at Korean
11 Americans could be -- would be actionable under
12 Section 2, even though the protections of 2 and 3
13 would not be available to Korean Americans in that
14 jurisdiction because they do not have sufficient
15 numbers at this time.

16 VICE CHAIR THERNSTROM: I have a couple of
17 questions myself.

18 Commissioner Yaki, do you also have a
19 couple?

20 COMMISSIONER YAKI: I'll save -- I can
21 wait my turn.

22 VICE CHAIR THERNSTROM: All right, well,
23 let me just ask two quick questions. Again, to Mr.
24 Coates, I had forgotten that -- my ears pricked up on
25 this. You talked about the existence today more than

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1 four decades after the passage of the Voting Rights
2 Act still of racist poll workers and other Southern
3 officials dealing with elections.

4 I wondered, that's a very powerful word,
5 racist. And I just wondered what constitutes evidence
6 of actual racism and then -- you used -- you referred
7 to bad conduct and I just wondered specifically what
8 either of those terms meant.

9 MR. COATES: Madam Chairman, I didn't mean
10 to limit it to just Southern officials because the
11 misconduct that has been reported to the Voting
12 Section and seen by some of our election monitors have
13 occurred in jurisdictions in the South and outside of
14 the South. But the use of racial slurs and racial
15 comments directed at Asian voters, directed at Native
16 American voters, would be the type of conduct that I
17 would characterize as being racist.

18 VICE CHAIR THERNSTROM: A poll worker
19 might say what, tell me what?

20 COMMISSIONER YAKI: Do we need to --

21 VICE CHAIR THERNSTROM: Yes, I want to --
22 I am very concerned about the use of -- charges of
23 racism in this country which too frequently made
24 against a racially complicated situation.

25 COMMISSIONER YAKI: Can we stipulate that

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1 probably those terms are ones not used in polite
2 company and why we should -- why we should -- well, to
3 me, a lot of these words are so racially charged that
4 I find them offensive even to hear them during
5 testimony. If you're comfortable doing it, go ahead,
6 but I would say that we can stipulate that there are
7 --

8 VICE CHAIR THERNSTROM: Well, wait a
9 minute --

10 COMMISSIONER YAKI: -- certain words that
11 are not --

12 VICE CHAIR THERNSTROM: I'm sorry, I don't
13 know what a racially charged -- yes, that covers a lot
14 of territory. I would like to know what the Justice
15 Department considers racist. That is a -- I mean
16 racism --

17 MR. COATES: I'll be glad to give you an
18 example.

19 VICE CHAIR THERNSTROM: Sure.

20 MR. COATES: We have an employee in the
21 Voting Section who has a Hispanic surname and when he
22 was recently on election coverage in a Northern state,
23 one of the poll officials mentioned the fact that he
24 had a Hispanic surname and asked if he came from a
25 family of criminals.

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1 VICE CHAIR THERNSTROM: Yes.

2 MR. COATES: That she knew nothing about
3 him other than the fact that his last name was of an
4 Hispanic surname.

5 VICE CHAIR THERNSTROM: Right, good
6 example, proving my point that Mr. Coates can answer
7 questions for himself.

8 (Laughter.)

9 Doesn't need any protection by
10 Commissioner Yaki.

11 MR. COATES: I think that all of us could
12 agree that presupposing criminal activity on the basis
13 of --

14 VICE CHAIR THERNSTROM: Absolutely.

15 MR. COATES: Of a surname is an
16 inappropriate behavior of poll officials and so I have
17 no hesitancy in labeling that type of activity as
18 being racist.

19 VICE CHAIR THERNSTROM: Fair enough. I
20 agree with you.

21 Commissioner Yaki, do you have a question
22 of your own?

23 COMMISSIONER YAKI: Well, I enjoyed
24 interrupting yours, but --

25 (Laughter.)

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1 I'm waiting for something off of my
2 blackberry to come up.

3 Keep on going.

4 VICE CHAIR THERNSTROM: No --

5 COMMISSIONER YAKI: Commissioner Gaziano
6 had a question.

7 VICE CHAIR THERNSTROM: Oh, I see. I'm
8 sorry.

9 COMMISSIONER GAZIANO: If you don't mind -
10 -

11 VICE CHAIR THERNSTROM: Absolutely, I'm
12 sorry.

13 COMMISSIONER GAZIANO: Since, of course,
14 we've established and I think logically that it's very
15 difficult to quantify the range of the amount of
16 fraud, it might be a little easier to identify
17 intimidation because there you have a real victim, so
18 that's why the difficulties you've explained in your
19 testimony, Mr. Welch, is identifying the amount of
20 fraud.

21 I'd like to at least just right on the
22 record some potential motives so that we know maybe
23 where you all have to look. I think some Americans
24 were surprised at the extent of fraud that's been
25 covered or at least concern over fraud in primaries

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1 because it's assumed by some Americans that partisan
2 advantage, either racial animus and partisan advantage
3 are the only two motives for fraud.

4 In my review in some of the five cases
5 that's -- it's often -- the motive is more likely the
6 promise of a job. Is that not the case in some of
7 these machine error fraud schemes?

8 MR. WELCH: It can be a variety of
9 motives, just as you're identifying. It can be the
10 promise of a job. It can be the promise of
11 advancement within a machine. It can be turnout in
12 votes. It can be the promise of contracts in the
13 sense of if you know that a particular individual who
14 you're trying to get into office gets into office and
15 they pay you back through forms of corruption. So
16 very often election fraud, election crime and
17 corruption matters overlap to a substantial degree.

18 COMMISSIONER GAZIANO: And some of the
19 lower level participants might be willing to risk a
20 federal jail sentence for \$100?

21 MR. WELCH: That's correct. I mean --

22 COMMISSIONER GAZIANO: That amazes me. It
23 amazes me how many people are involved in some of
24 these schemes once the tip of the iceberg is uncovered
25 or the rest of the iceberg is uncovered by the tip I

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1 should say.

2 MR. WELCH: That's right. I mean I think
3 the amount of the financial remuneration that goes to
4 an individual whose vote is going to be bought is
5 offset by the promise of future reward. And so
6 they're willing to pay or willing to assume the risk
7 of getting caught, believing that it's negligible in
8 order to advance either their own or someone else's
9 self interest in the future.

10 COMMISSIONER GAZIANO: And other than
11 racial, potential racial animus, what -- why would
12 there be -- these factors come into play, but isn't
13 there a personal preference for one candidate over
14 another in a primary? There's some concern that
15 between Clinton and Obama in certain of the primaries,
16 there was concern by one of the camp to the other that
17 -- isn't each party one big happy family?

18 The voters are willing to engage in fraud
19 to advance one candidate over the other.

20 MR. WELCH: I'm not quite clear what your
21 question is. I think the question is either within a
22 primary itself, meaning simply it's one party's
23 interest at stake. I think all the things that we've
24 been talking about still come into play and they can
25 be, for example, one trying to ensure the personal

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1 preference for a particular candidate wins out and in
2 order to do that, they engage in a vote-buying scheme
3 or things of that nature. I think the parallels that
4 we're talking about are also seen in campaign finance
5 where you see campaign finance violations to advance
6 perhaps one candidate over the other even within the
7 primary itself.

8 COMMISSIONER GAZIANO: Right. And the
9 last question is there can be some -- there may not be
10 a particular goal of a certain person engaging in
11 voting in multiple states to get a job, but they
12 really believe that X candidate is better than Y
13 candidate even within their own party.

14 MR. WELCH: That's certainly possible,
15 correct.

16 COMMISSIONER GAZIANO: Thank you.

17 VICE CHAIR THERNSTROM: You got --

18 COMMISSIONER YAKI: Not a question. I
19 wanted a fact. One comment on Commissioner Gaziano's
20 remarks brings me to -- reminds me of a certain radio
21 commentator who was urging people in Ohio under the
22 Ohio format to swear their fealty to the other party
23 simply for the chance of voting in that particular
24 primary election which was found by people to be in a
25 sense free speech and not voter fraud, although I find

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1 it very close --

2 COMMISSIONER GAZIANO: Was that not the
3 large party you registered in? Don't you welcome all
4 voters in your party?

5 COMMISSIONER YAKI: I have a feeling that
6 more --

7 COMMISSIONER GAZIANO: As an independent
8 --

9 (Simultaneous speakers.)

10 COMMISSIONER YAKI: More of them will stay
11 -- than some people would like to know. But going to
12 the 2008 election, two little follow-ups, one in terms
13 of the resources allocated for observers and monitors,
14 you said and you emphasized it again with Commissioner
15 Gaziano that so far, at least, there's been sort of no
16 limit on the resources that you can allocate to that.

17 Who in the Department has the final say over how many
18 people are going to be sent out into the field and
19 where is it you or is it the Civil Rights Division,
20 Assistant AG, or where exactly does the buck stop?

21 MR. COATES: We make the recommendation as
22 to what jurisdictions we should have monitors and
23 observers in and the numbers and that goes up my chain
24 of command to the Assistant Attorney General for Civil
25 Rights and I think that's where the final decision is

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1 made. It may go higher than that, but I think that
2 it's made finally by the division.

3 COMMISSIONER YAKI: Now in terms of the
4 people that you send out, some are Justice Department
5 employees --

6 MR. COATES: Yes.

7 COMMISSIONER YAKI: Some are attorneys
8 from different divisions within Justice. What kind of
9 training is involved? Specifically, at least
10 anecdotally, I'm saying this anecdotally, so I'm sorry
11 there's not lots of data on this --

12 VICE CHAIR THERNSTROM: It's not a data
13 question.

14 COMMISSIONER YAKI: But anecdotally there
15 have been some instances where individuals from the
16 criminal prosecutor's offices of Justice go out as
17 monitors and some people have found them to be as
18 intimidating, if not more intimidating, than the
19 people who allegedly they're supposed to try to keep
20 in check, simply because I don't know, maybe they wear
21 the dark suits and flash a badge or what have you.
22 But is there any training that goes on --

23 COMMISSIONER GAZIANO: Let the record
24 reflect Commissioner Yaki is wearing a dark suit.

25 VICE CHAIR THERNSTROM: I was about to say

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1 that.

2 COMMISSIONER YAKI: Actually, today I'm
3 just wearing a sports coat and slacks, so it's not a
4 suit, just to correct the record.

5 But is there any truth in saying we want
6 you to be there, we don't want you to sort of be a
7 heavy fed presence or maybe you want to be? What is
8 it that goes into that training so when they're out
9 there they're doing their job and not unintentionally
10 you know scaring away potential new voters who are
11 going who are these guys who look like they're guys
12 who carry guns and badges and what have you?

13 MR. COATES: First of all, I'd like to
14 point out to you the training is done by us, by people
15 in the Voting Section. It's not done by the Criminal
16 Division. And during the monitoring, people who work
17 for the Department, even though they may come from the
18 Housing Section or may come from a local U.S.
19 Attorney's office, some of those people do civil
20 cases. Some do criminal cases. They work under the
21 direction of people from the Civil Rights Division
22 during the time that they're monitoring elections.

23 The observers who are primarily monitored
24 and directed by OPM supervisors, but we work closely
25 with them so the duration for those days of monitoring

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1 is something that's done by the Civil Rights Division.

2 The training that is done instructs people about the
3 nature of their job, the nature under the Voting
4 Rights Act of monitors and observers is to go out and
5 observe, to collect information. It is not to
6 intervene. It is not to walk up and to tell the
7 election -- the poll worker in a particular place that
8 he or she is not following state law or that he or she
9 is not following federal law. It's to collect
10 information about the fact that violations are
11 occurring.

12 On election day what we train our people
13 to do is that if you see violations occurring that can
14 be corrected, have a close contact with local
15 officials, either local or state officials, contact
16 them and let them know, for example, that there's some
17 woman in a polling place in Sugarloaf, Mississippi who
18 is not allowing people to ask for assistance, but is
19 grabbing them by the arm when they come in and forcing
20 assistance upon them. Contact local officials and let
21 them know that that kind of inappropriate behavior is
22 going on so that corrective action, hopefully, can be
23 taken by the locals. But what the observer is there
24 to do is to gather than information so we can make a
25 determination at a later date as to whether or not a

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1 federal violation has occurred and whether or not
2 litigation needs to be filed.

3 COMMISSIONER YAKI: Does a monitor --

4 VICE CHAIR THERNSTROM: Michael? We've
5 got a problem of four participants in the next panel
6 and --

7 COMMISSIONER YAKI: This will be quick.

8 VICE CHAIR THERNSTROM: The clock is
9 really ticking here.

10 COMMISSIONER YAKI: I understand.
11 Quickly. Is there a difference between a monitor and
12 an observer in terms of the interaction with election
13 law officials at the local level?

14 MR. COATES: No. The difference is the
15 observers, the observers can enter the polling place
16 that's provided for under the Voting Rights Act.
17 Monitors are Justice Department employees. Many times
18 they enter, but only with the permission of state and
19 local officials. They do not -- people from -- the
20 few people from the U.S. Attorney's office who have
21 served as federal monitors, they do not wear firearms.

22 They do not hold themselves out to be prosecutors,
23 and even though some persons in some organizations
24 have raised the complaint that a few prosecutors have
25 been used is that we have never received complaints

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1 from individual voters, minority or otherwise, so that
2 because the local AUSA from the U.S. Attorney's Office
3 in Macon was then at the polls that people felt
4 intimidated and did not vote.

5 COMMISSIONER YAKI: I just want to say one
6 final statement. In the wake of Indiana, there are
7 still states who have not enacted a Voter ID law, yet
8 in report after report in 2002, 2004, 2006, a lot of
9 election officials nevertheless decided on their own
10 absent any law to create their own sort of voter ID.
11 I would just ask that as you prepare for the 2008
12 elections you keep that in mind because there may be
13 some people who believe that simply because the
14 Supreme Court came down on Indiana the way it did that
15 will somehow give carte blanche to voter ID checks
16 even in jurisdictions where there is no state law
17 mandating that.

18 VICE CHAIR THERNSTROM: And can we leave
19 it there with my apologies for not permitting an
20 answer to that.

21 COMMISSIONER YAKI: Yes.

22 VICE CHAIR THERNSTROM: But I'm really
23 concerned our four panelists for the next panel and I
24 thank you so much and the reason that it's gone on so
25 long is because you brought this rich testimony to

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1 this briefing and I appreciate your coming and what
2 are very busy, professional days, I'm sure.

3 Thank you so much.

4 MR. COATES: Thank you very much for
5 taking the time to hear us.

6 VICE CHAIR THERNSTROM: Do we need a break
7 at all or can we go right into the next -- you're
8 ready to roll? Everybody is ready to roll? Good.

9 COMMISSIONER YAKI: I was here at 9:30.

10 VICE CHAIR THERNSTROM: You get some kind
11 of gold stars and those of us who were not ready to
12 roll get some kind of what? Demerits.

13 (Pause.)

14 VICE CHAIR THERNSTROM: Pete, you're still
15 there?

16 COMMISSIONER KIRSANOW: I'm here.

17 VICE CHAIR THERNSTROM: Good. Thank you
18 for sticking with us on this.

19 (Pause.)

20 VICE CHAIR THERNSTROM: The next panel is
21 four voting rights experts and I'm going with
22 everybody's permission to change the rules here a
23 little bit. I understand that Professor Tokaji has a
24 plane to catch and what I would like to do is to allow
25 him to make his statement and then have questions

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1 addressed to him before we go on and the fact that
2 he's been held up is, of course, entirely our fault
3 here because we had a lot of people who don't really
4 sit silently by in these briefings.

5 Anyway, first let me run through who we've
6 got as these panelists and then they can begin. I'll
7 need to swear them in.

8 Daniel Tokaji who is going to go first, is
9 an Associate Professor of Law at the Moritz College of
10 Law at Ohio State University; Associate Director of
11 the website, Election Law at Moritz. It's an
12 invaluable resource, I should say for those of us who
13 try to follow the developments in election
14 administration law. So it's very much appreciated.

15 Professor Tokaji has written extensively
16 on voting rights issues, contributes regularly to a
17 website called Equal Vote which provides analysis and
18 commentary on election reform and voting rights issues
19 with special attention to the rights of racial and
20 ethnic minorities, nonspeaking voters, non-English
21 speaking voters, and people with disabilities. He
22 serves on the Board of the ACLU of Ohio.

23 Hans A. von Spakovsky served as a member
24 of the Federal Election Commission and as counsel to
25 the Assistant Attorney General for Civil Rights where

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1 he specialized in voting and election issues,
2 including the enforcement of the Voting Rights Act and
3 Help America Vote Act. He has written extensively on
4 voting rights.

5 Paul Hancock is currently a partner in the
6 Miami office of Kirkpatrick & Lockhard Preston Gates.
7 He previously served for more than 20 years in the
8 Civil Rights Division. While at DOJ he directed the
9 Voting Rights Litigation Program and in addition he
10 served as the State Deputy Attorney General for South
11 Florida and argued Gore v. Bush before the Florida
12 Supreme Court and the U.S. Supreme Court.

13 Last, but not least, Roger Clegg is the
14 President and General Counsel of the Center for Equal
15 Opportunity. He served in the Justice Department in a
16 variety of positions including as Deputy Assistant
17 Attorney General in both the Civil Rights Division and
18 the Environment and Natural Resources Division. He
19 also served as an Assistant to the Solicitor General,
20 Associate Deputy Attorney General, and Acting
21 Assistant Attorney General in the Office of Legal
22 Policy. He has appeared as a panelist before this
23 Commission on several occasions.

24 Please swear and affirm that the
25 information you provided is true and accurate to the

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1 best of your knowledge and belief?

2 (The witnesses were sworn.)

3 Okay, Professor Tokaji. Then you can
4 catch your plane.

5 MR. TOKAJI: Thank you so much, Madam
6 Chair, and I very much appreciate your efforts to move
7 things along.

8 My name is Daniel Tokaji, and I am
9 Associate Professor of Law at the Ohio State
10 University's Moritz College of Law. My research and
11 scholarship, as was just mentioned, focuses primarily
12 on matters of voting rights and election
13 administration, and I'm very honored and appreciate
14 the opportunity to appear before you today.

15 There can be no disputing the fact that
16 the United States Department of Justice has a vital
17 role to play in ensuring that the fundamental right to
18 vote is protected. There will inevitably be some
19 reasonable disagreements, I expect, on this panel on
20 how best to serve this overarching objective, but
21 whatever those disagreements, I hope we can agree that
22 an integral part of the Department of Justice's
23 historic mission is to insure that all eligible voters
24 are permitted to exercise their right to vote on equal
25 terms with other citizens.

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1 It is especially important that the
2 Department of Justice ensure that eligible voters
3 aren't denied their right to full and fair
4 participation in elections based on race, ethnicity,
5 poverty, language proficiency or disability.

6 The remarks that follow summarize my views
7 on the appropriate role of the department when it
8 comes to the enforcement of voting rights in the 2008
9 election season, and I'll be giving a somewhat more
10 abbreviated version of the longer written testimony
11 that I have provided for you. I will first discuss
12 areas that in my opinion ought to be high priorities.
13 Those include making sure that voter registration
14 opportunities, language assistance, and disability
15 access are provided to all voters as required by
16 federal law.

17 Next I will discuss the type of activities
18 that I would respectfully suggest the department avoid
19 so as to ensure both the appearance and the reality of
20 nonpartisanship in this election season.

21 There are many ways in which the
22 department can promote voting rights, but I'm going to
23 focus on three, registration, language assistance, and
24 disability access, in my testimony today.

25 First, voter registration, and this is the

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1 point on which I will most extensively focus. One of
2 the most important areas of voting rights activity in
3 this year's election, in my view, are the procedures
4 that state and local jurisdictions follow in
5 registering voters and in maintaining voting rolls.
6 The importance of this area is a result of several
7 factors, including the Help America Vote Act of 2002,
8 evidence regarding compliance and noncompliance with
9 the National Voter Registration Act of 1993, sometimes
10 known as "Motor Voter," and state laws that have been
11 enacted in recent years.

12 Although election administration,
13 including voter registration is mostly a state and
14 local matter, as we mentioned earlier, there are some
15 important federal legal requirements in place designed
16 to ensure that all eligible voters have a fair
17 opportunity to participate in elections. A
18 cornerstone of these requirements is the National
19 Voter Registration Act, or as I'll refer to it here
20 NVRA, which requires to voter registration for federal
21 elections be made available at state motor vehicle
22 agencies, as well as at state offices providing public
23 assistance services and services to people with
24 disabilities.

25 The department is, of course, empowered to

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1 bring civil actions in federal court to enforce the
2 NVRA's requirements.

3 Unfortunately, we do have evidence of
4 noncompliance and less than full compliance with the
5 requirements of the National Voter Registration Act,
6 especially when it comes to making registration
7 opportunities available at public assistance offices.
8 The number of voter registration applications from
9 public assistance offices has declined precipitously
10 in the past ten years, despite the fact that somewhere
11 around 40 percent of voting age citizens from low
12 income households remain unregistered.

13 Survey evidence suggests that registration
14 opportunities are not being made available as required
15 by the NVRA. Put simply, there is evidence that a
16 disproportionate number of poor Americans are not
17 being registered as required by the law, and yet I
18 would emphasize that it appears that the Department of
19 Justice has done relatively little in recent years to
20 make sure that registration opportunities are made
21 available at public assistance offices as federal law
22 requires, at least until very recently.

23 On my survey of the department's Website,
24 as I was flying in this morning, I found one case
25 having to do with making registration available at

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1 public assistance agencies from Tennessee. That case
2 was actually filed, I believe, in 2002, has been quite
3 successful in increasing registration, but in my
4 opinion there hasn't been enough focus on making sure
5 that that aspect of the NVRA is complied with.

6 Another priority is to make sure that
7 voters' names are not wrongly removed from or omitted
8 from state voter registration lists. This is not
9 merely a theoretical problem. A study that was
10 conducted by Cal Tech-MIT Voting Technology Project in
11 2001 after the 2000 election found that this was
12 probably the greatest source of lost votes, that is,
13 registration mix-ups, accounting for some 1.5 to three
14 million voters affected.

15 Evidence that this is a continuing problem
16 was partly in the high number of provisional ballots
17 that are being cast, and provisional ballots are cast,
18 among other reasons, where a voter's name doesn't show
19 up on the registration list, just like the fact the
20 voter believes that he or she has registered. This is
21 particularly a problem in my own state of Ohio, based
22 on data I've just recently received.

23 No eligible voter should be denied the
24 right to vote, to have that vote counted due to a
25 faulty registration list.

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1 The NVRA, as well as HAVA, impose
2 important limitations on voters being purged or
3 otherwise having their names wrongly removed from
4 voting rolls, that includes a limitation on removal
5 within 90 days of an election that I discuss in
6 somewhat greater detail in my written testimony.

7 Here, again, there's reason to worry that
8 the requirements of federal law are not being complied
9 with, and I'll just refer you all to the evidence that
10 I cite in my written testimony, in the interest of
11 time.

12 A second area of concern is language
13 assistance, and I was here during the first panel. I
14 know this has been discussed. There's one additional
15 point that I just want to emphasize. The language
16 assistance requirements of the Voting Rights Act,
17 Sections 203 and 4(f)(4), don't just require bilingual
18 ballots. In fact, I'm not even sure that's the most
19 important thing they require.

20 They also require registration and oral
21 assistance to be provided, and I say this is
22 particularly important in light of evidence regarding
23 a registration gap, especially facing Asian Americans,
24 Native Americans, and Latino voters.

25 Third and finally, disability access.

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1 This is a group that, I fear, are sometimes the
2 forgotten and stepchildren of voting rights law, the
3 last group to get full and equal access to the
4 franchise. The requirements of both the ADA, HAVA,
5 and other federal laws have to do with this, and I
6 think the bottom line here is it's just hard to know
7 very much because the data and the information, going
8 back to something you alluded to earlier, Dr.
9 Thernstrom, is just so poor on this, and I think we
10 need better monitoring and better information
11 gathering in this area especially.

12 Finally, because I've seen the yellow
13 light is on, let me say something in regard to some of
14 the allegations that have emerged in the past couple
15 of years regarding the so-called politicization of the
16 Justice Department. Many commentators, including a
17 number of former DOJ professionals have alleged that
18 the department's actions, particularly in the area of
19 voting rights, were driven by partisan interests
20 rather than the rights of voters.

21 I emphasize that it is not my purpose here
22 today to rehash those allegations, but I would
23 emphasize this: There is no question that the
24 department's reputation has been tarnished by the
25 revelations that have emerged in the past year or so.

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1 For this reason, it is vitally important in this
2 current election season that the department be
3 especially careful to avoid even the appearance of
4 partisanship in the discharge of its responsibilities,
5 and I would emphasize especially when it gets very
6 close to the election.

7 The focus of DOJ's efforts should be on
8 expanding access for all voters including racial
9 minorities, language minorities, poor people, and
10 people with disabilities rather than on taking actions
11 that could chill registration and participation or
12 that might be perceived as advancing partisan
13 interests.

14 Thank you.

15 VICE CHAIR THERNSTROM: Well, thank you,
16 and as I said, I'd like to let you get liberated in
17 time for your plane. If you have time --

18 MR. TOKAJI: I do have time.

19 VICE CHAIR THERNSTROM: -- of course,
20 stick around, but let us have people ask questions of
21 you at this point.

22 MR. TOKAJI: Thank you, Madam Chair.

23 So Commissioner Gaziano.

24 COMMISSIONER GAZIANO: Yes. Thank you,
25 Professor, for testifying.

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1 There's one thing in particular I wanted
2 to ask you about, and that is the supposed evidence
3 you've mentioned for the failure to enforce the Voter
4 Registration Act with regard to welfare offices. It
5 is certainly not surprising after President Clinton
6 signed the welfare reform into law that the welfare
7 rolls have declined dramatically, and my colleague at
8 the Heritage Foundation, David Muhlhausen, among
9 others, has done very careful studies, rather than
10 just sort of anecdotal surveys, and found that the
11 decline in the number of registrations at public
12 assistance offices mirrors almost exactly the decline
13 in the number of people being offered in this.

14 Are you aware of David Muhlhausen's
15 testimony before Congress?

16 MR. TOKAJI: I am aware of it. I can't
17 say that I've read that testimony, but let me respond
18 as follows.

19 COMMISSIONER GAZIANO: Just before I do
20 that, have you read the subsequent, more complete
21 study that he's published?

22 MR. TOKAJI: No, but I'd like to see --

23 COMMISSIONER GAZIANO: Well, I'm going to
24 enter it into the record and encourage you to do so.

25 MR. TOKAJI: Let me say this. I don't

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1 doubt that at least a part of the decrease, the
2 significant decrease in registrations coming from
3 public assistance agencies is attributable to that,
4 but there is survey evidence showing that voters are
5 not being offered the opportunity, and I would
6 emphasize a couple of points.

7 In cases where there actually have been
8 efforts to make sure there's compliance, as in
9 Tennessee, which I mentioned earlier, and one other
10 state in which private groups got together, that is,
11 North Carolina, we have seen a significant increase in
12 voter registration coming from public assistance
13 agencies.

14 That suggests to me that if we actually
15 enforced the provisions of the NVRA, we will see a
16 desperately needed increase in voter registration
17 among poorer voters.

18 COMMISSIONER GAZIANO: Okay, and by the
19 way, if there is some sort of systematic failure to
20 comply with this act, I suppose the theory would be
21 that it is both the state public assistance agencies,
22 the social workers who really don't want to register
23 these people, and the federal officials then turning a
24 blind eye, would not be the way if the federal law is
25 not being --

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1 MR. TOKAJI: Yes. I mean, I think often
2 the state secretary of states will take the position
3 that it is not our job to do it. County welfare
4 agencies, unless there's pressure to be put upon them,
5 have not much of an incentive to do so, and it would
6 be the Department of Justice logically that would be
7 applying that pressure.

8 But for the most part in the past several
9 years, at least until relatively recently, that has
10 not happened.

11 COMMISSIONER GAZIANO: Well, I will be
12 glad to look into your research further. I'm still
13 somewhat perplexed that the mirror drop, responding to
14 the mirror drop in welfare suggests a different
15 conclusion than you have reached.

16 MR. TOKAJI: Well, even if your statement
17 of the evidence is correct, I wouldn't draw that
18 inference, and you and I may just respectfully
19 disagree --

20 COMMISSIONER GAZIANO: Sure.

21 MR. TOKAJI: -- with each other on that
22 point.

23 I would also note a recent study which
24 came out after I had written my testimony on Friday or
25 just last week from electionline.org, which I'll

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1 submit into the record as well.

2 COMMISSIONER GAZIANO: Thank you.

3 VICE CHAIR THERNSTROM: You are saying
4 that social workers, surely their bias is towards
5 getting people, the clients they serve, getting them
6 registered to vote. Am I wrong on that?

7 MR. TOKAJI: Well, let me try to look at
8 it from their perspective. We're both speculating
9 here about --

10 VICE CHAIR THERNSTROM: Right.

11 MR. TOKAJI: -- you can't get into the
12 minds of somebody.

13 VICE CHAIR THERNSTROM: Right.

14 MR. TOKAJI: But these are people with a
15 lot of other tasks, and if nobody is telling them this
16 is something you have to do, you know, they may be
17 anxious to get on to the next client. Again, this is
18 just speculation, but it's not difficult for me to
19 understand, Dr. Thernstrom, from the perspective of
20 the busy welfare worker why they might not have a
21 strong incentive to put this on their list of things
22 to do with these clients.

23 VICE CHAIR THERNSTROM: Other questions?
24 Yes, Commissioner -- oh, Commissioner Kirsanow, you
25 are from Ohio yourself. Would you like to come in

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1 here at all?

2 COMMISSIONER KIRSANOW: Not at this point.

3 Thank you very much.

4 VICE CHAIR THERNSTROM: Okay.

5 Commissioner Melendez.

6 COMMISSIONER MELENDEZ: Yes. Thank you,

7 again, for being here.

8 Since you were here during the first
9 panel, I wonder what your opinion is of the care for
10 allocating monitors that Mr. Coates mentioned, and
11 would you prioritize operations of these sources
12 differently than what he said?

13 MR. TOKAJI: Let me make a couple of
14 points on monitors. The first is that there's a limit
15 to what monitors can do. I think they're necessary,
16 but what I tried to emphasize in my testimony today is
17 just sending monitors on election day is not going to
18 get the job done. This has to begin weeks, months in
19 advance, which is why I'm glad we're having this
20 hearing in June rather than in October.

21 The second point is that I think there are
22 some dueling considerations here in terms of resource
23 allocation. I mean, you know, I think there are
24 resource allocation decisions that have to be made,
25 but on the one hand, it may well be the case as was

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1 mentioned earlier that in jurisdictions that are swing
2 states, like my own State of Ohio, are more likely to
3 have voting rights violations; that there will be an
4 increased incentive for people to engage in tactics,
5 like so called voter caging or intimidation or giving
6 false information about, you know, where you're
7 supposed to vote or the date on which you're supposed
8 to vote.

9 At the same time, I think the reality is
10 in swing states like mine, like Ohio, the parties, the
11 political parties, advocacy groups are going to be
12 paying much closer attention to what's going on, and
13 let's face it. They have a stronger incentive if they
14 believe there's a violation of the NVRA or HAVA or the
15 Voting Rights Act to litigate in Ohio than they do in
16 some state that's not in play.

17 So from that perspective, it may be more
18 appropriate actually, just taking that one factor into
19 consideration, for the department to focus on less
20 high profile states. So as I say, there are dueling
21 considerations here.

22 VICE CHAIR THERNSTROM: I have a question.
23 I have a few questions, but let me just start with
24 this. During your testimony here, you referred to the
25 high number of provisional ballots in some states, and

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1 in Ohio, for example, the percentage of voters casting
2 provisional ballots actually increased.

3 What's the problem? I ask this. What is
4 the problem with provisional ballots? That is, their
5 purpose is obviously to make sure that at the end of
6 the day voters who are properly registered, eligible
7 to vote are not disfranchised.

8 You've obviously got a problem with
9 provisional votes.

10 MR. TOKAJI: Yes. Let me say, first of
11 all, certainly being able to cast a provisional ballot
12 is better than not being able to cast any ballot at
13 all, and you know, I think that the provision of HAVA
14 requiring provisional ballots for voters who don't
15 have proper ID or who appear at polls and find out, in
16 fact -- that was a good provision of law, one that I'm
17 thankful was enacted.

18 The problem, if you've got a bad
19 registration system that results in a lot of people
20 casting provisional ballots is, I guess I'd say,
21 twofold. Let me make it threefold actually.

22 First of all, there's a risk that some of
23 those voters' votes won't be counted, and we have
24 widely varying rates of counting provisional ballots
25 not only among states, but within states, presenting

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1 an equal protection problem, I think under Bush versus
2 Gore. People's provisional ballots are being treated
3 differently from jurisdiction to jurisdiction.

4 VICE CHAIR THERNSTROM: And they're not
5 counted because of incompetence? Why aren't they
6 counting them?

7 MR. TOKAJI: It's really hard to say, and
8 like I said earlier, I tend to be data driven, and the
9 data here is not as good as I would like it to be. My
10 suspicion is it's probably due to different practices
11 among jurisdictions within a state. There may not be
12 clear rules for ascertaining which provisional ballots
13 should count and which shouldn't.

14 Second, the second problem with a large
15 number of provisional ballots, obviously it creates a
16 big headache and consumes a lot of resources of state
17 and local election officials.

18 Third, and this may be more important
19 leading up to the 2008 elections, it increases the
20 likelihood of a litigated election. If you've got
21 more provisional ballots, just as if you have more
22 over votes or under votes, it gives the parties more
23 things to fight over after the election.

24 You know, we can all remember Palm Beach
25 County 2000. I think the last thing we want to see is

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1 officials in, let's say, Franklin County, Ohio, where
2 I live, going through every provisional ballot, you
3 know, trying to figure out whether it should be
4 counted, analogous to what happened eight years ago.

5 So it increases the likelihood -- it
6 increases the margin of litigation and, therefore, the
7 likelihood of post election disputes, which I think
8 we'd all like to avoid if we can.

9 VICE CHAIR THERNSTROM: What is the
10 magnitude of the problem here? I mean, when you've
11 got a bad provisional ballot, what percentage of the
12 ballots are we talking about that could be, you know,
13 provisional? Are we talking about, you know, one
14 percent or less of all ballots?

15 MR. TOKAJI: It varies considerably from
16 state to state.

17 VICE CHAIR THERNSTROM: A larger number?

18 MR. TOKAJI: My state is at the higher
19 end, and let me give you some time-line statistics.
20 In the November 2004 election in Ohio, it was as I
21 recall 2.7 percent. By 2006 it was 3.1 percent. In
22 this primary election, based on information I've just
23 received from the Ohio Secretary of State's Office,
24 which is in my testimony, it's 3.4 percent.

25 So you know, a significant number of

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1 ballots ending up in a close election could affect the
2 result.

3 VICE CHAIR THERNSTROM: Yes, that is a
4 significant number.

5 And when you refer to people wrongly
6 removed or omitted from registration lists, what's
7 going on there?

8 MR. TOKAJI: I think there are probably
9 multiple things going on. Let me just identify some
10 of the things that can go wrong. It could be that
11 election officials have made a mistake. It could be
12 that motor vehicle agencies have made a mistake, or
13 public assistance agencies, in failing to transfer the
14 registration form.

15 It could be that the voters made some
16 mistake, did in some form even though he or she
17 thought she did. It could be that some third party or
18 what I prefer to call non-party registration group has
19 made a mistake, has collected the registration, but
20 for some reason they didn't make it to the County
21 Board of Elections Office.

22 I don't want to suggest that it's all
23 database problems, but having said that, I think there
24 are some database problems which the Brennan Center
25 report that I refer to in my testimony documents. You

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1 know, if you've got overly stringent, quote, unquote,
2 "matching" procedures, that is, procedures for
3 matching data --

4 VICE CHAIR THERNSTROM: Right.

5 MR. TOKAJI: -- you can have voters
6 erroneously stricken because they're registered in one
7 place or their registration has Ben, but their motor
8 vehicle registration says Benjamin or there's a
9 transposition of first and last name or there's a
10 problem with a hyphenated name.

11 VICE CHAIR THERNSTROM: And related to
12 this now, and I'll let other people speak, I mean, is
13 there related to this a failure on the part of voters
14 to re-register, let's say, after moving to a new
15 address and is there a failure of information given to
16 voters such that we don't run into the problems?

17 Are there actions that can be taken so
18 that -- obvious actions that can be taken -- so that
19 we don't end up with three-plus percent of provisional
20 ballots in a State like Ohio?

21 MR. TOKAJI: Yes. I've been thinking about
22 that a lot, Dr. Thernstrom, and you know, there are
23 different states that have different ways of doing
24 registration which can substantially reduce reliance
25 on provisional ballots. At one end of the spectrum is

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1 Election Day registration, and you know, I know there
2 are a variety of different views on Election Day
3 registration. I happen to be a supporter of them.
4 One of the big advantages that it has in States like
5 Minnesota, Wisconsin is it reduces reliance on
6 provisional ballots.

7 Short of that, other states have what Dr.
8 Michael McDonald, a political scientist, refers to as
9 portable voter registration, where you can transfer
10 your registration on Election Day by going to your new
11 polling place. That can also in some instances reduce
12 these errors from occurring.

13 He's got a forthcoming paper on that
14 subject that I would be happy to provide as well after
15 today's hearing.

16 VICE CHAIR THERNSTROM: Good. Other
17 people, questions. Commissioner Kirsanow, are you
18 still in that swing state of yours where there's
19 undoubtedly going to be 1,000 voting rights lawyers
20 gathered on both parties, gathered on Election Day?

21 COMMISSIONER KIRSANOW: I'm moving to
22 Montana.

23 (Laughter.)

24 VICE CHAIR THERNSTROM: Good move. It's
25 prettier, for one thing. Okay. You don't have an

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1 immediate question.

2 COMMISSIONER KIRSANOW: I do not.

3 COMMISSIONER YAKI: I dispute that it's
4 prettier.

5 VICE CHAIR THERNSTROM: Moving on --

6 COMMISSIONER YAKI: It's got a big sky
7 though.

8 VICE CHAIR THERNSTROM: Moving on to
9 Commissioner Yaki.

10 COMMISSIONER YAKI: Thank you very much,
11 Commissioner Thernstrom.

12 A quick question, and I guess I didn't
13 really have time to talk about it with the first
14 panel, but to me, having been an elected official and
15 watching how elections tend to be conducted, we're
16 very -- I don't know if we're unique or not, but at
17 least the American system is one where we have
18 national elections run by people at the very local
19 level, many of who are elected, appointed, political
20 or otherwise.

21 I know that in San Francisco you could
22 with very little effort get behind the desk to see
23 what was going on with the ballot counting that was
24 going on, which goes to the issue of how do you treat
25 provisionals, how do you treat damaged ballots,

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1 spoiled ballots, those sorts of things. And I was
2 just wondering what your take is on the fact that so
3 much of the determinations are being made right there
4 at the local level by a person who only does this
5 maybe once every four years, not probably up to date
6 with every development and election law that's gone
7 on.

8 Do you have any comments on that?

9 MR. TOKAJI: Yes. I mean, I have a
10 comment on it, which is basically to agree with your
11 recognition of a problem without having a real simple
12 solution to it. One of the things that I've written
13 about is what's sometimes called the hyper
14 decentralization of the American election system. We
15 don't just have one election system or even 50. We've
16 got thousands and thousands of election systems in
17 this country. You know, most of the responsibilities
18 are foisted upon local election officials who I
19 understand often don't have the resources they need to
20 do their jobs as well as they would like to. I get
21 that, and I --

22 COMMISSIONER YAKI: And I mean not even
23 resources. I think dream.

24 MR. TOKAJI: Yes.

25 COMMISSIONER YAKI: And the fact that if

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1 you have a person who may be elected or appointed by
2 an elected official, I just make this as an
3 observation comment. I think that one of the major
4 reasons for the -- and this goes on both sides,
5 Democrat and Republicans -- I think you can see the
6 sees of the so-called Brooks Brothers riot in Miami
7 pretty much anywhere else in the country because of
8 the ease of access that people have inside the sanctum
9 of the Registrar's Office because of close
10 relationships, friendships, what have you, that give
11 people really unprecedented access to national
12 decisions that are being made.

13 MR. TOKAJI: Well, I think it's integral
14 that at least the balloting, and that includes
15 electronic voting machines, that the sanctity of those
16 be maintained rigorously, that there be chains of
17 custody.

18 Going back to something that I think is
19 implicit in your remark and was certainly a part of
20 your original question, you know, we rely very heavily
21 on volunteer poll workers, who are there just one day,
22 and God love them, our system depends upon them. We
23 don't have enough of them. We don't have enough of
24 them who are capable of doing the job, to be honest.

25 You know, I say that not to slight any of

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1 the hard working poll workers who our system depends
2 upon, but our election laws have gotten so complex
3 that you almost have to be a lawyer to understand
4 them.

5 So since I know this is going on C-SPAN,
6 let me just say this. For those out there wondering
7 what they can do to make our elections better, and I
8 hope we can all agree on this regardless of our party,
9 something everyone can do is volunteer to be a poll
10 worker in your community. I know that county
11 Registrars and Boards of Election throughout the
12 country will thank you for it.

13 VICE CHAIR THERNSTROM: Thank you very,
14 very much.

15 Anybody else?

16 (No response.)

17 VICE CHAIR THERNSTROM: Well, we will move
18 on. Professor Tokaji, please stay around as long as
19 you feel like it.

20 MR. TOKAJI: I'll stay for a few more
21 minutes. Thank you. Take care.

22 VICE CHAIR THERNSTROM: Hans von
23 Spakovsky.

24 MR. VON SPAKOVSKY: Thank you, Madam
25 Chairman.

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1 COMMISSIONER YAKI: I'm probably breaking
2 a union contract when I do this.

3 (Laughter.)

4 VICE CHAIR THERNSTROM: Probably not for
5 the first time, right?

6 MR. VON SPAKOVSKY: Madam Chairman, I
7 appreciate the invitation to be here today to speak to
8 the Commissioners about this issue.

9 In addition to the time I spent at the
10 Department of Justice and Federal Election Commission,
11 I actually spent five years as a local election
12 official in Atlanta, Georgia as a member of the Fulton
13 County Board of Registration and Elections, which was
14 the largest county in the state and was a
15 predominantly African American jurisdiction.

16 I was also on the first board of advisors
17 of the Election Assistance Commission.

18 The subject of this hearing is the
19 Department of Justice plans for the November election.
20 I, frankly, think that the outstanding record of the
21 division during this administration shows that it's
22 well prepared to monitor compliance with and enforce
23 the four federal voting rights statutes it has
24 responsibility for, that is, the Voting Rights Act,
25 the National Voter Registration Act, the Help America

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1 Vote Act, and the Uniformed and Overseas Citizens
2 Absentee Voting Act, which has not gotten a lot of
3 mention here today.

4 I also was going to say some complementary
5 things about the new Chief of the Voting Section, who
6 has just become the Chief, but you all saw him here
7 this morning. He's an outstanding lawyer. He's
8 probably the most experienced trial lawyer not just in
9 the Voting Section, but in the entire Civil Rights
10 Division, and I, frankly, think under his leadership
11 and that of the other deputies he brought with him,
12 they're going to do a very good job.

13 They have pointed out that in 2002 and
14 2004, when I was at the division, we broke historical
15 records in the number of federal observers and staff
16 that we sent out: 2002, 829 observers and staff;
17 2004, if you actually consider both the general
18 election and the primaries, we sent out almost 1,500
19 federal observers and 533 staff.

20 Now, when you consider that the Voting
21 Section only has about 85 lawyers and support staff,
22 you realize that's quite an achievement. The only
23 reason that we were able to do that was because we
24 instituted an in-house training program, and we
25 recruited division-wide trying to get people in that

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1 had not done this before.

2 We also installed for the 2002-2004
3 elections, frankly, a new 800 number and a new
4 telephone system because GAO had done a study and had
5 criticized the department and division for the 2000
6 election over its handling of the huge volume of
7 complaints it had gotten in. We put in the new
8 telephone system, and we set up a triage system using
9 lawyers and paralegals that would determine the most
10 serious complaints that needed immediate attention
11 Election Day.

12 We also put in the first Web-based
13 complaint system. I assume that all of these
14 improvements will be in place with this November
15 election.

16 We also, along with the Criminal Division,
17 mobilized not only our division but also the Public
18 Integrity Section, the 93 U.S. Attorney's Offices, and
19 the FBI so that on Election Day, they would have
20 agents and lawyers available in all of the field
21 offices and in Washington at telephones ready to
22 answer any complaints that came in from voters, and we
23 trained them so they would know who it should be
24 referred to.

25 So, for example, if the FBI got a

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1 telephone call about an issue that was not a criminal
2 issue, but was a civil rights issue, they would know
3 to immediately call the section and forward it to us
4 and vice versa.

5 Frankly, the division, despite a lot of
6 misplaced criticism, has a terrific enforcement record
7 over the past eight years, and I have no doubt they
8 will investigate and litigate any unremedied cases
9 they see. As Chris Coates said, and I know Dan Tokaji
10 has indicated his concern over Section 203, well, when
11 this administration came to office, there had only
12 been about a dozen cases filed to enforce Section 203,
13 the language minority provisions. I think that the
14 last count I saw this administration has filed 27,
15 more than double what had been filed in the prior
16 history of the act, including the first 203 cases on
17 behalf of, for example, Filipino Americans, Vietnamese
18 Americans.

19 Section 208, the right to assistance on
20 Election Day, is a very important provision of the
21 Voting Rights Act during elections. Well, 90 percent
22 of the suits filed to enforce that provision have been
23 during this administration.

24 This administration has also filed more
25 lawsuits to enforce the National Voter Registration

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1 Act than any prior administration. That's very
2 important because that ensures that individuals who
3 apply to register will become registered to vote, and
4 each state will properly maintain the voter
5 registration list.

6 They filed close to a dozen Help America
7 Vote Act suits to enforce not just the provisional
8 balloting requirements in some counties and states
9 that were not providing provisional ballots, but also
10 they went after states who were not putting in the
11 statewide voter registration database. They were
12 required to do so, and doing it in time for the
13 federal elections, and that database was designed by
14 Congress to solve some of the registration problems
15 that Dan Tokaji was talking about.

16 They also filed numerous cases under the
17 Voting Rights Act under Section 2.

18 One of the biggest problems I see in the
19 upcoming election is the fact that our overseas
20 military voters remain one of the largest groups of
21 disenfranchised voters that there is. That's because
22 they're still voting by a 100 year old method of paper
23 absentee ballots, and it can take more than 30 days
24 for a requested ballot to wind its way through the
25 mail from election centers here overseas to a combat

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1 soldier in Iraq. If the combat soldier immediately
2 votes and sends it back, the chances are in more than
3 half of the cases the ballots don't make it back in
4 time.

5 That's why it's extremely important that
6 the department set up, as they did in the 2004
7 election in cooperation with DoD a survey system that
8 monitors through E-mail and otherwise what is going on
9 in the 3,000 counties across the country who are
10 responsible for sending out absentee ballots. Time is
11 very short when we find out, when Justice finds out
12 that a state or a county hasn't sent out their
13 absentee ballots at least 30 days before the election.
14 They have got to be ready to go to court immediately.

15 We had to do that in 2004 in Georgia and
16 Pennsylvania when we discovered counties had not sent
17 out their absentee ballots. In those cases we
18 obtained court orders that were the broadest relief
19 the department had ever gotten, including transmittal
20 of the ballots overseas by fax and E-mail, return by
21 overnight express mail at the state's expense and
22 extensive notice to the voters.

23 I do think the department does need to
24 look at one problem that it has not dealt with, and
25 that is the failure of certain states, such as Ohio,

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1 South Dakota, and Iowa to comply with 42 USC §15483.
2 That's the part of the Help America Vote Act that
3 added a citizenship question to the voter registration
4 form.

5 The statutory language is very clear.
6 Registration can't be completed unless the citizenship
7 question is answered in the affirmative by the
8 applicant. These states are accepting voter
9 registration forms and registering voters even when
10 the citizenship question has not been answered.
11 That's a direct violation of federal law, and it needs
12 to be remedied by the Justice Department.

13 There's also another problem with states.
14 Maryland is one that does this. A number of states
15 provide driver's licenses to illegal aliens. Most
16 states provide driver's licenses to legal aliens who
17 are here with permission of the government. Because
18 many of the DMVs automatically offer voter
19 registration with any individual who is getting a
20 driver's license, they are not differentiating that
21 they are offering voter registration opportunity to
22 people who are not citizens.

23 A final thing that needs to be done is
24 they need to check to make sure that all of the states
25 have their statewide voter registration databases up

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1 and running, in full compliance with HAVA. There's
2 some indication that Illinois may not have a fully
3 compliant system.

4 There was a recent study in Connecticut
5 finding that almost 9,000 deceased people were still
6 on the rolls. That indicates that they are not
7 complying with Section 303 of HAVA which requires
8 these new statewide databases to be coordinated with
9 state agency records on death.

10 In conclusion, I do think DOJ is well
11 prepared overall to handle any issues that may arise
12 during the November election. I do think that some of
13 these HAVA and NVRA compliance issues need to be
14 surveyed and reviewed by the division.

15 They also, both divisions, criminal and
16 civil rights need to complete their training and
17 preparations this summer to insure that they have the
18 resources, the equipment, and the personnel ready on
19 election day for any problems that may occur.

20 I am confident that under the leadership
21 of both divisions that they'll be able to do that.

22 Thank you.

23 VICE CHAIR THERNSTROM: Thank you very
24 much.

25 Obviously we're waiting until all three of

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1 your give your testimony for questions addressed to
2 the three of you.

3 Paul Hancock.

4 MR. HANCOCK: Thank you, Doctor.

5 Members of the Commission, I submitted a
6 written statement. I would ask that it be made part
7 of the record of this proceeding.

8 My --

9 VICE CHAIR THERNSTROM: All written
10 statements are a part of the record I assure you.

11 MR. HANCOCK: The views that I expressed
12 here are based on my long experience in the Civil
13 Rights Division of Department of Justice, including in
14 the Voting Section for many years and supervising the
15 work of the Voting Section.

16 I also have a perspective as a former
17 state Deputy Attorney General, and that we in Florida,
18 where we lived through some dramatic times in the 2000
19 election system, and then we had to come up with a
20 remedy. So I was involved with not only the
21 litigation, but also the remedial provisions that we
22 had to enact, and then had to get the clearance under
23 Section 5 of the Voting Rights Act.

24 I agree that there is certainly room for
25 principal debate as to the continuing need for certain

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1 provisions of the Voting Rights Act, but there's not
2 much room for debate as to what caused the act to be
3 enacted in the first place. Blacks in this country
4 faced the very sorry history of the most severe
5 discrimination anyone could imagine. They were
6 subject to discriminatory tester devices as a
7 precondition to voting. If they attempted to register
8 to vote, they were harassed. They were beaten. They
9 were murdered.

10 That's not ancient history. Many African
11 Americans who will appear to vote this year were
12 subject to that conduct, and unfortunately it wasn't
13 just blacks in the South. Native Americans have also
14 a very severe history of discrimination in voting.

15 And it wasn't just citizens who were
16 imposing unfair conditions in harassing and
17 intimidating and murdering blacks. It was state
18 public officials, including law enforcement officials.

19 So while we've made great achievements
20 since that time, the plan for the future needs to be
21 carried out in the context of what people experience.

22 We all view conduct based on our own life experience.

23 I give you one example of the 2000 election in
24 Florida where we got reports that police officers had
25 set up a roadblock south of Tallahassee in north

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1 Florida to check people's driver's license and
2 registration.

3 That spread great fear through the black
4 community that this was an effort -- it was near a
5 black polling place, and the fear was that people
6 began to report that they were being targeted because
7 they were -- the only reason they were being targeted
8 is because they were on the way to the polls to vote.

9 Now, somebody without the experience of
10 north Florida blacks might say that was a silly
11 reaction, but for those who lived through what
12 happened earlier, it was not a silly reaction. It
13 spread such great fear that reports were made to the
14 Department of Justice. They were conveyed to me in
15 the Attorney General's Office. We were able to stop
16 it, and I must say that our investigation showed that
17 Officer Bubba may not even know there was an election
18 that day, but the point was that their conduct,
19 although innocuous to them, could have deterred many
20 people from voting.

21 We stopped it early. Whether people were
22 deterred from voting I can't say, but that is just an
23 example of what we consider going forward here. The
24 Voting Rights Act has had remarkable success, and it's
25 remarkable that you're having this hearing today when

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1 just yesterday it was informed that the presumptive
2 nominee of one of our parties is going to be an
3 African American. That itself shows the remarkable
4 success of this law.

5 At the same time, it presents some really
6 serious issues for this next election. I mean, we can
7 expect to have the largest African American turnout in
8 the history of our country. I don't think it's
9 unreasonable to expect that, nor is it unreasonable to
10 expect that a large number in presenting to the voters
11 will be people who haven't voted in a long time.
12 Maybe they've never voted, African Americans who have
13 never voted. They're going to come out in force.
14 They might have stayed away from the polls for a long
15 time. They might be elderly. They might not be as
16 informed of the election process as others.

17 So what do we do? And also it's not going
18 to be a secret as to who their candidate of choice is,
19 which means that if somebody wants to suppress the
20 vote, they can target people for suppression just by
21 the color of their skin.

22 That's a reality. It's not system.
23 That's a reality. So what do we do to prepare for
24 this election? I mean I, for one, do not think that
25 the most important statistic is the number of -- and

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1 let just say the Voting Right Act provisions, I think
2 it's important to keep it in context because I think
3 terms have been thrown around here today that aren't
4 quite accurate.

5 There were a number of interrelated
6 provisions to the Voting Rights Act of '65. First, it
7 threw out the discriminatory tested device. I know
8 you know this, Dr. Thernstrom, but bear with me a
9 moment. It threw out discriminatory tester devices
10 that were used. It allowed federal officials to enter
11 southern states and other specially designated states
12 to actually list people for registration purposes, in
13 other words, registered voters, and it provided -- and
14 this is the crucial point for purpose of today -- it
15 allowed the federal government in those cases where
16 counties were designed for examiners, as they were
17 called, to send in federal observers to observe the
18 election process for the sole purpose, sole purpose of
19 determining whether people would be denied their right
20 to vote on account of race, color, or later amended to
21 mean language minority status.

22 That's the sole reason, the only reason in
23 law that Department of Justice officials through the
24 Office of Personnel Management can enter a polling
25 place to observe the election, is to look for race

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1 discrimination. That's all, nothing else.

2 Also, Section 5 was a prophylactic
3 provision to make sure that new discriminatory devices
4 weren't enacted.

5 Now, what do we do here? What does it
6 mean to prepare for this election? Well, I will offer
7 a number of suggestions to you, some of which have
8 been discussed today, and I'll try to address some of
9 the issues that have been raised.

10 First of all, this is a presidential
11 election. It's different than any other election.
12 The lesson from Florida is that we don't rerun
13 presidential elections. So it's not important just to
14 have observers that are to find out what problems
15 might exist. Mr. Coats talked about the observer
16 program that they gather information. They go back,
17 and they study it, and they see whether the Department
18 of Justice should bring a lawsuit.

19 Well, the presidential election is over,
20 and the problems they find that might affect the
21 presidential election are not going to be used to
22 remedy that election. In a mayoral election, perhaps
23 we could rerun the election if there were serious
24 problems that affected the outcome of the election,
25 but the election we learned from Bush v. Gore is we

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1 don't rerun presidential elections, and the problems,
2 even if they're valid, even if they're valid, we don't
3 have time to fix them sometimes after the election is
4 held.

5 The lesson is we've got to do this in
6 advance. We try to avoid these problems, stop them
7 from occurring. Now, how do we do this? Well, it
8 requires advanced planning. It requires a lot of
9 advanced planning. The department needs to work with
10 state and local election officials to coordinate with
11 advocacy groups, to coordinate with state officials,
12 to coordinate with anyone who has any insight in the
13 electoral process to try and predict what the problems
14 might be.

15 Other imports, I agree. We talked about
16 HAVA, NVRA. Those are important enforcement tools,
17 and they can be used in an actual election to make
18 sure that we have accurate registration lists, to make
19 sure that people are going to be allowed to put when
20 they are put on the list properly, and at the polls
21 the lists are cleaned properly.

22 With this election it's going to be very
23 important that local election officials do the little
24 things right. That is, they let people know where
25 they should go to vote. One of the biggest problems

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1 we have in elections is that people don't know whether
2 they should go to vote. Polling places are changed
3 and people don't get advanced notice of the polling
4 places. It's going to be crucial this year when we
5 have so many people who aren't as experienced in the
6 electoral process. How are they going to know where
7 to go? Are they going to know the procedures that
8 they need to follow to vote?

9 And, Dr. Thernstrom, you talked about
10 provisional balloting. My major concern about this is
11 that a provisional ballot only counts if the person is
12 otherwise properly registered and otherwise complies
13 with the law. If they appear at the wrong polling
14 place mainly because they didn't get proper notice or
15 they didn't know where to go to vote, I'm not blaming
16 anyone for it. Let's just say they appear. They're
17 properly registered. They just went to the wrong
18 school house. If they are given a provision ballot
19 without being directed to the right polling place,
20 their vote isn't going to count.

21 Now, we can debate the wisdom of that from
22 a public policy purpose because what difference does
23 it make in the role for President where you go to
24 vote, but that is the law. That is the requirement of
25 most states. I would say that it's very important to

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1 the department. In fact, when we got clearance of the
2 election reform legislation that had a provisional
3 ballot that had that requirement, the Department of
4 Justice would not preclude agreement from the state
5 that before they did a provisional ballot, they would
6 first find where the voter should be voting and direct
7 them to the proper precinct.

8 That should be done in every state, and
9 it's a serious, serious problem because if we get long
10 lines on Election Day and election officials are busy,
11 it's very easy to hand people a provisional ballot.
12 "I don't see your name on the list. Here's a
13 provisional ballot. If you're properly registered,
14 it's going to count."

15 So that's my major concern with
16 provisional balloting. I wish we had it done
17 differently, and I wish we would consider ways. If
18 someone is properly registered and they want to vote
19 for President, count their vote, but under the present
20 law, it's not going to happen.

21 So it's very important that the department
22 work with election officials in advance to make sure
23 it's done right, and it's nothing that's going to be
24 corrected on Election Day.

25 I mentioned that the only reason in law

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1 for sending observers in is denial of a person of the
2 right to vote on account of race or language minority
3 status, and they can only be sent to jurisdictions
4 that are subject to the special provisions of the
5 Voting Rights Act. That's all.

6 Now, the department has expanded this
7 program by using attorney coverage and also with the
8 consent of some states, the states have allowed
9 department officials to enter the polling place even
10 though they're not authorized by law to do so. That's
11 positive, but I say to you I'm not overly impressed by
12 the number of observers that are sent out. I think
13 sometimes this program has been misused to give a
14 stamp of federal approval on an election.

15 The design should be identifying areas
16 where there might be a problem and sending people in
17 to address those problems, and it can't be political.

18 This can't even have the appearance of politics.
19 That's going to be tough in this election because it's
20 going to be so obvious who the people are lining up to
21 vote for, at least African Americans.

22 So it has to be done in a professional
23 manner, and I suggest that the department should, as
24 it used to do in the past and maybe still does, there
25 should be detailed memoranda prepared explaining the

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1 weaker justification for sending people to those
2 areas, not just that a state official wanted us there.

3 That doesn't mean a thing to me. The point is have
4 you done the research necessary to determine whether
5 there might be a denial or abridgement of the right to
6 vote on account of race or national origin, and if
7 that's the case, use it.

8 And I think that, again, I'd say that --
9 okay. I will wrap it up -- and I would say also that
10 it's crucial who's sent out here. The expansion of
11 this program beyond its original intent might have
12 some benefit, but it also has a lot of risk because
13 when you're sending civil rights lawyers out, that's
14 one thing. If you're sending lawyers from the
15 Criminal Division or other areas of the Department of
16 Justice, they don't have the background in civil
17 rights. They don't have the understanding. They're
18 perceived to be law enforcement officials that can
19 have the same countervailing effect that we just don't
20 want to have.

21 And I would say on voter ID issue, that
22 was for the racial challenge, but there's still great
23 concern in the minority community what the impact of
24 that is going to be, and this election provides an
25 opportunity to gather information about that.

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1 Observers are going to be in the polling place. It
2 won't be hard to keep information about people that
3 are turned away, and then we'll know the racial impact
4 of this. You'll have your data that you need to do
5 your studies.

6 To sum it up, I think we really have an
7 awfully great challenge this year. It's going to be
8 an historic election, and it's going to have the
9 largest African American turnout we've ever
10 experienced, and the challenge is going to be to make
11 sure these people are treated fairly and without
12 regard to race. That, in my view, rests primarily
13 with the Department of Justice, but they've got a lot
14 of work cut out for them that they need to begin doing
15 now.

16 Thank you.

17 VICE CHAIR THERNSTROM: Well, I think all
18 of us would agree with what you just said. Historic
19 election, and we absolutely need to make sure that
20 people are casting ballots and their ballots are
21 counted.

22 MR. HANCOCK: That we count them. That's
23 right.

24 VICE CHAIR THERNSTROM: So I can't imagine
25 there's any disagreement on the Commission on that.

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1 Roger Clegg.

2 MR. CLEGG: Thank you, Madam VICE CHAIR,
3 for the opportunity to testify today before the
4 Commission.

5 My name is Roger Clegg, and I'm President
6 and General Counsel of the Center for Equal
7 Opportunity, which is a nonprofit research and
8 educational organization that is based in Falls
9 Church, Virginia. Our Chairman is Linda Chavez, and
10 our focus is on public policy issues that involve race
11 and ethnicity, such as civil rights, bilingual
12 education, and immigration and assimilation.

13 I should also note that I was a deputy in
14 the U.S. Department of Justice's Civil Rights Division
15 for four years, from 1987 to 1991, part of the time
16 when Paul was there also. We worked together.

17 Law enforcement agencies have two tasks
18 with respect to voting: making sure that legitimate
19 voters are not kept from voting and making sure that
20 fraudulent voters are kept from voting. Both tasks
21 are important.

22 I won't say that they are equally
23 important since most Americans are offended more when
24 they read about a person denied the right to vote who
25 shouldn't be than when they read about someone

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1 illegally voting.

2 On the other hand, this is not quite the
3 usual criminal law situation where we can blithely
4 assert that it is better to let ten guilty men go free
5 than imprison one innocent one. After all, when
6 someone votes illegally, he cancels out the vote of a
7 lawful voter. So arithmetically, if not
8 psychologically, the impact is the same as if that
9 lawful voter had been turned away from the polls.

10 Those who have been kept from voting in
11 recent memory, both lawfully and unlawfully, have
12 disproportionately included members of groups that
13 have tended to vote Democratic. On the other hand, my
14 sense is that illegal voters have also tended to vote
15 Democratic.

16 Consequently, Democrats are happy to
17 insist that nobody should be hindered from getting to
18 the polls, even if this means that some illegal voters
19 get to the polls as well. From the Democrats'
20 perspective, it is win-win.

21 I would add in this regard that probably
22 Democrats would, by and large, want to define illegal
23 voters more narrowly. I've noted, for instance, that
24 the left is more likely to favor letting criminals,
25 non-citizens, the mentally competent and the mentally

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1 incompetent and children vote, the only groups that
2 are now generally restricted from voting.

3 Conservatives, on the other hand, are
4 willing to be more adamant about ensuring that illegal
5 voters not vote and are more comfortable with saying
6 that criminals, for instance, shouldn't have the right
7 to vote in the first place.

8 The reason that I bring up this partisan
9 divide is that it complicates the Justice Department's
10 job. If the department focuses effort on making sure
11 that illegal votes are not cast, then Democrats and
12 their ideological allies will criticize the
13 department, especially when this happens during a
14 Republican administration. The Democrats will assert
15 that voter fraud is nonexistent or is exaggerated,
16 which in my view is a dubious claim, and that the
17 department's efforts should, instead, be limited to
18 ensuring more voter registration and access.

19 Conversely, we would expect Republicans to
20 object if the department, especially in a Democratic
21 administration, were to focus on ensuring voter access
22 while turning a blind eye to voter fraud and illegal
23 voting. And, indeed, I have some recollection that
24 this happened to a degree in the Clinton
25 administration.

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1 Now, it's not necessarily a bad thing that
2 we have this kind of public discussion about what sort
3 of job the Justice Department is doing and ought to
4 do, but the discussion ought to be civil and
5 responsible, and it ought to make allowances for the
6 fact that it is as legitimate for the department to
7 take steps to stop illegal voting as it is for it to
8 take steps to protect legal voting.

9 Let me note here that in the recent past
10 too many of the criticisms aimed at the department
11 have been neither civil nor responsible. Instead they
12 appear to be an effort to use personal vilification
13 and character assassination to intimidate department
14 officials into adopting policies that favor one side
15 or the other. It is ironic that those launching these
16 attacks claim that the department has been politicized
17 when it is they who have this aim.

18 Let me conclude, Madam VICE CHAIR, by
19 saying that in addition to these legitimate roles,
20 it's also important for the Justice Department to do
21 no harm -- and I wanted just to add here that
22 unfortunately two of the statutes that the Justice
23 Department has responsibility for enforcing do cause
24 harm. We've talked about Section 203 of the Voting
25 Rights Act this morning, which requires ballots to be

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1 printed in foreign languages. (And by the way, it's
2 not just four foreign languages or five foreign
3 languages that these ballots have to be printed in.
4 Those are just the basic ethnic categories. For
5 instance, "Asian" is one category, but there is more
6 than one language spoken in Asia. So there's a
7 requirement that ballots be printed in Mandarin and
8 Japanese and Korean and Vietnamese, and so forth and
9 so on. The same thing for Native American ballots.)

10 I think that Section 203 balkanizes the
11 country. It diverts resources that could be spent
12 elsewhere -- that have to be spent now on printing
13 foreign-language ballots that could be spent on
14 improving polling opportunities -- and it also
15 increases the likelihood of voter fraud.

16 Likewise, and you referred to this,
17 Commissioner Thernstrom, I think that Section 5 for
18 all of the good that it has done in the past also
19 creates significant harm these days by encouraging
20 racial gerrymandering, which I think is a serious
21 loss to our society.

22 Well, as I say, I view those as ways that
23 the department unfortunately is adding to voting
24 problems rather than counteracting them.

25 Thank you for the opportunity to testify

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1 today, Madam VICE CHAIR, and I look forward to any
2 questions you and the other Commissioners may have.

3 VICE CHAIR THERNSTROM: And I will open
4 the floor for questions.

5 VICE CHAIR THERNSTROM: I want to say one
6 thing before I do, that I actually very much regret
7 that at the beginning of this meeting I failed to say
8 that whatever party you feel affiliated with and will
9 eventually and whatever candidate you will eventually
10 vote for in November, I for one, as somebody who is
11 not a Democrat, nevertheless, I for one very much
12 celebrate the fact that we do have a historic turning
13 point here and the first African American as the
14 candidate of a major party with obviously a good
15 chance of ending up in the White House.

16 And it does say something, it seems to me,
17 very good about this country and how far we've come.
18 So I wanted to interject that.

19 Anyway, questions from the Commissioners?
20 Yes.

21 COMMISSIONER GAZIANO: No one else as
22 eager as I am to begin, but let me continue one line
23 of questioning regarding the assistance for those
24 registrations that were part of the National Voter
25 Registration Act and HAVA. I'm not sure I understand

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1 completely the interplay between those, but one of the
2 concerns that's been expressed, and I think I'll
3 direct this primarily to Mr. von Spakovsky, and maybe
4 other panelists have a thought as you happen to hear
5 it, is that some states have adopted a policy of not
6 asking people seeking public assistance whether
7 they're U.S. citizens or not.

8 In particular, because they do not want to
9 discourage non-citizens from seeking public
10 assistance, and yet there is a requirement to
11 encourage them to register, and the anecdotal evidence
12 that I have is that someone involved in the foster
13 care process was encouraged every time he entered an
14 office in California or Ohio whether he was registered
15 so that there is no failure of the social workers and
16 others involved in encouraging that.

17 But if a non-citizen is asked, there is a
18 concern that some are fearful not to register and
19 indicating that they're non-citizens. Is there a
20 concern that you have regarding states that don't ask
21 for any evidence of citizenship that they're ever
22 registering those who aren't eligible to vote?

23 MR. VON SPAKOVSKY: Thank you,
24 Commissioner Gaziano.

25 Yes, I do have a concern about that. It's

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1 very clear based upon my experience and not just at
2 Justice, but discussions with lots of local officials,
3 and just Tuesday I was down in Georgia speaking to the
4 Georgia Election Officials Association, that they have
5 a tremendous fear of being charged with claims of
6 discrimination or otherwise if they differentiate, for
7 example, in DMVs and not automatically offer voter
8 registration to everyone who comes in.

9 And in fact, when I was at the Justice
10 Department, we received a call at one point from a
11 delegate in Maryland who had found out that the
12 Maryland DMV was, in fact, doing exactly that. Even
13 when someone applied for getting a driver's license
14 and the DMV officials knew they were not a citizen,
15 they were automatically offering them the right to
16 register to vote, and the delegate was very upset
17 about this, and when he asked people why they're doing
18 that, they said, "Well, we have to do this under the
19 NRVA."

20 And the result was that we, the Justice
21 Department, sent a letter to the delegate explaining
22 that, no, the NVRA does require you to offer voter
23 registration when people are applying for a license,
24 but not if they're not U.S. citizens.

25 But, for example, I don't think the DMV in

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1 Maryland has changed that procedure, and I think there
2 are other states that are doing the same thing.

3 COMMISSIONER GAZIANO: So in your view,
4 should the federal legislation be changed to insure
5 that states are more careful to distinguish between
6 those who are eligible to vote?

7 MR. VON SPAKOVSKY: I actually don't think
8 it's a matter of legislation. There's four federal
9 statutes, criminal statutes that govern the fact that
10 non-citizens are not allowed to register and not
11 allowed to vote. I think, frankly, it just needs --
12 one of my recommendations is the Justice Department
13 ought to contact and do a survey of the 50 states and
14 make sure and ask them, "Do you have procedures and
15 rules in place in your DMVs to make sure that if
16 someone is applying for a license and they are not a
17 U.S. citizen, whether they're a legal citizen or not,
18 your DMV clerks are not automatically providing them
19 the opportunity to register to vote?"

20 And I think they would very quickly be
21 able to find out what the regulations or rules and
22 procedures are in all of the states and which states
23 are not doing that.

24 COMMISSIONER GAZIANO: Well, I share your
25 concern about the DMVs, and there are certainly some

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1 who are not legal citizens who still when applying for
2 driver's licenses would want to not indicate that they
3 are citizens who are concerned about that, but aren't
4 there some states who have an affirmative policy not
5 to ask for citizenship in public assistance offices?

6 And if so, then how can they have a system
7 of not encouraging them to vote?

8 MR. VON SPAKOVSKY: I believe that is
9 correct.

10 COMMISSIONER GAZIANO: If I could be
11 permitted to ask one other line of questioning, Mr.
12 Clegg, on the Section 203 language minority ballot
13 issue, I also have a concern with how the federal
14 government determines the number of foreign language
15 speakers, the non-English proficient is the standard,
16 to then know whether to require the local government.

17 They use, as I understand it, Census data
18 in part to do that; is that correct?

19 MR. CLEGG: That's my understanding, and
20 I'm going to --

21 MR. HANCOCK: Yes, that's right. They use
22 Census data to do it.

23 COMMISSIONER GAZIANO: And I've read some
24 congressional testimony and maybe the current panel
25 doesn't know that unless there's four levels on the

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1 Census form, you don't speak English, although I'm not
2 sure whether this is in English but they're asked; but
3 anyway, they don't speak English; they don't speak
4 English very much; they speak it fairly well, but I
5 don't know.

6 MR. HANCOCK: There's well and less well
7 or not at all, something like that.

8 COMMISSIONER GAZIANO: Unless you are the
9 completely proficient, the federal government counts
10 that as not English language proficient; isn't that
11 right?

12 MR. HANCOCK: I think that, yes, I think
13 that as I recall anyone who says they speak English
14 well, less well or not at all is counted in the count,
15 and I think that's based on the Census Bureau's
16 determination that people who report back are in need
17 of assistance. I mean, that's their academic
18 determination.

19 COMMISSIONER GAZIANO: That's ridiculous,
20 that someone who speaks English well and is a U.S.
21 citizen --

22 MR. HANCOCK: No, I'm not saying well, no.

23 COMMISSIONER GAZIANO: Unless it's the
24 highest level.

25 MR. HANCOCK: Right.

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1 COMMISSIONER GAZIANO: The highest level
2 is proficient, very well. Then the next level is,
3 yes, speaks it pretty well, and if you're not a native
4 or an English speaker, most people I mention wouldn't
5 be so egotistical to claim that they speak it
6 perfectly, but if it's anything less than perfect
7 fluency, that's counted as a non-proficient English
8 speaker.

9 MR. HANCOCK: No, not perfect fluency.
10 That's not the standard, but you're correct that --

11 COMMISSIONER GAZIANO: It's not the
12 highest level.

13 MR. HANCOCK: Yes, if it's not.

14 COMMISSIONER GAZIANO: And the second
15 level is that they do speak it pretty well.

16 MR. HANCOCK: That's their reporting, and
17 you'd have to talk to the experts at the Census Bureau
18 as to why they do that. That's certainly a valid
19 issue. I say to you that you incorporate that.
20 That's how the department does it, yes, and how they
21 do it and why they do it, you'd have to talk to them.
22 I think the standard, the concern is that people have
23 a tendency to over report their speaking ability, and
24 the Census Bureau believes that that is the accurate
25 way of determining the people that need assistance in

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1 order to vote effectively.

2 You know, I can't substantiate that. I
3 can just tell you that that's the decision that was
4 made, and you certainly can talk to the people who
5 made it.

6 COMMISSIONER GAZIANO: I understand, and
7 that's something I'd like to look into more. I
8 understand part of it is regulatory, and it's an
9 interpretation of the statute, and it's an
10 interpretation of the statute that to me seems
11 patently unreasonable, and we really ought to be
12 concerned about those small number of U.S. citizens
13 who can't speak English sufficiently well to
14 understand a ballot, but if we are jiggering the
15 statistics to create a problem that doesn't really
16 exist and requiring these jurisdictions to print
17 ballots in ten different languages, and then that
18 exacerbates the problem of sending them overseas,
19 that's a waste of resources, but it also potentially
20 leads to other more serious problems.

21 Thank you.

22 COMMISSIONER YAKI: I'm going to respond
23 to that because, first of all, living in a city where
24 we have ballots in multiple languages and dealing with
25 American citizens who I would say speak English fairly

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1 well, I can tell you with a great deal of certainty,
2 but there is a big difference between the ability to
3 speak English in a way that you can communicate and
4 read it in a ballot book and understand the arguments,
5 the ballot arguments, the other things that are in
6 there. Trying to understand a ballot initiative is a
7 totally different level than saying I can pretty much
8 discourse my way through the day.

9 So I think it's presumptuous to say that
10 just because someone may say on a form they can speak
11 English fairly well or generally well, that that
12 translates into the ability to parse through a very
13 dense ballot book, which I think all of us find
14 procedurally challenging anyway when we get it,
15 especially in California where we have initiatives
16 that spring up by the boat load.

17 So I would say that, you know, you just
18 can't draw generalizations on this. And, by the way,
19 I would also note as an ironic fact that this
20 Commission held hearings with individuals advocating
21 that we do away with those sorts of questions and
22 identifications in the census which, of course, would
23 never lead us to, as I said at the time, more
24 important for the Voting Rights Act and made no
25 impression on those speakers at all.

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1 I just wanted to interject that fact.

2 MR. HANCOCK: I would add also that the
3 department's regulations enforcing 203 allow
4 jurisdictions to target assistance to people who need
5 it. So they keep records as they observe elections.
6 One of the things the department does is keep records
7 of the number of people that come in and require
8 assistance.

9 So if you have an area that might on the
10 census data show a certain percentage of people of a
11 different national origin, for example, like Koreans,
12 if it turns out that they don't need assistance at the
13 polls by past history, then the department's
14 interpretation of the act is there's not much the
15 jurisdiction has to do.

16 The big burden in elections as to language
17 minorities is providing oil assistance. As Roger
18 says, when you have so many different languages, it's
19 a tough time recruiting sufficient poll workers who
20 can effectively provide all assistance at polls.
21 That's the major challenge.

22 COMMISSIONER GAZIANO: Some work needs to
23 be done in deciding what languages to print the
24 ballots in.

25 MR. HANCOCK: Yes. The coverage formula

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1 does have an impact there. I mean, that's the law we
2 have now, and as we talk about preparing for this
3 election, that's the law that's going to be in place.

4 So what we've been focusing on here is talking about
5 what we need to do to get ready for this election.

6 COMMISSIONER GAZIANO: Right, and I'm
7 suggesting that if you want to concentrate the
8 resources where they're really needed, we need to
9 examine whether the way one language or non-English
10 language proficient citizens live it, and these are
11 citizens. You've got to come up with a realistic,
12 accurate way of doing that.

13 MR. HANCOCK: I agree as a former state
14 official that it presents problems on the state and
15 particularly it presents problems, and I think
16 targeting is really a key to this, and I say to you
17 again I think that the biggest problem is recruiting
18 sufficiently qualified people, and to be translators
19 and assistants it's not only that you speak the
20 language at issue, but you speak English well, as
21 well.

22 So it's hard to recruit people, and if you
23 don't target, you have a tendency to spread your
24 resources. You have a limited number of people who
25 are qualified to do this, and if you don't target,

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1 you're spreading your resources too thinly and you
2 might not provide assistance to the people who need it
3 because they're going to be concentrated in certain
4 areas, and you don't really know, and as you say,
5 because the coverage formula is maybe over inclusive
6 to some extent, that it might include some people who
7 aren't going to need assistance when they come to the
8 polls.

9 What election officials need to do and
10 when they run an effective program, they're
11 researching their own data to target the precincts
12 where the people who are going to come are going to
13 need assistance, and that's where you concentrate your
14 people who are qualified to give assistance.

15 As a state official, again, it's by no
16 means an easy program.

17 MR. CLEGG: If I could just make one
18 comment, supporting your line of questioning,
19 Commissioner. I remember reading the four
20 classifications myself and being torn about whether I
21 would check box three or box four, and then learning
22 that, well, had I checked box three I would have
23 counted toward minority status.

24 COMMISSIONER GAZIANO: Why would an
25 eloquent person like you, Roger, hesitate?

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1 MR. CLEGG: Well, I make that point not
2 because I'm so clearly eloquent in English, but
3 because I'm so clearly not otherwise conversant. I
4 mean, as poor as my English is, it is my only
5 language.

6 (Laughter.)

7 COMMISSIONER HERIOT: Exactly my
8 experience when I looked at this question, but I think
9 the first category, I looked at the bottom first and I
10 thought, you know, "Should I pick C or B." You know,
11 it wasn't C, but the top category as native speaker.
12 So that made it easy. I had no excuse, but
13 nevertheless, I had the same thought that you had.
14 Not too many people can really honestly say that they
15 are very, very fluent in English.

16 COMMISSIONER GAZIANO: Particularly if
17 English is not their first language. You know, that's
18 not like you're bragging, and I can see a lot of
19 people saying, "Well, I'm not going to say I speak it
20 very" --

21 VICE CHAIR THERNSTROM: I don't know why
22 that. I had no problem answering the question of
23 whether I speak English, and I would like to say for
24 the record that, Commissioner Yaki, your comments are
25 always taken seriously by this Commission. You made a

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1 statement a few minutes ago saying nobody listened to
2 you, nobody took you -- something like that.

3 COMMISSIONER YAKI: No, I never said that.

4 VICE CHAIR THERNSTROM: What did you say
5 exactly?

6 COMMISSIONER YAKI: I have no idea.

7 (Laughter.)

8 COMMISSIONER YAKI: This is where I would
9 check the box that says I have no idea. The spirit
10 somehow moves me and it goes from there.

11 VICE CHAIR THERNSTROM: Okay. Other
12 questions for this panel?

13 COMMISSIONER KIRSANOW: Madam Chair.

14 VICE CHAIR THERNSTROM: Yes.

15 COMMISSIONER KIRSANOW: Kirsanow here.

16 I've got two questions, one for Mr.
17 Spakovsky.

18 VICE CHAIR THERNSTROM: Could you speak up
19 a little bit?

20 COMMISSIONER KIRSANOW: Yes, ma'am. Two
21 questions. Can you hear me? Hello.

22 VICE CHAIR THERNSTROM: I can hear you.
23 Can everybody else hear you? Yes. The answer is yes.
24 The court reporter can't hear you. Shout.

25 COMMISSIONER KIRSANOW: Two questions, one

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1 for Mr. Spakovsky. You highlighted the issue of --

2 VICE CHAIR THERNSTROM: Hold on, Pete.
3 Hold on. We're going to try to do something about the
4 volume here. One second.

5 (Pause in proceedings to adjust speaker
6 volume.)

7 COMMISSIONER KIRSANOW: Mr. Spakovsky, you
8 have raised the issue of the military ballots. In the
9 2000 presidential election, they were at issue because
10 of the close nature of the vote, for example, in
11 Florida, where I believe there are approximately 5,000
12 overseas military ballots, and now we've got many more
13 overseas ballots that will be involved in this
14 election.

15 Are there any jurisdictions that we failed
16 to identify that have particular problems with
17 processing overseas ballots in a timely fashion?

18 MR. VON SPAKOVSKY: As of today, no, I
19 can't say. All I can tell you is the past problems
20 that the Justice Department had to deal with. As I
21 said, in 2004, both Georgia and Pennsylvania did not
22 get their ballots out on time. I think in the 2002
23 elections if I remember correctly, I think it was
24 Texas and Oklahoma that had problems.

25 There are efforts being made by a couple

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1 of places to try to improve this. The new Secretary
2 of State in Alabama, Beth Chapman, has formed a task
3 force to try to figure out a way to improve this.

4 There's actually a very unique and very
5 interesting project being done by Okaloosa County,
6 Florida. The Election Director there, someone I've
7 known for many years, comes from a military family.
8 She is very concerned about this. She actually is
9 sending Okaloosa County election officials to three
10 overseas bases about two weeks before the election in
11 November, one in Japan, one in Germany, the third one
12 I don't recall where, and they are going to set up
13 actually an early voting site so that military voters
14 and their families, rather than having to wait for and
15 depend on an absentee ballot to be mailed to them from
16 the States, they are going to be able to go to this
17 early voting site. They have a vendor that is going
18 to have a computer with the ballots from that county,
19 and once they are checked and shown to be on the voter
20 registration list, they are going to be able to vote
21 overseas so that there's no problem with delays in
22 getting the ballot back.

23 And that actually is a very interesting
24 project, one that if it works I think will show great
25 promise for the future to try to fix this problem.

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1 There is a bill that has been introduced in Congress
2 by, I think, Congressman Kevin McCarthy of California
3 that's kind of an interim solution that would call for
4 the Department of Defense to put out a bid for a
5 contract for overnight, for International Express to
6 bring ballots back not just from American military
7 bases, but from the U.S. embassy.

8 The idea would be that overseas voters
9 would still have to get the mail-in absentee ballot,
10 but as long as they got it, filled it out and had it
11 in the hands of people at the bases and the U.S.
12 embassies by the Friday before election, then by
13 international mail service they could be brought back
14 to the United States. That actually would solve about
15 half of the problem with these overseas absentee
16 ballots.

17 COMMISSIONER KIRSANOW: Do you know what
18 the status of that bill is and what the -- I'm sure
19 you probably don't know the numbers, but is there a
20 name associated with the bill?

21 MR. VON SPAKOVSKY: I should know that,
22 Commissioner, and I'm sorry. It's like the Military
23 Voting Protection Act. I believe that's the name of
24 it. It's Kevin McCarthy who is, I believe, the
25 minority chairman of the Elections Subcommittee of the

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1 House Administration Committee. I don't know what the
2 status of the bill is.

3 VICE CHAIR THERNSTROM: Well, certainly we
4 can have somebody here track that down. I, frankly,
5 don't understand this whole issue, and it got my teeth
6 grinding over it. I mean, okay. You've got this one
7 county who is sending some machines for early voting
8 to Germany and wherever else you named, but we have
9 got soldiers in Najaf and Fallujah. I mean what is
10 the matter with the Department of Defense or is it
11 really completely outside their capacity to respond to
12 this problem that they cannot make sure that people
13 who are putting their lives on the line for this
14 country cannot vote by machine?

15 They send E-mails all the time. What is
16 the fundamental problem here? It just boggles my
17 mind.

18 MR. VON SPAKOVSKY: Well, the answer to
19 that, Commissioner, is that Congress actually
20 appropriated the money, and there is a special office
21 at the Department of Defense. When UOCAVA, which is
22 the federal law that was passed in 1986, the President
23 had to designate a particular office to administer
24 this new law, and so he designated the Department of
25 Defense, and they set up a special office called the

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1 Federal Voting Assistance Program Office, and they
2 administer this law not just for American military
3 personnel, but for overseas civilians also.

4 In the 2004 election, they had gotten the
5 money and they designed and were setting up an
6 Internet voting system for overseas Americans, and
7 they were in the testing stages. I'm not quite sure
8 how far they had got advanced, and they asked ten
9 computer scientists to review the system as it had
10 been designed and was being built and four of those
11 computer scientists wrote a very devastating report
12 attacking the system saying that the security risks of
13 this Internet voting system were such that it should
14 not be used, and because of that, the Department of
15 Defense canceled it.

16 When Congress passed the Help America Vote
17 Act, I think part of the law was a provision that said
18 that they want the Department of Defense to try to do
19 this again, set up a program like this, but they can't
20 do it until and unless the U.S. Election Assistance
21 Commission, which is the federal agency that was
22 established by HAVA, comes up with and sets up
23 standards for this kind of voting system.

24 And the EAC has not done that. I have no
25 idea where they are on trying to come up with

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1 standards for it, or whether they can do it. There
2 are a number of people, computer scientists, who say
3 that the Internet is so risky and so full of security
4 holes that there's no way you could ever have a safe
5 voting system using the Internet. I don't know if
6 that's true or not, but that's what people -- I have
7 seen that said about it.

8 VICE CHAIR THERNSTROM: Even though
9 there's obviously all sorts of communication between
10 the military and Iraq, let's say, or Afghanistan
11 and --

12 COMMISSIONER YAKI: Yes, but there's also
13 a presumption that some of it is not as secure as they
14 think it should be.

15 MR. HANCOCK: Let me answer your question
16 more about the problems that cause this because I've
17 dealt with it over the years.

18 VICE CHAIR THERNSTROM: Okay.

19 MR. HANCOCK: I was living in Florida in
20 2000 as well.

21 VICE CHAIR THERNSTROM: Right.

22 MR. HANCOCK: The traditional problem that
23 arises is the states don't get their ballots done on
24 time. I mean, the federal law only allows you to vote
25 for federal offices.

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1 VICE CHAIR THERNSTROM: Right.

2 MR. HANCOCK: It doesn't cover others, but
3 most states want to send the whole ballot to the men
4 and women in the military, and within the problems
5 there might be a ballot challenge, for example. There
6 are contests that just aren't resolved.

7 One of the problems we had in Florida was
8 that if there was a runoff primary, it was too close
9 to the general election, that this didn't give enough
10 time. So state officials, voting officials faced real
11 problems in getting their ballot done.

12 I've never experienced any invidious
13 conduct where they don't want the men and women of the
14 military to --

15 VICE CHAIR THERNSTROM: No, I'm sure.

16 MR. HANCOCK: -- practical problems, and
17 the Defense Department kind of talks about it, has
18 been all over this in trying to come up with remedies.
19 The problem has been though that because of issues
20 they face, they don't get the ballot in the mail
21 sufficiently in advance of the election. Most states
22 require that it has to be back in the hands of
23 election officials by the time the polls close on
24 Election Day to be counted.

25 So that was always the issue that was

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1 faced. As Hans says, the Justice Department as an
2 election approaches regularly faces these kinds of
3 crises when they come up, that someone in such-and-
4 such a state didn't get their ballots out in time.

5 The remedies, the one that became well
6 known with the Florida election in 2000, because
7 Florida was subject to a suit by Department of Justice
8 in the '70s over this issue, and the remedy that was
9 reached was that the state would count ballots so long
10 as they were cast by the day of the election and
11 received by election officials within ten days after
12 the date of the election.

13 So there was security that it was cast by
14 the time the polls closed. In the Defense Department,
15 I was there at the time, and in the department we
16 coordinated closely with them. Their view was that
17 they could get the ballots back in that time period,
18 and that was, as the department has filed these cases
19 over the years, that's kind of been a similar remedy.

20 And the ten days, you know, you had to get
21 the election over at some time, but in ten days you
22 weren't going to certify the results in that time
23 period anyhow. So that's the issue. That's the
24 problem, and it would be good if there were some more
25 automated solutions that would solve it, but it has

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1 been caused by just real practical problems that
2 election officials face.

3 VICE CHAIR THERNSTROM: Not all
4 provisional ballots are counted by the Election Day.
5 Is that not correct?

6 MR. HANCOCK: They're back. They're back
7 in the hands of the --

8 VICE CHAIR THERNSTROM: They're back in
9 their hands, yes, but in terms of the actual
10 counting --

11 MR. HANCOCK: That's right. There's time
12 after the election in which -- and that was the reason
13 for the settlement, was that everybody agreed there
14 was some time there where they could get the ballots
15 back and still count them and count them as valid.

16 VICE CHAIR THERNSTROM: Do other people
17 have questions? I don't want to hog the microphone
18 here.

19 COMMISSIONER KIRSANOW: Just one more,
20 Madam Chairman.

21 VICE CHAIR THERNSTROM: Yes.

22 COMMISSIONER KIRSANOW: This goes to Mr.
23 Clegg's speech made reference to the use of the two
24 provisions very often as a means of racial
25 gerrymandering. Given that we've got the candidate

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1 for the presidency who is black that received a
2 majority of the white vote in a number of states,
3 Washington, Oregon, Iowa, you name it, to what extent
4 does this affect the rationale undergirding the
5 temporary provisions of the Voting Rights Act
6 pertaining to the dilution of minority voting?

7 MR. CLEGG: Well, I think that, more
8 broadly the recent election data -- and I testified
9 about this when the Voting Rights Act was up for
10 reauthorization a couple of years ago -- do undermine
11 the argument that we need a Section 5 anymore.
12 Notwithstanding my testimony, the Voting Rights Act
13 and Section 5 were rather overwhelmingly re-passed,
14 and so I have not had occasion to look at the most
15 recent data to see if that further undermines the need
16 for Section 5.

17 But I certainly take your point. Of
18 course, you need to look not just at states, but to
19 draw distinctions between the states that are covered
20 by Section 5 and the states that aren't covered by
21 Section 5. So, to be fair, I note that most of the
22 states that you named where Obama got a majority of
23 white voters were not covered jurisdictions. So that
24 wouldn't necessarily show that Section 5 isn't still
25 needed.

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1 But I think that the data even before this
2 year tended to show that the empirical case for
3 Section 5 is no longer persuasive.

4 VICE CHAIR THERNSTROM: You're talking
5 about levels of black registration and turnout in
6 states like Georgia?

7 MR. CLEGG: Well, I think the point that
8 Commissioner Kirsanow was making was racially
9 polarized voting as well.

10 VICE CHAIR THERNSTROM: Right. Well, that
11 all depends on how you define it, of course.

12 MR. CLEGG: Right.

13 VICE CHAIR THERNSTROM: Other questions?
14 I have one myself, but I'd like other people to have a
15 chance obviously.

16 Yes, Commissioner Melendez.

17 COMMISSIONER MELENDEZ: Yes, Mr. Hancock.
18 I think you suggested that the Justice Department
19 made detailed memoranda about why they are sending
20 monitors and observers into a particular place. Could
21 you say more about the past practice regarding this?

22 And is the criteria for sending out
23 monitors usually made public? And are they always the
24 same criteria, such as Mr. Coates described this
25 morning?

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1 MR. HANCOCK: Well, I think it has been
2 blended, Commissioner, as they've expanded the
3 program. Historically they always prepared memoranda
4 describing the reason for sending. They had to do it
5 for designating -- first of all, under the act, you
6 had to designate a county for examiners before you
7 could send in observers, and you had to base that on
8 allegations of discrimination on the basis of race.
9 That was the only way you could designate a county.

10 So historically they have prepared memos.
11 I don't know what they're doing now because this has
12 been such a broad program of just I don't mean to say
13 willy-nilly. They have some reason for doing it, but
14 I'm not one who's impressed by the number of observers
15 or the number of places they're going.

16 My concern is what's the reason for their
17 going there, and I think the department has to, and I
18 have great respect for the men and women of the Voting
19 Section. They're my friends. A lot of them have gone
20 to work with me, but the leaders who were here today
21 were there when I was there, and they're very fine
22 people, and they do their job without regard to
23 politics.

24 But unfortunately there has been a
25 perception that politics enters into this, and that

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1 needs to be dispelled, and I think it can be dispelled
2 by relying more on the men and women of the section to
3 make the decisions and having them justify their
4 decisions with recent bases that are justified in the
5 law.

6 That is, we're going there because we have
7 a recent basis to believe that our presence might --
8 because we have reason to suspect that there might be
9 a denial of the right to vote on account of race or
10 language minority status if we don't go. That's got
11 to be the reason. That's the only reason.

12 So there is just not -- and I agree with
13 Roger and his testimony that we have to get over this
14 conflict between those that want to prevent both fraud
15 and those that want to protect the right to vote, and
16 I'm not going to propose to -- we all agree that you
17 should be a citizen before you vote, and we ought to
18 make sure that people are citizens before they vote.

19 But you've got to do that in a way that
20 doesn't otherwise interfere with people who are
21 legitimately registered and do it in a way that is
22 going to suppress their coming to the polls, and even
23 the person who was from the Criminal Section who was
24 here today told a very good story. The perception of
25 that is you don't go out and announce before the

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1 election that we've cracked down on a voter
2 registration drive that we think was fraudulent or
3 somewhat fraudulent because you then send a message
4 there that perhaps people will hear that everyone who
5 was registered was registered improperly, and they
6 weren't.

7 So the approach in the department has been
8 to address those issues, but to try and keep them
9 separate from the Voting Rights Act issues. You know,
10 enforce criminal law, but don't do it in a way that
11 interferes with the designs of the Voting Rights Act.
12 They both can be done. You can do both.

13 But as far as your question, again, I
14 think that if the department focuses on -- and I
15 express to you again the difference in a presidential
16 election. You've got to do it before the election.
17 You can't rely on observers to solve the problems in a
18 presidential election. It isn't going to happen. You
19 might get a basis for bringing a lawsuit later, but
20 you're not going to stop the problem. You've got to
21 do it in advance, and when you are going to have
22 observers go to a county, you know, let's have a
23 justified basis for it.

24 You get rid of politics by saying we have
25 a memorandum that explains our reasoning, and our

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1 reasoning is a reasoning that is authorized by law,
2 and if you have that, I don't think anyone can
3 disagree with the actions of the department.

4 MR. VON SPAKOVSKY: Can I say something
5 about this?

6 VICE CHAIR THERNSTROM: Sure.

7 MR. VON SPAKOVSKY: I mean, there's a
8 strawman being raised here which is just completely
9 untrue. Okay? I was in the Justice Department for
10 four years, and there have been no changes in the
11 procedure. There was a detailed memorandum produced
12 every time a recommendation came up from the Voting
13 Section to send either federal observers or to send
14 staff to a particular area to do an investigation, and
15 that has not changed. There is no willy-nilly
16 assignment. There were detailed memoranda.

17 As I'm sure Paul knows, there's a detailed
18 internal memorandum, for example, when we were sending
19 observers, which are governed by very specific
20 provisions that had to be signed off on by the
21 Attorney General, and those procedures have not
22 changed in any way.

23 MR. HANCOCK: Well, my concern, again, is
24 -- and this is a criticism of the program even when I
25 was there. I don't think the observer program, the

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1 validity of it, should be judged by how many people
2 were sent out or whether or not they found problems.
3 I mean, you can send people to every polling place in
4 the country if you wanted to and then report back that
5 we didn't find problems in 98 percent of them because
6 we were there. You know, that's one answer, that
7 problems were averted because we were there.

8 Another answer is you didn't need to have
9 them there in the first place, and I think with this
10 election that's coming up and with the perception of
11 the department today and the perception of the role
12 that law enforcement has played in effectuating
13 discrimination against minorities historically, not
14 now, but historically, that it's very crucial for the
15 department to balance all of these issues and assign
16 people where they think there's a valid reason for
17 suspecting there might be a problem, and hopefully
18 they will avert that problem, but if we can all agree
19 that they went there because there was a real concern
20 that if they went there there was going to be a
21 problem, that's the design of this program. That's
22 the design of the program from 1965 on. That's the
23 reason it was put in the act.

24 VICE CHAIR THERNSTROM: Roger, you had
25 something to say on this?

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1 MR. CLEGG: Well, I just wanted to make
2 one point about the distinction between political
3 appointees and career appointees. You know, I was
4 both at different points in my career at the Justice
5 Department, and I have to take issue with Paul when he
6 suggests that part of the solution is to make sure
7 that decisions are committed to career folks rather
8 than political folks.

9 I mean this is a democracy, and the
10 executive branch, is controlled by the President, and
11 ultimately has to be run in a way that is part of the
12 administration. That is not to say that political
13 appointees should be allowed to make decisions based
14 on, small-p, political grounds, but I think that
15 ultimately they do have the authority and that's the
16 way it has to work.

17 I also think that there's a suggestion
18 frequently that career people in the Justice
19 Department are these white lab coat professionals who
20 are completely disinterested when it comes to partisan
21 politics -- and that is not true. Frequently they're
22 at least as partisan in their sympathies as political
23 appointees are.

24 And, conversely, there's frequently a
25 suggestion that political leadership and political

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1 appointees in the department are political hacks and
2 don't know anything about civil rights law and are
3 just making decisions based on, small-p political
4 grounds -- and that's not true. That's not true
5 either.

6 MR. HANCOCK: I'm going to backslide a
7 little bit from what I said before in light of what
8 Roger said because I agree with him to a large extent.

9 I don't mean to say that political appointees should
10 be out of this process entirely, and when Roger was
11 there and Brad Reynolds was the Assistant Attorney
12 General in the Reagan years, I was in the Voting
13 Section, and we debated strongly the position the
14 department should take in voting cases, where we
15 should send examiners, what cases we should file.
16 Those were the days where regularly, based on the
17 facts and the law, it never was a suggestion that
18 politics was entering into that.

19 And there were disagreements. I think the
20 government, in higher levels of government, people who
21 are in that position are in that position so they can
22 debate issues on which there's room for principle
23 disagreement. If there weren't room for principle
24 disagreement they wouldn't be needed. If it was all
25 easy they wouldn't be needed.

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1 So, yes, there should be debates that
2 should be carried out, and then there's a decision
3 that should be made and everyone should abide by that
4 decision.

5 I think what's unfortunate in more recent
6 years is at least there's a perception -- and I'm not
7 saying it's a reality -- but there's a perception, and
8 people in the country know it, that that's not what
9 has been happening in the department. So I think that
10 needs to be considered as they're going forward with
11 this election because -- and I would say that Roger
12 also says that people have their own political agenda.

13 Perhaps at times, yes, they have to some extent, but
14 I would say that in my background in the Voting
15 Section that it wasn't partisan.

16 In other words, even in the redistricting
17 example, for example, and I was involved in the
18 redistricting of the Florida legislature after the
19 2000 census and was opposed to it because, in part, I
20 thought it was purposely designed. It was a political
21 gerrymander in my view designed to limit Democratic
22 voting strength.

23 And yet the Department of Justice in pre-
24 clearance of that didn't want to hear any of that.
25 They didn't want to hear the political effect of it.

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1 They wanted to know whether it met the standard of the
2 Voting Rights Act regardless of the politics of it,
3 and that's the way they should do their job because
4 the Voting Rights Act gives them just a limited amount
5 of authority under Section 5, and they can't look at
6 anything, whether it's discriminatory on the basis of
7 race or national origin. That's the sole role.

8 VICE CHAIR THERNSTROM: But also political
9 gerrymandering is not covered by the 14th Amendment or
10 at least by any standards that the Court has been able
11 to articulate.

12 MR. HANCOCK: Yes, that's right. That's
13 exactly right.

14 VICE CHAIR THERNSTROM: But, you know,
15 there's a statement here I don't understand that you
16 made. I mean a political or just simply professional
17 and not political on the part of people, for instance,
18 like Brad Reynolds, who was, of course, a Republican
19 appointee but had very much in mind, it seems to me,
20 and his record in the Justice Department had very much
21 in mind the degree to which the racially gerrymandered
22 districts benefitted Republicans.

23 MR. HANCOCK: Well, I worked very closely
24 with Brad at the time. I've never sensed that it was
25 done for political reasons. In fact, I'm proud of

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1 what we achieved during those years in enforcing the
2 Voting Rights Act. Brad was always concerned about
3 the issue. I don't know if he went to Mississippi
4 with us when Reverend Jackson invited us down to
5 Mississippi to tour the Delta and talk to people about
6 their experiences. I mean, Brad Reynolds rolled up
7 his sleeves and got into the issues and made decisions
8 based on the law.

9 It was controversial at the time, as you
10 recall. It was the time of Bolden v. City of Mobile
11 and the change in Section 2 and the legislation about
12 Section 2. So there was a lot of controversy, but
13 again, I say that my recollection based on my own
14 participation is that it was always very principled
15 debates, and believe me, I didn't always win. I mean,
16 my side was not always adopted, but I came away with a
17 respect for the process that I hoped would continue
18 throughout the history of the Civil Rights Division.

19 VICE CHAIR THERNSTROM: Well, but as you
20 know, for instance, the record in Miller, I mean, that
21 was the depiction of a Justice Department way outside
22 the law, way outside pre-clearance law, imposing
23 racial quotas in terms of legislative districting.

24 Well, this is a longer discussion, and I
25 don't want to take up other people's time. I had one

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1 other question for Roger, but, Commissioner Yaki, have
2 you got a question?

3 COMMISSIONER YAKI: No, no. I just had a
4 statement at the end, but go ahead.

5 VICE CHAIR THERNSTROM: I just want to go
6 back to the question a minute of the bilingual
7 ballots. Is there any relationship between printing
8 ballots in multiple languages and the risk of fraud?

9 And I ask that just in total ignorance.

10 MR. CLEGG: Well, I think the answer is,
11 yes, there is. I give particulars on that in the
12 testimony that I delivered to the Congress on the
13 reauthorization of Section 203, and I think it's also
14 in the law review article that the Georgetown Journal
15 of Law and Public Policy printed. As I recall, one of
16 the things that I cited was a Justice Department
17 report on non-citizen voting.

18 I think a lot of Americans don't
19 understand why we are printing ballots in foreign
20 languages. They know that in order to become a U.S.
21 citizen you're supposed to be able to speak English
22 and they know that you're not supposed to be voting
23 unless you're a U.S. citizen. So it would seem to
24 follow that if you don't speak English, you shouldn't
25 be voting, and that if you're making it easier for

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1 people who don't speak English to vote, that you're
2 going to be at least indirectly facilitating ballot
3 fraud.

4 Now, it's not a complete syllogism because
5 we do have citizens who are not fluent in English.
6 Sometimes they were born here, but never learned to
7 speak English very well. That doesn't happen very
8 much, and the fact that it happens at all is a
9 separate problem that's very disturbing, but I think
10 sometimes it does happen.

11 The other thing that happens is that you
12 are allowed to become a citizen, I think, if you're
13 relatively senior; I think the sense is that, well,
14 you know, if you've been here a long time and you're
15 70 or 80 years old and you still don't speak English,
16 we're going to give you a break and we're going to let
17 you vote anyhow even though you can't speak English.

18 But I don't think that that happens very
19 much, and there are other ways to accommodate
20 individuals like that rather than requiring the
21 jurisdiction to go through this whole rigmarole and
22 print thousands of ballots in foreign languages.

23 But a short answer to your question is
24 yes.

25 VICE CHAIR THERNSTROM: Commissioner Yaki,

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1 I need to close this out, obviously, but do you have a
2 question?

3 COMMISSIONER YAKI: Commissioner Melendez.

4 COMMISSIONER MELENDEZ: Well, I just
5 wanted to say that, you know, as far as the language,
6 going back to that last one, you know, those people
7 probably never will speak English fluently, but that
8 bothered more citizens than anybody in this country.
9 I just wanted to state that for the record.

10 But my question has to do with any
11 recommendations as far as the provisional ballot type
12 thing. It seems that because everything is left to
13 the states and it seems that's where we're going to
14 have a lot of the problems, do you think that there's
15 anything that can be done further, maybe federal, some
16 way that something can be streamlined, the state's
17 procedure in provision ballots as time frames and
18 those things could basically help us streamline or
19 unify it to come on one page rather than the problems
20 we'll see when you kind of leave it up to the states?

21 I just wonder what you thought along those
22 lines.

23 MR. HANCOCK: In my view, in the context
24 of the current law, what needs to be done is serious
25 attention being given in getting people to the right

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1 precinct. That's the key, and now with the advent of
2 computerized voter lists that they're supposed to have
3 now, they should have records at the polling place for
4 every registered voter so that whoever comes in and
5 they're not shown on the list of registered voters for
6 that polling place, the election official can easily
7 look up where they should be and direct them to that
8 place so the vote could count.

9 The danger is that they would just hand
10 them a provisional ballot and that ballot won't count.
11 So I mean, we can talk about changing the law, but
12 with this present law, that's what needs to be done,
13 and the problem you have is that sometimes election
14 officials say, "Well, we'll have an open phone line so
15 that you can call the main office and find out where
16 they should be."

17 Well, on Election Day those people are
18 busy. The phones are jammed. They don't get through.

19 Sometimes they don't have a complete list of all the
20 registered voters in the city. In large jurisdictions
21 like the City of New York, it's a tremendous problem
22 because of the size of the electorate, but in small
23 jurisdictions it might be a problem because they don't
24 have the resources to have the list.

25 But to make this work in the present

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1 context of the present law, we need to have an
2 accurate list at the polling place of every person who
3 is registered and where they should be voting, and if
4 they show up and they're not at the right spot, they
5 ought to be directed to the right spot so that their
6 vote is counted.

7 VICE CHAIR THERNSTROM: So we should call
8 it quits, but, Commissioner Yaki, you do have
9 something you want to say.

10 COMMISSIONER YAKI: Yes, I just wanted to
11 thank the rest of the Commission for allowing me to
12 hold this briefing in June. I mean, I could say a lot
13 of things, but I think what we're trying to do here is
14 get beyond the partisanship issue of who's trying to
15 be registered here or there or what have you. I think
16 most importantly is that certain offhand -- I don't
17 think casual, but offhand -- remark, and I don't mean
18 "offhand" in terms of intent, but just the way it was
19 said about how in determining prioritization within
20 the Department of Justice that there's some
21 consideration that goes to whether or not there is
22 essentially a candidacy between an African American
23 and a white candidate and how that affects their
24 decisions about how they prioritize their use of
25 election monitors or what have you.

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1 I would just say that of all elections in
2 the history of this country, if there's any election
3 for which the '65 Voting Rights Act and its
4 reauthorization cannot fail us in any way, shape or
5 form is this election. If there is any doubt, if
6 there is any issue of barriers to voting by African
7 Americans in this country in this election, this
8 nation will have extremely difficulties dealing with
9 that in its aftermath.

10 And in some ways I wish the order of this
11 had been reversed. I wish you had been first and then
12 Justice had been here to hear afterwards, but this is
13 really meant for the Justice Department. This
14 election more than any other is one where if you're
15 going to prioritize, if you're going to put resources
16 up, if you're going to make sure you absolutely get it
17 right to the nth degree, this is it because this is
18 the true test of whether or not the '65 Act is going
19 to work the way it's supposed to be.

20 COMMISSIONER GAZIANO: Madam Chair, one
21 brief comment.

22 By the same token, false claims of
23 disenfranchisement on the basis of race will also have
24 a similar caustic effect. So I trust your comments
25 and I know your comments were in good faith with

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1 regard to the Justice Department, but there is also an
2 unfortunate history of crying wolf.

3 COMMISSIONER YAKI: I'm not saying that.
4 I'm saying the integrity of this election more than
5 any other is at stake. It's interesting. When you're
6 talking about crying wolf, one of the crying wolf that
7 people keep on citing was the example of that police
8 officer in northern Florida. This is the first time I
9 have actually heard that actually although maybe not
10 related to the vote itself, there was some kind of
11 action at that time that may have had some kind of, as
12 you said, because of the history, some kind of a
13 chilling.

14 We don't know whether or not, but the fact
15 of the matter is that, you know, false whatever, we've
16 got to get it right. Democrat, Republican, liberal,
17 conservative, left right, independent, whatever, we
18 have got to get it right this time.

19 VICE CHAIR THERNSTROM: I want to second
20 that thought because Paul Hancock earlier said we've
21 got to make sure to avert -- something like we've got
22 to make sure to avert problems. I would also add we
23 must act to avert perceived problems.

24 COMMISSIONER YAKI: Exactly.

25 VICE CHAIR THERNSTROM: And that is, I

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1 think, Michael Yaki's point, and I completely agree
2 with what you just said.

3 COMMISSIONER YAKI: Thank you.

4 VICE CHAIR THERNSTROM: On that note, I
5 want to thank all of you very, very much. It is
6 extremely interesting to me, obviously, but I think to
7 everybody and this has been a wonderful panel. Thank
8 you so much for coming.

9 MR. HANCOCK: Thank you. Nice to see you
10 again.

11 VICE CHAIR THERNSTROM: Nice to see you,
12 Paul.

13 (Whereupon, the Commission Briefing went
14 off the record at 1:20 p.m.)

15

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