

U.S. COMMISSION ON CIVIL RIGHTS

**Department of Justice  
Voting Rights Enforcement for the  
2008 U.S. Presidential Election**

**VOTE**

**BRIEFING  
REPORT**



JULY 2009

## U.S. COMMISSION ON CIVIL RIGHTS

The U.S. Commission on Civil Rights is an independent, bipartisan agency established by Congress in 1957. It is directed to:

- Investigate complaints alleging that citizens are being deprived of their right to vote by reason of their race, color, religion, sex, age, disability, or national origin, or by reason of fraudulent practices.
- Study and collect information relating to discrimination or a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, age, disability, or national origin, or in the administration of justice.
- Appraise federal laws and policies with respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, disability, or national origin, or in the administration of justice.
- Serve as a national clearinghouse for information in respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, disability, or national origin.
- Submit reports, findings, and recommendations to the President and Congress.
- Issue public service announcements to discourage discrimination or denial of equal protection of the laws.

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**Department of Justice  
Voting Rights  
Enforcement for the  
2008 U.S. Presidential  
Election**

A Briefing Before  
The United States Commission on Civil Rights  
Held in Washington, DC

Briefing Report



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## **Executive Summary**

On June 6, 2008, a panel of experts briefed members of the U.S. Commission on Civil Rights to review the Department of Justice's (DOJ) plans to monitor voting rights enforcement for the 2008 U.S. Presidential election. The panel consisted of the following individuals: Christopher Coates, Acting Chief of the Voting Section of the Department of Justice; William Welch, Chief of the Public Integrity Section of the Department of Justice; Daniel Tokaji, associate professor of law at the Ohio State University's Moritz College of Law, Associate Director of Election Law at Moritz; Hans A. von Spakovsky, former member of the Federal Election Commission and former Counsel to the Assistant Attorney General for the Department of Justice Civil Rights Division; Paul F. Hancock, partner at Kirkpatrick & Lockhart Preston Gates Ellis LLP, former director of the litigation program in the Voting Section of the Department of Justice Civil Rights Division, and former Deputy Attorney General for the State of Florida during the 2000 Presidential election; and Roger Clegg, President and General Counsel of the Center for Equal Opportunity and former Deputy Assistant Attorney General in the Reagan and Bush Administrations. Each of these individuals made presentations and offered their expertise on the Department of Justice's history of monitoring voting rights enforcement and what problems might arise for the 2008 U.S. Presidential election, offered their critiques of past approaches to addressing these problems, and made recommendations for election reform. The briefing was held in Room 540 at the Commission's national headquarters at 624 Ninth Street, NW, Washington, DC.

Christopher Coates detailed the court cases in which the Justice Department's Voting Section prosecuted state voting districts that violated the Voting Rights Act (VRA), the Help America Vote Act (HAVA), the Uniformed Overseas Citizens Absentee Voting Act (UOCAVA), and the National Voter Registration Act (NVRA). Concerning the 2008 elections, Mr. Coates said that the Department will implement a comprehensive Election Day program to ensure ballot access and will coordinate the deployment of hundreds of federal election monitors across the country in partnership with civil rights organizations that advocate on behalf of minority or disabled voters, state and local officials, and other interested citizens.

William Welch primarily discussed the roles, responsibilities, and interplay between the Public Integrity Section, the Criminal Division, and the Civil Rights Division within the Department of Justice. Mr. Welch then discussed the 2002 Ballot Access and Voting Integrity Initiative and how it has affected the training of federal prosecutors in the areas of voter fraud and voting rights, federal coordination with state law enforcement and election officials before federal elections, and prosecutions for various forms of voting and election crime.

Daniel Tokaji focused on the application and enforcement of NVRA. He cited numerous problems that need to be addressed nationwide, including lack of voter registration among the poor, erroneous striking of voters from registration lists, difficulties surrounding provisional ballots, a lack of language assistance for minority language voters, and a lack of

polling access for the disabled. He emphasized that given the allegations of partisanship surrounding DOJ in the area of voting rights, it was crucial that the department focus on maximizing voter participation and turnout for the 2008 presidential election rather than take actions that would deter people from voting.

Hans A. von Spakovsky described how DOJ was preparing for the 2008 election, including an increase in staff, new telephone and online complaint centers, and a new training process. He also stressed the importance of ensuring that military ballots arrive from overseas in time to be counted. Mr. von Spakovsky also discussed what he believes to be a nationwide deficiency in the enforcement of HAVA: states providing voter registration applications to undocumented immigrants, states not requiring voter applicants to confirm their status as U.S. citizens, and states neglecting to update their voter registration rolls after registered voters die or change residencies.

Paul Hancock stressed the importance of ensuring that DOJ is prepared for a difficult election in light of a presumptive minority candidate and the history of discrimination against minorities on Election Day. His main concerns were ascertaining that all voters know how to find their polling place on Election Day as well as overhauling the provisional balloting process. He also suggested that DOJ prepare detailed memoranda describing why it is sending observers to particular polls so that the presence of federal observers does not have the unintended consequence of potentially deterring voters.

Roger Clegg criticized the notion that preventing voter suppression is somehow more important than preventing voter fraud. He stated that Democrats tend to be lax in preventing voter fraud -- and are often willing to extend the vote to criminals, noncitizens, the mentally incompetent, and children -- as such tactics usually benefit liberal candidates. He said that he believes one problem in the debate of voter fraud versus voter suppression is that it is riddled with partisanship and personal attacks. Finally, he voiced his disapproval of Section 203 of VRA, stating that it does more harm than good by wasting resources on printing voting material in foreign languages, which he believes encourages voter fraud.

The six panelists also fielded questions from the Commissioners dealing with the following issues:

- The number of federal observers dispatched to the polls in elections between 2000 and the 2008 presidential election, their training process, and the criteria by which they are allocated to particular precincts.
- The motivation for, and prosecution of, voter fraud crimes such as vote buying, multiple registration, machine error fraud, and non-citizen voters.
- Concerns relating to the availability and quality of minority language ballot materials and poll-place assistants, including the standards used to determine what constitutes a minority language voter and whether such ballots increase the risk of fraud.



- Violations of NVRA, including the lack of voter registration availability at government agencies, the availability of voter registration for non-citizens, and non-updated voter registration databases.
- Problems inherent in the use of provisional ballots.
- Ensuring that overseas military ballots are sent, returned, and counted in a timely fashion.



# Summary of Proceedings

## *First Panel*

### **Christopher Coates**

Mr. Coates began by stating that DOJ strongly supported the recent reauthorization of VRA.<sup>1</sup> He noted that the Civil Rights Division had vigorously defended VRA's constitutionality in federal court, which resulted in the recent ruling in the *Northwest Austin* case<sup>2</sup> upholding the constitutionality of Section 5 of VRA.<sup>3</sup>

Mr. Coates then turned to the different cases that the Voting Section has successfully litigated in federal court under the anti-discrimination provisions of Section 2 of VRA. These cases included instances in which at-large voting systems had diluted minority voting strength in Florida,<sup>4</sup> Ohio,<sup>5</sup> and New York,<sup>6</sup> as well as one case from Mississippi where local officials had intentionally discriminated against white voters and candidates preferred by white voters in violation of Section 2.<sup>7</sup> Mr. Coates then briefly mentioned two 2008 cases, one in Florida and one in South Carolina, that the Voting Section had successfully litigated involving at-large voting and school board district plans that diluted minority voting strength.<sup>8</sup>

Turning to Voting Section enforcement of Section 208 of VRA, Mr. Coates noted that nine of the 11 cases ever brought under Section 208 were brought in the past seven years, including the first case to protect the rights of Haitian Americans. He then stated that the Voting Section is in negotiations with another jurisdiction concerning evidence of violations of Section 208 against Puerto Rican Americans.<sup>9</sup>

Mr. Coates then addressed the language minority requirements of VRA, noting that in the past seven years, the Civil Rights Division has brought 27 cases under the language minority provision, more cases than in all the prior years combined. These include the first cases on

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<sup>1</sup> 42 U.S.C. §§ 1973 – 1973aa-6 (2000).

<sup>2</sup> *Northwest Austin Mun. Util. Dist. No. One v. Mukasey*, 557 F. Supp. 2d 9 (D.D.C. 2008), *superseded by* 573 F. Supp. 2d 221 (D. D.C. 2008), *rev'd sub nom. Northwest Austin Mun. Util. Dist. No. One v. Holder*, 129 S.Ct. 2504 (June 22, 2009).

<sup>3</sup> Christopher Coates, testimony, Briefing before the U.S. Commission on Civil Rights, Voting Rights Enforcement for the 2008 U.S. Presidential Election, Washington, DC, June 6, 2008, transcript, pp. 7–9 (hereafter cited as Coates Testimony, Briefing Transcript).

<sup>4</sup> *U.S. v. Osceola County, Fla.* 474 F. Supp. 2d 1254 (M.D. Fla. 2006).

<sup>5</sup> *U.S. v. City of Euclid*, 580 F. Supp. 2d 584 (N.D. Ohio 2008).

<sup>6</sup> *U.S. v. Village of Port Chester*, No. 06-15173, 2008 WL 190502 (S.D. N.Y. Jan. 17, 2008).

<sup>7</sup> *U.S. v. Brown*, 494 F. Supp. 2d 440 (S.D. Miss. 2007).

<sup>8</sup> Coates Testimony, Briefing Transcript, pp. 9–10.

<sup>9</sup> *Ibid.*, pp. 10–11.

behalf of Korean, Vietnamese, and Filipino Americans. He stated that the Voting Section is presently involved in negotiations in a language minority case and is investigating other jurisdictions for possible violations of language minority provisions.<sup>10</sup>

In addition, Mr. Coates discussed how, since the 2004 presidential election, the Voting Section has investigated and resolved 10 cases that involved claims under HAVA,<sup>11</sup> four cases under UOCAVA,<sup>12</sup> and seven cases under NVRA.<sup>13</sup> Mr. Coates stated that these statutes provide important guarantees to all Americans that they will have access to the ballot, and that the Voting Section has given and will continue to give high priority to enforcing these laws.<sup>14</sup>

Finally, Mr. Coates listed the ways in which DOJ is preparing for the 2008 elections. As they have done in the past, Mr. Coates said that the Department will implement a comprehensive Election Day program to ensure ballot access and will coordinate the deployment of hundreds of federal government employees across the country to ensure access to the polls. To identify these locations, Mr. Coates said that the Civil Rights Division and the Voting Section will seek out the views of groups including civil rights organizations that advocate on behalf of minority or disabled voters, state and local officials, and other interested citizens.<sup>15</sup>

### **William Welch**

Mr. Welch, the Chief of the Public Integrity Section at DOJ, began by explaining that the majority of the claims prosecuted by the department involve election or ballot fraud, such as vote buying, ballot stuffing, and campaign finance crimes. Mr. Welch said that his section is responsible for assisting in the department's nationwide oversight of election crime investigations and prosecutions filed throughout the country.<sup>16</sup>

Mr. Welch next discussed how the Criminal Division's oversight of election crime is designed to ensure that the department's efforts to combat election crimes are consistent, impartial, uniform, and effective. As the Public Integrity Section has only consultative capacity with U.S. Attorneys' Offices across the country, Mr. Welch said that his office provides advice and guidance on the handling of election crime investigations and prosecutions. Mr. Welch noted that consultation with his section is required in the event that a U.S. Attorney's Office wants to open a field investigation or a grand jury investigation into election fraud matters, as well as with respect to charging decisions. Mr. Welch further explained that, in the event of a disagreement between his office and a U.S. Attorney's

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<sup>10</sup>Ibid., p. 11.

<sup>11</sup> 42 U.S.C. §§ 15301 – 15545 (Supp. 2002).

<sup>12</sup> 42 U.S.C. §§1973ff – 1973ff-6 (2000).

<sup>13</sup> 42 U.S.C. §§ 1973gg – 1973gg-10 (2000).

<sup>14</sup> Coates Testimony, Briefing Transcript, p. 12.

<sup>15</sup> Ibid., pp. 12–13.

<sup>16</sup> William Welch, testimony, Briefing before the U.S. Commission on Civil Rights, Voting Rights Enforcement for the 2008 U.S. Presidential Election, Washington, DC, June 6, 2008, transcript, pp. 13–14 (hereafter cited as Welch Testimony, Briefing Transcript).

Office, the disagreement is resolved by the head of the Criminal Division as well as by the Deputy Attorney General.<sup>17</sup>

Mr. Welch spoke about the relationship between the Criminal Division, the Department's federal prosecutors and the role of the Civil Rights Division in election matters. He noted that the Civil Rights Division has a proactive responsibility to protect the right to vote, while the Criminal Division's Public Integrity Section has a reactive responsibility to prosecute those who corrupt elections.<sup>18</sup>

Finally, Mr. Welch turned to the 2002 Ballot Access and Voting Integrity Initiative, designed to combat election fraud and civil rights violations involving voting. He stated that this initiative requires annual training of federal prosecutors in the areas of voter fraud and voting rights, as well as coordination with state law enforcement and election officials before federal elections. Mr. Welch stated that since the initiative began, 148 people have been charged with, and 111 people have been convicted of, offenses including non-citizen voting, vote buying, and multiple voting.<sup>19</sup>

### **Discussion**

Commissioner Yaki began the questioning by asking Mr. Coates about the criteria and the consultation processes that DOJ uses to assign election observers and monitors for the upcoming election in light of prolonged national debate about irregularities in the 2000 and 2004 presidential elections.<sup>20</sup> Mr. Coates answered that the department is in active consultation with civil rights organizations to determine the types and locations of problems that they anticipate for the 2008 election. He stated that he and his staff met with civil rights organizations in April and May of 2008 to discuss concerns about whether jurisdictions are complying with Section 7 of NVRA, as well as other issues that civil rights groups feel will need federal monitoring during the 2008 election.<sup>21</sup>

Mr. Coates then noted other groups that he and his fellow members of the Civil Rights Division have met with (and will continue to meet with), including staffers from the House and Senate. He said that he is in constant contact with state and local officials, noting that he made a presentation to the National Association of Secretaries of State in January of 2008, and that in April of 2008, he attended workshops put on by the National Association of State Legislators in Washington to help determine how many federal election monitors were needed, and where they would be sent. Finally, Mr. Coates stated that his division is in contact with people who have made complaints about alleged violations of federal law in

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<sup>17</sup> Welch Testimony, Briefing Transcript, pp. 14–16.

<sup>18</sup> *Ibid.*, p. 16.

<sup>19</sup> *Ibid.*, pp. 16–17.

<sup>20</sup> Briefing before the U.S. Commission on Civil Rights, Voting Rights Enforcement for the 2008 U.S. Presidential Election, Washington, DC, June 6, 2008, transcript, p. 18 (hereafter cited as Voting Rights Enforcement, Briefing Transcript).

<sup>21</sup> Coates Testimony, Briefing Transcript, p. 19.

their own individual jurisdictions, as well as with concerned citizens who were not associated with any group, but felt that they had issues to voice.<sup>22</sup>

Commissioner Yaki then asked Mr. Coates what went into the ranking or prioritization system for determining how many election monitors were assigned to particular areas. Commissioner Yaki wanted to know how the Voting Section decides to allocate their resources, and if they have enough resources available to fulfill all of their perceived needs.<sup>23</sup> Mr. Coates answered that there would be no limitation on the resources available, as far as he knew. Mr. Coates noted that on the day of the 2004 presidential election, they had over 800 people in the field, including federal observers and DOJ employees acting as monitors. Mr. Coates said that the number of monitors necessary for 2008 would be based upon a determination as to what they felt would be necessary to get the job done, and again emphasized that no one had indicated to him that there would be any restrictions in terms of funding or the number of observers that would be available.<sup>24</sup>

Commissioner Yaki asked again how the Voting Section decided where to send the monitors.<sup>25</sup> Mr. Coates replied that they hold pre-election surveys and interviews and try to determine whether or not the concerns that are expressed therein are meritorious. He described this process: the Voting Section talks with state and local officials as well as members of the community to determine whether there is a reasonable need or belief that improper and illegal activity will occur on Election Day, and then makes a determination as to whether the presence of federal observers would likely stop that type of activity. He said that the section also notes instances of local elections involving both minority and white candidates, as such contests tend to create antagonisms within the community.<sup>26</sup>

Commissioner Yaki then asked if the fact that the 2008 presidential election will be between an African American and a Caucasian sent signals that heightened scrutiny would be needed to ensure election propriety.<sup>27</sup> Mr. Coates said that he was not yet prepared to reach that conclusion, but urged that we should be mindful that bi-racial elections have caused difficulties in the past. He reiterated that these concerns would be taken into consideration when the Voting Section allots election monitors. Returning to the criteria used to allot election resources, Mr. Coates stated that another consideration is the requirement that bilingual poll workers be on hand to assist voters with limited English proficiency. He said that the Voting Section would ensure that jurisdictions that have promised in consent decrees to provide bilingual assistance at polling places actually do so.<sup>28</sup>

Commissioner Yaki asked whether the Voting Section planned on sending monitors who were themselves fluent in other languages to ensure that bilingual assistance was actually

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<sup>22</sup> *Ibid.*, pp. 19–21.

<sup>23</sup> Voting Rights Enforcement, Briefing Transcript, p. 21.

<sup>24</sup> Coates Testimony, Briefing Transcript, pp. 21–22.

<sup>25</sup> Voting Rights Enforcement, Briefing Transcript, p. 22.

<sup>26</sup> Coates Testimony, Briefing Transcript, p. 23.

<sup>27</sup> Voting Rights Enforcement, Briefing Transcript, p. 24.

<sup>28</sup> Coates Testimony, Briefing Transcript, pp. 24–25.

occurring.<sup>29</sup> Mr. Coates responded that that was indeed the approach that the Voting Section used, and that bilingual monitors and attorneys were regularly used to fulfill bilingual needs. Mr. Coates continued by saying that another criterion used to determine the allocation of election monitors was whether a particular jurisdiction has a history of questionable behavior at the polls, including activity aimed at ethnic minority or minority language voters or racial slurs and other insensitive behavior from poll workers. Mr. Coates emphasized that jurisdictions where poll workers have been historically racist or have participated in acts that would be in violation of VRA would likely receive attention in 2008.<sup>30</sup>

Commissioner Melendez asked if the expected closeness of an election was a factor in whether monitors were sent out.<sup>31</sup> Mr. Coates replied that if wrongdoing at the polls could affect the outcome of a close election, that would be something the Voting Section would consider when assigning a federal presence to a polling place.<sup>32</sup>

Commissioner Melendez said that he understood that, until 2006, the Public Integrity Section would not open public investigations or issue indictments immediately prior to elections to avoid influencing elections. He believed that this policy was changed in 2006, when indictments were made before an election in Missouri, and asked Mr. Welch how and why this policy shift occurred.<sup>33</sup> Mr. Welch replied that there had been no policy shift, and that the confusion arose from differences between the 1995 election crimes book, known as the Red Book, and the more reader friendly and expansive 2007 election crimes book, known as the Green Book. Referring to the 2006 incident in Missouri, Mr. Welch explained that since it involved the submission of false voter registration cards, no voters needed to be interviewed and the indictment was not seen as being in contradiction with the noninterference policy.<sup>34</sup>

Commissioner Melendez asked if there had been a shift from the Criminal Division's policy to prioritize investigation of voting crimes involving conspiracies, large schemes, or other group wrongdoings.<sup>35</sup> Mr. Welch said that there had not been, and that there has never been a per se ban against prosecuting individual voter crimes. He said that between 1995 and 2007, the collective experience of the Criminal Division showed that by not giving prosecutors more discretion in targeting individual voter cases, they might have missed opportunities to build smaller arrests that could have led to larger schemes. Mr. Welch said that they leave individual prosecutions to the discretion of the field attorneys and that the Criminal Division is always available to provide advice and guidance.<sup>36</sup>

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<sup>29</sup> Voting Rights Enforcement, Briefing Transcript, p. 25.

<sup>30</sup> Coates Testimony, Briefing Transcript, pp. 25–27.

<sup>31</sup> Voting Rights Enforcement, Briefing Transcript, p. 27.

<sup>32</sup> Coates Testimony, Briefing Transcript, pp. 27–28.

<sup>33</sup> Voting Rights Enforcement, Briefing Transcript, p. 28.

<sup>34</sup> Welch Testimony, Briefing Transcript, pp. 28–30.

<sup>35</sup> Voting Rights Enforcement, Briefing Transcript, p. 30.

<sup>36</sup> Welch Testimony, Briefing Transcript, pp. 30–31.

Commissioner Gaziano observed that there had been a large increase in the number of government election monitors used during the period from 1996 to 2004. He asked Mr. Coates if he remembered those numbers.<sup>37</sup> Mr. Coates responded by discussing how a record number of 1463 federal observers and 533 Justice Department personnel had been sent to monitor elections in 2004, compared to 640 federal observers and 110 Department personnel in 2000. Mr. Coates said that he felt it was necessary because of the large numbers of complaints that the Voting Section receives and because local officials have told them that federal presence at the polls has a deterring effect upon possible problems. Mr. Coates stated that the Voting Section does not want to just rely on numbers, but wants to send however many people are necessary to ensure fair elections in 2008.<sup>38</sup>

Commissioner Gaziano asked Mr. Coates whether more monitors were used in 2006 as compared to 2004 and 2002.<sup>39</sup> Mr. Coates responded that in 2006, they sent over 1500 federal personnel to monitor elections, exceeding the 2004 number by a few dozen and doubling the 2000 number.<sup>40</sup> Commissioner Gaziano then asked whether there was any limit to the number of election monitors that DOJ could send to various jurisdictions.<sup>41</sup> Mr. Coates replied that no one has ever indicated to him that there would be any limit to the amount of election monitors used in an election.<sup>42</sup>

Commissioner Gaziano asked Mr. Welch if he could describe one or more of the vote-buying schemes that he had mentioned in his testimony and how they were uncovered.<sup>43</sup> Mr. Welch said that he did not have that information available, but that as a general rule, small tips initiate many election fraud investigations that then lead to larger cases. He cited the conviction of Governor Ryan (former governor of Illinois), as an example of one small incident that eventually led to a larger criminal scheme.<sup>44</sup> Commissioner Gaziano then asked what the range of federal prison sentences was for certain intentional fraud crimes.<sup>45</sup> Mr. Welch replied that they range from probation to 24 months in jail. He referenced a 2006 Missouri incident in which two of the individuals engaged in a false registration scam received 18 months in jail.<sup>46</sup> Commissioner Gaziano asked for an estimate of how many voter fraud schemes go unreported or uninvestigated.<sup>47</sup> Mr. Welch said that it was impossible for him to provide an estimate, and distinguished between people who were actively cheating the system and people who were unwittingly being used as dupes for voter fraud schemes. As to the latter, he gave the example of innocent out-of-state college students or military

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<sup>37</sup> Voting Rights Enforcement, Briefing Transcript, pp. 31–32.

<sup>38</sup> Coates Testimony, Briefing Transcript, pp. 32–33.

<sup>39</sup> Voting Rights Enforcement, Briefing Transcript, p. 35.

<sup>40</sup> Coates Testimony, Briefing Transcript, p. 35.

<sup>41</sup> Voting Rights Enforcement, Briefing Transcript, p. 34.

<sup>42</sup> Coates Testimony, Briefing Transcript, p. 34.

<sup>43</sup> Voting Rights Enforcement, Briefing Transcript, pp. 34–35

<sup>44</sup> Welch Testimony, Briefing Transcript, p. 35.

<sup>45</sup> Voting Rights Enforcement, Briefing Transcript, p. 36.

<sup>46</sup> Welch Testimony, Briefing Transcript, p. 36.

<sup>47</sup> Voting Rights Enforcement, Briefing Transcript, pp. 36–37.



personnel abroad, who might be victims of those who attempt to impersonate them and vote in their names.<sup>48</sup>

Vice Chair Thernstrom stated that she was bothered by the manner in which Mr. Coates described the Voting Section's defense of Section 5. She cited the fact that the Voting Section was not entirely successful, having lost parts of *LULAC v. Perry*,<sup>49</sup> and noted that, although DOJ won *Northwest Austin Municipal Utility District Number One v. Mukasey*,<sup>50</sup> it remained an open question as to whether that case would be appealed and how the Supreme Court would rule on it. She then stated that she felt Mr. Coates had whitewashed the vigorous debate over the continuing constitutionality of Section 5 of VRA and whether it would survive a constitutional challenge in the Supreme Court, and noted that many scholars and voting rights experts were nervous that it could be overturned. Finally, she stated that she wished to have heard a more nuanced discussion of Section 5.<sup>51</sup>

Mr. Coates responded by apologizing if he created the impression that the constitutionality of Section 5 was a simple issue that everyone agreed upon. He stated that there was nothing, in his opinion, more essential to the enforcement of minority voting rights than the continuation of Section 5 pre-clearance requirements, and that Voting Section litigation in the area was proof that DOJ took the protection of minority voting rights seriously. He stated that it was his belief that terminating Section 5 would lead to a dramatic and serious impact on the voting rights of minorities, and a regression towards pre-1965 voting conditions.<sup>52</sup>

Vice Chair Thernstrom asked Mr. Coates if what he just said was that critics of the Voting Section are wrong, and stated that in her opinion, the views of the Voting Section reflect the views of the ACLU.<sup>53</sup> Mr. Coates refuted this, noting the Bush Administration's view on the constitutionality of the reauthorized Section 5 is the same as many civil rights groups, including the ACLU. He stressed that he was articulating the views of DOJ, and not those of the ACLU.<sup>54</sup>

Vice Chair Thernstrom asked Mr. Welch about the scope of the issue of non-citizen voting.<sup>55</sup> Mr. Welch said that he was concerned with any violation of a statute he enforces and treats that issue just as any other.<sup>56</sup> Vice Chair Thernstrom commented on the lack of data on the dimensions of voter fraud problems, and asked Mr. Welch what, in his prosecutorial role, he had seen prosecuted and what was his sense about the scope of the problem and how to

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<sup>48</sup> Welch Testimony, Briefing Transcript, p. 37.

<sup>49</sup> *League of United Latin America Citizens v. Perry*, No. 2:03-CV-354, 2007 WL 951684, at \*1 (E.D. Tex. Mar. 28, 2007).

<sup>50</sup> *Northwest Austin Mun. Util. Dist. No. One v. Mukasey*, 557 F. Supp. 2d 9 (D.D.C. 2008), *superseded by* 573 F. Supp. 2d 221 (D. D.C. 2008), *rev'd sub nom. Northwest Austin Mun. Util. Dist. No. One v. Holder*, 129 S.Ct. 2504 (June 22, 2009).

<sup>51</sup> Voting Rights Enforcement, Briefing Transcript, pp. 38–41.

<sup>52</sup> Coates Testimony, Briefing Transcript, pp. 41–43.

<sup>53</sup> Voting Rights Enforcement, Briefing Transcript, pp. 43–44.

<sup>54</sup> Coates Testimony, Briefing Transcript, pp. 46–47.

<sup>55</sup> Voting Rights Enforcement, Briefing Transcript, p. 47.

<sup>56</sup> Welch Testimony, Briefing Transcript, p. 47.

quantify it.<sup>57</sup> Mr. Welch replied that it is the U.S. Attorneys' offices that bring the majority of cases, and that the Public Integrity Section's role is mainly consultative. He then said that it was difficult to quantify the scope of the problem solely by equating the number of convictions with the number of instances of voter fraud. He finished by stating that he did not believe that he, in his professional capacity, was able to comment on data collection.<sup>58</sup> Vice Chair Thernstrom commented how she found it frustrating that no one could either determine how big a problem voter fraud was or quantify the problem with hard data.<sup>59</sup>

Commissioner Kirsanow asked Mr. Coates whether the Voting Section's approach to the 2008 election was at all affected by the Supreme Court's recent decision upholding the Indiana Voter I.D. law.<sup>60</sup> Mr. Coates replied that, if a state voter identification requirement was enforced in a racially or ethnically discriminatory fashion, such practices would raise a question under VRA and could weigh in favor of a federal presence at the polls.<sup>61</sup>

Commissioner Kirsanow then asked if either the Voting Section or the Criminal Division had any role to play regarding the issue of people innocently being registered in multiple states, and asked if there was anything that is done to ensure that this situation was not fraudulently manipulated.<sup>62</sup> Mr. Welch confirmed that this was a problem, but stated that, although his agency views multiple registrations just as any other criminal act, it was important to distinguish between people who intend to defraud the system as opposed to people who have multiple registrations based on a mistake or a residency misunderstanding. Mr. Welch said that although his agency would not criminally pursue those who had made a mistake, they would scrutinize such incidents more thoroughly if there was any evidence of a broader pattern of fraud.<sup>63</sup>

Mr. Coates noted that from a civil point of view, problems with multiple registrations arise under Section 8 of NVRA's purge requirement. He stated that most illegal registration arises either from people being registered in multiple jurisdictions or from the failure to strike from voting rolls those who have died. He emphasized that this creates a potential for people to fraudulently vote under the names of these illegally registered individuals, and that his agency has brought cases under Section 8 of the NVRA in an attempt to combat this problem.<sup>64</sup>

Staff Director Dannenfelser noted that Mr. Coates had said that the Voting Section reached out to different groups for help and advice. He asked Mr. Coates if they had reached out to national or state political parties for help in identifying patterns of voter suppression or voter

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<sup>57</sup> Voting Rights Enforcement, Briefing Transcript, pp. 47–48.

<sup>58</sup> Welch Testimony, Briefing Transcript, pp. 48–49.

<sup>59</sup> Voting Rights Enforcement, Briefing Transcript, p. 49.

<sup>60</sup> Voting Rights Enforcement, Briefing Transcript, p.50 (referencing *Crawford v. Marion County Election Bd.*, 128 S.Ct. 1610 (2008)).

<sup>61</sup> Coates Testimony, Briefing Transcript, pp. 50–51.

<sup>62</sup> Voting Rights Enforcement, Briefing Transcript, pp. 51–52.

<sup>63</sup> Welch Testimony, Briefing Transcript, pp. 52–53.

<sup>64</sup> Coates Testimony, Briefing Transcript, p. 53.

fraud.<sup>65</sup> Mr. Coates replied that they had not.<sup>66</sup> Staff Director Dannenfesler asked if this was a policy decision or if they were precluded from doing so.<sup>67</sup> Mr. Coates replied that they were not precluded from doing so, and that although they had not done so during the primaries, the Voting Section would be receptive to any information from political parties pertaining to their concerns about violations of federal law during the general election.<sup>68</sup> Staff Director Dannenfesler then asked if there was any monitoring that was done between the closing of the polls and the recording of the votes.<sup>69</sup> Mr. Coates replied affirmatively, stating that monitors from DOJ go to the vote counts and report any circumstances indicating that there might be activities of an irregular nature that would draw federal law into question.<sup>70</sup>

Commissioner Melendez commended DOJ for sending observers to South Dakota and New Mexico, and noted that Alaska also poses a particular concern due to its size and the number of Native Americans and Alaskan natives living there. He discussed the voting issues that concerned Native villages, including a lack of polling places and the failure to provide translation and language assistance to speakers of Native languages. He mentioned a recent lawsuit filed by the ACLU and the Native American Rights Fund to provide Yup'ik language translations to residents in an Alaskan county where over 85 percent of the population speaks Yup'ik as their first language.<sup>71</sup> He asked what the monitoring plans were for Alaska in 2008, and what steps were being taken to ensure compliance with language and voter assistance as required by VRA in Alaska, South Dakota, and New Mexico.<sup>72</sup> Mr. Coates responded that while the Voting Section had sent monitors to several counties in South Dakota that have substantial Native American populations, and was in the process of gathering information from Alaska state officials and Native groups, he did not know whether monitors would be sent to New Mexico, Alaska, or South Dakota for the general election.<sup>73</sup>

Commissioner Melendez asked whether the Voting Section intends to take any steps to ensure compliance by the state of Alaska with language and voter assistance provisions of VRA.<sup>74</sup> Mr. Coates said that the Department would intervene if, after a thorough investigation, it appeared that a proposed language minority program would have a discriminatory purpose or effect.<sup>75</sup>

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<sup>65</sup> Voting Rights Enforcement, Briefing Transcript, p. 54.

<sup>66</sup> Coates Testimony, Briefing Transcript, p. 54.

<sup>67</sup> Voting Rights Enforcement, Briefing Transcript, p. 54.

<sup>68</sup> Coates Testimony, Briefing Transcript, pp. 54.

<sup>69</sup> Voting Rights Enforcement, Briefing Transcript, pp. 54–55.

<sup>70</sup> Coates Testimony, Briefing Transcript, p. 55.

<sup>71</sup> In the pending case of *Nick v. Bethel*, No. 3.07-cv-0098-TMB (D. Alaska, filed May 2, 2008), the plaintiff filed a preliminary injunction against the state of Alaska, disputing the state's current practice of providing ballot and polling materials solely in the English language in a district where the majority of the residents speak Yup'ik as their primary language.

<sup>72</sup> Voting Rights Enforcement, Briefing Transcript, pp. 56–57.

<sup>73</sup> Coates Testimony, Briefing Transcript, pp. 57–58.

<sup>74</sup> Voting Rights Enforcement, Briefing Transcript, p. 58.

<sup>75</sup> Coates Testimony, Briefing Transcript, p. 58.

Commissioner Heriot asked in how many languages have election officials across the country been required to provide ballot information.<sup>76</sup> Mr. Coates said that he believed five languages were covered under Section 203, but noted that if intentional discrimination against a group which speaks an uncovered language arose, that would involve intentional discrimination under the prohibitions of Section 2 of the Act.<sup>77</sup> Commissioner Heriot asked how many languages had been involved in Section 2 complaints.<sup>78</sup> Mr. Coates responded that did not know the total number, but gave the example of districts where there are many Korean Americans, but not enough to trigger the protections of Section 203 of VRA. He then said that there were certain cases where overt acts of racism towards a minority would be actionable under Section 2, even if the minority group's numbers were not otherwise large enough to warrant protection under Section 203.<sup>79</sup>

Vice Chair Thernstrom asked Mr. Coates what he meant when he had said that poll workers were racist or that certain jurisdictions had a history of bad behavior.<sup>80</sup> Mr. Coates replied that he did not intend that statement to be limited to Southern jurisdictions, and that the examples of racism and bad behavior he was referring to also meant racial slurs and racist comments directed at Asian or Native American voters.<sup>81</sup> Vice Chair Thernstrom asked Mr. Coates what types of comments DOJ considers racist.<sup>82</sup> Mr. Coates cited by way of example an incident in which a local poll official asked an employee of the Voting Section whether his Hispanic surname meant that he came from a family of criminals.<sup>83</sup>

Commissioner Gaziano stated that, in his opinion, some Americans were surprised at the concern over fraud in primaries because it is generally assumed that fraud is motivated either by racial animus or a desire for partisan advantage. He stated that in his review of the cases, the promise of a job was the most likely motive, and asked Mr. Welch if this was true in some of the machine error fraud schemes.<sup>84</sup> Mr. Welch replied that a variety of things such as the promise of a job, the promise of advancement in a political machine, or the promise of government contracts could motivate such crimes, and that election fraud, election crime, and corruption crimes often overlap.<sup>85</sup> Commissioner Gaziano expressed his amazement that lower level participants would be willing to risk a federal jail sentence for so little reward.<sup>86</sup> Mr. Welch agreed, saying that the low amount of financial remuneration offered in exchange for complicity in a voting fraud scheme is offset by the promise of future reward.<sup>87</sup>

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<sup>76</sup> Voting Rights Enforcement, Briefing Transcript, p. 59.

<sup>77</sup> Coates Testimony, Briefing Transcript, p. 59.

<sup>78</sup> Voting Rights Enforcement, Briefing Transcript, p. 59.

<sup>79</sup> Coates Testimony, Briefing Transcript, pp. 59–60.

<sup>80</sup> Voting Rights Enforcement, Briefing Transcript, pp. 60–61.

<sup>81</sup> Coates Testimony, Briefing Transcript, p. 61.

<sup>82</sup> Voting Rights Enforcement, Briefing Transcript, pp. 61–62.

<sup>83</sup> Coates Testimony, Briefing Transcript, pp. 62–63.

<sup>84</sup> Voting Rights Enforcement, Briefing Transcript, pp. 64–65.

<sup>85</sup> Welch Testimony, Briefing Transcript, p. 65.

<sup>86</sup> Voting Rights Enforcement, Briefing Transcript, pp. 65–66.

<sup>87</sup> Welch Testimony, Briefing Transcript, p. 66.

Commissioner Gaziano asked why, aside from racial animus, these factors would come into play during a primary, mentioning that there was concern between Clinton and Obama that voters were engaging in fraud to advance one candidate over another.<sup>88</sup> Mr. Welch said that all of the factors and motivations for engaging in fraud come into play equally during a primary, with parallels existing in the field of campaign finance violations. He said that the motivating factor was often a true belief that one candidate in a primary is that much better than another.<sup>89</sup>

Commissioner Yaki asked who in DOJ has the final say over how many people are going to be sent out into the field during elections.<sup>90</sup> Mr. Coates said that his agency makes recommendations as to what jurisdictions should have how many election monitors, and that he believes that the Assistant Attorney General for Civil Rights makes the final decisions.<sup>91</sup>

Commissioner Yaki inquired as to whether election monitors are DOJ employees, and if so, what kind of training they receive before they are sent into the field. He observed that there have been stories of DOJ employees intimidating voters through their dress and demeanor, and that the obvious appearance of federal agents might unintentionally drive away the very voters that they're supposed to be protecting.<sup>92</sup> Mr. Coates said that the Voting Section handles the training process and that the Civil Rights Division directs monitors while they are monitoring elections. He described the training process for an election monitor, and described how monitors are instructed to let local officials know when they see impropriety at the polling place, as well as to gather information in the event that litigation needs to be filed.<sup>93</sup>

Commissioner Yaki asked if there was a difference between a monitor and an observer in terms of their level of interaction with local election officials.<sup>94</sup> Mr. Coates responded that there was not, and that the difference between them is that the observers can enter the polling places as is provided for under VRA, whereas monitors are DOJ employees and can only enter with the permission of state and local officials. He stated that none of these people wears firearms nor do they hold themselves out to be prosecutors, and that there has never been a complaint to his agency that they were intimidating voters into leaving the polling place.<sup>95</sup>

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<sup>88</sup> Voting Rights Enforcement, Briefing Transcript, p. 66.

<sup>89</sup> Welch Testimony, Briefing Transcript, pp. 66–67.

<sup>90</sup> Voting Rights Enforcement, Briefing Transcript, pp. 67–68.

<sup>91</sup> Coates Testimony, Briefing Transcript, pp. 68–69.

<sup>92</sup> Voting Rights Enforcement, Briefing Transcript, pp. 69–70.

<sup>93</sup> Coates Testimony, Briefing Transcript, pp. 70–72.

<sup>94</sup> Voting Rights Enforcement, Briefing Transcript, p. 72.

<sup>95</sup> Coates Testimony, Briefing Transcript, pp. 72–73.

Commissioner Yaki made a statement reminding the panelists that, despite the recent Supreme Court decision upholding the Indiana voter I.D. law, localities have not been given carte blanche to create voter I.D. checks that have not been mandated by state law.<sup>96</sup>

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<sup>96</sup> Voting Rights Enforcement, Briefing Transcript, p. 73.

## Second Panel

### Daniel Tokaji

Mr. Tokaji described his research and scholarship as having to do primarily with voting rights and election administration. He stated that regardless of one's political preferences, it is undisputed that an integral part of DOJ's mission is to ensure that all eligible voters are permitted to vote on equal terms. He noted that it was especially important to ensure that voters are not discriminated against based on race, ethnicity, poverty, language proficiency, or disability.<sup>97</sup>

Mr. Tokaji said that one of the most important areas of concern is the procedures that state and local jurisdictions follow in registering voters and in maintaining voting rolls. He stated that although election administration is mostly a state and local matter, there are several important federal legal requirements in place designed to ensure fairness towards all eligible voters. He said that a cornerstone of these requirements is NVRA, and briefly described the provisions of NVRA.<sup>98</sup>

Addressing concerns regarding noncompliance with NVRA, Mr. Tokaji said that there is evidence that the number of voter registration applications from public assistance offices has declined precipitously in the past 10 years, even though about 40 percent of voting age citizens from low-income households are unregistered. He said that this and other evidence suggests that a disproportionate number of poor Americans are not being registered as required by the law because registration opportunities are not being made available as required by NVRA. He contended that, although there has been one successful case having to do with making registration available at public assistance agencies, DOJ has done relatively little to remedy the situation.<sup>99</sup>

A second priority that Mr. Tokaji addressed was making sure that voters' names are not omitted or wrongly removed from state voter registration lists. He cited a study that found that this was the greatest source of lost votes in the 2000 election, with over 1.5 million voters affected. As evidence of this problem, Mr. Tokaji pointed to the high numbers of provisional ballots being cast, which are often used when voters' names do not show up on the registration list. He mentioned that his written testimony goes into far greater depth on the matter.<sup>100</sup>

Adding to the earlier discussion about language assistance, Mr. Tokaji noted that not only does Section 203 of VRA require bilingual ballots, it also requires registration and oral assistance to be provided. He said that this was particularly important in light of evidence

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<sup>97</sup> Daniel Tokaji, testimony, Briefing before the U.S. Commission on Civil Rights, Voting Rights Enforcement for the 2008 U.S. Presidential Election, Washington, DC, June 6, 2008, transcript, pp. 77–78 (hereafter cited as Tokaji Testimony, Briefing Transcript).

<sup>98</sup> Tokaji Testimony, Briefing Transcript, pp. 78–80.

<sup>99</sup> *Ibid.*, pp. 80–81.

<sup>100</sup> *Ibid.*, pp. 81–82.

regarding a registration gap with regard to Latino, Asian American, and Native American voters.<sup>101</sup>

Another area that Mr. Tokaji touched on was access to polling places for the disabled. He expressed concern that the disabled were often forgotten in the grand scheme of voting rights law, and that there was a need for better information gathering in this area of law.<sup>102</sup>

Finally, Mr. Tokaji addressed allegations from commentators and former DOJ professionals that partisan interests drove DOJ's actions in recent years, rather than the rights of voters. He emphasized that there is no question that such allegations and their accompanying revelations have tarnished DOJ's reputation in recent years, and that it is vitally important to avoid even the appearance of partisanship during the 2008 general election. Mr. Tokaji closed by stating that DOJ should focus on expanding access for all voters rather than taking actions that could chill registration and participation or that might be perceived as advancing partisan interests.<sup>103</sup>

### **Hans von Spakovsky**

Mr. von Spakovsky began by stating that DOJ's outstanding record during the Bush administration proves that it is well prepared to enforce the four federal voting rights statutes for which it is responsible. He complimented the new Chief of the Voting Section at DOJ, and pointed out that in 2002 and 2004, the Voting Section broke historical records in the number of federal observers and staff that were sent to the field. He noted that the Voting Section sent out almost 1,500 federal observers and 533 staff, a high achievement given that the Voting Section only has about 85 lawyers and support staff. Mr. von Spakovsky attributed this to the fact that the Voting Section had instituted an in-house training program and had recruited division-wide trying to get people to join the team of observers.<sup>104</sup>

Mr. von Spakovsky then noted that the Voting Section installed a new 800 number and telephone system staffed by paralegals and lawyers after a GAO study indicated that a new complaint system was needed in light of trouble during the 2000 election. He said that the Voting Section had also installed a new Web-based complaint system that he assumed would be available for the 2008 election. He then mentioned that the Voting Section and Criminal Division mobilized the F.B.I., the Public Integrity Section, and the 93 U.S. Attorneys' Offices so that there would be well trained lawyers and agents available to answer phones in field offices when complaints arrived.<sup>105</sup>

Mr. von Spakovsky said that he believes much of the criticism of the Voting Section is misplaced and that it has a terrific enforcement record over the past eight years that will

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<sup>101</sup> Ibid., p. 82.

<sup>102</sup> Ibid., pp. 82–83.

<sup>103</sup> Ibid., pp. 83–84.

<sup>104</sup> Hans von Spakovsky, testimony, Briefing before the U.S. Commission on Civil Rights, Voting Rights Enforcement for the 2008 U.S. Presidential Election, Washington, DC, June 6, 2008, transcript, pp. 101–03 (hereafter cited as von Spakovsky Testimony, Briefing Transcript).

<sup>105</sup> von Spakovsky Testimony, Briefing Transcript, pp. 103–04.



continue into the future. He noted that when the Bush administration came to office, there had only been about a dozen cases filed to enforce the language minority provisions of the Voting Rights Act, but that there had been 27 such cases since that time. This included the first cases on behalf of Filipino Americans and Vietnamese Americans. Mr. von Spakovsky said that 90 percent of suits filed to enforce Section 208 have been during the Bush administration and that the administration had filed more lawsuits to enforce NVRA than any prior administration. Mr. von Spakovsky also mentioned that the Bush administration's Voting Section filed close to a dozen HAVA suits against jurisdictions that were not establishing the required statewide voter registration databases or that were not providing provisional ballots at the polls.<sup>106</sup>

Mr. von Spakovsky said that the biggest problem he sees in the upcoming election is the fact that overseas military voters remain one of the largest groups of disenfranchised voters due to their reliance on a 100-year-old method of paper absentee ballots. He said that such ballots can take up to 30 days to arrive from election centers to a combat soldier in Iraq, and that even if the soldier immediately votes and sends it back, more than half of such ballots do not arrive in time to be counted. He said that it is extremely important that DOJ set up a system to determine who is responsible for sending out absentee ballots in a timely fashion, and that the Department be ready to go to court immediately, given the time-sensitive nature of the claims. He noted that Justice had been forced to do so in Georgia and Pennsylvania in 2004, and that the Department had obtained the broadest relief that it had ever received.<sup>107</sup>

One problem that Mr. von Spakovsky believes DOJ has not properly dealt with is the failure of certain states (such as South Dakota, Ohio, and Iowa), to comply with the HAVA provision requiring that voter registration forms contain a citizenship question. He said that it is very clear that registration cannot be completed unless the citizenship question is answered in the affirmative, and that not doing so is a direct violation of federal law.<sup>108</sup>

Another problem addressed by Mr. von Spakovsky was the fact that certain states, such as Maryland, provide driver's licenses to both documented and undocumented aliens, and do not differentiate between them and other citizens when offering voter registration along with a driver's license. Mr. von Spakovsky said that this eventually results in non-citizens being registered as voters.<sup>109</sup>

A final problem that Mr. von Spakovsky discussed was how certain states, such as Illinois, do not have fully compliant voter registration databases up and running as required by HAVA. He noted a recent study in Connecticut finding that almost 9,000 deceased people were still on the voter rolls, a violation of Section 303 of HAVA requiring that statewide databases be coordinated with state agency records upon the death of a registered voter. Mr. von Spakovsky concluded by reiterating that DOJ is well prepared to handle any issues that may arise during the November election, though adding that certain HAVA and NVRA

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<sup>106</sup> Ibid., pp. 104–05.

<sup>107</sup> Ibid., pp. 105–06.

<sup>108</sup> Ibid., pp. 106–07.

<sup>109</sup> Ibid., p. 107.

compliance issues needed addressing and that the Department needs to complete their training and preparations this summer in order to be ready for the November election.<sup>110</sup>

## **Paul Hancock**

Mr. Hancock began by stating that the views he expresses are based on his experience in the Civil Rights Division of DOJ, as well as his experience as a former State Deputy Attorney General in Florida during the 2000 election. He said that he agrees that there is a need for debate about the continuing requirement of certain provisions of VRA, but that there is not much room for debate as to what caused the Act to be enacted in the first place. He said that blacks and Native Americans in America have faced a long history of discrimination and violence when attempting to vote, and that these problems continue today. Mr. Hancock noted that state public officials and law enforcement officers have often been the ones responsible for this intimidation.<sup>111</sup>

In that context, Mr. Hancock discussed an incident in Florida in 2000 where there were reports that the police had set up a roadblock south of Tallahassee to check people's driver's licenses and registrations. He talked about how, because this was near a polling place in a predominantly black district, there was a fear among voters that they were being targeted specifically because they were on the way to the polls to vote. Mr. Hancock said that while the roadblock was stopped early that day, and while the police might not have even known that there was an election going on, that incident still could have deterred many people from voting.<sup>112</sup>

Mr. Hancock noted that because the government expects the largest African American voter turnout in history in 2008, it is not unreasonable to expect that a large number of voters will be first-time voters, elderly, or misinformed. He said that it is also not unreasonable to think that their candidate of choice will be Barack Obama; thus, if somebody wanted to suppress Democratic votes, they could target people for suppression solely based on the color of their skin.<sup>113</sup>

Mr. Hancock then reviewed the history of VRA, and noted that the only reason why a DOJ official can enter a polling place to observe the election is to look for race discrimination. He said that this was important in the context of the 2008 election for a number of reasons. First, he said that the lesson from 2000 is that it is impossible to rerun a presidential election and that there is not enough time to address all electoral problems that might be observed. He said that the best way to avoid these issues is to plan heavily in advance and to work with state and local election officials to coordinate with anyone who might have insight into what

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<sup>110</sup> Ibid., pp. 107–08.

<sup>111</sup> Paul Hancock, testimony, Briefing before the U.S. Commission on Civil Rights, Voting Rights Enforcement for the 2008 U.S. Presidential Election, Washington, DC, June 6, 2008, transcript, pp. 109–10 (hereafter cited as Hancock Testimony, Briefing Transcript).

<sup>112</sup> Hancock Testimony, Briefing Transcript, pp. 110–11.

<sup>113</sup> Ibid., p. 112.

perceived problems could be. Second, he said that HAVA and NVRA must be used to ensure accurate registration lists at polling places.<sup>114</sup>

Mr. Hancock next turned to the key issues for the upcoming election. He said that one of the biggest problems we have in elections is that people do not know where they should go to vote because polling places are often changed without advanced notice. Mr. Hancock noted that this problem will be especially crucial to address this year due to the high number of inexperienced voters. A second issue he mentioned was that of provisional balloting, as such ballots are only counted if all other voting requirements are fulfilled, and that if someone goes to the wrong polling place to fill out a provisional ballot, their vote is eventually discarded. Mr. Hancock stressed the importance of every state having a requirement that, before poll workers give out a provisional ballot, they first direct voters to the correct polling place to ensure that their vote will be counted. Mr. Hancock stated that the provisional balloting system needs to be revamped, and that this needs to happen before Election Day, when officials are too busy and overworked to properly deal with problems that arise.<sup>115</sup>

Turning to the issue of federal observers, Mr. Hancock stated that sending out high numbers of observers does not impress him, and that he thinks this technique is often misused to give a false stamp of federal approval on an election. He said that the observer system needs to identify problem areas and send out people to address those problems accordingly, and that this process cannot be political. Mr. Hancock asserted that the government should provide detailed memoranda at polling places explaining the federal government's justification for sending in observers in the first place. Further, he said that observers must have a civil rights background, as DOJ employees with other backgrounds do not have the understanding necessary to do the job and often deter voters by providing a false impression that law enforcement officers are patrolling the polls.<sup>116</sup>

Concluding by addressing voter ID laws, Mr. Hancock said that there is still great concern in the minority community as to what the impact of such legislation will be. He noted that the upcoming election will provide an opportunity to gather information about whether there is any racial impact arising from a voter identification requirement. Mr. Hancock ended by saying that the 2008 election will be a historic one that will present DOJ with a great deal of challenges in their quest to ensure that all people are treated fairly regardless of race, and that the department needs to begin working on solutions to potential problems immediately.<sup>117</sup>

## **Roger Clegg**

Mr. Clegg first addressed the two tasks that law enforcement agencies have with respect to voting: making sure that legitimate voters are not prevented from voting while simultaneously making sure that fraudulent voters are kept from voting. He expressed his belief the most Americans are more offended by people being denied the right to vote than

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<sup>114</sup> Ibid., pp. 112–15.

<sup>115</sup> Ibid., pp. 115–17.

<sup>116</sup> Ibid., pp. 117–19.

<sup>117</sup> Ibid., pp. 119–20.

they are about someone who is illegally voting, but noted that in his opinion the two problems are equally troubling. Mr. Clegg indicated that those who have been kept from voting, both legally and illegally, have disproportionately included members of groups that have tended to vote Democratic, while illegal voters have also tended to be Democrats; consequently, he opined, Democrats are happy to insist that nobody should be hindered from voting, even if this means that some illegal voters get to the polls as well. He indicated his belief that, from the Democrats' perspective, it was a win-win proposition.<sup>118</sup>

Turning to the differences between liberals and conservatives on the issue, Mr. Clegg said that, by and large, liberals are more likely to favor letting criminals, non-citizens, the mentally incompetent, and children vote, whereas conservatives are willing to be more adamant about insuring that illegal voters not vote and are happy with not allowing criminals, for instance, to vote in the first place. Mr. Clegg said that this partisan divide complicates DOJ's job. He stated his opinion that Democrats will criticize Republican administrations for making sure that illegal votes are not cast, which is their job, and will make dubious claims that voter fraud is nonexistent or exaggerated. Conversely, he said that Republicans will object when Democrats ignore voter fraud and illegal voting in order to focus on ensuring voter access, which he said is allegedly what happened during the Clinton administration. Mr. Clegg said that a problem that he sees with the overall debate is that it is neither civil nor responsible, and appears to be used for personal vilification and character assassination in order to intimidate DOJ officials into adopting policies that benefit one party over another.<sup>119</sup>

Mr. Clegg then discussed the problems that he saw with Section 203 of the VRA. First, he said that requiring ballots to be printed in foreign languages contributes to balkanization, wastes resources that could be spent on improving polling opportunities, and also increases the likelihood of voter fraud. He stated his belief that Section 5 of VRA Act encourages racial gerrymandering. Mr. Clegg concluded by saying that it is his opinion that enforcing the aforementioned provisions of VRA causes DOJ to do more harm than good in certain situations.<sup>120</sup>

## **Discussion**

Commissioner Gaziano began the questioning by inquiring into Mr. Tokaji's evidence about the failure to enforce NVRA at welfare offices. He mentioned a study that found that the decline in the number of registrations at public assistance offices mirrors almost exactly the decline in the number of people being offered welfare since President Clinton signed welfare reform into law. He then asked Mr. Tokaji if he was aware of the testimony that the study's author, David Muhlhausen, offered before Congress, or of Mulhaushen's subsequent, more complete follow-up study. Commissioner Gaziano then submitted that study into the record.<sup>121</sup> Mr. Tokaji said that he was aware of the testimony but had not read it. He did not

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<sup>118</sup> Roger Clegg, testimony, Briefing before the U.S. Commission on Civil Rights, Voting Rights Enforcement for the 2008 U.S. Presidential Election, Washington, DC, June 6, 2008, transcript, pp. 121–22 (hereafter cited as Clegg Testimony, Briefing Transcript).

<sup>119</sup> Clegg Testimony, Briefing Transcript, pp. 122–24.

<sup>120</sup> *Ibid.*, pp. 124–25.

<sup>121</sup> Voting Rights Enforcement, Briefing Transcript, p. 85.

dispute that at least a part of the decrease is attributable to welfare reform, but noted that there also exists survey evidence showing that voters are not being offered the opportunity to register at welfare offices. He cited cases in several states where private groups made successful efforts to register voters at public assistance agencies, which he interpreted as meaning that if NVRA was properly enforced, there would be a substantial increase in voter registration among poor voters.<sup>122</sup>

Commissioner Gaziano commented that if there were ever a systematic failure to comply with NVRA, the theory would be that it is the fault of the state public assistance agents and social workers, who do not want to register voters, and the federal officials, who then turn a blind eye to the problem.<sup>123</sup> Mr. Tokaji agreed, saying that state secretaries of state often take the position that registering voters is not their responsibility, and that county welfare agencies have no incentive to do so unless they are pressured by DOJ, but noted that there has never been such a systematic failure until relatively recently.<sup>124</sup>

Commissioner Gaziano said that he was perplexed that Mr. Tokaji did not attribute the drop in voter registration among the poor to the drop in welfare.<sup>125</sup> Mr. Tokaji respectfully disagreed with Commissioner Gaziano's statement of the evidence, and noted a recent study from election.org, which he submitted into the record.<sup>126</sup>

Vice Chair Thernstrom asked Mr. Tokaji why it would not be in a social worker's best interest to get their poor clients registered to vote.<sup>127</sup> Noting that this was just speculation, Mr. Tokaji answered that social workers are very busy and that it made sense to him why they might not have a strong incentive to prioritize voter registration in their already full schedules.<sup>128</sup>

Commissioner Melendez asked Mr. Tokaji what his opinion was about the process of allocating monitors that Mr. Coates had described, and whether Mr. Tokaji would have prioritized allocation of these resources differently.<sup>129</sup> Mr. Tokaji said that while monitors are necessary, there are limits to what they can do and said that maintaining fair elections involves planning for months beforehand. The second point that Mr. Tokaji made was that, in terms of resource allocation, it might well be that swing states such as Ohio would be the most likely targets for voter caging and intimidation, but that as a result, political parties and advocacy groups would be more likely to be attentive as to what was going on in those states. From that perspective, Mr. Tokaji said that it might be a better policy to have the federal

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<sup>122</sup> Tokaji Testimony, Briefing Transcript, pp. 85–86.

<sup>123</sup> Voting Rights Enforcement, Briefing Transcript, p. 86.

<sup>124</sup> Tokaji Testimony, Briefing Transcript, p. 87.

<sup>125</sup> Voting Rights Enforcement, Briefing Transcript, p. 87.

<sup>126</sup> Tokaji Testimony, Briefing Transcript, pp. 87–88.

<sup>127</sup> Voting Rights Enforcement, Briefing Transcript, p. 88.

<sup>128</sup> Tokaji Testimony, Briefing Transcript, p. 88.

<sup>129</sup> Voting Rights Enforcement, Briefing Transcript, p. 89.

government focus on more obscure areas of the country and to let political parties and activist groups pay attention to and litigate in high profile states.<sup>130</sup>

Vice Chair Thornstrom opined that provisional votes were a necessary way to prevent disenfranchisement and asked Mr. Tokaji why he had a problem with provisional votes.<sup>131</sup> Mr. Tokaji noted that being able to cast a provisional ballot was better than not being able to vote at all, and expressed his approval for the HAVA provision requiring that provisional ballots be made available at polling places for people not on the registration lists or who had been wrongly removed or omitted from registration lists. He then pointed to three problems with registration systems that result in many people using provisional ballots. First, Mr. Tokaji asserted, is the risk that some provisional ballots will not be counted. He indicated that there are widely varying rates of counting provisional ballots in different jurisdictions, and that such ballots are sometimes treated differently even within jurisdictions.<sup>132</sup> Vice Chair Thornstrom asked Mr. Tokaji if provisional ballots were not being counted due to incompetence.<sup>133</sup> Mr. Tokaji said that it was difficult to say because of bad data in the area, but that he suspected it was because of different practices among jurisdictions within a state resulting from unclear rules as to which provisional ballots should count and which should not. Returning to his three issues with provisional ballots, Mr. Tokaji said that the second problem was that they consume a lot of resources for state and local officials. Mr. Tokaji then said that the third and most important problem with provisional balloting is that it increases the likelihood of a litigated election by giving political parties more things to fight over. He noted that the Palm Beach County situation in 2000 was a debacle and that it was imperative to avoid a situation like that in the future.<sup>134</sup>

Vice Chair Thornstrom asked how serious the problem of provisional balloting is, and what percentage of ballots could be provisional in any given jurisdiction.<sup>135</sup> Mr. Tokaji said that it varies considerably from state to state, but that his home state of Ohio had a particular problem with it. He said that provisional ballots were 2.7 percent of the total ballots cast in the 2004 election, 3.1 percent in the 2006 elections, and 3.4 percent for the current presidential primary, a significant number.<sup>136</sup>

Vice Chair Thornstrom agreed that this was a significant number, and then asked Mr. Tokaji what he meant when he referred to people who had been wrongly removed or omitted from registration lists.<sup>137</sup> Mr. Tokaji said that this happens when election officials make a mistake, when motor vehicle agencies or public assistance agencies fail to transfer registration forms, when voters make some error in filling out their registration, or when a third party collects registrations but for some reason does not get them into the database on time. He referenced

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<sup>130</sup> Tokaji Testimony, Briefing Transcript, pp. 89–90.

<sup>131</sup> Voting Rights Enforcement, Briefing Transcript, pp. 90–91.

<sup>132</sup> Tokaji Testimony, Briefing Transcript, pp. 91–92.

<sup>133</sup> Voting Rights Enforcement, Briefing Transcript, p. 92.

<sup>134</sup> Tokaji Testimony, Briefing Transcript, pp. 92–93.

<sup>135</sup> Voting Rights Enforcement, Briefing Transcript, p. 93.

<sup>136</sup> Tokaji Testimony, Briefing Transcript, pp. 93–94.

<sup>137</sup> Voting Rights Enforcement, Briefing Transcript, p. 94.

a Brennan Center report that indicated that database problems tend to arise when there are overly stringent matching procedures, such as striking voters who register as “Ben” when their driver’s license says “Benjamin,” or when there is a problem with a hyphenated name.<sup>138</sup>

Vice Chair Thernstrom asked if there was ever a problem with voters failing to re-register after moving to a new address or problems with voter registration information that made it unclear that voters had to re-register. She then asked if there was any way to avoid the percentages of provisional ballots being as high as they were in Ohio.<sup>139</sup> Mr. Tokaji said that one approach used in Minnesota and Wisconsin is to allow Election Day registration; while controversial, Mr. Tokaji stated that he supported Election Day registration. A second approach he mentioned, outlined by Dr. Michael McDonald in a new paper, is to allow voters to transfer their registration on Election Day by simply showing up at their preferred polling place and having the system immediately re-register them and count their vote.<sup>140</sup>

Commissioner Yaki noted that, as a former elected official, he saw firsthand how the American voting system allows national elections to be run by people at the very local level. He discussed how in San Francisco, one could easily see how there were issues with provisional ballots, damaged ballots, etc. He asked Mr. Tokaji what his take was on the fact that so many of the determinations on Election Day are made by local officials who deal with elections once every four years and are not up-to-date with current election laws.<sup>141</sup> Mr. Tokaji agreed that this is an issue, but said that there is no easy solution to the problem. He referenced his own paper on the hyper decentralization of the American election system, wherein there are thousands and thousands of different election systems across the country. Mr. Tokaji noted that officials without the proper resources to do their jobs often run these elections.<sup>142</sup>

Commissioner Yaki made an observation that a major reason for election difficulties, (and a problem which concerns both Democrats and Republicans), is that people have easy access to voting officials such as county registrars, due to close relationships and friendships, and that this gives unprecedented access to electoral decisions.<sup>143</sup> Mr. Tokaji said that it is integral to establish chains of custody that rigorously ensure the sanctity of ballots and balloting machines. He noted that America relies heavily on volunteer poll workers, and that there are not nearly enough of them available to meet the demand. He said that, while he did not mean to slight poll volunteers, election laws are so complex that one almost has to be a lawyer to understand them. He addressed the C-Span audience and said that anyone who wants to make the election better should volunteer to be a poll worker in their local community.<sup>144</sup>

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<sup>138</sup> Tokaji Testimony, Briefing Transcript, pp. 94–95.

<sup>139</sup> Voting Rights Enforcement m, Briefing Transcript, p. 95.

<sup>140</sup> Tokaji Testimony, Briefing Transcript, pp. 95–96.

<sup>141</sup> Voting Rights Enforcement, Briefing Transcript, pp. 97–98.

<sup>142</sup> Tokaji Testimony, Briefing Transcript, p. 98.

<sup>143</sup> Voting Rights Enforcement, Briefing Transcript, pp. 98–99.

<sup>144</sup> Tokaji Testimony, Briefing Transcript, pp. 99–100.

Commissioner Gaziano discussed the fact that some states require public assistance offices to encourage people to register to vote, and yet still offer assistance to non-citizens, thus encouraging non-citizens to illegally register to vote. He asked Mr. von Spakovsky whether there is a concern that states that do not ask for any evidence of citizenship at public assistance offices are illegally registering aliens to vote.<sup>145</sup> Mr. Von Spakovsky said that there is a tremendous fear among states that they will be charged with discrimination if they do not automatically offer everyone a chance to register to vote at DMVs or welfare offices. He discussed how in Maryland, DMV officials knowingly offered non-citizens voter registration solely to avoid being charged with discrimination, and that Maryland officials believed that doing so was required under NVRA. Mr. von Spakovsky said that his agency told Maryland officials that NVRA does not require offering non-citizens voter registration forms, but that he did not think that Maryland has changed its procedures. He also indicated that many states follow the same practice.<sup>146</sup>

Commissioner Gaziano asked Mr. von Spakovsky whether he thought that federal legislation should be changed to ensure that states are more careful to distinguish between eligible and non-eligible voters.<sup>147</sup> Mr. von Spakovsky replied that one of his recommendations is that DOJ do a survey of all 50 states and ask them whether they have procedures and rules in place for distinguishing between citizens and non-citizens at DMVs to make sure that non-citizens are not registering to vote. He said that by doing so, the department would quickly be able to figure out which states are complying with federal regulations and which states are not complying.<sup>148</sup>

Commissioner Gaziano voiced his approval with Mr. von Spakovsky's concern over registration at the DMVs. He then asked how states with an affirmative policy of not asking for citizenship at public assistance offices could differentiate between citizens and non-citizens when encouraging voter registration.<sup>149</sup> Mr. von Spakovsky stated that Commissioner Gaziano was correct in identifying that problem.<sup>150</sup>

Commissioner Gaziano voiced his concern about how the federal government determines the number of foreign language speakers when printing non-English language ballots. He asked if they used census data to do so.<sup>151</sup> Mr. Hancock confirmed that they use census data.<sup>152</sup> Commissioner Gaziano asked if he was correct in believing that unless you are completely proficient in English, the federal government counts that as not being English language proficient. He described the four census levels of proficiency, and how anything less than a native speaker is counted as non-proficient.<sup>153</sup> Mr. Hancock confirmed this to be true, and

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<sup>145</sup> Voting Rights Enforcement, Briefing Transcript, pp. 126–27.

<sup>146</sup> Von Spakovsky Testimony, Briefing Transcript, pp. 127–29.

<sup>147</sup> Voting Rights Enforcement, Briefing Transcript, p. 129.

<sup>148</sup> Von Spakovsky Testimony, Briefing Transcript, p. 129.

<sup>149</sup> Voting Rights Enforcement, Briefing Transcript, pp. 129–30.

<sup>150</sup> Von Spakovsky Testimony, Briefing Transcript, p. 130.

<sup>151</sup> Voting Rights Enforcement, Briefing Transcript, p. 130.

<sup>152</sup> Hancock Testimony, Briefing Transcript, p. 130.

<sup>153</sup> Voting Rights Enforcement, Briefing Transcript, pp. 130–32.



said that this is a valid issue.<sup>154</sup> Commissioner Gaziano said that he wants to address this issue of statutory interpretation: whether there is a tremendous effort being made to create multi-language ballots when in reality only a very small percentage of people truly need English language assistance, and that the statistics are inflated by the Census Bureau's proficiency ratings.<sup>155</sup>

Commissioner Yaki stated that, coming from a city with a large population of non-English speakers, there is a large difference between the ability to communicate well in day-to-day English and being able to read a ballot book and understand its instructions and initiatives. He said that even American-born English speakers find the ballot book difficult to understand, and that you cannot generalize about the levels of proficiency in English needed to vote correctly.<sup>156</sup> Mr. Hancock added that the regulations enforcing Section 203 of VRA are targeted to help those people who truly need it. He said that the difficulty is not in providing multiple language ballots where census data identifies non-English speakers are living, but in providing poll assistance and recruiting sufficient poll workers.<sup>157</sup>

Commissioner Gaziano stated that work needs to be done in deciding in what languages to print voting ballots. He said that in order to concentrate the resources where they are truly needed, we need to come up with an accurate way of determining where non-English-proficient speakers are living and targeting those communities accordingly.<sup>158</sup> Mr. Hancock agreed, and reiterated that the biggest problem is recruiting sufficiently qualified people since, to be an efficient translator, one must speak both English and a foreign language fluently. He said that if you do not target high-need areas, you tend to spread your resources too thin and might not recruit people who are truly qualified to provide assistance. Mr. Hancock said that the key is for election officials to review and analyze their own data to target the precincts where people are going to need the most assistance.<sup>159</sup>

Commissioner Kirsanow noted that in Florida in 2000, a major problem was ensuring that overseas military ballots were counted, and that there are now far more soldiers stationed overseas than in 2000. He asked Mr. von Spakovsky if there were any jurisdictions that had a particular problem with processing overseas ballots in a timely fashion.<sup>160</sup> Mr. von Spakovsky replied that he did not know, but that Georgia, Pennsylvania, Texas, and Oklahoma had problems with it in the past. He mentioned a district in Okaloosa County, Florida, that sent its election officials to overseas bases to establish an early voting site for military voters and their families so as to ensure that they did not have to worry about the absentee ballot process. He also mentioned a proposed congressional bill, the Military Voting Protection Act,<sup>161</sup> that would call for the Department of Defense (DOD) to put out a bid for a

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<sup>154</sup> Hancock Testimony, Briefing Transcript, pp. 132–33.

<sup>155</sup> Voting Rights Enforcement, Briefing Transcript, p. 133.

<sup>156</sup> *Ibid.*, pp. 133–35.

<sup>157</sup> Hancock Testimony, Briefing Transcript, p. 135.

<sup>158</sup> Voting Rights Enforcement, Briefing Transcript, pp. 135–36.

<sup>159</sup> Hancock Testimony, Briefing Transcript, pp. 136–37.

<sup>160</sup> Voting Rights Enforcement, Briefing Transcript, p. 140.

<sup>161</sup> Military Voting Protection Act of 2008, H.R. 5673, 110th Cong. (2008).

contract for overnight international mailing services from overseas bases to the United States.<sup>162</sup>

Vice Chair Thernstrom expressed her frustration with DOD's inability to get soldiers proper voting materials and machines. She asked, what is the fundamental problem with overseas military ballots?<sup>163</sup> Mr. von Spakovsky replied that DOD had once created an Internet voting system for all overseas government personnel, but that it was cancelled after preliminary reports indicated that it was a terrible security risk. He said that HAVA requires DOD to wait until the U.S. Election Assistance Commission comes up with and imposes standards for such a voting system, which they have not yet done.<sup>164</sup>

Mr. Hancock said that the traditional problem with overseas ballots is that states do not get their ballots in on time, and if there is a runoff primary, in many cases it will be too close to the general election to receive the overseas ballots in a timely fashion. He said that DOD has been trying to fix the problem, but they still often do not get the ballots in the mail sufficiently in advance of the election. He said that the remedy that was reached in Florida was for the state to count the ballots so long as they were cast by the day of the election and received by election officials within ten days after the date of the election.<sup>165</sup>

Vice Chairman Thernstrom asked if she was correct in thinking that while all provisional ballots were in hand by Election Day, they were not all counted by Election Day.<sup>166</sup> Mr. Hancock affirmed this statement.<sup>167</sup>

Commissioner Kirsanow asked Mr. Clegg if the fact that Obama received a majority of the white vote in a number of states undercuts the rationale of the temporary provisions of VRA pertaining to the dilution of minority voting.<sup>168</sup> Mr. Clegg said that although he believes we no longer need a Section 5 of VRA, most of the states where Obama got a white majority were not covered by Section 5 anyway, which would not necessarily show that Section 5 is not still needed.<sup>169</sup> He added that data collected even before this year tended to show that the empirical case for Section 5 is no longer persuasive.<sup>170</sup>

Commissioner Melendez asked Mr. Hancock to elaborate on his suggestion that DOJ prepare detailed memoranda about why they are sending monitors and observers into a particular place, and to talk about their past practices in that area. He also asked if the criteria for sending out monitors are usually made public, and if it is always the same criteria.<sup>171</sup> Mr.

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<sup>162</sup> Von Spakovsky Testimony, Briefing Transcript, pp. 140–142.

<sup>163</sup> Voting Rights Enforcement, Briefing Transcript, p. 143.

<sup>164</sup> Von Spakovsky Testimony, Briefing Transcript, pp. 143–145.

<sup>165</sup> Hancock Testimony, Briefing Transcript, pp. 145–148.

<sup>166</sup> Voting Rights Enforcement, Briefing Transcript, p. 148.

<sup>167</sup> Hancock Testimony, Briefing Transcript, p. 148.

<sup>168</sup> Voting Rights Enforcement, Briefing Transcript, pp. 148–49.

<sup>169</sup> Clegg Testimony, Briefing Transcript, pp. 149–150.

<sup>170</sup> *Ibid.*, p. 150.

<sup>171</sup> Voting Rights Enforcement, Briefing Transcript, p. 150.

Hancock said that historically, DOJ has prepared memoranda outlining its reasons for sending people out because DOJ's presence had to be based on allegations of race discrimination. Mr. Hancock said that the reason he suggested more openness in the process is that, since allegations of political biases and agendas have clouded the observer process, posting memoranda would allow the observers to justify their decisions with clearly delineated procedures based in law. He also said that while he agreed with Mr. Clegg's testimony that we have to get over the conflict between those who want to protect the right to vote and those who want to prevent voter fraud, it has to be done in a way that does not interfere with registered voters coming to the polls. He said that there needs to be separation between enforcing criminal law and interfering with the rights of legitimate voters. Mr. Hancock stressed that any issues had to be addressed before the presidential election so as to avoid lawsuits and political influence.<sup>172</sup>

Mr. von Spakovsky disagreed with Mr. Hancock, saying that there have never been any changes in DOJ's procedures, and that there was always a detailed memorandum written up when a recommendation came up from the Voting Section. He said that everything involving observers is very specifically governed and has to be signed off by the Attorney General.<sup>173</sup> Mr. Hancock responded that he did not think that the observer program should be judged solely based on the numbers of observers sent out, because there is no guarantee that this is effectively stopping anything. Second, he said that given the history of racial discrimination in the context of voting, it is particularly important for DOJ to send observers solely when there is evidence that there is a problem that needs to be addressed.<sup>174</sup>

Mr. Clegg said that he disagrees with Mr. Hancock's suggestion that part of the solution is to make sure that decisions are made by career bureaucrats and not political appointees. He suggested that DOJ is a part of the presidential administration and needs to be run as such. He also said that stereotypes that career people are free of partisan politics and that political appointees are uneducated and unduly partisan are both untrue.<sup>175</sup>

Mr. Hancock said that he agrees with Mr. Clegg to a large extent and did not mean to say that political appointees should be kept out of the process entirely. He clarified that there needs to be a mix between appointees and career servicemen so as to ensure debate over issues with room for principled disagreement. Mr. Hancock then noted that there is still a perception, imagined or not, that DOJ has functioned with a political agenda in recent years. He cited his own experiences in the redistricting of the Florida legislature after the 2000 census, and stated that it was a political gerrymander designed to limit Democratic strength. He said that DOJ does not care about political gerrymanders, but only whether a law satisfied VRA because the department has no authority to intervene unless race-based discrimination is involved.<sup>176</sup>

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<sup>172</sup> Hancock Testimony, Briefing Transcript, pp. 151–54.

<sup>173</sup> Van Spakovsky Testimony, Briefing Transcript, p. 154.

<sup>174</sup> Hancock Testimony, Briefing Transcript, pp. 154–55.

<sup>175</sup> Clegg Testimony, Briefing Transcript, pp. 156–57.

<sup>176</sup> Hancock Testimony, Briefing Transcript, pp. 157–59.

Vice Chair Thernstrom noted that political gerrymandering is not covered by the 14<sup>th</sup> Amendment according to the Supreme Court. She asked Mr. Hancock to explain how DOJ under Brad Reynolds, a Republican appointee (in the Reagan administration), controlled racial gerrymandering to the extent that it benefited Republicans.<sup>177</sup> Mr. Hancock said that his experiences with Mr. Reynolds in Mississippi around the time of *Bolden v. City of Mobile*<sup>178</sup> gave him a respect for the principled debate about Section 2 of the Voting Rights Act, and a respect for the process that he hopes will continue.<sup>179</sup>

Vice Chair Thernstrom asked if there was any relationship between printing ballots in multiple languages and the risk of fraud.<sup>180</sup> Mr. Clegg responded that there was. He said that because one is supposed to be able to speak English if one is a U.S. citizen, he thinks that non-English speakers should not be allowed to vote and that giving non-English speakers voting rights indirectly facilitates voter fraud. He noted that there are instances where people who speak poor English or elderly citizens who have been in America for a long time but still do not speak English are allowed to vote, but said that they are the exception and that we should not run the risks and take the trouble to print ballots in foreign languages.<sup>181</sup> In response, Commissioner Melendez noted that some, such as Native Americans, may never speak English fluently, but were arguably more citizens than anybody else in the country.

Commissioner Melendez then noted that it seemed to him that all decisions involving provisional ballots are left for the states, and asked if there was any way of involving the federal government in the process so as to streamline the state procedures.<sup>182</sup> Mr. Hancock said that the main issue is getting people to the right precinct, and that each precinct should have computerized records so that they always have a list of registered voters on hand. He said that the current solution is often for election officials to tell people just to call the precinct to figure out where they should go, but that on Election Day, those people are busy and the phone lines are jammed. He said that it could be a problem of numbers in a huge precinct like New York City, or a problem of not having sophisticated enough resources to get a computerized list in a smaller precinct. He closed by saying that it is crucial that every polling place have an accurate list of every registered voter and the precinct where they are registered, and to ensure that voters are directed to the correct polling place if they arrive at the wrong one.<sup>183</sup>

Commissioner Yaki made a statement that the Commission wishes to get beyond partisanship and to move beyond remarks about politicization of DOJ. He said that of every election ever held since 1965, this is the one election wherein the system cannot fail, and that if minorities are denied the right to vote in this election, the country will have an incredibly difficult time

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<sup>177</sup> Voting Rights Enforcement, Briefing Transcript, p. 159.

<sup>178</sup> *Bolden v. City of Mobile, Ala.*, 542 F. Supp. 1050 (S.D. Ala. 1982).

<sup>179</sup> Hancock Statement, Briefing Transcript, pp. 159–60.

<sup>180</sup> Voting Rights Enforcement, Briefing Transcript, pp. 160–61

<sup>181</sup> Clegg Testimony, Briefing Transcript, pp. 161–62.

<sup>182</sup> Voting Rights Enforcement, Briefing Transcript, p. 163.

<sup>183</sup> Hancock Testimony, Briefing Transcript, pp. 163–65.

dealing with the aftermath. He stated that this is the true test of whether VRA is ever going to work the way it was designed.<sup>184</sup>

Commissioner Gaziano made a statement that false claims of race-based disenfranchisement must also be prevented.<sup>185</sup>

Commissioner Yaki said that he found Commissioner Gaziano's remark interesting because one of the most famous episodes of false claims of disenfranchisement was that surrounding the police roadblock in Florida in 2000 that was based in an understandable background of historical racism. He closed by saying that no matter what you believe, this election has to be run correctly.<sup>186</sup>

Vice Chair Thernstrom closed the meeting by agreeing with Commissioner Yaki's point that we have to be sure to avert election problems, both real and perceived.<sup>187</sup>

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<sup>184</sup> Voting Rights Enforcement, Briefing Transcript, pp. 165–66.

<sup>185</sup> *Ibid.*, Briefing Transcript, pp. 166–67.

<sup>186</sup> *Ibid.*, Briefing Transcript, p. 167.

<sup>187</sup> *Ibid.*, Briefing Transcript, pp. 167–68.



## Statements

*Note: Statements are unedited by the Commission and are the sole work of the author.*

### **Christopher Coates**

Chief, Voting Section, Civil Rights Division, U.S. Department of Justice  
Review of the Department of Justice's plans to monitor voting rights enforcement for the 2008 United States Presidential election

Thank you, Mr. Chairman and members of the Commission on Civil Rights, it is a pleasure to appear before you to represent the dedicated professionals of the Voting Section of the Civil Rights Division.

I am honored to serve the people of the United States as the Chief of the Voting Section for the Civil Rights Division. I am pleased to report that the Voting Section and Civil Rights Division remain diligent in protecting voting rights.

The right to vote is the foundation of our democratic system of government. The Department strongly supported the Voting Rights Act Reauthorization and Amendments Act of 2006, named for three heroines of the Civil Rights movement, Fannie Lou Hamer, Rosa Parks, and Coretta Scott King. The Department currently is vigorously defending the statute's constitutionality in federal court here in the District of Columbia. On May 30, 2008, a three-judge district court panel unanimously upheld the constitutionality of the statute. *See Northwest Austin Municipal Utility District No. 1 v. Mukasey*, No. 06-1384 (D.D.C. May 30, 2008). The Department is pleased that the three-judge district court agreed with our position in upholding the constitutionality of the reauthorization of the Voting Rights Act. We look forward to studying the opinion and continuing to vigorously enforce all the provisions of federal law.

The Civil Rights Division is responsible for enforcing several laws that protect voting rights, and I will discuss the Division's work under each of those laws. First, however, it is worth noting that under our nation's federal system of government, the primary responsibility for the method and manner of elections lies with the States. Article I, Section 4, of the Constitution states, "The Times, Places and Manner of holding Elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof." Thus, each State holds responsibility for conducting its own elections. However, Article I, Section 4, goes on to provide: "[B]ut the Congress may at any time by Law make or alter such Regulations" with respect to federal elections. The Fourteenth and Fifteenth Amendments likewise authorize congressional action in the elections sphere. Therefore, except where Congress has expressly decided to legislate otherwise, States maintain responsibility for the conduct of elections.

Congress has passed legislation in certain distinct areas related to voting and elections. These laws include, among others, the Voting Rights Act of 1965 and subsequent amendments thereto, the Uniformed and Overseas Citizen Absentee Voting Act of 1986 (UOCAVA), the National Voter Registration Act of 1993 (Motor Voter or NVRA), and the Help America Vote Act of 2002 (HAVA). The Voting Section of the Civil Rights Division enforces the civil provisions of these laws. Pursuant to 28 C.F.R. §§ 50 and 55, the vast majority of criminal matters involving possible federal election offenses are assigned to and supervised by the Criminal Division and are prosecuted by United States Attorneys' Offices. However, a small percentage of voting-related offenses are principally assigned to the Civil Rights Division to handle or supervise.

The Voting Section is committed to enforcing vigorously each of the statutes within its jurisdiction. The 18 new lawsuits we filed in calendar year 2006 is double the average number of lawsuits filed annually in the preceding 30 years.

In 2006, the President signed the Voting Rights Act Reauthorization and Amendments Act of 2006, which renewed for another 25 years certain provisions of the Act that had been set to expire. The Voting Rights Act has proven to be one of the most successful pieces of civil rights legislation ever enacted. However, as long as all citizens do not have equal access to the polls, our work is not finished.

Section 2 of the Voting Rights Act prohibits intentional, purposeful racial discrimination in voting as well as conduct with a racially discriminatory effect. Although most commonly used to address issues of minority vote dilution, Section 2 also has been the basis for other types of legal relief involving voter registration and election-day practices, including: the use of dual (state and municipal) voter registration systems, the refusal to recruit or hire minority poll workers, the intentional targeting of voters for challenges based on their race or ethnicity, misconduct by poll officials favoring candidates of a particular race, changes in candidate residency requirements intended to disqualify minority candidates, and actions and failures to act resulting in the denial of equal access to the political process for language minority voters, in the form of hostile poll workers and refusal to permit bilingual assistance.

In 2006, the Division's Voting Section filed and resolved a lawsuit under Section 2 against Long County, Georgia, for improper challenges to Hispanic-American voters — including at least three United States citizens on active duty with the United States Army — based on their perceived race and ethnicity.

The Voting Section also filed a Section 2 lawsuit in Ohio in 2006 that challenged the City of Euclid, Ohio's mixed at-large/ward method of electing its city council on the basis that it unlawfully diluted the voting strength of African-American voters. Although African-Americans comprise nearly 30 percent of the city's electorate, and there have been eight recent African-American candidates for the Euclid City Council, not a single African-American candidate has ever been elected to the nine-member city council or to any other city office. In August 2007, the court ruled that the city's method of electing its city council violated the Voting Rights Act. In March 2008, the first election was held under a court-



ordered remedial voting plan, and the first African-American was elected to the Euclid City Council from a majority-black voting district.

Also among our successes under Section 2 is the Division's lawsuit against Osceola County, Florida, where we brought a challenge to the county's at-large election system. In October 2006, we prevailed at trial. The court held that the at-large election system violated the rights of Hispanic voters under Section 2 and ordered the county to abandon it. In December 2006, the court adopted the remedial election system proposed by the United States and ordered a special election under that election plan that took place in April 2007. In that election a Hispanic representative was elected from a majority-Hispanic voting district to the Osceola County Commission. Further, in April 2008, the Voting Section filed and resolved another suit challenging a district voting plan for the Osceola Board of Education on the grounds that those districts, that were all majority-Angelo, diluted Hispanic voting strength.

In March 2008, the Division filed and resolved a lawsuit under Section 2 that challenged the at-large method of election for the Georgetown County, South Carolina Board of Education on the grounds that the use of at-large voting there diluted Africa-American voting strength. In that county black citizens constitute approximately one-third of the voting age population, but at the time of the filing of this suit the nine-member local school board was all-white. The remedial plan in the case provides for the use of three majority-black districts in future school board elections.

The United States filed a complaint on December 15, 2006, alleging that Port Chester, New York's at-large system of electing its governing Board of Trustees diluted the voting strength of Port Chester's Hispanic citizens, in violation of Section 2 of the Voting Rights Act of 1965. On March 2, 2007, after an evidentiary hearing, the court enjoined the March 20 elections, holding that the United States was likely to succeed on its claim. On January 17, 2008, the court ruled that the at-large system of election used by Port Chester to elect its trustees violates the Voting Rights Act because it denies Hispanics an equal opportunity to participate in the political process. The court ordered the parties to file proposed remedial plans by February 7, 2008. At present, the court has not ruled on the remedial issues in Port Chester. According to the evidence adduced at trial, and as cited in the court's opinion, the 2000 census shows that almost half of Port Chester's residents, and 22 percent of Port Chester's citizens of voting age, were Hispanic. By July 2006, the number of Hispanic citizens of voting age had increased to about 28 percent. Despite these figures, no Hispanic has ever been elected to Port Chester's municipal legislature, the six-member Board of Trustees. Indeed, no Hispanic has ever been elected to any public office in Port Chester, despite the fact that Hispanic candidates have run for office six times — twice for the Board of Trustees and four times for the Port Chester Board of Education, which manages a school system that is overwhelmingly Hispanic.

Also in 2007, in Fremont County, Wyoming, the Division successfully defended the constitutionality of Section 2 of the Voting Rights Act, for the fourth time in this Administration. In addition, the Division filed and resolved a claim under Section 2 involving discrimination against Hispanic voters at the polls in Philadelphia. In addition, the Voting Section obtained additional relief in an earlier Section 2 suit on behalf of Native

American voters in Cibola County, New Mexico. The actions against Philadelphia and Cibola County are noteworthy because both involve claims not only under the Voting Rights Act but also under HAVA and the NVRA. In Cibola County, which initially involved claims under Sections 2 and 203, the Division brought additional claims after the County failed to process voter registration applications of Laguna Pueblo and other Native American voters, removed Native American voters from the rolls without the notice required by the NVRA, and failed to provide provisional ballots to Native American voters in violation of HAVA. In Philadelphia, the Division added to our original Section 203 and 208 claims additional counts under Sections 2 and 4(e) of the Act to protect Hispanic voters, a count under the NVRA pursuant to which the City has agreed to remove from the rolls the names of numerous ineligible voters, including those who are deceased or have moved, and two counts under HAVA — to assure that accessible machines are available to voters with disabilities and that required signs at the polls also are posted in Spanish. The Division continues to monitor Philadelphia's compliance with the settlement agreement reached with that City, and attorneys from the Division monitored the presidential primary in Philadelphia in April 2008.

In 2007, the Section litigated a case in Mississippi under Sections 2 and 11(b) of the Voting Rights Act. On June 29, 2007, U.S. Senior District Judge Tom S. Lee found the defendants in *United States v. Ike Brown et al.* (S.D. Miss.) liable for violating the Voting Rights Act by discriminating against white voters and white candidates. This case marked the first time that the Division had ever filed a case under the Voting Rights Act alleging that whites had been the victims of racial discrimination in the voting area. The Division will continue to closely investigate claims of voter discrimination and vigorously pursue actions on behalf of all Americans wherever violations of federal law are found.

In recent years, the Division has broken records with regard to enforcement of Section 208 of the Voting Rights Act. Section 208 assures all voters who need assistance in marking their ballots the right to choose a person they trust to provide that assistance. Voters may choose any person other than an agent of their employer or union to assist them in the voting booth. During the past six years, we have brought nine of the eleven such claims brought by the Department since Section 208 was enacted twenty-five years ago, including the first case ever under the Voting Rights Act to protect the rights of Haitian-Americans.

Our commitment to enforcing the language minority requirements of the Voting Rights Act, reauthorized by Congress in 2006, remains strong, with nine lawsuits filed in fiscal year 2007. In September 2007, we settled the first lawsuit filed under Section 203 on behalf of Korean-Americans in the City of Walnut, California. During the past 7 years, the Civil Rights Division has brought more cases under the minority language provisions than in all other years combined since 1965. Specifically, we have successfully litigated over 60 percent of all the Department's language minority cases in the history of the Voting Rights Act. These cases include the first Voting Rights Act cases in history on behalf of Filipino, Korean, and Vietnamese Americans.

Our cases on behalf of language minority voters have made a remarkable difference in the accessibility of the election process to those voters. As a result of our lawsuit, Boston now employs five times more bilingual poll workers than before. As a result of our lawsuit, San

Diego added over 1,000 bilingual poll workers, and Hispanic voter registration increased by over 20 percent between our settlement in July 2004 and the November 2004 general election. There was a similar increase among Filipino voters, and Vietnamese voter registration rose 37 percent. Our lawsuits also spur voluntary compliance: after the San Diego lawsuit, Los Angeles County added over 2,200 bilingual poll workers, an increase of over 62 percent. In many cases, violations of Section 203 are accompanied by such overt discrimination by poll workers that Section 2 claims could have been brought as well. However, we have been able to obtain complete and comprehensive relief through our litigation and remedies under Section 203 without the added expense and delay of a Section 2 claim.

In 2006, the Voting Section processed the largest number of Section 5 submissions in its history. The Division has interposed six objections to submissions pursuant to Section 5 since January 2006, in Georgia, Texas, Alabama, North Carolina, South Dakota, and Michigan, and in 2006 filed a Section 5 enforcement action. Additionally, the Division filed an amicus brief in a Mississippi Section 5 case in 2007. The Division also consented to four actions since 2006 brought by jurisdictions that satisfied the statutory requirements for obtaining a release, or “bailout,” from Section 5 coverage.

The Division also has made a major technological advance in Section 5 with our new e-Submission program. Now, state and local officials can make Section 5 submissions on-line. This will make it easier for jurisdictions to comply, encourage complete submissions, ease our processing of submissions, and allow the Voting Section staff more time to study the changes and identify those that may be discriminatory.

The Division has continued to work diligently to protect the voting rights of our nation’s military and overseas citizens. The Division has enforcement responsibility for UOCAVA, which ensures that overseas citizens and members of the military, and their household dependents, are able to request, receive, and cast a ballot for federal offices in a timely manner for federal elections. Just since January 2008, we have taken legal action in two States to resolve UOCAVA violations for the February 5 federal primary elections. In Illinois, we participated as amicus curiae in a case to ensure the State adequately ensured the voting opportunities for UOCAVA voters under their truncated 2008 election calendar, and on January 30, the court approved a consent decree with Tennessee to resolve our complaint filed over the late mailing of overseas ballots in that state. In calendar year 2006, we filed successful UOCAVA suits in Alabama, Connecticut, and North Carolina and reached a voluntary legislative solution without the need for litigation in South Carolina. In Alabama and North Carolina, we obtained relief for military and overseas voters in the form of State legislation. We also obtained permanent relief in the form of legislation in a suit originally filed against Pennsylvania in 2004. The Civil Rights Division will continue to make every effort to ensure that our citizens abroad and the brave men and women of our military are afforded a full opportunity to participate in federal elections.

Since 2001, the Voting Section has filed 10 suits alleging violations of the National Voter Registration Act. Since 2006, we filed lawsuits containing NVRA claims in Indiana, Maine, New Jersey, Philadelphia, and Cibola County, New Mexico. Every one of these suits was

resolved by agreed orders. In May 2008, the Voting Section entered into a settlement agreement with Arizona regarding that State's compliance with Section 7 of the NVRA, which requires clients of public assistance agencies to be provided the opportunity to register to vote. The Division is presently involved in litigation under Section 7 with the State New York concerning its failure to offer voter registration opportunities at offices serving disabled students at its public universities and colleges.

Aside from lawsuits, we actively investigate the practices of jurisdictions to see whether they are complying with federal law. In the past year, we sent letters to a dozen states inquiring about their list maintenance practices when we learned that there appeared to be significant imbalances between their numbers of registered voters and their citizen populations. Last year, we sent letters to 18 states inquiring about their practices and procedures regarding the provision of voter registration opportunities at state offices that provide public assistance, disability, and other services. Investigations in some of these states are ongoing.

With January 1, 2006, came the first year of full, nationwide implementation of the database and accessible voting machine requirements of HAVA. HAVA requires that each State and territory have a statewide computerized voter registration database in place for federal elections, and that the voting systems used in federal elections, among other requirements, provide accessible voting for persons with disabilities in each polling place in the nation.

The Division worked hard to help States prepare HAVA's requirements, through speeches and mailings to election officials, responses to requests for our views on various issues, and maintaining a detailed website on HAVA issues as well as cooperative discussions with States aimed at achieving voluntary compliance. A significant example of the success of the Division's cooperative approach in working with States on HAVA compliance came in California. Prior to the 2006 deadline, the Voting Section reached an important memorandum of agreement with California regarding its badly stalled database implementation. California's newly appointed Secretary of State sought the Division's help to work cooperatively on a solution, and the Division put significant time and resources into working with the State to craft a workable agreement providing for both interim and permanent solutions. The agreement has served as a model for other States in their database compliance efforts.

Where cooperative efforts prove unsuccessful, the Division enforces HAVA through litigation. Since January 2006, the Division filed lawsuits against the States of New York, Alabama, Maine, and New Jersey. In New York and Maine, the States had failed to make significant progress on both the accessible voting equipment and the statewide databases. In Alabama and New Jersey, the States had not yet implemented HAVA-compliant statewide databases for voter registration. The Division ultimately obtained a favorable judgment and remedial order in Alabama, a preliminary injunction and the entry of a remedial order in New York, and favorable consent decrees in Maine and New Jersey. The Division recently won a motion for further relief against New York for failure to achieve full compliance with HAVA's voting system requirements, and the court there has entered a supplemental remedial order to cure the continuing violations. In addition, we filed HAVA claims against Galveston County, Texas, for failing to provide provisional ballots to individuals eligible to

vote, post required voting information at polling places, and provide adequate instructions for mail-in registrants and first time voters. Similar HAVA litigation has been filed and resolved against Boliver County, Mississippi. We also filed HAVA claims against an Arizona locality for its failure to follow the voter information posting requirements of the Act, and our recent lawsuits in Cibola County, New Mexico, and Philadelphia, Pennsylvania, discussed above, also included HAVA claims to protect Native American and voters with disabilities, respectively. The Division also has defended three challenges to HAVA in a private suit involving the HAVA accessible machine requirement. A separate Pennsylvania State court judgment barring the use of accessible machines was overturned after the Division gave formal notice of its intent to file a federal lawsuit.

A major component of the Division's work to protect voting rights is its election monitoring program, which is among the most effective means of ensuring that federal voting rights are respected on election day. The Justice Department deploys hundreds of personnel to monitor elections across the country. In 2006, the Division deployed a record number of Department monitors and federal observers from the Office of Personnel Management to jurisdictions across the country for a mid-term election. In total, more than 800 federal personnel monitored the polls in 69 political subdivisions in 22 States during the November 7, 2006, election. In calendar year 2006, we sent over 1,500 federal personnel to monitor elections, doubling the number sent in 2000, a presidential election year.

During calendar year 2004, a record 1,463 federal observers and 533 Department personnel were sent to monitor 163 elections in 106 jurisdictions in 29 states. This compares to the 640 federal observers and 110 Department personnel deployed during the entire 2000 presidential calendar year.

Thus far during calendar year 2008, 224 federal observers and 111 Department personnel have been sent to monitor 35 elections in 33 jurisdictions in 13 states.

For the 2008 elections, the Civil Rights Division will implement a comprehensive Election Day program to help ensure ballot access. As in previous years, the Civil Rights Division will coordinate the deployment of hundreds of federal government employees in counties, cities, and towns across the country to ensure access to the polls as required by our nation's civil rights laws.

As in prior years, the Division will monitor States' compliance with the requirements of the Voting Rights Act, the Help America Vote Act, the Uniformed and Overseas Citizens Absentee Voting Act, and the National Voter Registration Act, instituting enforcement actions as necessary. In that regard, we will closely monitor compliance with our numerous court orders, consent decrees, and other agreements, many of which will be in effect through the 2008 election cycle. The Civil Rights Division's efforts to ensure voter access in accordance with federal law will include training a responsible official, the District Election Official (DEO), in every U.S. Attorney's Office across the country on ballot access laws.

Such extensive efforts require substantial planning. Our decisions to deploy observers and monitors are made carefully and purposefully so that our resources are used where they are

most needed. To that end, Department officials will meet with representatives of a number of civil rights organizations prior to the 2008 general election, including organizations that advocate on behalf of racial and language minorities, as well as groups that focus on disability rights. Department officials also will meet with representatives of State and local election officials as well as Congressional staff members before the 2008 general election. These meetings will provide a forum for discussion of the concerns of national, state and local officials' regarding the 2008 Presidential election.

On election day, Department personnel here in Washington will stand ready. We will have numerous phone lines ready to handle calls from citizens with election complaints, as well as an internet-based mechanism for reporting problems. We will have personnel at the call center who are fluent in Spanish and the Division's language interpretation service to provide translators in other languages.

The Civil Rights Division will continue vigorously to protect the voting rights of all Americans.

**William Welch**

Chief, Public Integrity Section, Criminal Division, U.S. Department of Justice  
Review of the Department of Justice's plans to monitor voting rights enforcement for the  
2008 United States Presidential election

Good morning, Mr. Chairman and Members of the United States Commission on Civil Rights. My name is William Welch, and I am the Chief of the Public Integrity Section of the Justice Department's Criminal Division. It is a pleasure and honor to appear before you today to discuss the role of the Criminal Division and its Public Integrity Section relating to elections.

The Public Integrity Section's law enforcement responsibilities concerning elections are confined to all federal election crimes other than those involving voting rights violations, which are handled by the Civil Rights Division. The majority of election crimes that we prosecute involve election or ballot fraud, such as vote buying or ballot box stuffing, and campaign financing crimes, such as contributing excessive amounts or from prohibited sources. Under long-standing Department procedures, dating back to 1976 when the Public Integrity Section was created, the Section is responsible for assisting in the Department's nationwide oversight of the handling of election crime investigations and prosecutions by its United States Attorneys' Offices around the country. The Section has two senior attorneys who discharge this supervisory responsibility on a full-time basis, one of whom has spent over 38 years overseeing election crime cases, the other of whom has done so for over 30 years. These two individuals have written a series of books on the prosecution of election crimes under federal law for the Department's prosecutors and investigators, the latest iteration of which was completed last year.

The Criminal Division's oversight of election crime matters is designed to ensure that the Department's nationwide efforts to combat election fraud and other election-related offenses are consistent, impartial, and effective. It is important to note that the Public Integrity Section does not have formal approval authority over the investigation and prosecution of election crimes, but rather serves in a mandatory consultative capacity to the United States Attorneys' Offices in this area. We do not technically approve (or disapprove) investigative or charging decisions. Instead, we serve in a consultative capacity to the United States Attorneys' Offices, and provide guidance to the field on the handling of election crime matters based on the extensive experience of Section prosecutors in this field of criminal law enforcement. For example, Department procedures do not require that the Public Integrity Section review the facts and circumstances regarding the need to open a preliminary investigation into election fraud offenses, yet the Section is often consulted by United States Attorneys' Offices at this stage.

Consultation with the Public Integrity Section is required in the event that a United States Attorney's Office wants to open a full-field FBI investigation or grand jury investigation into an election fraud allegation. Similarly, consultation with the Section is required prior to any charging decision involving an election offense. On the rare occasion that agreement is not

reached between the Section and field, the matter is referred to the head of the Criminal Division for resolution.

The Criminal Division's Public Integrity Section and the Department's federal prosecutors in the field complement the role of the Civil Rights Division in election matters. The Civil Rights Division is responsible for protecting the right to vote, while the Criminal Division's Public Integrity Section and other Department prosecutors throughout the country seek to protect the value of each person's vote by prosecuting those who corrupt elections. It is our hope and belief that the Department's election crime prosecutions deter at least some election fraud, and thus enhance the integrity of future elections.

As I'm sure you know, the Criminal Division has no role in the appointment or activities of election observers. These election-monitoring activities are authorized by the Voting Rights Act, and fall within the jurisdiction of the Civil Rights Division. In the area of elections, the role of prosecutors in the Criminal Division and in the field is limited to prosecuting those who seek to corrupt the election process. This is a significant limitation on the Department's criminal law enforcement authority. Because this limitation is often misunderstood, I would like to explain the Criminal Division's approach to election crimes.

First, the Criminal Division has no statutory authority to send election monitors to the polls. Second, a federal statute expressly criminalizes sending armed men, such as FBI agents, to open polling places. Finally, the Department has a long-standing Policy of Noninterference with Elections that is based on sound prudential and tactical considerations. The policy provides that overt criminal investigative matters concerning alleged election fraud should not ordinarily be undertaken until after the election process has been completed, the election results certified, and all election recounts or contests concluded. In addition to avoiding interference with the state's administration of the election, the policy is designed to avoid chilling legitimate voting and campaigning activity and also to preclude the possibility of having partisans interject the existence of a criminal investigation as a campaign issue.

As discussed in the Section's election crimes book, federal criminal law currently gives the Justice Department's prosecutors in the Criminal Division and United States Attorneys' Offices authority to prosecute most common types of electoral corruption when they occur in elections where the name of one or more candidates for federal office appears on the ballot. However, the authority to bring federal criminal charges against those who commit frauds in purely local elections is limited largely to situations where the offense involved the necessary participation of a public official "acting under color of law."

In 2002, the Attorney General established a Ballot Access and Voting Integrity Initiative to spearhead the Department's efforts to combat election fraud and civil rights violations involving voting. To further these goals, the initiative requires annual training of federal prosecutors in the areas of voter fraud and voting rights and coordination with state law enforcement and election officials before federal general elections. Since the initiative began, the Department has charged 148 persons with election fraud offenses and has convicted 111 defendants. Non-citizens have been convicted of voting-related offenses in Florida, Colorado, North Carolina, and Oregon. Vote buying schemes have been successfully



prosecuted in Illinois, Kentucky, and North Carolina, and persons have been convicted for multiple voting in Kansas and South Dakota.

Thank you for the opportunity to provide the Commission with information about the Criminal Division's and its Public Integrity Section's efforts to combat election fraud. I look forward to answering any questions that you may have.

**Daniel P. Tokaji**

Associate Professor of Law, The Ohio State University, Moritz College of Law  
Review of the Department of Justice's plans to monitor voting rights enforcement for the  
2008 United States Presidential election

My name is Daniel Tokaji. I am an Associate Professor of Law at The Ohio State University's Moritz College of Law, and Associate Director of *Election Law @ Moritz*, a group of legal scholars whose mission is to provide reliable, nonpartisan analysis of election law matters.<sup>1</sup> In addition, I am a co-author of the forthcoming edition of the casebook *Election Law: Cases and Materials* (4th ed. 2008). My research and scholarship focuses primarily on voting rights and election administration. I am honored to appear before you today.

There can be no disputing the fact that the United States Department of Justice (DOJ) has a vital role to play in ensuring that the fundamental right to vote is protected. There will inevitably be some reasonable disagreements over how best to serve this overarching objective. But whatever these differences, we should be able to agree that an integral part of DOJ's historic mission is to ensure that all eligible voters are permitted to exercise their right to vote on equal terms with other citizens. It is especially important that DOJ ensure that no eligible voters are denied the right to full and fair participation in elections based on their race, ethnicity, poverty, language proficiency, or disability.

The remarks that follow summarize my views on the appropriate role of DOJ, when it comes to the enforcement of voting rights in the 2008 election season. I will first discuss areas that should, in my opinion, be high priorities. Those include making sure that voter registration opportunities, language assistance, and disability access are provided to voters as required by federal law. Next, I will discuss the type of actions that I respectfully suggest DOJ avoid, so as to ensure both the appearance and reality of nonpartisanship in this election season.

While there are many ways in which the Department can and should act to protect the right to vote, I will focus on three: voter registration, language assistance, and disability access.

1. *Voter Registration*. One of the most important areas of voting rights activity in this year's election is likely to be procedures that state and local jurisdictions follow in registering voters and in maintaining voting rolls. The importance of this area is the result of several factors, including the requirements of the Help America Vote Act of 2002 (HAVA), evidence that jurisdictions are not fully complying with the requirements of the National Voter Registration Act of 1993 (NVRA), and state laws that have been enacted in recent years that change registration procedures. Although voter registration is mostly a state and local matter, there are some important federal legal requirements in place that are

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<sup>1</sup> My affiliations with the University, the College of Law, and *Election Law @ Moritz* are provided solely for purposes of identification. This testimony is offered solely on my own behalf.

designed to ensure that all eligible voters have a fair opportunity to participate in elections. A cornerstone of these requirements is the NVRA, which requires that voter registration for federal elections be made available at state motor vehicle agencies, as well as state offices providing public assistance services and services to people with disabilities.<sup>2</sup> DOJ is empowered to bring civil actions in federal court to enforce the NVRA's requirements. Federal courts have upheld the constitutionality of the NVRA.<sup>3</sup>

Unfortunately, there is evidence of noncompliance with the NVRA's requirements. A recent report found that the number of voter registration applications from public assistance agencies in 2005-06 was a small fraction of what it had been 10 years earlier – despite the fact that roughly 40% of voting-age citizens from low-income households remain unregistered.<sup>4</sup> Survey evidence also indicates that registration opportunities are not being made available as required by the NVRA.<sup>5</sup> Put simply, there is evidence that a disproportionate number of poor Americans are not being registered as required by the law. Yet it appears that DOJ has done relatively little in recent years to make sure that states are making registration opportunities available as federal law requires.<sup>6</sup>

Another priority is to ensure that voter's names are not wrongly removed or omitted from state registration lists. This is not merely a theoretical problem. The highly regarded 2001 report of the Caltech/MIT Voting Technology Project found that this was probably the greatest source of lost votes in the 2000 presidential election, with 1.5 to 3 million voters affected by registration errors – probably more than the number of people affected by antiquated voting equipment.<sup>7</sup> Despite all the changes in the past few years, the accuracy of voter registration lists remains a problem. Evidence for this lies in the relatively high number of provisional ballots in some states, which are required if a voter appears at the polls and finds that his or her name does not appear on the registration list. In my own state of Ohio, for example, the percentage of voters casting provisional ballots actually increased between the 2004 and 2006 general elections.<sup>8</sup> Data just released by the Ohio Secretary of State's office shows that the percentage of people voting provisionally was higher still in the 2008 primary.<sup>9</sup>

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<sup>2</sup> 42 U.S.C. §§ 1973gg-3, 1973 gg-5.

<sup>3</sup> See *Association of Community Organizations for Reform Now v. Edgar*, 56 F.3d 791 (7th Cir. 1995); *Voting Rights Coalition v. Wilson*, 60 F.3d 1411 (9th Cir. 1995), cert. denied 516 U.S. 1093 (1996).

<sup>4</sup> Douglas R. Hess & Scott Novakowski, *Neglecting the National Voter Registration Act, 1995-2007*, at 1 (2008).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 13; see also U.S. Department of Justice, Civil Rights Division, *Cases Raising Claims Under the National Voter Registration Act*, available at [http://www.usdoj.gov/crt/voting/litigation/recent\\_nvra.html#cibola](http://www.usdoj.gov/crt/voting/litigation/recent_nvra.html#cibola).

<sup>7</sup> Caltech/MIT Voting Technology Project, *Voting: What Is, What Could Be* 9 (2001).

<sup>8</sup> Steven F. Huefner, et al., *From Registration to Recounts: The Election Ecosystems of Five Midwestern States* 32 (2007) (showing an increase from 2.8% to 3.1% from 2004 to 2006).

<sup>9</sup> Information released by the Secretary of State's office shows that approximately 3.4% of Ohioans cast provisional ballots (123,432 provisional ballots were issued, out of 3,603,523 total ballots cast). Ohio Secretary of State, "Absentee and Provisional Ballot Report: March 4, 2008," available at

No eligible voter should be denied the right to vote and have that vote counted due to a faulty registration list. This basic and undeniable principle is embodied in both the NVRA and HAVA. The NVRA imposes important limitations on voters being “purged” or otherwise having their names wrongly removed from the voting rolls, including a restriction on the systematic removal of voters within 90 days of a federal election.<sup>10</sup> HAVA requires that every state have in place a computerized “statewide voter registration list,” commonly referred to as a “statewide registration database.”<sup>11</sup> The idea behind this list was to make voter registration lists more accurate, thereby ensuring that eligible voters are not denied the right to vote due to faulty lists while at the same time protecting the integrity of the registration process. HAVA also includes requirements designed to ensure that voters’ names are not wrongly removed from the rolls. Among its requirements relating to list maintenance are that “*only* voters who are not registered or who are not eligible to vote” be removed, and states have in place “[s]afeguards to ensure that eligible voters are not removed in error from the official list of eligible voters.”<sup>12</sup>

Here again, there is reason for concern that the requirements of federal law are not fully being complied with. One report, based on a survey of the states, found that many states have adopted registration list practices that “create unwarranted barriers to the franchise.”<sup>13</sup> One of the most serious problems is overly stringent “matching” protocols, under which voter’s names are deleted if they do not perfectly match information available in other databases (such as motor vehicle records). The problem is that data-entry errors, such as misspellings or the inversion of first and last names, can result in voters erroneously being removed from voting lists. Such issues have already spurred lawsuits brought by private parties.<sup>14</sup>

A final topic of concern in this area pertains to state laws that impede the activities of groups engaged in voter registration efforts. While public agencies have an important role to play in registering voters, much of the responsibility still lies with non-governmental organizations like the League of Women Voters. This is sometimes referred to as “third-party registration” though I prefer and will use the term “non-party registration,” since it involves activities undertaken by groups that are not affiliated with political parties. In Florida and Ohio, private lawsuits have been filed to challenge state laws restricting non-party registration efforts. In both cases, federal courts issued orders enjoining those laws.<sup>15</sup> This too is an area to watch in 2008, as it is quite possible that there will be similar laws enacted in 2008. On this and other

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<http://www.sos.state.oh.us/SOS/elections/electResultsMain/2008ElectionResults/absentProvReport03042008.aspx>.

<sup>10</sup> 42 U.S.C. § 1973gg-6.

<sup>11</sup> 42 U.S.C. § 15483.

<sup>12</sup> 42 U.S.C. § 15482(a)(2)(B)(ii) & (a)(4)(B) (emphasis added).

<sup>13</sup> Justin Levitt, et al., *Making the List: Database Matching and Verification Processes for Voter Registration* (2006).

<sup>14</sup> See, e.g., *Washington Association of Churches v. Reed*, W.D. Wash, Case No. 2:06-cv-00726-RSM. This case resulted in a stipulated final order which, along with other documents from the case, is available at <http://moritzlaw.osu.edu/electionlaw/litigation/wac.php>.

<sup>15</sup> See *League of Women Voters of Florida v. Cobb*, S.D. Fla., Case No. 06-21265-CIV-JORDAN; *Project Vote v. Blackwell*, N.D. Ohio, Case No. 1:06-cv-01628-KMO. Documents from both these cases may be found at <http://moritzlaw.osu.edu/electionlaw/litigation/index.php>.

voter registration matters, it would be helpful for DOJ to stand up for the rights of voters, as it has historically done, so that all eligible citizens may freely register, vote, and have their votes counted.

2. *Language Assistance.* Another area of concern is the provision of language assistance to voters who are not proficient in English, as required by the Voting Rights Act of 1965 (VRA). The relevant provisions of the VRA, Sections 203 and 4(f)(4),<sup>16</sup> were reauthorized as part of the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006.<sup>17</sup> They require that jurisdictions meeting certain criteria, including a sufficiently large number of people are not proficient in English, provide materials in the language of the relevant language minority. That includes not only “bilingual ballots” but also registration forms, instruction, and oral assistance. Such assistance is particularly needed, given the evidence of persistent registration and turnout gaps facing Latinos, Asian-Americans, and Native Americans.<sup>18</sup>

Where the law is followed, the language assistance provisions have significantly increased the registration and participation rates among these groups.<sup>19</sup> A recent GAO survey, moreover, found that most election officials contacted supported bilingual voting assistance.<sup>20</sup> Another study, however, found that despite the modest costs at which language assistance can be provided, it is often unavailable or inadequate.<sup>21</sup> While most jurisdictions may be living up to their responsibilities under the language assistance provisions of the VRA, some are not. It is vitally important that DOJ undertake aggressive enforcement efforts, particularly to make sure that registration materials and oral assistance are provided to non-English proficient voters, as the VRA mandates.

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<sup>16</sup> 42 U.S.C. §§ 1973aa-1a, 1973b (f)(4).

<sup>17</sup> Pub. L. No. 109-246 (2006).

<sup>18</sup> Pei-Te Lien, “The Voting Rights Act and Its Implications for Three Nonblack Minorities,” in *The Voting Rights Act: Securing the Ballot* 129, 138-40 (2006).

<sup>19</sup> Spencer Overton, *Stealing Democracy: The New Politics of Voter Suppression* 121-47 (2006); James Thomas Tucker, “Enfranchising Language Minority Citizens: The Bilingual Election Provisions of the Voting Rights Act,” 10 *N.Y.U. Journal of Legislation & Public Policy* 195, 233-34 (2006/2007); Jocelyn Friedrichs Benson, “Su Voto Es Su Voz! Incorporating Voters of Limited English Proficiency Into American Democracy,” 48 *Boston College Law Review* 251, 270-21 (2007).

<sup>20</sup> Government Accountability Office, *Bilingual Voting Assistance: Selected Jurisdictions’ Strategies for Identifying Needs and Providing Assistance* (2008).

<sup>21</sup> James Thomas Tucker & Rodolfo Espino, “Government Effectiveness and Efficiency? The Minority Language Assistance Provisions of the VRA,” 12 *Texas Journal on Civil Liberties and Civil Rights*, 163, 229-30, 231 (2007); see also Asian American Legal Defense & Educational Fund, *The Asian American Vote: A Report on the AALDEF Multilingual Exit Poll in the 2004 Presidential Election* (2005) (poll of 11,000 Asian American voters, finding that almost one-third needed some assistance).

3. *Disability Access.* Federal law requires that both polling places and voting technology be accessible to voters with disabilities. The Americans with Disabilities Act of 1990 (ADA) prohibits the exclusion of people with disabilities from services provided by public entities, including the voting process.<sup>22</sup> In addition, the Voting Accessibility for Elderly and Handicapped Act (VAEHA) requires that polling places be accessible.<sup>23</sup> Most recently, HAVA required that accessible voting technology be provided to people with disabilities. This requirement may be satisfied by having at least one system equipped for people with disabilities at each polling place.<sup>24</sup> This equipment must provide “the same opportunity for access and participation (including privacy and independence) as for other voters.”<sup>25</sup>

It is frankly difficult to tell how effectively state and local election jurisdictions are complying with the requirements of federal law. That is partly due to the paucity of reliable information on the provision of accessible polling places and voting machines. A 2001 GAO study, the most thorough of its kind, found significant barriers facing people with various disabilities.<sup>26</sup> Of the polling places examined a decade after the ADA, 84% had at least one impediment.<sup>27</sup> There is little reason to believe that there has been significant improvement in polling place access since then. In a survey conducted after the 2004 election, more than half the states failed even to respond to questions pertaining to disability access.<sup>28</sup> There is also reason to be worried about the accessibility of absentee voting, upon which many voters with disabilities rely, as my colleague Ruth Colker and I have detailed in a recent article.<sup>29</sup>

While there is undeniably a need for further research, there can be no question that the accessibility of the voting process for people with disabilities is a subject that warrants careful monitoring by DOJ. The absence of much reliable evidence on this subject makes it particularly important that DOJ take an active role in inquiring into and that, where necessary, appropriate enforcement action be taken. Having discussed what I think DOJ *should* do, in the 2008 election cycle, let me close with a few thoughts on what DOJ *should not* do. In the last few years, there has been growing concern regarding the “politicization” of the Justice Department. Many commentators, including a number of former DOJ employees, have alleged that the Department’s actions – particularly in the area of voting rights – were

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<sup>22</sup> 42 U.S.C. § 12132.

<sup>23</sup> 42 U.S.C. § 1973ee.

<sup>24</sup> 42 U.S.C. § 15481 (a)(3)(B).

<sup>25</sup> 42 U.S.C. § 15481 (a)(3)(A).

<sup>26</sup> General Accounting Office, *Voters With Disabilities: Access to Polling Places and Alternative Voting Methods* (2001).

<sup>27</sup> *Id.* at 7.

<sup>28</sup> U.S. Election Assistance Commission, *A Summary of the 2004 Election Day Survey: Access to Voting for the Disabled* 20 (2005).

<sup>29</sup> Daniel P. Tokaji & Ruth Colker, “Absentee Voting by People with Disabilities: Promoting Access and Integrity,” 38 *McGeorge Law Review* 1015 (2007).

driven by partisan interests rather than the rights of voters.<sup>30</sup> There have been numerous media reports on personnel and litigation decisions reportedly influenced by partisan politics, including dubious voter fraud prosecutions and retaliation against U.S. Attorneys who failed to bring such prosecutions.<sup>31</sup> I have been among those expressing concern about the role of partisan politics in DOJ's actions, such as:

An undue focus on pursuing allegations of voter fraud rather than expanding access, most notoriously a prosecution brought just before the contested 2006 senatorial election in Missouri in violation of longstanding DOJ policy;

The DOJ's decision to file an amicus brief in a controversial 2004 case involving provisional voting, which included an argument that private citizens should not be allowed to sue to protect their rights under HAVA;

An implausible "interpretation" of HAVA in 2005, which would have allowed states to deny a provisional ballot to voters lacking identification, a position from which the Department ultimately backed away; and

The preclearance of Georgia's exceptionally restrictive voter identification law in 2005, contrary to the recommendation of career staff.<sup>32</sup>

While these are extremely serious issues, I am not especially interested in rehashing past events in my testimony today. Instead, my main objective is to look forward toward the 2008 election season. There can be no question that the DOJ's reputation has been tarnished by the revelations that have emerged in the past year or so. For this reason, it is vitally important that, in the future, the Department be especially careful to avoid even the appearance of partisanship in the discharge of its responsibilities. The focus of the DOJ's efforts should be on expanding access for all voters – including racial minorities, language minorities, and people with disabilities – rather than on taking actions that could chill registration and participation, or that might be perceived as advancing partisan interests. Thank you for giving me the opportunity to testify before you.

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<sup>30</sup> See, e.g., Joseph D. Rich, "Changing Tides: Exploring the Current State of Civil Rights Enforcement within the Justice Department," Testimony for the House Judiciary Committee, March 22, 2007; Testimony of Dr. Toby Moore, Oversight Hearing on the Voting Rights Section of the Civil Rights Division of the U.S. Department of Justice Before the Subcommittee on the Constitution, Civil Rights, and Civil Liberties, Committee of the Judiciary, U.S. House of Representatives, October 30, 2007; Mark A. Posner, "The Politicization of Justice Department Decisionmaking Under Section 5 of the Voting Rights Act: Is It a Problem and What Should Congress Do?," January, 2006.

<sup>31</sup> See, e.g., Jason McClure, "DOJ Probes Turn to Civil Rights Division," *Legal Times*, June 4, 2007; Gregg Gordon, "Justice Department Actions Expected to Draw Congressional Scrutiny," *McClatchy Newspapers*, June 4, 2007; Dan Eggen & Amy Goldstein, "Voter-Fraud Complaints by GOP Drove Dismissals," *Washington Post*, May 14, 2007; Jeffrey Toobin, "Poll Position: Is the Justice Department Poised to Stop Voting Fraud – or to Keep Voters from Voting?," *The New Yorker*, September 20, 2004.

<sup>32</sup> See Daniel P. Tokaji, "The Politics of Justice," May 22, 2007, available at [http://moritzlaw.osu.edu/blogs/tokaji/2007\\_05\\_01\\_equalvote\\_archive.html](http://moritzlaw.osu.edu/blogs/tokaji/2007_05_01_equalvote_archive.html). See also Daniel P. Tokaji, "If It's Broke, Fix It: Improving Voting Rights Act Preclearance," 49 *Howard Law Journal* 785, 798-819 (2006) (discussing allegations of partisanship in the DOJ's exercise of its preclearance possibilities in the 1990s and 2000s).

***Hans A. von Spakovsky***

Review of the Department of Justice's plans to monitor voting rights enforcement for the 2008 United States Presidential election

I appreciate the invitation of the Commission on Civil Rights to testify here today on this important subject. I have been involved in the administration of elections and the enforcement of voting rights for many years. I was a local election official in Atlanta, where I served for five years on the Fulton County Board of Registration and Elections, a bipartisan board that registered voters and administered elections in the largest county in Georgia, a county that was majority African-American. I also worked for four years as a career lawyer at the Department of Justice, my last three as the Counsel to the Assistant Attorney General for the Civil Rights Division responsible for voting matters. I worked for all three of the Assistant Attorney Generals who have served in the Justice Department for President Bush, Ralph Boyd, Alex Acosta, and Wan Kim. I was a member of the first Board of Advisors of the U.S. Election Assistance Commission and served for two years as a member of the Federal Election Commission.

The outstanding record of the Civil Rights Division during this Administration shows that it is well prepared to monitor compliance with and enforce the four federal voting rights statutes that it has the responsibility to enforce: the Voting Rights Act of 1965, the National Voter Registration Act of 1993, the Help America Vote Act of 2002, and the Uniformed and Overseas Citizens Absentee Voting Act. I was also pleased to see that the Division recently named a new Chief of the Voting Section, the Section in the Division with primary responsibility for voting matters. Chris Coates, the new Chief, is not only an outstanding lawyer and veteran of the Civil Rights Division, but the most experienced trial attorney that the Division has. He litigated numerous voting rights lawsuits even as a private attorney before he went to work for the Department of Justice, and has won many awards for his public service.

Compared to the 2000 election, when the Voting Section and the Civil Rights Division (as reported by the GAO) did not have the procedures in place to handle the many complaints it received, the Division today is well prepared to handle the responsibilities of a contentious election. When I was still at the Division during the 2002 congressional elections and the 2004 presidential elections, more federal observers and Civil Rights Division staff were sent out to monitor the elections than had ever been sent out before. In 2002, the Division had 829 observers and staff monitoring elections in 17 states. In 2004, the Division broke historical records by sending out a total of 1,463 federal observers and 533 Division staff to monitor elections during both the primaries and the general elections in 29 states. Such a large number of Civil Rights Division employees had never before been used, and it was only made possible due to an in-house training program that we established and the first-ever Division wide recruitment. This was quite an accomplishment given that the total staff of the Voting Section is only about 85 lawyers and support staff.



The GAO noted problems with the Voting Section's ability to receive and process complaints during the 2000 election. As a result, we established a new telephone system that could handle a very large number of calls on Election Day, with a triage system handled by Voting Section lawyers and paralegals to determine the most serious complaints requiring immediate attention. We also created the first web-based complaint system. I left the Division more than two and one half years ago; however, I assume that all of these changes and improvements that were made when I was the Voting Counsel at the Division will be in place for the November general election this year.

When I was at the Civil Rights Division, the Criminal Division, which is responsible for the investigation and prosecution of election crimes, also mobilized its Public Integrity Section, all ninety-three offices of United States Attorneys, and the Federal Bureau of Investigation to have its lawyers and agents on duty on Election Day, ready to answer any inquiries or complaints from voters or election officials concerning violations of federal laws governing the integrity of the voter registration and voting process. The United States Attorneys were also instructed by the Attorney General to coordinate their efforts and to cooperate fully with state law enforcement authorities and election officials to ensure both ballot access and ballot integrity on Election Day. The Civil Rights Division and the Criminal Division cooperated closely to make certain that if either Division received complaints that were the responsibility of the other, such matters would be instantly referred to the correct Justice Department official.

Members of the public do not always know who to call when they have a problem, and we wanted to make sure that, for example, if the FBI was called about a problem that was not a criminal complaint, but rather a voting rights issue coming under the jurisdiction of the Civil Rights Division, the FBI would quickly forward that complaint to the Division for handling. I assume and hope that the Civil Rights Division, the Criminal Division, the FBI, and the offices of the United States Attorneys will set up the same type of Election Day monitoring system this November and coordinate their responses to specific complaints from the public. This will provide immediate communication between all of these different offices. In addition, it will allow for referral to state law enforcement and election officials when a complaint does not come under the jurisdiction of the federal government, but is a state issue.

Also beginning in 2002, the Civil Rights Division and the Public Integrity Section set up an annual joint training program to make sure that its lawyers were cross-trained in both civil rights laws and the criminal laws governing elections so that on Election Day they would be prepared for the full scope of the complaints received by the Justice Department and have the knowledge required to refer matters to the appropriate Division within the Justice Department or state authorities for handling. It is essential that the Department engage in the same type of training this year for all of its new staff in preparation for the November election. This type of annual training had never been conducted prior to this Administration.

The superlative enforcement record of the Division over the past eight years also indicates that there is no doubt the Voting Section will pursue, investigate, and litigate any serious and unremedied violations of federal voting rights laws that it finds before, during or after the general election. For example, this Administration has filed more enforcement cases

under Section 203 of the Voting Rights Act, the language minority provision, than in the entire previous 26-year history of the Act. The enforcement of this section of the Voting Rights Act, which guarantees that language minority voters will receive a ballot in their language in hundreds of jurisdictions around the country, was basically moribund during the previous Administration. Enforcement was completely reinvigorated when President Bush was elected - since 2001, the Division has filed more than double the number of enforcement cases than had ever been filed before, including the first suits ever filed on behalf of Filipino- and Vietnamese Americans.

The same is true of Section 208 of the Voting Rights Act, which guarantees the right of a voter to receive assistance when he requires it. This is an especially important federal right on Election Day. Prior to this Administration, only one lawsuit had ever been filed by the Voting Section to enforce the voting assistance guarantees of Section 208 - since 2001, the Division has filed eight lawsuits to enforce Section 208, including the first suit ever filed by the Justice Department on behalf of Haitian-Americans.

This Administration has filed more lawsuits to enforce the National Voter Registration Act than were filed during the prior administration after the law first became effective in 1993. This has helped to ensure that individuals who are applying to register will become registered to vote and that states will properly maintain their voter registration lists. The Division has filed eleven lawsuits under the Help America Vote Act since it was passed in 2002 to enforce HAVA's many new federal requirements for the administration of federal elections, including the sections requiring states to provide voters with provisional ballots and to implement new statewide voter registration lists. The Voting Section has also filed and litigated numerous cases under Section 2 of the Voting Rights Act on behalf of varied groups of minority voters, including African-Americans, Hispanics, Native Americans, Chinese, Vietnamese, and Caucasian voters, and has successfully defended the constitutionality of both Section 2 and Section 5 of the Act.

There are several areas that the Civil Rights Division needs to be particularly concerned over in the upcoming election, that it should closely monitor, and that it should either take action in the immediate future or be prepared to take action as we get closer to the election. Overseas military voters remain one of the largest groups of disenfranchised voters. Because they are still voting through the use of absentee ballots sent by mail, more than half of their ballots do not count because of the delays in the mail and because blank ballots sent by election officials overseas are returned as undeliverable. It can take more than 30 days for a requested ballot to travel by mail to a voter in Iraq, and then for the completed ballot to be returned to the stateside election official. It is vitally important that local election officials mail requested absentee ballots to voters at least 30 days prior to Election Day, preferably at least 45-days prior, particularly to military personnel located in combat zones.

In 2002 and again in 2004, the Justice Department was forced to file a number of lawsuits to enforce the federal UOCAVA statute after counties in states such as Georgia and Pennsylvania failed to mail out their absentee ballots to overseas voters in time for them to be returned. Justice won court orders providing the broadest relief it had ever obtained on behalf of disenfranchised overseas voters in 2004, including requirements that the states transmit the

ballots to and from overseas voters by fax and email, allow return of the voted ballots by overnight mail at the states' expense, and provide extensive notice to voters of the ordered relief. In 2006, after I left Justice, the Division filed three more similar lawsuits.

It is essential that the Division implement the same type of extensive monitoring program that it used in 2004, with the help and cooperation of the Federal Voting Assistance Program office at the Department of Defense, to survey and track the performance of election officials in the more than 3,000 counties across the country to ensure they are mailing out requested absentee ballots in time to be received and returned by overseas voters. The Division must be prepared to file suit on only a few days notice to enforce UOCAVA's requirements the moment it discovers that an election jurisdiction has missed the mailing deadline - time is extremely short to remedy such a problem in time for ballots to count in the election.

One enforcement problem that must be attended to by Justice is the failure of states such as Ohio, South Dakota and Iowa to comply with the Help America Vote Act. Specifically, 42 U.S.C. §15483 required a citizenship question to be added to the federal voter registration form. If an applicant fails to answer that question, the election official "shall notify the applicant of the failure and provide the applicant with an opportunity to complete the form in timely manner to allow for the completion of the registration form prior" to the federal election. The statutory language is clear that the registration cannot be completed until the citizenship question has been answered with an affirmative response. Yet all three of these states are accepting voter registration forms and registering voters when the citizenship question has not been answered. This is a direct violation of federal law that must be remedied by the Justice Department, and the Civil Rights Division needs to also conduct an investigation to determine what other states may not be complying with this requirement.

Another enforcement problem that must be investigated by the Civil Rights Division is the registration of aliens that is occurring in the Department of Motor Vehicle offices of a number of states. Jurisdictions such as Maryland, Hawaii Maine, Michigan, New Mexico, Oregon, Utah and Washington allow illegal aliens to obtain driver's license, and many other states such as Tennessee provide licenses to resident aliens. To comply with the National Voter Registration Act, many of these states automatically offer voter registration to all drivers' license applicants *including non-citizens*, under the mistaken impression that they are required to do so by the NVRA. This had led to reports of non-citizens registering to vote in many different states, from Texas to Utah to California. The Justice Department should investigate the procedures of DMV's throughout the country to ensure that they have rules in place that prevent non-citizens from registering to vote when they are applying for driver's licenses.

Section 303 of HAVA, 42 U.S.C. §15483, requires states to verify the accuracy of the information contained in voter registration applications by matching the required driver's license number or the last four digits of the applicant's social security number with other state records. Yet a number of states are not verifying this information or are allowing an individual to register without conducting an investigation if a discrepancy exists, an indication of a possible problem with the registration applicant that may be inadvertent or a may be deliberate attempt to submit a fraudulent registration. These states include California,

Maryland, North Carolina, Texas, and Pennsylvania. This noncompliance with HAVA should be investigated by the Department of Justice and enforcement actions filed if the states fail to correct their procedures.

Finally, the Civil Rights Division needs to do a final survey of the states to ensure that all of them have statewide voter registration lists that are in full compliance with HAVA; there are indications that a number of states such as Illinois may still not have fully compliant systems. A recent study by the University of Connecticut found 8,558 deceased people who were still registered to vote in Connecticut, 300 of whom had voted after they were dead. This is a clear indication that Connecticut is not complying with Section 303 of HAVA, 42 U.S.C. §15483(a)(2), which requires states to coordinate their statewide voter registration lists with “State agency records on death.”

During recent elections, there have been reports of large numbers of fraudulent voter registration forms being submitted in various jurisdictions. The chief culprit for many of these incidents is the organization ACORN. In fact, ACORN’s supervision of its voter registration workers has been so dismal that last year it entered into a settlement agreement with Kings County, Washington, in order to avoid criminal and civil prosecution. It not only agreed to pay Kings County \$25,000, but also agreed to a very strict set of standards that it would comply with in conducting its voter registration operations to avoid violating the law again. The Criminal Division needs to keep a close eye on voter registration operations around the country to make sure that organizations such as ACORN are fully complying with the voter registration requirements of the NVRA. When election officials have to spend their time investigating these types of fraudulent voter registrations, it delays the timely processing of legitimate voter registration applications - and it is essential that everyone who is eligible and wants to vote becomes properly registered in time to exercise their franchise on Election Day.

In conclusion, it is my opinion that the Department of Justice is already well prepared overall to handle any issues that may arise during the November election. There are a number of HAVA and NVRA compliance issues that need to be surveyed and reviewed by the Civil Rights Division. Both the Civil Rights Division and the Criminal Division need to complete all of their training and preparations this summer to ensure that they have the resources, equipment, and personnel ready on Election Day for any problems that may occur anywhere in the country. I am confident that under the current leadership of the Department, that can be accomplished.

**Paul F. Hancock**

Review of the Department of Justice's plans to monitor voting rights enforcement for the 2008 United States Presidential election

I am honored to participate in this Commission Briefing to review the United States Department of Justice plans to monitor voting rights enforcement for the 2008 Presidential election.

I was fortunate to serve as the director of the litigation program in the Voting Section of the Civil Rights Division for more than ten years. In my final position in the Department, as Acting Deputy Assistant Attorney General for Civil Rights, I supervised the work of the Voting Section.

I experienced both enforcement of, and compliance with, the voting rights laws of our country from a state perspective. After leaving the Department in 1997, I served as Deputy Attorney General for the State of Florida. We endured tumultuous issues in Florida with the Presidential election in 2000. Based on that experience, however, we were the first state to enact meaningful voting rights reforms that, in many respects, became a model for the federal Help America Vote Act of 2002 (HAVA). My role in Florida included handling the litigation that ensued in 2000. I directed the State's compliance with Section 5, compliance with the National Voter Registration Act of 1993 (NVRA), and coordination with the Department of Justice over election monitoring.

States have the primary authority for conducting and monitoring elections. The heart of the Department's authority to monitor elections arises from the Voting Rights Act of 1965, which has been amended and extended several times, most recently with the reauthorization and amendments enacted in 2006. The Voting Rights Act was an aggressive response to egregious conduct designed to prevent Black citizens in many areas of our country from participating in the electoral process. It later was amended to address other issues and protect other minority groups, but the design of the original Act was to address race discrimination. The remedial provisions, including the preclearance requirements of Section 5, and the examiner and election observer provisions of Section 6 and 8, were a major intrusion on states' rights that were justified only because of the severe discrimination that led to the enactment.

The Voting Rights Act is recognized as the most successful civil rights law enacted by Congress. It led to immediate changes in southern states with dramatic increases in registration of Black citizens. Continued enforcement made the right to vote more meaningful with the development of standards to ensure that votes are properly tabulated and that election structures do not deny minority groups a fair opportunity to participate in the political process and elect candidates of their choice to office.

The change has been remarkable. State governments, which originally were the target of the Act's remedial provisions, now embrace the Act and are major contributors to the protection

of the right to vote. At the same time, the battle for equality is not complete as recognized by the 2006 enactment. In some respects, the issues facing enforcement officials may have changed, but the structure for addressing the issues remains intact and can be used to continue to effectuate meaningful reform.

It is important to emphasize, as we consider appropriate action to ensure a fair election in 2008, that the egregious problems that led to the Voting Rights Act are not ancient history. The Act has been in place for only 43 years. Many thousands of Black Americans who will appear at the polls this fall, lived through the open suppression and intimidation (and even murders of family and friends) merely because they wanted to vote. That suppression and intimidation was carried out under the color of law, often by law enforcement officials. Even younger Black voters know of the treatment that their parents received.

All of us react to statements and actions in the context of our own life experiences, and it is understandable that Black citizens might react differently to voting related conduct by state and federal officials than would others who have not shared their life experiences. For example, on election day in 2000, law enforcement officers in North Florida set up a driver's license check point in the vicinity of a precinct with a large Black population. The officers may not even have known it was election day, but the conduct caused and spread great fear in the Black community that Blacks were being targeted by law enforcement because they desired to vote. Close coordination between the Civil Rights Division and the Florida Attorney General's office led to a prompt termination of the police checkpoint. Unfortunately, we cannot say that we were able to respond promptly enough to prevent people from returning home out of fear without casting a ballot.<sup>1</sup>

As we approach the 2008 Presidential election, the success of the Voting Rights Act is even more obvious. For the first time in the Nation's history, a Black person is the presumptive nominee of one of the two major political parties. Such a result was unthinkable as of 1965.

But this achievement may also prove to be the greatest test yet of the Act's ability to address the remaining discrimination in voting, as well as the resolve and ability of the Department of Justice to ensure a fair, and non-discriminatory election.

It reasonably can be expected that the 2008 Presidential election will cause the largest turnout of Black voters in the Nation's history. Many of these voters will be elderly, or voting for the first time, or voting after an extended absence from the political process, or otherwise unfamiliar with the voting process.

Of course, such voters will be free to vote for the candidate of their choice. But prognosticators likely will project that an overwhelming majority will support the Black candidate. It is quite common in elections for some persons to attempt to dissuade other persons from voting if it seems likely that they will support an opposing candidate. The

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<sup>1</sup> As another example, an older Black American reading an advertisement for housing that describes a neighborhood as "restrictive" might have a different reaction than a White person, or even a younger Black person. That is because older Black Americans lived through the time that "restrictive" was commonly used to convey the message that Blacks were not welcomed.

present circumstances, however, make Black voters particularly susceptible to voter suppression efforts this year. The mere color of their skin might provide the standard for suppression targeting.

Persons seeking to suppress the vote of Blacks may claim that they are motivated by partisan politics rather than any racial animus, and that may be true. But racial animus is not a necessary element of a violation of the Voting Rights Act. The crucial issue is whether persons are targeted “on account of race or color.” This election presents serious risk that prospective voters may be targeted for suppression “on account of race or color” which, in turn, raises grave concerns under the Voting Rights Act.

It may be difficult to predict what schemes will be attempted this year, but the role of the Department is to carefully study the issues and prepare to address whatever arises. An enduring lesson from the 2000 election in Florida is that equal protection violations are much more difficult to repair in a Presidential election, than in any other type of election, and may, in some circumstances, be irreparable. Thus, the challenge is to prevent the violations from even occurring.

The career women and men of the Voting Section are very familiar with preparation for the monitoring of elections, and I am confident that they will carry out their duties in a professional and thoughtful manner. I offer the following thoughts as to what might be particularly important this year.

- The key to the avoidance of problems is study, analysis and investigations well in advance of the election. Again, a Presidential election presents unique remedial issues and thus the focus should be on problem-avoidance, rather than merely Department presence to evaluate problems arising on election day.
- Coordination with state and local election officials, as well as state attorneys general and minority community representatives, is important.
- The Section 5 program, as well as HAVA and NVRA enforcement, are important contributors to fair elections. Problems often arise as a result of changes in polling places, or simply because voters do not know where to vote. Through Section 5 enforcement and coordination with election officials in all states, the Department can evaluate whether voters have been informed properly as to where to vote. HAVA and NVRA enforcement can ensure proper registration opportunities as well as the maintenance of accurate voter roles. Ballot layouts should be reviewed carefully to avoid a discriminatory effect.
- In this regard, the Department should not rely merely on the opportunity of a voter to cast a provisional ballot. Provisional balloting has proven to be an illusory promise for many voters since states may provide that the vote will be counted only if the voter was properly registered and complied with all other requirements. A voter may be registered properly, but simply appeared at the wrong precinct to vote; thus the vote may not be counted. It is important for election officials to take effective efforts to tell voters where they need to go to vote. If they merely hand a provisional ballot to a person appearing at the wrong

- precinct, they are, in effect, denying the right to vote. The Department can act to prevent such easily avoidable disenfranchisement.
- The Department has expanded its election monitoring to jurisdictions not covered by the special provisions of the Act. This frequently is done by means of “attorney coverage.” In these circumstances, Department officials do not have the authority of law to enter a polling place, but often are permitted to do so. The program is positive and allows the opportunity to promote compliance throughout the country. The factors below should be considered in the course of implementing the program.
  - The Department must avoid both the reality and perception that political considerations are impacting its election monitoring program. This may present a difficult challenge in light of widespread publicity regarding the politicization of the Department and the Civil Rights Division. Black citizens of the South have regularly relied on the Department to protect their voting rights. But with recent publicity and the expansion of the monitoring program to the entire country, the Department faces great challenges. If the persons that the Act is designed to protect do not trust the Department, the very presence of Department officials can cause more problems than they solve.
  - The perception of political basis for action can be avoided by reliance on the career, non-political staff to effectuate the program. The Department should have memoranda that describe the reasons for selection of states, counties, and cities for election monitoring, and such decisions should be made solely on the basis of possible violations of laws that the Department has authority to enforce.
  - The Department needs to balance carefully its program to prevent vote fraud with its efforts to enforce the Voting Rights Act. During my tenure in the Department, the government refrained from announcing election-related criminal charges shortly before an election out of concern that it might improperly influence the results of an election. For example, announcement of an indictment of persons for allegedly improperly registering voters might deter others from voting even if they are registered properly. The view of the Department, at least in the past, was that the indictment could be held until after the day of the election. It is unclear whether the Department continues that policy.
  - In the circumstances that we face today, the assignment of personnel is crucial. Personnel from the Civil Rights Division can be expected to have the most credibility with minority groups. Use of personnel from the Criminal Division and the United States Attorney offices may be necessary from a criminal law enforcement perspective, but the Department should consider whether such visible use has a countervailing impact of discouraging minorities from voting. Again, it is important to evaluate this in the context of the life experience of the voters — law enforcement was regularly used to suppress minority voting. In this regard, the Department should also be mindful of the language it employs in press releases and other communications to advise the public that “federal investigators” may be present at polling places on election day. The wrong



wording could have an unintended suppressive effect on protected communities for the reasons stated here.

- Enforcement of civil rights laws is a specialty, requiring legal talent, an understanding of the methods by which discrimination can be effectuated, and the continued impact of egregious past discrimination. It is difficult to master this area in a short time.
- This election provides an opportunity to gather information on the impact of voter ID laws that have been implemented in many states. The Indiana law withstood a facial constitutional challenge in *Crawford v. Marion County Election Board*. But the laws remain controversial because of a suspected discriminatory impact on minorities. The impact of the new laws should be monitored carefully.
- The Department should continue its aggressive program to ensure that language minority groups are afforded a meaningful opportunity to cast a ballot.

In conclusion, I again emphasize that this election represents both the overwhelming success of the Voting Rights Act and the problems that remain. I wish the Department much success in achieving a fair, non-discriminatory election.

I would be pleased to answer any questions that the members of the Commission might have.

**Roger Clegg**

President and General Counsel, Center for Equal Opportunity  
Review of the Department of Justice's plans to monitor voting rights enforcement for the  
2008 United States Presidential election

Thank you, Mr. Chairman, for the opportunity to testify this morning before the Commission.

My name is Roger Clegg, and I am president and general counsel of the Center for Equal Opportunity, a nonprofit research and educational organization that is based in Falls Church, Virginia. Our chairman is Linda Chavez, and our focus is on public policy issues that involve race and ethnicity, such as civil rights, bilingual education, and immigration and assimilation. I should also note that I was a deputy in the U.S. Department of Justice's Civil Rights Division for four years, from 1987 to 1991.

Law-enforcement agencies have two tasks with regard to voting: making sure that legitimate voters are *not* kept from voting, and making sure that fraudulent voters *are* kept from voting. Both tasks are important. I won't say that they are equally important, since most Americans are offended more when they read about a person denied the right to vote who shouldn't be than when they read about someone illegally voting. On the other hand, this is not quite the usual criminal-law situation where we can blithely assert that it is better to let ten guilty men go free than imprison one innocent one. After all, when someone votes illegally, he cancels out the vote of a lawful voter, so arithmetically - if not psychologically - the impact is the same as if that lawful voter had been turned away from the polls.

Those who have been kept from voting in recent memory - both lawfully and unlawfully - have disproportionately included members of groups that have tended to vote Democratic. On the other hand, my sense is that illegal voters have also tended to vote Democratic (see, e.g., <http://www.heritage.org/Research/Legalissues/lm23.cfm>). Consequently, Democrats are happy to insist that nobody be hindered from getting to the polls, even if this means that some illegal voters get to the polls as well; from the Democrats' perspective, it is win-win. I would add in this regard that probably Democrats would by and large want to define "illegal voters" more narrowly; I have noted, for instance, that the Left is more likely to favor letting criminals, non-citizens, the mentally incompetent, and children vote—the only groups now generally restricted from voting. See [http://pajamasmedia.com/blog/get\\_out\\_the\\_vote\\_who\\_shouldnt/](http://pajamasmedia.com/blog/get_out_the_vote_who_shouldnt/). Conservatives, on the other hand, are willing to be more adamant about ensuring that illegal voters not vote, and are more comfortable with saying that criminals, for instance, shouldn't have the right to vote in the first place.

This partisan divide complicates the Justice Department's job. If it focuses effort on making sure that illegal votes are not cast, then Democrats and their ideological allies will criticize the Department—and, if this happens during a Republican administration, they will claim its policies are politically motivated. The Democrats will assert that voter fraud is nonexistent or at least exaggerated—a dubious claim, in my view (again, see

<http://www.heritage.org/Research/Legalissues/lm23.cfm>, as well as <http://www.heritage.org/Research/LegalIssues/lm22.cfm>)—and that the Department’s efforts should instead be limited to ensuring more voter registration and access. And we would expect Republicans to object if the Department—especially in a Democratic administration—were to focus on ensuring voter access while turning a blind eye to voter fraud and illegal voting, and indeed I have some recollection that this happened to a degree in the Clinton administration.

It’s not necessarily a bad thing that we have this kind of public discussion about what sort of job the Justice Department is doing and ought to do, but the discussion ought to be civil and responsible, and it ought to make allowances for the fact that it is as legitimate for the Department to take steps that stop illegal voting as it is for it to take steps that protect legal voting.

Let me conclude by saying that in the recent past too many of the criticisms aimed at the Department have been neither civil nor responsible. Instead, there appears to be an effort to use personal vilification and character assassination to intimidate Department officials into adopting policies that favor one side over the other. It is ironic that those launching these attacks claim that the Department has been politicized, when it is they who have this aim.

Thank you again, Mr. Chairman, for the opportunity to testify today. I look forward to any questions you and the other Commissioners may have.



# Findings and Recommendations

## Findings

1. Two sections at the Department of Justice (DOJ) play an important role in enforcing the voting rights of U.S. citizens.
  - a. The Voting Section of the Civil Rights Division enforces such statutes as the Voting Rights Act (VRA), the Help America Vote Act (HAVA), the Uniformed and Overseas Citizen Absentee Voting Act (UOCAVA), and the National Voter Registration Act (NVRA). The Voting Section plays a proactive role in preventing violations of these statutes and is responsible for Election Day programs run by DOJ. The Voting Section has approximately 85 attorneys and support staff.
  - b. The Public Integrity Section is part of the Criminal Division. It is responsible for prosecuting those who corrupt elections and governmental processes and addresses such issues as ballot fraud, vote buying, ballot stuffing, voting by non-citizens, multiple voting by individuals, bribery of officials, extortion by officials, and violations of campaign finance laws. It is responsible for working in a consultative capacity with local U.S. Attorneys' offices across the country to prosecute such crimes. The Public Integrity Section has approximately 29 trial attorneys and 13 support staff.

[Chairman Reynolds, Vice Chair Thernstrom, Commissioners Gaziano, Heriot, Kirsanow, and Taylor voted in favor; Commissioner Melendez voted against; Commissioner Yaki abstained.]

2. Since the election of 2000, the Voting Section has greatly expanded the number of federal observers from the Office of Personnel Management and DOJ staff members who are sent into the field to monitor federal elections for purposes that include the prevention of voter intimidation and voter fraud. In the year 2000, the Voting Section sent 640 federal observers and 110 DOJ staff members to serve as monitors. In the year 2004, however, the numbers were increased to 1,463 federal observers and 533 DOJ staff members. In 2006, a record was set for midterm elections with over 1,500 federal observers and DOJ staff members deployed. At the time of our briefing, plans were being made to staff a comprehensive program to ensure ballot access in the historic 2008 election.

[Chairman Reynolds, Commissioners Gaziano, Heriot, Kirsanow, and Taylor voted in favor; Commissioners Melendez and Yaki voted against; Vice Chair Thernstrom was absent.]

3. From 2001 to 2008, the Voting Section vigorously enforced the statutes that are entrusted to its care. Indeed, the 18 lawsuits filed in 2006 were double the average number of lawsuits filed annually in the previous 30 years. Nine of the eleven cases ever brought by DOJ under Section 208, which requires that a voter who needs

assistance to vote “be given assistance by a person of the voter’s choice,” were filed by the Voting Section between 2001 and 2008. Similarly, during that period, twenty seven cases were filed by the Voting Section under Section 203, which requires certain jurisdictions to provide election materials “in the language of the applicable language minority group” residing there—more cases than in all the years since Section 203’s passage in 1975 combined. The Voting Section also filed more lawsuits to enforce the National Voter Registration Act of 1993 between 2001 and 2008 than it had in the previous eight years.

[Commissioners Gaziano, Heriot, Kirsanow, and Taylor voted in favor; Chairman Reynolds, Commissioners Melendez and Yaki voted against; Vice Chair Thernstrom abstained.]

4. Despite this expansion of the Voting Section’s election enforcement activities, various problems continue to exist. For example, some states have failed to comply with HAVA’s requirement that each state “implement, in a uniform and non-discriminatory manner, a single, uniform, centralized, interactive computerized statewide voter registration list” and/or with the minimum requirements for that list. This has resulted in deceased, no-longer-resident, and other ineligible voters remaining on the rolls. Additional concerns have been raised regarding perceived overzealous enforcement of HAVA that has sometimes resulted in legitimate voters being improperly purged from the rolls. Although the Voting Section has engaged in some enforcement activities in this area, not all states are in compliance.

[Chairman Reynolds, Vice Chair Thernstrom, Commissioners Gaziano, Heriot, and Taylor voted in favor; Commissioners Melendez and Yaki voted against; Commissioner Kirsanow abstained.]

5. Ensuring that overseas military voters are able to exercise their right to vote remains a serious problem. It can take paper ballots 30 days to get to a combat serviceman or woman in Iraq or Afghanistan and another 30 days to get the ballot back to the appropriate jurisdiction. Even if upon receipt of the ballot the serviceman or woman immediately votes and sends it back, the chances that it will get back in time to be counted may be only fifty-fifty. So long as paper ballots are the method by which service men and women must vote, it is crucial that the Voting Section stand ready for immediate action when violations of UOCAVA and other applicable laws occur, since time will be of the essence. Between 2001 and 2008, the Voting Section has brought multiple lawsuits to enforce UOCAVA in the courts. On several occasions, the relief sought was ultimately obtained through state legislation.

[Chairman Reynolds, Vice Chair Thernstrom, Commissioners Gaziano, Heriot, Yaki, and Taylor voted in favor; Commissioner Melendez voted against; Commissioner Kirsanow was absent.]

6. Section 303 (b)(4)(A)(i) of HAVA amends NVRA to require that voter registration applications created pursuant to that act specifically ask, “Are you a citizen of the United States of America?” If that question is left unanswered, Section 303(b)(4)(B) directs the registrar to notify the applicant of that failure and provide a second opportunity to complete the form, thus making it clear that applicants who fail to

answer that question in the affirmative are not to be registered (or, if registered, are registered only for state elections in which non-citizens are permitted to vote). Yet in several states—Ohio, South Dakota and Iowa—applications are reportedly accepted when the citizenship question has been left unanswered. This may be the result of state officials who do not wish to go to the trouble of providing a second opportunity mandated by law and prefer to follow the path of least resistance by simply accepting the application. This presents a serious problem as federal law forbids non-citizens from voting in federal elections. When state law permits non-citizens to register and vote, they may only vote using a ballot that does not give them the opportunity to cast a vote for candidates for federal office.

[Chairman Reynolds, Vice Chair Thernstrom, Commissioners Gaziano, Heriot, and Taylor voted in favor; Commissioners Melendez and Yaki voted against; Commissioner Kirsanow was absent.]

## Recommendations

1. DOJ should be commended for its willingness, through the Voting Section, to play an aggressive and proactive role in preventing voting rights violations, including voter intimidation, especially through its dramatic expansion of its election-monitoring function. In any democracy, elections must not only be fair, they must appear fair if their results are to be regarded as legitimate. The Voting Section's efforts have made an important contribution to ensuring both the appearance and reality of election integrity.

[Chairman Reynolds, Vice Chair Thernstrom, Commissioners Gaziano, Heriot, and Kirsanow voted in favor; Commissioners Melendez and Yaki voted against; Commissioner Taylor abstained.]

2. DOJ's role in prosecuting voter fraud, such as by double voting, voting by non-residents, and voting by non-citizens, which is assigned to the Public Integrity Section, is also important. When illegitimate votes are counted, the votes of legitimate voters are effectively nullified. Ensuring both the appearance and reality of election integrity requires that DOJ place a high priority on combating this voter fraud. We urge DOJ to initiate action to prevent illegal voting, and not simply wait to hear of and react to specific accusations of wrongdoing.

[Chairman Reynolds, Vice Chair Thernstrom, Commissioners Gaziano, Heriot, and Taylor voted in favor; Commissioners Melendez and Yaki voted against; Commissioner Kirsanow was absent.]

3. DOJ should take aggressive steps to ensure that all states comply with HAVA's requirement that each state "implement, in a uniform and nondiscriminatory manner, a single, uniform, official, centralized, interactive computerized statewide voter registration list" and with the minimum statutory requirements for that list. In keeping with the both text and the underlying purpose of that statute, DOJ should ensure that the state lists be up-to-date and available at every polling place within the jurisdiction. At the same time, however, DOJ must be mindful that sometimes legitimate voters have been improperly removed from the rolls, so care must always be taken when

attempting to remove ineligible voters from those rolls. Those voters who believe they have been improperly removed from the rolls are entitled to provisional ballots.

[Chairman Reynolds, Vice Chair Thernstrom, Commissioners Gaziano, Heriot, and Taylor voted in favor; Commissioners Melendez and Yaki voted against; Commissioner Kirsanow was absent.]

4. It is unacceptable that the men and women of our armed services, who are making sacrifices for the country that will never be adequately repaid, are sometimes denied the opportunity to vote in federal elections. While primary responsibility for ensuring that opportunity lies with the States, their political subdivisions, the Secretary of Defense, and the Department of Defense, DOJ, through the Voting Section, should be vigilant in its enforcement of UOCAVA. We recommend that the Voting Section be especially mindful of the need for advanced preparation and speed whenever paper ballots, which must be moved great distances in a timely manner, are used.

[Chairman Reynolds, Vice Chair Thernstrom, Commissioners Gaziano, Heriot, Yaki, Kirsanow, and Taylor voted in favor; Commissioner Melendez voted against.]

5. We believe that states that currently (1) register persons who fail to answer the citizenship question on voter registration applications made pursuant to NVRA and (2) fail to keep a separate registration list for such persons and provide them with non-federal ballots for voting purposes raise concerns under federal law. We therefore recommend that the Voting Section take appropriate enforcement action in order to prevent the possibility of non-citizens voting in federal elections. If necessary, the Voting Section should seek an appropriate remedy, including a court order, requiring that state officials either (1) reject such applications from persons who fail to state that they are American citizens (after being contacted and provided a second chance to do so as provided by law) or (2) keep a separate list of such registrants and provide voters on that list only with non-federal ballots.

[Chairman Reynolds, Vice Chair Thernstrom, Commissioners Gaziano, Heriot, and Taylor voted in favor; Commissioners Melendez and Yaki voted against; Commissioner Kirsanow was absent.]



## Statements of Commissioners

### ***Arlan D. Melendez and Michael Yaki***

We strongly dissent to the findings and recommendations issued by the Commission majority in this briefing report.

First, the record of this briefing does not support such sweeping findings and recommendations about the Department of Justice (DOJ) or our national election system. To properly evaluate the enforcement activities of the department and/or such deep-seated problems with the election system as maintenance of state voter registration lists would take multiple hearings and independent research by Commission staff. None of that was done for this report. As the title of this report makes clear (*Department of Justice Voting Rights Enforcement for the 2008 U.S. Presidential Election*), the underlying briefing was narrowly focused on the department's preparations for the 2008 election. Notwithstanding the narrow focus of the record, the Commission majority chose to expand on comments and topics only tangentially mentioned at the briefing. The result, notably, is a set of findings and recommendations that hardly even mentions the Department's specific actions addressing the 2008 Presidential elections. The majority's overreaching undermines the credibility of this and other agency reports.

Second, the Commission majority's uncritical commendation of the Department of Justice Voting Section seems to us not only wrong, but a troubling sign of the lack of independence of the current Commission. We do not understand how the majority's first "recommendation" can be called a "recommendation" when it contains no action items. Moreover, the unashamed flattery in its statement that the "DOJ should be commended" is not even deserved. As noted above, the Commission's briefing did not examine the integrity or success of the Department of Justice (or its Voting Rights Section) generally, and did not do a review of the agency's litigation or enforcement efforts concerning voting rights. However, if one were to really perform such an analysis of the department, we suspect one could not help but note the Congressional hearings and the report of the Bush administration's own DOJ Office of Inspector General<sup>1</sup> finding widespread violations of federal law by leadership politicizing the Department's Civil Rights Division, and the Voting Rights Section especially. It matters little whether the Commission majority's unusual commendation of the DOJ Voting Section is a deliberate attempt to paper over the Section's past problems, or whether they are unaware of recent problems within the Civil Rights Division. Either way, the U.S. Commission on Civil Rights, co-created with the Civil Rights Division in 1957 and long a watchdog on administration enforcement of civil rights, has lost its objectivity.

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<sup>1</sup> U.S. Department of Justice Office of Inspector General and U.S. Department of Justice Office of Professional Responsibility, *An Investigation of Allegations of Politicized Hiring and Other Improper Personnel Actions in the Civil Rights Division*, July 2, 2008 (available at <http://www.usdoj.gov/oig/special/s0901/final.pdf>).

Lastly, we want to note that we are particularly concerned about the ability of all members of our armed forces to have their vote counted. There were some troubling assertions made at the underlying briefing for this report about failures to implement the Uniformed and Overseas Citizen Absentee Voting Act (UOCAVA). However, as with other troubling assertions about problems in our voting system that were raised by speakers at the Commission's briefing, we do not think it prudent for the Commission to leap to findings and recommendations without gathering more evidence on the matter. The few remarks on the matter at this briefing are not enough. We believe the reported issues with UOCAVA merit serious, separate examination by the Commission and other government bodies.

## **Abigail Thernstrom**

This briefing revealed that under current law and policy there are myriad ways in which our voting system can be compromised. It is evident from the testimony that enforcement agencies and election officials are not able to detect all possible instances of voter fraud. The scope of the problem is therefore unclear.

**Voting Rights Act:** During the briefing, I noted the nervousness of many voting rights experts with respect to the constitutionality of section 5, the preclearance provision, of the Voting Rights Act. It is important to stress that this concern crossed party lines when the matter was last discussed, which was in the summer of 2006 when the renewal and amendment of the provision was before Congress.

The 1965 Voting Rights Act started America down the road of political integration; when the statute was passed only a minority of blacks throughout the South could register to vote; today, we have elected our first black president. What a tribute to this nation and the remarkable racial change to which it has been committed over recent decades!

Section 5 was passed as, in effect, a wartime measure—an emergency provision, the aim of which was black enfranchisement in the South. It accomplished that rudimentary right-to-vote aim with remarkable speed, and the focus of enforcement switched to a more subtle problem: methods of election that threatened to dilute the power of the new black vote. Race-conscious districting lines became a statutory mandate; if legislative bodies in the South were to be politically integrated, it was clear that safe black districts were needed to protect black candidates from white competition where white voters were continuing to make political office a whites-only prerogative. I have no problem with such race-conscious policies; they served an essential purpose: busting open an otherwise racially closed political system.

Today, however, the South is much changed. And thus in 2006, although Congress passed the “Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act” (VRARA) almost unanimously, a vigorous debate occurred among voting rights scholars as to its wisdom.

The vigorous debate, Loyola Law School professor Richard Hasen noted in May 2006, was the good news. But the bad news was that “this debate is taking place among academics, not among Members of Congress.”<sup>1</sup> A month later, reacting to the proposal to extend preclearance for another twenty-five years, Hasen wrote: “The bill . . . did not acknowledge that the state of minority voting rights in 2006 is not the same as the state of such rights in 1982 or in 1965.” Those pushing the legislation, he went on, “act as though 2007 and 1982

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<sup>1</sup> Richard L. Hasen, “What Congress Should Consider Before Renewing the Voting Rights Act: A Chance to Preempt Supreme Court Invalidation, and Better Protect Minority Voting Rights,” [http://writ.news.findlaw.com/commentary/20060530\\_hasen.html](http://writ.news.findlaw.com/commentary/20060530_hasen.html) (accessed July 6, 2009), with a link provided on Hasen’s own blog: <http://electionlawblog.org/archives/005733.html>, May 30, 2006, republished on Election Law Blog, May 30, 2006, <http://electionlawblog.org>.

are the same.”<sup>2</sup> The renewal squandered “an opportunity for Congress to take a more serious look at how it can fix its voting laws to better protect minority voting rights in the Twenty-first Century.”<sup>3</sup>

In the same vein, New York University professor Richard H. Pildes described the Voting Rights Act as representing “the past of voting rights, but not the future.” The selective targeting of only certain jurisdictions for federal oversight and the focus on racially discriminatory practices alone made perfect sense in 1965; not today.<sup>4</sup> The House Judiciary Committee had held extensive hearings on the continuing need for section 5, but, Pildes argued, the assumption upon which the House record rested seemed to be that it was “sufficient to identify continuing problems *in the covered jurisdictions*, such as racially polarized voting, in complete isolation from consideration of whether similar problems exist in non-covered sites.” And yet the evidence suggested “the problems identified, such as racially polarized voting, [were] similar in many places throughout the country where sizable minority populations exist.” The Judiciary Committee relied as well on a frequently cited study that looked at all published cases since 1982 in which courts found violations of section 2. “Yet, once again, these violations [were] not overwhelmingly or systematically concentrated in Section 5 areas,” Pildes concluded. They arose in many places across the nation with significant minority populations. “Since 1990, for example, there are as many judicial findings of Section 2 violations in Pennsylvania as in South Carolina – and more in New York.”<sup>5</sup>

Moreover, while in *Georgia v. Ashcroft* in 2003, the Supreme Court had recognized that maximizing the number of safe black seats did not necessarily maximize minority electoral power, Congress took a step backward in overturning that decision in 2006.<sup>6</sup> As Pildes put it, testifying at the Senate hearings on the proposed VRARA, “Here were black and white legislators, willing to make their seats more dependent upon interracial voting coalitions.” Yet the VRARA would impose on them “more racially homogenous constituencies.” Elected black state legislators had decided they would be more effective as part of a state senate in which Democrats remained the majority and held on to important committee seats. Yet the proposed statute would require them “to become the minority in all state representative institutions, for the sake of a marginal potential gain, at best, in formal black representation in the senate.”<sup>7</sup>

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<sup>2</sup> Richard L. Hasen, “The Civil Rights Community’s Double Gamble on VRA Renewal,” Election Law Blog, June 21, 2006, 9:56 p.m., [http://electionlawblog.org/archives/2006\\_06.html](http://electionlawblog.org/archives/2006_06.html) (accessed July 6, 2009).

<sup>3</sup> Richard L. Hasen, “What Congress Should Consider Before Renewing the Voting Rights Act: A Chance to Preempt Supreme Court Invalidation, and Better Protect Minority Voting Rights,” [http://writ.news.findlaw.com/commentary/20060530\\_hasen.html](http://writ.news.findlaw.com/commentary/20060530_hasen.html) (accessed July 6, 2009), republished on Election Law Blog, May 30, 2006, <http://electionlawblog.org>.

<sup>4</sup> Richard H. Pildes, “Testimony on the Continuing Need for Section 5 Pre-Clearance,” Senate Judiciary Committee, May 16, 2006, p. 10.

<sup>5</sup> *Ibid.*, p. 2.

<sup>6</sup> 539 U.S. 461 (2003).

<sup>7</sup> Richard H. Pildes, “Testimony on the Continuing Need for Section 5 Pre-Clearance,” Senate Judiciary Committee, May 16, 2006 (hereafter Pildes May 16, 2006 Senate Testimony).

Both Pildes and New York University law professor Samuel Issacharoff called for “a reexamination of the extent to which a model of racial exclusion continues to define the central defects in American elections.”<sup>8</sup> Pildes preferred a statute less focused on combating racial discrimination and more concerned with “the substantive right to vote itself.”<sup>9</sup> He suggested substituting radically different federal legislation along the lines of the 2002 Help America Vote Act [HAVA] and the 1993 National Voter Registration Act (NVRA), which would establish uniform, national voting standards.<sup>10</sup> Hasen, as well, urged voting rights legislation that matched the voting rights problems of today. “If Congress were designing legislation to help minority voters today, it likely wouldn’t single out those jurisdictions covered by section 5 as the place where minorities need the most help,”<sup>11</sup> he wrote.

It might target Florida and Ohio. It certainly would target voter identification requirements that put financial burdens on poor and minority voters. It might do something about the racially discriminatory impact of felon disenfranchisement laws. But it wouldn’t create an act so geographically limited, and it probably wouldn’t limit DOJ’s scrutiny to changes in voting procedures. Existing voting procedures can also be racially discriminatory.<sup>12</sup>

Without exception, the scholars quoted above are Democrats and strong voting rights advocates. My point, however, is theirs: To question the continuing need for section 5, as I did at the briefing, is not to suggest doubts about the Voting Rights Act, as a whole. Most provisions are permanent, and the statute changed the face of American politics—much for the better. But 2008 is not 1965, and new problems require rethinking old protections.

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<sup>8</sup> “Issacharoff: On the Constitutionality of the VRA Renewal,” Election Law Blog, June 24, 2006, [http://electionlawblog.org/archives/2006\\_06.html](http://electionlawblog.org/archives/2006_06.html) (accessed July 6, 2009).

<sup>9</sup> Pildes May 16, 2006 Senate Testimony, p. 10.

<sup>10</sup> Richard H. Pildes, “The Future of Voting Rights Policy: From Anti-Discrimination to the Right to Vote,” *Howard Law Journal* 49 (2006): 742.

<sup>11</sup> Richard L. Hasen, “What Congress Should Consider Before Renewing the Voting Rights Act: A Chance to Preempt Supreme Court Invalidation, and Better Protect Minority Voting Rights,” [http://writ.news.findlaw.com/commentary/20060530\\_hasen.html](http://writ.news.findlaw.com/commentary/20060530_hasen.html) (accessed July 6, 2009), republished on Election Law Blog, May 30, 2006, <http://electionlawblog.org>

<sup>12</sup> .Ibid.



**Arlan D. Melendez and Michael Yaki - Rebuttal**

We respectfully disagree with Vice-Chair Thornstrom's position on voter fraud and the doubt that she expresses concerning the ongoing need for Section 5 of the Voting Rights Act of 1965.

First, the Vice-Chair's conclusion that the scope of voter fraud is "unclear," is not well founded in our opinion and that of most experts. There have been many investigations, at all levels of government, searching for voter fraud. Yet, to our knowledge, none of these investigations have revealed systemic voter fraud in the last decade that threw an election into doubt. As was repeatedly stated throughout our June 2008 briefing, the instances of voter fraud are few and far between. While the potential for mischief may be there, especially in the context of absentee ballots, the weight of evidence does not show that this is a pervasive problem requiring the allocation of massive resources, as the majority's findings and recommendations would seem to imply. On the other hand, well-documented instances of voter intimidation, particularly against racial minorities, do require heightened vigilance by the Justice Department. Unfortunately, although this briefing was supposed to cover both voter intimidation and voter fraud, the Commission majority stacked the briefing witnesses (or lack thereof) to have little testimony on voter intimidation and little credible testimony on the issue of voter fraud. Public officials should always work to improve the integrity of our election system. However, there is a danger to fanning flames of distrust in our election system when investigation after investigation continues to show no evidence that systemic voter fraud has undermined our elections.

Second, while the Vice-Chair has written at length in her statement regarding the Section 5 requirements of the Voting Rights Act of 1965, this briefing was not about Section 5. We do not disagree that there should continue to be a vigorous dialogue about how to keep laws protecting voting rights strong and updated. However, we note that there already has been such a dialogue regarding Section 5—and it has led to a strong consensus view in favor of the Section 5 provisions. An overwhelming (and very rare) bipartisan super-majority of Congress came together to agree to reauthorize the Section 5 provisions in 2006, after holding many hearings and gathering a substantial legislative record. Moreover, the Department of Justice, which is tasked with safeguarding our right to vote, has repeatedly gone on record during both the Bush and Obama administrations saying that the Section 5 provisions remain essential. As Christopher Coates, Acting Chief of the Voting Section of the Department of Justice said to the Commission at our June 2008 briefing, "There is nothing in my opinion today that is more essential to the enforcement of the voting rights of minority voters in the United States than the continuation of the Section 5 pre-clearance requirements."<sup>1</sup> In a recent case testing Section 5 of the Voting Rights Act, the Supreme Court also has upheld the law's continuing importance despite the calls of a few to strike it down.<sup>2</sup>

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<sup>1</sup> Voting Rights Enforcement, Briefing Transcript, pp. 43–44.

<sup>2</sup> *Northwest Austin Municipal Utility District Number One v. Attorney General Holder, et al.*, No. 08-322 (June 22, 2009), available at <http://www.supremecourt.us/opinions/08pdf/08-322.pdf> (accessed July 5, 2009).

Lastly, while the opening sentences of Vice-Chair Thernstrom's statement explicitly rely on briefing testimony for support, we must note that we do not find the testimony of briefing speaker Hans von Spakovsky to present a credible, objective view of voter fraud or the actions of the Department of Justice. Mr. von Spakovsky's positions are cited frequently in the Commission majority's findings and recommendations and seem echoed in the Vice-Chair's position on voter fraud. Moreover, shortly after our June 2008 briefing the Vice-Chair co-wrote an amicus brief to the Supreme Court with Mr. von Spakovsky, raising concerns about Section 5 based on their shared "interest in eliminating race as a factor in redistricting."<sup>3</sup> However, recent statements made by Mr. von Spakovsky concerning the Department of Justice's Civil Rights Division and President Obama's administration of justice appear to us to be so extreme and contrary to established facts that we question the credibility of his testimony concerning the operation of the Department of Justice's Voting Rights section, or alleged voter fraud. An official report by the Department of Justice's Office of the Inspector General and Office of Professional Responsibility reporting on the Civil Rights Division at the time of Mr. von Spakovsky's employment,<sup>4</sup> as well as subsequent media statements made by von Spakovsky regarding the past<sup>5</sup> and future operation of the Department of Justice,<sup>6</sup> raise the appearance of substantial bias. We cannot give Mr. von Spakovsky's statements the weight that the Vice-Chair and other members of the Commission majority have.

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<sup>3</sup> Brief of Dr. Abigail Thernstrom and Former Justice Department Officials as *Amici Curiae* in support of Appellant, filed in the Supreme Court case of *Northwest Austin Municipal Utility District Number One v. Attorney General Holder*, (No. 08-322) Feb. 26, 2009, p. 1, available at [http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/08-322\\_AppellantAmCuAThernstromandFmrJDOfficials.pdf](http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/08-322_AppellantAmCuAThernstromandFmrJDOfficials.pdf) (accessed July 4, 2009).

<sup>4</sup> See U.S. Department of Justice Office of Inspector General and U.S. Department of Justice Office of Professional Responsibility, *An Investigation of Allegations of Politicized Hiring and Other Improper Personnel Actions in the Civil Rights Division*, July 2, 2008, p. 43, available at <http://www.usdoj.gov/oig/special/s0901/final.pdf> (accessed July 1, 2009). ("In an e-mail from Schlozman to Flynn dated December 4, 2003, Schlozman wrote, "Please let me know when you decide who is going to argue this 4th Circuit voting appeal. If [specific Appellate attorney] is going to do it, that's fine. If it's the other atty on the case, I will have either Hans [von Spakovsky] (or possibly myself) do it instead. The potential stakes are too great to entrust this to either a lib or an idiot."); see also, *Ibid.*, p. 45 ("The evidence also indicated that Schlozman considered the politics of attorneys in the Division's Voting Section. In an e-mail dated November 28, 2003, to front office Counsel von Spakovsky and Principal DAAG Bradshaw, Schlozman wrote about a particular Voting Section attorney, 'If I recall correctly, [Voting Section attorney] is a crazy lib hans, am I right?' and 'a detail would be a great way to get him out of our hair for 6 months.'").

<sup>5</sup> Hans von Spakovsky, "Obama Administration May Have First Real Scandal," *HumanEvents.com*, June 8, 2009, available at <http://www.humanevents.com/article.php?id=32174> (accessed July 1, 2009). ("This [dismissal of a civil lawsuit by DOJ] represents the worst form of political tampering with the administration of justice -- actions that are far more serious (and inexcusable) than the often alleged but always disproved claims of so-called 'politicization' during the Bush administration. Back then, the Voting Rights section of the Bush DOJ was frequently pilloried for being politicized.")

<sup>6</sup> Hans von Spakovsky, "Obama's Thought Police," *HumanEvents.com*, Oct. 2, 2008, available at <http://www.humanevents.com/article.php?id=28831> (accessed June 30, 2009), ("...Barack Obama sees nothing wrong with using the power of government to criminally prosecute his political opponents and to use the regulatory authority of federal agencies to threaten businesses to achieve political objectives -- such as winning an election." Mr. Spakovsky went even further in the article to fan fears, claiming he had found "a frightening example of just how partisan and politically-biased the Justice Department and other federal agencies would be under an Obama administration, criminally prosecuting political opponents while turning a blind eye to supporters like NARAL.").



Despite any protestations by the majority that the briefing panel was fair and balanced, the fact remains that the report as it stands does not reflect any fairness or balance.



## Speaker Biographies

### ***Christopher Coates***

Christopher Coates has been involved in voting rights litigation since 1976. Between 1976 and 1985, he worked as a staff attorney with the Voting Rights Project of the American Civil Liberties Union in Atlanta. While there he was an attorney in a number of voting rights cases in which he represented African-American voters in numerous challenges to discriminatory methods of election in the South. In the period 1985–1996, he was in private practice in Milledgeville, Georgia, where he continued to represent minority litigants in voting cases. In 1991, the Georgia NAACP awarded him its Thurgood Marshall Decade Award for his work in race discrimination cases.

He began his employment in the Voting Section of the Department of Justice in 1996 as a trial attorney. In 1999, he was appointed to the position of Special Litigation Counsel, and in 2005 to the position of Principal Deputy Chief of the Voting Section. He served in that capacity until December 2007, when he was named Acting Chief of the Voting Section and served as acting chief until his promotion to chief.

Mr. Coates has participated in a number of high profile voting rights cases that have included successful challenges to at-large methods of election on behalf of American Indians in Blaine County, Montana; on behalf of African Americans in Charleston and Georgetown Counties, South Carolina; and on behalf of Hispanics in Euclid, Ohio, Osceola County, Florida, and Port Chester, New York. In 2007, he served as the lead attorney for the department in a case in Noxubee County, Mississippi, in which the federal court found that local election officials had intentionally discriminated against white voters and the candidates they supported. The latter case marked the first time the department had filed suit under the Voting Rights Act alleging that white citizens had been subjected to racial discrimination in the area of voting. In 2007, he was awarded the Walter Barnett Memorial Award by the Civil Rights Division for excellence in advocacy.

Mr. Coates is a native of Charlotte, North Carolina, a 1967 graduate of the University of North Carolina (UNC) at Chapel Hill, and a 1972 UNC law school graduate.

### ***William Welch***

William Welch was appointed as the Department of Justice's Chief of the Public Integrity Section in March 2007. He has served as Deputy Chief for the Public Integrity Section since August 2006. Prior to joining the Criminal Division, he led the U.S. Attorney's corruption initiative for the United States Attorney's Office in Springfield, Massachusetts. Working with the FBI, IRS-Criminal Investigation, and HUD, he assembled a task force of approximately 10 special agents that led to the prosecution and conviction of 22 defendants, including the former chairman of the Springfield Police Commission and the former executive director of the Springfield Housing Authority. From 1991 to the present, he has

been an Assistant United States Attorney, first as an OCDETF attorney in Reno, Nevada for four years, and then in the District of Massachusetts since 1995.

Mr. Welch received his Bachelor of Arts degree from Princeton University in 1985, and his *juris doctor* from Northwestern University in 1989.

### **Daniel P. Tokaji**

Daniel Tokaji is an Associate Professor of Law at the Ohio State University's Moritz College of Law, and the associate director of Election Law @ Moritz. His areas of expertise include the law of democracy, civil rights, freedom of speech, disability rights, federal courts, and civil procedure.

Among the publications in which Prof. Tokaji's scholarship has appeared are the *Michigan Law Review*, *Stanford Law & Policy Review*, and *Yale Law Journal*. His writings address questions of racial justice and political equality. His recent publications include "Early Returns on Election Reform: Discretion, Disenfranchisement, and the Help America Vote Act," *73 George Washington Law Review* 1206 (2005), which examines litigation surrounding the 2004 election, and "The Paperless Chase: Electronic Voting and Democratic Values," *73 Fordham Law Review* 1711 (2005), which analyzes the legal issues arising out of the transition from paper-based to electronic voting technology. His current research focuses on the intersection between election reform and the Voting Rights Act of 1965.

Prof. Tokaji is presently the author of a daily blog called "Equal Vote," which includes analysis of and commentary on election reform and voting rights issues, with special attention to the impact of changes in our election system on the voting rights of people of color, non-English speaking voters, and people with disabilities. The subjects addressed in the blog include the implementation of the Help America Vote Act and the Voting Rights Act.

Prior to his tenure at the Moritz College of Law, Prof. Tokaji was a staff attorney with the ACLU Foundation of southern California. He has appeared before several federal and state courts, including the California Supreme Court and United States Courts of Appeals for the Sixth and Ninth Circuits.

Prof. Tokaji clerked for the Honorable Stephen Reinhardt of the U.S. Court of Appeals for the Ninth Circuit from 1994 to 1995. He earned his *juris doctor* in 1994 from Yale Law School, where he was an editor of the *Yale Law Journal* and a director of the Disability Law Clinic. He graduated *summa cum laude* from Harvard College in 1989, with an A.B. in English and American Literature and Philosophy.

### **Hans A. von Spakovsky**

Hans A. von Spakovsky was a commissioner for two years at the Federal Election Commission, a federal agency responsible for enforcing campaign finance laws for all congressional and presidential elections, including the presidential public funding program.

He served as counsel to the Assistant Attorney General for Civil Rights at the U.S. Department of Justice, where he provided expertise and advice for four years on voting and election issues, including enforcement of the Voting Rights Act and the Help America Vote Act of 2002. He was a member of the first Board of Advisors of the U.S. Election Assistance Commission, which advised the commissioners on the administration of the Help America Vote Act. He also served for five years as a member of the Fulton County Board of Registration and Elections, which is responsible for administering elections in the largest county in Georgia.

Commissioner von Spakovsky is a 1984 graduate of the Vanderbilt University School of Law, and received a Bachelor of Science degree from the Massachusetts Institute of Technology in 1981. He has a wide range of experience in election-related issues, including campaign finance reform, voter fraud, enforcement of federal voting rights laws, election administration, and voting equipment standards. The Commission on Federal Election Reform, organized by President Jimmy Carter and Secretary James Baker, also sought his expertise.

He has published numerous articles and testified before state and Congressional legislative committees, as well as made presentations to organizations such as the National Association of Secretaries of State and the National Association of State Election Directors. Prior to entering public service, he worked for 17 years as a government affairs consultant in a corporate legal department and in private practice.

### ***Paul Hancock***

Paul Hancock focuses his practice on litigation as it relates to the financial services industry, namely mortgage banking and consumer credit. He also handles matters involving commercial litigation, civil rights, and general civil litigation, particularly class action lawsuits.

Prior to joining the law firm of K&L Gates, LLP, Mr. Hancock was a partner in the Miami office of a leading law firm headquartered in Washington, DC. Before entering private practice, he served as the Deputy Attorney General for South Florida, managing the Attorney General's legal programs in the southern portion of the state, and personally litigating cases of major significance statewide. He briefed and argued *Gore v. Bush* before the Florida Supreme Court and the U.S. Supreme Court. He also defended the state in private class action and governmental pattern or practice litigation.

Mr. Hancock spent more than 20 years with the Civil Rights Division of the U.S. Department of Justice (DOJ), attaining the highest-ranking career position in the division. He is experienced in all areas of civil rights litigation, and is best known for his work in the fields of voting, housing, disability rights, insurance, and lending and credit. While at DOJ, Hancock directed the Voting Rights Act litigation program and enforcement of the Fair Housing Act. He originated the department's fair lending enforcement program, serving as the program's director for nine years. He also served as the DOJ's Acting Deputy Assistant Attorney General for Civil Rights. He received many awards from the department, as well as from outside organizations for his law enforcement efforts, including special recognition

from U.S. Attorney General Janet Reno, for his development of the department's fair lending enforcement program.

Mr. Hancock received his Bachelor of Science and Master of Business Administration degrees from Xavier University, and *juris doctor* from the University of Toledo College of Law.

### ***Roger Clegg***

Roger Clegg is president and general counsel of the Center for Equal Opportunity. He focuses on legal issues arising from civil rights laws, including the regulatory impact on business and the problems in higher education created by Affirmative Action. A former Deputy Assistant Attorney General in the U.S. Department of Justice (DOJ) during the Reagan and George H. W. Bush administrations, Clegg held the second highest positions in both the Civil Rights Division (1987–91) and in the Environment and Natural Resources Division (1991–93). He has held several other positions at DOJ, including Assistant to the Solicitor General (1985–87), Associate Deputy Attorney General (1984–85), and Acting Assistant Attorney General in the Office of Legal Policy (1984).

Clegg is a graduate of Yale University Law School (1981), and currently lives in Fairfax, Virginia.



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