VOTING SECTION OF THE CIVIL RIGHTS DIVISION OF THE U.S. DEPARTMENT OF JUSTICE

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED TENTH CONGRESS

FIRST SESSION

OCTOBER 30, 2007

Serial No. 110–156

Printed for the use of the Committee on the Judiciary

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VOTING SECTION OF CIVIL RIGHTS DIVISION OF THE U.S. DEPARTMENT OF JUSTICE

TUESDAY, OCTOBER 30, 2007

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON THE CONSTITUTION,
CIVIL RIGHTS, AND CIVIL LIBERTIES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 10:10 a.m., in Room 2141, Rayburn House Office Building, the Honorable Jerrold Nadler (Chairman of the Subcommittee) presiding.

Present: Representatives Conyers, Nadler, Scott, Davis, Wasserman Schultz, Ellison, Chabot, Pence, King and Franks.

Staff Present: David Lachman, Chief of Staff; LaShawn Warren, Majority Counsel; Paul Taylor, Minority Counsel.

Mr. NADLER. Good morning. This hearing of the Subcommittee on the Constitution, Civil Rights, and Civil Liberties will come to order. Today's hearing will continue the Subcommittee's oversight of the Civil Rights Division of the Department of Justice. Today the Subcommittee will focus on the work of the voting section. The Chair recognizes himself for 5 minutes for an opening statement. The right to vote is the bulwark of our other rights. Without an effective franchise, all other rights are vulnerable.

For that reason, our Nation's history has been one of fulfilling the promise of our Declaration of Independence and our Constitution by progressively extending the right to vote to all citizens. That struggle has taken generations. But the struggle to ensure that the legal right to vote translates into an actual right to cast the ballot and have it counted remains unfinished. Congress has responded over the years with the enactment of laws to protect the right to vote, most recently with the bipartisan reauthorization of the Voting Rights Act.

The hearings we held on the Voting Rights Act demonstrated the continuing need for its protection for voters, especially minority voters and voters with limited English proficiency. I take the Voting Rights Act very seriously. The two counties I represent, or parts of which I represent, are in New York City, are both covered jurisdictions under the preclearance provisions of section 5. We came by that distinction honestly through past misconduct. And I think you will find that most New Yorkers support the continued enforcement of the act.

Today we examine the Voting Section of the Justice Department's Civil Rights Division. The Voting Section provides the teeth

behind the words of the statute, or at least it is supposed to. If the laws are to have any real meaning the Voting Section must be a tireless advocate for the right to vote without fear or favor or without the intrusion of partisan political meddling.

We have received numerous reports over the years that the section is not living up to its mandate, that politics has, as is the case with other parts of the Justice Department, intruded into the decision-making process, sometimes at the expense of the voting rights of the very people the law was intended to protect. In cases involving the Georgia ID statute or the preclearance of redistricting plans in Texas and other jurisdictions, there have been allegations, and I have serious concerns, that the work of the section was swayed by political considerations. We need to get to the bottom of these allegations. The work of the Voting Section is too important to let these hang in the air.

I am also concerned about some comments that Mr. Tanner has made recently about minority voters which demonstrate to me at best the lack of understanding of the mission with which the section is entrusted. These comments call into question his fitness to head this important section. I look forward to the testimony of our distinguished witnesses. I yield back the balance of my time. I would now recognize our distinguished Ranking minority Member, the gentleman from Arizona, Mr. Franks, for his opening statement.

Mr. FRANKS. Well, thank you, Mr. Chairman, and thank you, Mr. Tanner, for being here.

Mr. Chairman, the Voting Section of the Civil Rights Division protects Americans' voting rights through a Federal monitoring program.And the proper functioning of this section is essential to the integrity of our election process. During the course of this hearing, we're going to hear numerous criticisms of the section's enforcement activities and priorities. And certainly that's part of the process, Mr. Chairman, to make sure that we get the facts on the table regarding the section's enforcement activities.

Among the most important priorities that I want to emphasize is the difficulty that State and local officials have in confirming the citizenship of voters and preventing illegal noncitizen voters from voting and cancelling out legally cast votes. In April, I was glad to see that a Federal Appeals Court in *Gonzalez v. Arizona* rejected an effort to halt carrying out Arizona's recently enacted law that was part of Proposition 200 which passed in 2004. The Arizona law requires residents to prove that they are American citizens when they register to vote and to present identification when they vote at the polls.

The ruling by the United States Court of Appeals for the Ninth Circuit said the law did not appear to unduly burden the right to vote or violate Federal voting laws or place a disproportionate burden on naturalized citizens or require what would be an unconstitutional poll tax.

Arizona's sound approach to voting integrity follows a 2005 report by a group of bipartisan leaders and scholars led by former President Carter and Secretary of State James Baker, III. As the Carter-Baker report elaborated, "to make sure that a person arriving at a polling site is the same one who is named on the list, we

propose a uniformed system of voter identification based on the real ID card or an equivalent for people without a driver's license. They emphasize there is likely to be less discrimination against minorities if there is a single uniform ID than if poll workers can apply multiple standards."

Mr. Chairman, a recent *Wall Street Journal/NBC* news poll confirms every other poll on the subject over 81 percent of those surveyed supported a requirement to show a photo ID before voting. This included two-thirds of majorities from African-American populations, two-thirds majorities from Democrats and two-thirds majorities of Hispanics. Requiring photo identification would increase voter confidence. And one of the reasons identified by some minority and low-income voters as to why they do not vote is the perception that they will not be permitted to cast a ballot, or a ballot they cast will not be counted. Providing photo identification will increase that voter's confidence that they will be allowed to cast an effective vote.

Mr. Chairman, we have many important issues to cover here today, and I simply look forward to hearing from all of our witnesses.

Mr. NADLER. I thank the gentleman. I now recognize the distinguished Chairman of the full Committee, the gentleman from Michigan.

Mr. CONYERS. Thank you, Chairman Nadler.

And I want to point out that in the midst of all the work that we are doing in trying to rehabilitate the Department of Justice—and nobody knows more than the Members of this Committee what we've been through these last 10 months since I've been Chairman—there is no section more important to us than the voter rights section. And that's why this hearing is so important to me. We had an oversight hearing earlier. But we want it to be made clear that the work we are doing has to go way beyond just a hearing, way beyond us taking 5 minutes each in a couple of rounds. This is far, far more critical than that.

And so it is in that spirit that I welcome Mr. John Tanner, the head of the section. I notice his wife and daughter are here in the hearing room, which will probably make us be even more polite than we are going to be as this hearing proceeds. But we are in a crisis. We are in a crisis, and it is the duty of this Committee to determine what went wrong in terms of the voting responsibility, the encouragement of the right to vote, the protecting the right to vote, the continuing integrity of the ballot.

And so what we are trying to inquire in this archaic way that the Congress runs is to find out what went wrong. And we want to also understand what the present situation is. And then of course the issue is, what are we going to do about it? And I am concerned about the time from today, October 30, until the first Tuesday in November. We got a lot of work, and we don't have much time to do it.

Now, there have been more irregularities and challenging of the vote of purges, of misinformation, of failure to act since the election of 2000, the election of 2002, of 2004, 2006, than in any time in the service that I've been on this Committee. It has never been more troubling and disturbing. And so I'm very happy that we have

the people on the Constitution Committee working with me on this. We've got to deal with this question. So what I'm saying is that we've got to work beyond and between these public hearings.

The decline in section 2 cases is unprecedented in the history of the Department of Justice. And we are talking about one case being prosecuted in 6 years. We are talking about the Citizens' Commission on Civil Rights that criticize the enforcement efforts made under the tenure of the chief of the Voting Section, and well before Mr. Tanner's arriving at that position. And we are investigating the fact that a career attorney's recommendations were disregarded with reference to the vigorous enforcement of section 5; and that not only were they stripped out, but they were rewritten by someone else.

We are concerned about the Inspector General's Office of Professional Responsibility who have raised multiple complaints against the section leader of that section and the staff. And it is being investigated in some depth concerning the defrauding the government through the abuse of travel funds. We are concerned about the fact—and some of it approaches the astounding circumstance of people selecting litigation sites based on their vacation travel preferences rather than the merits of the issue. We've got management issues raised by the section 5 preclearance. And so all of this—oh, don't let me forget, in Ohio, we got a letter from the section, probably from Tanner, Mr. Tanner himself, defending their decision to maldistribute voting machines disproportionately to the predominantly White precincts at the expense of the minority areas in Franklin County. It goes on and on.

I'm going to revise and extend my statement. But we have more grievances, more questions of integrity, more questions about the efficiency of the most sensitive part of the Department of Justice, the voting rights section. And so we've got a big job in front of us. I thank the Chairman for allowing me to make some opening comments.

[The prepared statement of Mr. Conyers follows:]

PREPARED STATEMENT OF THE HONORABLE JOHN CONYERS, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN, CHAIRMAN, COMMITTEE ON THE JUDICIARY, AND MEMBER, SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES

Last Congress, the Judiciary Committee was united in its effort to reauthorize the expiring provisions of the Voting Rights Act. Too many Americans face still barriers to exercising their right to vote and vigorous enforcement of this right by the Department of Justice is essential. Unfortunately, the Voting Section of the Civil Rights Division of the Justice Department, which is the primary agency charged with this responsibility, still faces many challenges, three of which I will highlight here.

First, we need a clearer understanding of how the Civil Rights Division interprets its responsibilities regarding photo identification requirements. Earlier this year, the Citizens' Commission on Civil Rights issued a report criticizing the Voting Section's enforcement efforts and cited the preclearance of the Georgia photo identification requirement as a major example. In particular, the Commission cited Voting Section Chief Tanner's failure to fairly and vigorously enforce preclearence requirements of Section 5 as a result of partisan political concerns. The Commission concluded that this failure damaged the Section's procedural integrity and undermined its credibility.

I am particularly troubled by Mr. Tanner's recent comments regarding the effects of photo identification requirements on minority voter participation. He said, for example, "Our society is such that minorities don't become elderly the way white people do; they die first." While Mr. Tanner has already demonstrated questionable

judgment in overruling the decision of Justice Department lawyers to object to the Georgia photo ID law, this statement—at least in my opinion—demonstrates a severe lack of appreciation of what the Section's mission should be—that minority voters should not be disenfranchised.

Second, serious management issues have also been raised with the Section's core responsibility of Section 5 enforcement. Under Mr. Tanner's tenure, the corps of Section 5 analysts has been reduced from 23 to 8 positions. In addition, the Judiciary Committee is aware of complaints of racial discrimination against the Deputy Chief for Section 5 as well as other Equal Employment Opportunity complaints.

While I take seriously any allegation of discrimination, it is especially disturbing when the allegation is against the very institution that is charged with fighting against discrimination. In the coming year, the Voting Section will face a substantial increase in its work load due to preclearence requirements associated with the Federal elections. I look forward to hearing how the Mr. Tanner plans to address the allegations of a hostile racial environment in the Section and how he will rebuild the Section 5 analyst corps.

Third, the Section's record with respect to Section 2 litigation, claims alleging discrimination in voting, is also problematic. In the first six years of the Bush Administration, fewer Section 2 cases were brought by the Voting Section than in any other administration since 1982. The number of Section 2 cases brought on behalf of African Americans has come to a virtual standstill. While Mr. Tanner's testimony states that there has been a slight upswing in the last year, critics—particularly in the Latino community—note that the office's apparent overemphasis on Section 203 has left minority voters outside the political process, when they could have had a fair opportunity to elect candidates of their choice through Section 2 litigation. Bilingual voting materials are not the whole story for language minority voters.

The Voting Rights Act remains the "Crown Jewel" of our civil rights laws. Nevertheless, as the Citizens' Commission on Civil Rights has detailed, those responsible for maintaining this treasure have faltered in their mission. In the next 14 months, the Voting Section has a substantial amount of work to complete. I hope that this hearing will highlight those challenges and that the Justice Department witness will suggest effective solutions. We have clearly reached the point where the status quo is unacceptable.

I thank the gentleman. In the interest of proceeding to our witnesses, and mindful of the fact that there's another Subcommittee hearing scheduled in this room not too long from now, that we have a lot of witnesses, I would ask other Members to submit their statements for the record. Without objection, all Members will have 5 legislative days to submit opening statements for inclusion into the record. Without objection, the Chair will be authorized to declare a recess of the hearing. We will now turn to our witnesses.

[The prepared statement of Mr. Cohen follows:]

PREPARED STATEMENT OF THE HONORABLE STEVE COHEN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TENNESSEE, AND MEMBER, SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES

Reports about the significant drop in and possible politicization of enforcement activity by the Civil Rights Division's Voting Section fit a deeply troubling pattern within the Justice Department under this Administration. The Voting Section is charged with protecting the most basic right in a democracy—the right to participate in choosing our leaders. Yet if the reports are accurate, it appears that, rather than protecting this right, the Voting Section has acted to suppress minority voters by approving regressive voting practices and procedures and by failing to file lawsuits when such suits would have been warranted. Moreover, the Voting Section may be using its enforcement discretion to assist the Republican Party politically, rather than to fulfill its mission of protecting minority voting rights. Finally, illustrating another persistent pattern under this Administration, it appears that the career staff of the Voting Section has largely been replaced by a cadre of conservative ideologues who have little experience with and little concern for civil rights law. I look forward to the opportunity to air publicly these concerns and to seek answers from the Administration concerning the enforcement activity of the Voting Section.

Mr. NADLER. As we ask questions of our witnesses, the Chair will recognize Members in the order of their seniority on the Sub-

committee, alternating between majority and minority, providing that the Member is present when his or her turn arrives. Members who are not present when their turn begins will be recognized after the other Members have had the opportunity to ask their questions. The Chair reserves the right to accommodate Members unavoidably late or only able to be with us for a short time.

Our first witness is John Tanner, the Chief of the Voting Section of the Justice Department's Civil Rights Division. Mr. Tanner joined the Voting Section in 1976 as a research analyst, attended law school at night and, upon graduation, was hired under the Attorney General's program for law graduates. In 1995, he left to prosecute criminal civil rights violations, including as a member of the National Church Arson Task Force. He also worked in the White House Office of Counsel to the President, the Senate Judiciary Committee and the Justice Department's Office of Legislative Affairs. In July 2002, he returned to the Voting Section to coordinate enforcement of the minority language provisions of the Voting Rights Act and was named chief of the Voting Section in June 2, 2005.

Welcome. Your written statement will be made part of the record in its entirety. I would ask you now summarize your testimony in 5 minutes or less. To help you stay within that time, there is a timing light at your table. When 1 minute remains, the light will change from green to yellow and then red when the 5 minutes are up. Before we begin, it is customary for the Committee to swear in its witnesses. If you could please stand and raise your right hand to take the oath.

[Witness sworn.]

Mr. NADLER. Thank you. Let the record reflect that the witness answered in the affirmative. The witness may proceed.

TESTIMONY OF JOHN K. TANNER, CHIEF, VOTING SECTION, CIVIL RIGHTS DIVISION, U.S. DEPARTMENT OF JUSTICE

Mr. TANNER. Mr. Chairman, Ranking Member Franks and Members of the Subcommittee. Thank you for the opportunity to appear before you. Let me first note that I have apologized to the National Latino Congreso for comments I made about the impact of voter identification laws on elderly and minority voters. My explanation of the data came across in a hurtful way which I deeply regret. The reports of my comments do not in any way accurately reflect my career of devotion to enforcing Federal laws designed to assure fair and equal access to the ballot.

I began working to secure equal voting rights as a teenager in Birmingham, Alabama, in the 1960's. I spent time on weekends at the SCLC headquarters stuffing envelopes. I took African American citizens to the Federal examiners to register to vote. And I embraced a vision of a just society: African Americans in elected positions in city halls, county courthouses, the State legislature and in Congress from Alabama.

In 1976, I joined the Voting Section where I pursued that vision of a just society through voting rights enforcement actions. In the high point of my career, I helped obtain fair representation for African Americans in the Alabama legislature using section 5 of the Act, which we are now vigorously defending against a constitu-

tional challenge. I also helped obtain a Mississippi legislative plan that added 20 new African American legislators, and I brought cases in many other States. I'm honored that my work has been recognized by the Conecuh County Branch NAACP, the Concerned Citizens of Bessemer, the Alabama Democratic Conference Young Democrats, the Greenwood, Mississippi, Voters League and the City Council of the District of Columbia.

I worked outside the Voting Section from 1995 to 2002, serving at the White House Office of Counsel to the President, the Criminal Section of the Civil Rights Division and the Department's Office of Legislative Affairs, where I worked with Members and staff of this Committee. I returned to the Voting Section in 2002, assigned to lead the section's efforts in enforcing the minority language provisions of the Voting Rights Act.

Since 2002, the section has filed twice as many such cases as in the entire previous history of the Act. During that time, we have filed a majority of all cases ever filed under the substantive provisions of the Act on behalf of Latinos, a majority of all cases on behalf of Asian Americans and over 70 percent of all cases ever filed under the voter assistance provisions of section 208.

Since I became Chief in June 2005, I have worked to protect and extend the voting rights of all minorities. We changed the election system in Euclid, Ohio, this year to open the door to African American representation. We have used section 5 to block discrimination in Alabama, Georgia, Texas. I reached out to African American groups to seize new opportunities to protect the rights of African Americans and to other groups protected by our statutes—Arab Americans, Native Americans, Latinos, Asian Americans and persons with disabilities.

During my 31-year career, the section has averaged eight new cases per year. Since I became Chief, our pace has nearly doubled. In 2006, the section brought 18 new cases, the highest number in any year in history. These have been important cases. We have seen segregated polling places, ethnic slurs, race-based challenges, voters leaving the polls in tears, and ballots actually taken from voters and marked contrary to their wishes. We go into court to stop these practices.

The section is so productive because of the energy, the enthusiasm, and the commitment of the section staff, a group of talented self-starters eager to find and combat discrimination. I have to make hard decisions. Ultimately, all of my decisions are made after careful scrutiny of the evidence, and they're based solely on the facts and the law. I am blessed to be in this position which enables me to continue to work toward realizing the vision of a just society I embraced over 40 years ago in Birmingham and to help this Nation realize its own vision of equal voting rights for all. Thank you for your attention. I appreciate the opportunity to respond to any questions you may have.

[The prepared statement of Mr. Tanner follows:]

PREPARED STATEMENT OF JOHN K. TANNER

Statement of
John Tanner
Chief, Voting Section
Civil Rights Division
Department of Justice

Before the
Subcommittee on the Constitution, Civil Rights, and Civil Liberties
Committee on the Judiciary
United States House of Representatives

Concerning
"Civil Rights Division Voting Section"

October 30, 2007

Mr. Chairman, Ranking Member Franks, Members of the Subcommittee, it is a pleasure to appear before you as Chief of the Voting Section. I am pleased to report that the Voting Section of the Civil Rights Division remains ever vigilant in working to preserve and protect the fundamental right to vote.

I want to apologize for the comments I made at the recent meeting of the National Latino Congreso about the impact of voter identification laws on elderly and minority voters. I understand that my explanation of the data came across in a hurtful way, which I deeply regret. The reports of my comments do not in any way accurately reflect my career of devotion to enforcing federal laws designed to assure fair and equal access to the ballot. I am honored to have the opportunity to do this work, and I am honored to serve with the dedicated employees of the Voting Section who, day in and day out, work hard to protect the rights of all Americans under the Voting Rights Act.

I joined the Voting Section many years ago, in February 1976, but my participation in securing the voting rights of all Americans began much earlier. I spent much of my youth in the mid to late 1960s working on civil rights issues. I worked outside the Voting Section from 1995 to 2002, serving in the White House Office of Counsel to the President from February to September 1995; the Criminal Section of the Civil Rights Division, where I prosecuted cases of police brutality, hate crimes, and church arson from November 1995 to June 2002, when I was not detailed to other offices; the Senate Judiciary Committee from April to October 1998; and the Department's Office of Legislative Affairs, where I worked with the Members of the Judiciary Committee and their staff, for portions of 2000 and 2001. Upon my return to the Voting Section in 2002, I became responsible for enforcement of the minority language provisions of the Voting Rights Act, and I became Chief of the Section in 2005.

The right to vote is the foundation of our democratic system of government. The Civil Rights Division is responsible for enforcing specific statutes that protect voting rights, and I will

discuss my work as Voting Section Chief under each of those laws. 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). Through the Voting Section, the Civil Rights Division enforces the civil provisions of these laws. The criminal matters involving possible Federal election offenses are assigned to and supervised by the Criminal Division or the Criminal Section of the Civil Rights Division and are prosecuted by them and by the United States Attorneys' Offices.

During my tenure as Chief of the Voting Section, we have brought lawsuits that were authorized by the Assistant Attorney General under each of the statutes referenced in the previous paragraph, as well as the Civil Rights Act of 1960. In fact, the 18 new lawsuits we filed in Calendar Year 2006 is double the average number of lawsuits filed annually in the preceding 30 years. Additionally, because 2006 was a Federal election year, the Section worked overtime to meet its responsibilities to protect the voting rights of our citizens.

In 2006, the Voting Rights Act Reauthorization and Amendments Act of 2006 became law, renewing for another 25 years certain provisions of the Act that had been set to expire. At the direction of the Assistant Attorney General, the Voting Section played a significant role in supporting the reauthorization. In advance of the hearings on the bill, the Voting Section compiled thousands of pages of documents that were provided to committee staff on compact discs, including lists of cases in which the Voting Section has participated, charts and graphs of statistics regarding the administrative review of voting changes under Section 5, lists of objections under Section 5 and letters interposing such objections, listings of declaratory judgment actions under Section 5, copies of complaints and orders, samples of correspondence sent to jurisdictions covered by the language minority provisions, maps showing election monitoring locations by year, statistics for election monitoring, and copies of federal observer reports. In addition, the Voting Section assisted the Office of the Assistant Attorney General in preparing testimony for hearings held by this Subcommittee and by the Senate Judiciary Committee, at which Civil Rights Division officials testified. Finally, the Voting Section also compiled information in response to requests and questions from members of these congressional committees. As authorized by the Assistant Attorney General, the Voting Section also is committed to defending the Act and is currently doing so against a constitutional challenge in Federal court here in the District of Columbia.

During my tenure as Section Chief, the Voting Section has filed 23 lawsuits, which were authorized by the Assistant Attorney General, to enforce various provisions of the Voting Rights Act. These cases include a lawsuit that we filed and resolved 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 entirely on their perceived race and ethnicity. We also filed a Section 2 lawsuit in Ohio in 2006 that challenged the City of Euclid'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. In August 2007, the court ruled that the city's method of electing its city council violated the Voting Rights Act and stayed Euclid's council elections until a new method of election is approved by the court. Also among

the Section's successes under Section 2 during my tenure as Section Chief is our 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. In 2007, the Section obtained a preliminary injunction in our challenge to Port Chester, New York's at-large election system.

We also obtained additional relief in 2007 in an earlier Section 2 suit filed on behalf of Native American voters in Cibola County, New Mexico, which involves 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, we 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. We also brought cases under HAVA in 2007 against the City of Philadelphia, where the accessible voting machines were not operational and available to voters, and Galveston County, Texas, for its failure to offer voters provisional ballots and to post voter information as required by HAVA.

The Section recently 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. The court found that the defendants acted with a racially discriminatory intent and engineered "a concerted effort to illegally 'assist' black voters."

The Division's commitment to enforcing the language minority requirements of the Voting Rights Act remains strong, with 17 lawsuits authorized by the Assistant Attorney General and filed under the language minority provisions during my tenure as Chief. In September 2007, we settled the first lawsuit filed under Section 203 on behalf of Korean Americans in the City of Walnut, California. Our cases on behalf of language minority voters have made a remarkable difference in the accessibility of the election process to those voters. For instance, as a result of a lawsuit brought by the Section, Boston now employs five times more bilingual poll workers than before.

During my tenure as Chief, the Section also has broken records with regard to enforcement of Section 208 of the Voting Rights Act. As the Committee knows, 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 my tenure as Chief, the Assistant Attorney General has authorized and the Voting Section has brought five out of the eleven lawsuits filed under Section 208 since it was enacted twenty-five years ago.

In 2006, the Voting Section processed the largest number of Section 5 submissions in its history. Career staff members are involved in the review and decision-making process of every Section 5 submission, and the Assistant Attorney General has final decision-making authority in these matters, *see* 28 CFR § 51.3. We interposed two objections to submissions pursuant to Section 5 in 2006, in Georgia and Texas, and filed the Section's first Section 5 enforcement

action since 1998. The Department also interposed an objection pursuant to Section 5 in Alabama in January 2007 and recently filed an amicus brief in a Mississippi Section 5 case. Again, we are vigorously defending the constitutionality of Section 5 before the District of Columbia court. We consented to several actions in Fiscal Year 2006 in jurisdictions that satisfied the statutory requirements for obtaining a release, or "bailout," from Section 5 coverage. The Section 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 Section also has significantly expanded its contacts to minority citizens during the Section 5 process, both in terms of the number and frequency of contacts, and we have broadened the scope of interviews of minority community members beyond the narrow scope of Section 5 to include other provisions of federal law. The result has been five affirmative Voting Rights Act lawsuits in 2007 that were prompted by Section 5 review.

During my tenure as Chief, the Section has continued to work diligently to protect the voting rights of our nation's military and overseas citizens. The Section 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. As authorized by the Assistant Attorney General, in Fiscal Year 2006, the Voting Section filed the largest number of cases under UOCAVA in any year since 1992. 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. In 2007, we have initiated a similar approach to structural issues in special elections and worked with the Secretary of State of Mississippi to obtain curative legislation for that state. Also in 2007, we have worked with states conducting special congressional elections to overcome UOCAVA issues. For example, Ohio extended the deadline for receipt of UOCAVA ballots, and Massachusetts sent out ballots by express mail.

In 2006, the Voting Section also filed the largest number of suits under the National Voter Registration Act at the direction of the Assistant Attorney General since shortly after the Act became effective in 1995. We filed lawsuits in Indiana, Maine, and New Jersey. The Voting Section's suits against New Jersey and Maine also alleged violations of HAVA. We resolved these two suits with settlement agreements that set up timetables for implementation of a statewide computer database. Finally, we received a favorable decision in our lawsuit against New York for its failure to designate disability services offices that serve disabled students as mandatory voter registration offices. The court largely denied the defendants' motion to dismiss, and the case is currently in litigation.

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, among other requirements, there be accessible voting equipment for voters with disabilities throughout the nation. Many States, however, did not achieve full compliance.

At the direction of the Assistant Attorney General, the Section worked hard to help States prepare for the effective date of January 1, 2006, through speeches and mailings to election officials, responses to requests for our views on various issues, and maintaining a detailed website on HAVA issues. We have been, and remain, in close contact with many States in an effort to help them achieve full compliance at the earliest possible date. Where cooperative efforts prove unsuccessful, the Section enforces HAVA through litigation when authorized to do so by the Assistant Attorney General.

A major component of the Section'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. Each year, the Justice Department deploys hundreds of personnel to monitor elections across the country. Last year, we deployed a record number of monitors and observers to jurisdictions across the country for a mid-term election. In total, over 800 Federal personnel monitored the polls in 69 political subdivisions in 22 States during the general election on November 7, 2006 – a record level of coverage for a mid-term 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.

The improvements to our monitoring program have increasingly resulted in enforcement actions. Lawsuits that benefited from evidence obtained in monitoring include, but are by no means limited to, those against the following jurisdictions: San Diego County, California; Osceola County, Florida; City of Boston, Massachusetts; City of Rosemead, California; Brazos County, Texas; Philadelphia, Pennsylvania; City of Walnut, California; and Cibola County, New Mexico. Our monitoring work has paid off, and we are laying the groundwork for 2008 even today.

The Voting Section remains committed to the continued enforcement of Nation's voting rights laws.

I look forward to answering any questions the Members of the Subcommittee may have.

Mr. NADLER. Thank you, Mr. Tanner.

I will begin the questions by recognizing myself for 5 minutes.

Mr. Tanner, in April 2005, while you were serving as the Voting Section chief, Georgia passed a law requiring photo identification in order to vote. Georgia submitted its law for section 5 preclearance. We now know that four out of five of the Justice Department's civil service employees objected to the law and forwarded a 51-page memo to you that included a factual investigation into the legal review of the Georgia plan. Most significantly, the memo included a detailed analysis and a recommendation that the Department object to the voting change because it was likely to discriminate against Black voters, but they were overruled the next day by higher ranking officials at Justice. Only 1 day after receiving a staff analysis recommending an objection, the Department approved the Georgia plan.

Brad Schlozman and Hans von Spakowsky, both former senior level Department of Justice officials who served in the CRT, testified before the Senate that you played a key role in the Department's decision to approve the Georgia photo identification law. Now, you received a 51-page memo that analyzed thousands of pages worth of information on August 25. The Department received additional information from the State of Georgia on August 26. So is it your position that you had sufficient time between August 25 and August 26, 1 day, to conduct a thorough review of the staff memorandum and the new information the Department received from Georgia?

Mr. TANNER. Thank you for your question, Mr. Chairman. You've raised an important issue, and I'm happy to have an opportunity to address it.

Consideration of the Georgia ID statute began, I believe, even before it was passed and certainly before it was received by the Department. I recall meeting in Georgia with Mr. McDonald, who is on the next panel, and discussing it before we received it. I entered that process. I approached the review of the decision, frankly, with the presumption that we would interpose an objection to it, that we would determine that it was racially discriminatory.

My presumptions ran into the facts, however. It turned out that the statistical data, the facts before us, the best facts available, which is what I have to make my decisions on, demonstrated that it did not warrant an objection under the very narrow standards and the very narrow inquiry under section 5 of the Voting Rights Act. I would be happy to discuss the precise scope of our review under section 5. But the——

Mr. NADLER. Before you get into that, we'll get into that in a moment, the staff recommendation said that it did—the four to five staff members who reviewed it said that you ought to recommend an interposing objection. You overruled that; is that correct?

Mr. TANNER. I made the decision to——

Mr. NADLER. That they were incorrect and that you should change the recommendation?

Mr. TANNER. I made the decision, Mr. Chairman. I would like to make that clear. I would, of course——

Mr. NADLER. But in making that decision, you differed from the four attorneys or whoever, four of the five people, staff people, permanent staff, who recommended a contrary decision; correct?

Mr. TANNER. I'm in an awkward position in that we are not allowed and it is inappropriate for Department personnel to discuss internal deliberations and the confidences of our clients. I'm happy to give you information and explain the basis for my——

Mr. NADLER. Mr. Tanner, I believe that that is public information; that that has been testified to before, I think, the Senate. Is that not correct, that this is public? That these five individuals who reviewed this, who did all the staff work for them, recommended disapproving and one differed from that? That's all public information at this point.

Mr. TANNER. I'm not aware of the testimony on that. I'm not going to deny it. I will say that I made the decision. And my decision was based on a careful analysis that had been ongoing for a considerable period of time. There were, as is typical in such situations, numerous discussions, detailed discussion of the data.

Mr. NADLER. Before you did that, did you forward that to the front office, or did you get approval from the front office?

Mr. TANNER. The internal memorandum was forwarded to the front office. The matter had been—had involved a large number of discussions over an extended period and very careful analysis and review by me——

Mr. NADLER. Now, but is it not true that it was a long-standing section practice for a section chief who disagreed with a staff recommendation to submit a separate recommendation and leave the final decision concerning the split recommendation between staff and section chief to the assistant attorney general?

Mr. TANNER. I think that the Assistant Attorney General was fully aware——

Mr. NADLER. That wasn't my question. Was it or was it not a long-standing practice that when the section chief disagreed with the staff recommendation to submit a separate recommendation so that the Assistant Attorney General could see the separate recommendations by the staff and by the section chief and he could make a decision, or she?

Mr. TANNER. That has not been the uniform practice.

Mr. NADLER. Was it the general practice?

Mr. TANNER. I will say——

Mr. NADLER. I know it wasn't uniform because you didn't do it. Was it the general practice up to that point?

Mr. TANNER. Prior to that time, it had not been uniformly done. As I mentioned, I was outside the section from 1995 through 2002, and I was not involved in section 5 review of voting changes until I became Chief to any significant extent. So I can't speak authoritatively about the practices during that time. I have made changes in the section 5 process, and I would be happy to discuss those——

Mr. NADLER. In a section 5 submission, who has the burden of proof, the submitting jurisdiction to prove that it doesn't violate the—that it doesn't negatively impact minority voting rights or the objecting parties?

Mr. TANNER. The statute is clear that the burden is on the submitting authority to establish——

Mr. NADLER. And what were the facts that met the burden of proof in this case?

Mr. TANNER. There were three key facts to me in the case. The first was data showing, much to my surprise, frankly, and contrary to my expectations, that statistically the number of people in Georgia who had the requisite identification, the requisite photo identification, from the Department of Driver Services alone actually slightly exceeded census estimates of the population eligible to possess that ID. That was the first fact.

The second fact that was very significant to me was the very large number, over 700,000, I believe, persons in Georgia who had nondriver's license IDs which met significant issues in the case.

And finally, each of four data sets showed uniformly that the proportion of persons—that minorities were slightly more likely than White persons to possess the requisite Department of Driver Services identification.

Those facts met the State's burden of showing that it would not discriminate where essentially or statistically all persons had the ID, and minorities were not—were more, not less, likely to have the ID.

Mr. NADLER. And I'm not going to go into the fact that some of those figures were quite erroneous and that Georgia had to correct them. Yet despite everything you just said, the Federal Court reversed the decision and said that this was quite incorrect.

Mr. TANNER. You've made an important point, Mr. Chairman, that I think it is good to address. The Federal Court in Georgia rejected the claim that the Georgia ID law was racially discriminatory. There was a claim under section 2 of the Voting Rights Act, which is the closest parallel among the claims to the section 5 inquiry. The court did reject the plan on the other bases, on constitutional bases, which are outside the scope of our review under section——

Mr. NADLER. The poll tax is outside the scope of section 5 review?

Mr. TANNER. The only thing we can look at under section 5 is a narrow question of whether a voting change would be retrogressive. That is, it would make things worse for minority voters relative to White voters, or at that time, if it had the purpose to retrogress. We cannot interpose an objection based on a constitutional violation or statutory violation that does not meet that narrow standard.

Mr. NADLER. Thank you very much. My time has expired.

I now recognize the gentleman from Arizona, the Ranking Member, Mr. Franks.

Mr. FRANKS. Thank you, Mr. Chairman.

Thank you, Mr. Tanner, for being here. Mr. Tanner, I'm sure it is a little bit redundant, and I'm going to ask you to repeat yourself a little bit, but would you give us your understanding of the Federal District Court ruling on the challenge to the Georgia voter ID law?

Mr. TANNER. The initial Federal court ruling, which was in the preliminary injunction stage of the case, addressed a number of claims, including constitutional claims of the poll tax and the equal protection claim, as I recall, that were, as I said, completely outside

the scope of section 5 review, which is, as I described it, does the voting change make things worse for minority voters relative to White voters? There was a similar claim under section 2 of the Voting Rights Act which is a general claim of discrimination. And the court, while issuing preliminary injunctions on the constitutional claims, declined to issue such an injunction and rejected the Section 2 claim at the preliminary injunction stage as it did other statutory claims under the Civil Rights Act. I don't recall the exact details of those.

Mr. FRANKS. Mr. Tanner, as far as the 2008 elections, what steps have you taken to make those elections come off in a way that is the most just for voters in general? Give us an insight into what some of your priorities are there?

Mr. TANNER. The first thing we are doing is conducting active litigation on Election Day type issues. Since I became Chief, we have brought 23 cases under the Voting Rights Act itself, the Voting Rights Act alone. We've also brought cases under our other statutes that protect overseas voters and other voters here in the United States. We also have been conducting very active Election Day monitoring. And during the 2004 election, we had 1,199, or during the course of 2004, we had nearly 2,000 people out monitoring the polls.

Every year we set a new record of placing people in the polls in key areas to make sure that we can address such problems that arise on Election Day and also to get evidence to go forward and address problems in the future. I also have been reaching out to minority groups, as I said in my opening statements, of all types of minority groups to work with us, to first help us to identify problem areas, areas where issues within our statutes are likely to occur, to help us obtain information and to help us gather that information in a way that it later can be used as evidence in Federal court.

Mr. FRANKS. Mr. Tanner let me ask you, what do you think are your greatest accomplishments during your tenure as Chief? What are things that you think you've accomplished? What do you intend to do in the future?

Mr. TANNER. I think my greatest accomplishment, which actually began before I was chief, was to develop a system to address the specific minority language statutes that I was responsible for enforcing so that we have a regular flow of such cases so we are doing a record setting job every year of addressing those issues and bringing lawsuits. My challenge now is to develop similar systems under each of our other statutes, and I'm making significant progress in that. We are reaching out to African American organizations, Arab American organizations and others whom we had not reached out to before to make sure that we get as much information and do as much for everyone as we possibly can.

Mr. FRANKS. Thank you.

Mr. Tanner, the Carter-Baker report on election reform, I'm sure you're probably more familiar with it than anyone on this panel. But they reported that a substantial amount of Americans are registered to vote in two different States. And according to those news reports, Florida has more than 140,000 voters who are apparently registered in four other States; in Georgia, Ohio, New York and

North Carolina. This includes almost 64,000 voters from New York City alone who are also registered to vote in Florida as well. Voting records of the 2000 election suggested that more than 2,000 people voted in more than one of those States. Duplicate registrations are seen elsewhere. As many as 60,000 voters are reportedly registered in both North Carolina and South Carolina. How do we address that? What has been your approach to that issue.

Mr. TANNER. The issue of people voting in two different States or voting twice would fall within the jurisdiction of the Criminal Division of the Department of Justice. Our office enforces the civil laws that are designed to and do a great job of providing voter access. But we do not do criminal enforcement in our shop.

Mr. FRANKS. Thank you, Mr. Tanner.

My time is up. Thank you, Mr. Chairman.

Mr. NADLER. Thank you. I now recognize the distinguished Member of the full Committee, Mr. Conyers.

Mr. CONYERS. Thank you, Chairman Nadler. This is the kind of a hearing in which we get two diametrically opposed reports of what's going on. We called this hearing because we are gravely disturbed about the ineffectiveness and the activities that have gone on within the voter section. And the voter section chief comes to us this morning to tell us he's never been more proud of the voter rights section and its accomplishments and, further, that he's got the greatest group of people, energetic, committed to voter rights, activity and its promotion. And as a matter of fact, it has never been better.

And I think what we are seeing here with the Georgia voter ID case just starts off this discussion which we've been on. I didn't know we were going to be on it for so long. But the bottom line of all of this is, is that there wouldn't have been any Georgia voter ID law if your Department had followed the recommendations of your career lawyers. And it was because you overturned their work and decided to do something differently we now have not only Georgia voter ID, but we have other places which are screaming about voter fraud. The last time I looked, we had 82 individual cases of voter fraud that were prosecuted over the last period of 6 years. And so it seems to me that this is a hearing that we are going to go over sentence by sentence.

Now, having said that, and I notice that the gentleman from Georgia, John Lewis, was over here for a while and still is. I want to turn very quickly to Ohio. You see, the Chairman of this Committee and I were in Ohio in Columbus. We he had a forum. We had Members of Congress, Stephanie Tubbs Jones, Sherrod Brown and other Members, the now Governor of Ohio and others were there. And I want to tell you, Mr. Section Chief, I never met so many hundreds of people furious about the process that characterized the elections in Ohio in November 2004. Never in my life. And I've been south and north in this situation. And yet you explain that—and there were African Americans and White people, Democrats and Republicans, people that worked in the electoral process, all furious about the misstatements, the deceptive practices, the purges that went on. And your letter that says allowing for problems of incidents in individual precincts, it appears that the tendency in Franklin County for White voters to cast ballots in the

morning, i.e., before work, and for Black workers to cast ballots in the afternoon, i.e., after work, we have established this tendency through local contacts and through both political parties.

Now, that was the only thing that nobody complained of, as I recall, at that hearing. That was the one thing that was not the problem. The problem is that there were people purged. There were incredible misstatements by the secretary of State at that time. The weight and the quality of the paper that one must apply for a ballot was all on there. And so I would refer you to the book "What Went Wrong in Ohio" that documents the incredible activities that took place there. And for you to have sent this letter does anything but demonstrate, the one you sent to Franklin County from the Department of Justice, anything, it demonstrates anything but your concern about voter rights, enforcement and encouraging the vote.

Now, I just want to conclude. We have a lack of prosecution in the voting rights section. We need to do a lot, lot more in your section. And I'm hoping that you will take what will be directed to you as constructive. Because the one thing I'm concerned about is that we stop having happen what's happened since the 2000 elections, and then you come here to stagger our imagination by telling us that it has never been better. It has never been worse.

Mr. NADLER. The time of the gentleman has expired.

I recognize the gentleman from Indiana for 5 minutes.

Mr. TANNER. I would welcome an opportunity to comment on Chairman Conyers' observations on that.

Mr. NADLER. The gentleman's time has expired. We'll make it later.

Mr. TANNER. Certainly. Thank you.

Mr. PENCE. Thank you, Mr. Chairman.

I would be pleased, Mr. Tanner, if you would like to respond to Chairman Conyers' question during my time. You may proceed.

Mr. TANNER. Thank you very much, Mr. Pence.

I would like to thank Chairman Conyers for the work that he did do in Ohio where there were a lot of issues raised for all parts of the election process; issues that properly come before our office or the Criminal Division of the Criminal Section of the Civil Rights Division, many issues that fall within the jurisdiction of State officials, and many issues for this Congress to consider and address. And I appreciate your leadership in that and your report, which actually was the thing that spurred the investigation.

From the report by Chairman Conyers, I determined that there was a good likelihood of a potential for a lawsuit in Franklin County. We went there. We gathered facts that fit into our statute. And many of the problems mentioned by the Chairman are things that happened outside of the county, that happened at the State level and that had already been addressed. I don't apologize for those things or defend those things, but I do note the context.

The statistics in Franklin County showed that in terms of the actual voters who showed up on Election Day, there were more voters per voting machine in the predominantly White precincts than there were in the predominantly African American precincts, which was not the same as the voter registration data. We looked into it. We talked, as we mentioned, to both parties and other knowledgeable individuals. And ultimately, as I always must do, I based a de-

cision after careful scrutiny on the facts and on the applicable law and made the complex, lengthy decision whether or not we can prove a violation of a specific statute in Federal court.

Mr. PENCE. Thank you for that.

Reclaiming my time, I'm happy to extend that courtesy to you. I want to appreciate very much your apology today in the clarification of the comments that you made at the recent meeting of the National Latino Congresso. I want to acknowledge your three decades of commitment to civil liberties and to protecting against discrimination, particularly in the ballot box. I voted in favor of the Voting Rights Act reauthorization last year. I disagreed with some Members of this panel on my side of the aisle in defending bilingual ballots. It may just come up in a minute or two. But let me also offer—I would like to, Mr. Chairman, if we can submit in the record the strong letter of recommendation directed to you from the American Arab Anti-Discrimination Committee, a record that describes our witness as an individual who has, quote, gone above and beyond the normal call of a public servant to listen, work and incorporate the input of a diversity of communities, and extols his dedication of 30 years of his life to fighting discrimination.

[The information referred to follows:]

American-Arab Anti-Discrimination Committee

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In Memoriam
Hala Salaam Maksoud, PhD (1943-2002)
Alex Odeh (1944-1985)

October 26, 2007

The Honorable Jerrold Nadler, Chairman
Subcommittee on the Constitution, Civil Rights, and Civil Liberties
House Committee on the Judiciary
2334 Rayburn House Office Building
Washington, DC 20515

VIA FAX: (202) 225-6923

Dear Chairman Nadler:

On October 30, as the House Subcommittee on the Constitution, Civil Rights, and Civil Liberties convenes an oversight hearing on the Voting Section of the Civil Rights Division of the US Department of Justice (DOJ), the American-Arab Anti-Discrimination Committee (ADC), the nation's premier organization dedicated to ensuring the civil rights of Arab Americans, would like to express our support for Voting Rights Section Chief John Tanner.

Mr. Tanner has shown nothing but the most professional leadership and courtesy in his proactive outreach efforts on behalf of the Voting Section to the Arab-American community. He has gone above and beyond the normal call of a public servant to listen, work with and incorporate the input of a diversity of communities from across this nation. As one of ADC's many efforts to work with our government officials, we are proud to have a solid working relationship with Mr. Tanner and his team. He is someone in government who takes seriously the concerns of Arab Americans. He has worked with our team in Washington DC as well as ADC members in New Jersey, Texas and Michigan on proactively and constructively addressing challenges that our community may face in the voting process.

John Tanner is a career public servant who has dedicated 30 years of his life to fighting discrimination in voting and protecting civil rights. He is a man who served both in a political position in the White House during the Clinton administration and was elevated to a civil service leadership position during the current Bush administration, and, our work with him has proven to us that he does what he does because he cares deeply about voting rights.

Thank you for your consideration of this matter. Should you or your staff have any questions concerning ADC's work with Mr. Tanner, please do not hesitate to contact me at kshora@adc.org or (202) 244-2990.

Sincerely,

Kareem Shora, JD, LL.M.
National Executive Director

Mr. NADLER. Without objection.

Mr. PENCE. I would just ask in my remaining time, Mr. Tanner, there was so much controversy in the last Presidential Election over accusations of the rights of minority voters being infringed upon. Could you speak about any steps your division has taken, you've personally taken to prepare for the 2008 elections? Can you give us assurances that the Voting Section will respond to problems of the kind experienced or alleged to be experienced in 2000 and 2004?

Mr. TANNER. I would be happy to, and I appreciate the very important question. We have begun reaching out, and began some time ago to reach out to the groups that monitor elections, as I did before the 2004 election, to minority groups across the spectrum. I much appreciate the letter from the Arab American Anti-Defamation Committee because they may well be the group that in many ways is most vulnerable because of all the circumstances of this country. And I felt that we have a particular obligation to protect them. But also to many organizations—the NAACP, the Lawyers Committee, the NAACP Legal Defense Fund, the National Congress of American Indians, LULAC, MALDEF, MALEO, and groups across the spectrum so that we can work together so we can do the best possible job anticipating problems, getting information early enough to make the difficult decisions, not only about where there might be a problem on Election Day but where we should have someone stand, in which building they should be. It is very complex. It is very important. We've been doing more of it than ever. In 2008, and the time as Mr. Conyers mentioned, between now and 2008, is such an important time, there's not a lot of time, and there is an awful lot to do.

Mr. NADLER. Thank you. And before proceeding to our next question, I simply want to recognize and welcome the presence of one of the giants of the civil rights movement in the struggle for voting rights, our colleague, the gentleman from Georgia, Mr. Lewis, and to welcome him here today. And I now recognize the gentleman from Alabama for 5 minutes.

Mr. DAVIS. Thank you, Mr. Chairman.

Mr. Tanner, good morning to you.

Mr. TANNER. Good morning.

Mr. DAVIS. I echo the concerns that Mr. Nadler and Mr. Conyers raise. I did note a number of letters that you submitted. Mr. Pence just alluded to some of them, people with whom you've worked in the civil rights community. I think you submitted some letters from some people I know in Alabama. There's only one problem with letters. Someone somewhere once said that only people with bad credit need co-signers.

But let me turn to a more important observation than that. You apologized at the beginning of your comments today for the statements that you made. I'm not 100 percent sure what you're apologizing for. I'm not sure if you're apologizing for how people read the statements or if you're apologizing for making them. So I want to give you some chance to be more specific about that. I want to read you a quote, and first of all tell me if you said it. Quote, our society is such that minorities don't become elderly the way White people do; they die first. Did you say that?

Mr. TANNER. That was part of my statement, Mr. Davis, and I welcome——

Mr. DAVIS. I just want to ask you if you said that, and you've said that you did. Is that an accurate statement?

Mr. TANNER. It is a sad fact.

Mr. DAVIS. Is it an accurate statement?

Mr. TANNER. I believe that the census data shows that life expectancy, in Georgia anyway, which is what I was addressing, is lower for African Americans.

Mr. DAVIS. Well, you don't say that. You say that minorities don't become elderly the way White people do. Is that accurate?

Mr. TANNER. It was a very clumsy statement.

Mr. DAVIS. Is it an accurate statement?

Mr. TANNER. I believe that I've said—Mr. Davis, I may not completely understand the question.

Mr. DAVIS. The question is, is it accurate that minorities don't become elderly the way White people do?

Mr. TANNER. The statistical data indicate that life expectancy is lower for minorities.

Mr. DAVIS. Then you say, they die first. Who is the they?

Mr. TANNER. I was addressing the sad fact that the inequities in this country are such, and I'm not an expert on all of those inequities——

Mr. DAVIS. Let me slow you down because we only have 5 minutes, and you'll have an opportunity to respond to our comments, so my time is precious. Let me ask you this. In my State of Alabama, 2004 Presidential Election, what percentage of minorities do you think voted in that election for President, Mr. Tanner, in my State of Alabama?

Mr. TANNER. I would be—I do not know the figure, and I would like to make sure before I give any information.

Mr. DAVIS. Do you have a ballpark estimate?

Mr. TANNER. I don't have an estimate. I would have to——

Mr. DAVIS. The number was 73 percent. Do you happen to know what percentage of Whites voted in my State of the Presidential in 2004?

Mr. TANNER. I also do not know that.

Mr. DAVIS. The number was 74 percent. Do you know what percentage of those minority voters were elderly in my State?

Mr. TANNER. It is my belief, but I would have to check the data, that elderly voters in Alabama, many of whom I've worked with, have good turnout.

Mr. DAVIS. Yes, elderly voters have good turnout. And in fact, minority elderly voters have a very good turnout; don't they, Mr. Tanner? Just to frame this in terms of statistics, in my State of Alabama in 2004, of that 73 percent Black voter turnout, 40 percent of them were over 60. That is actually a higher percentage than in the White community. So if you look at the statistics rather than your stereotypes, elderly Blacks are more likely to vote than elderly Whites. And I think this is—did you also make the comment, by the way, that Blacks were more likely to go to check cashing businesses at some point in Georgia? Did you make that observation?

Mr. TANNER. In addressing the——

Mr. DAVIS. Don't give me a long answer. I don't have the time. Did you make the comment, or did you not?

Mr. TANNER. I made a comment about that.

Mr. DAVIS. Now, this is the point, Mr. Tanner, I think we want to drive home. Do you have any statistics about how many Blacks visit check cashing businesses versus the number of Whites who do?

Mr. TANNER. I do not have any with me, but I believe such statistics about the number of unbanked persons here in the United States by race would be available through the Office of Comptroller of the Currency.

Mr. DAVIS. Do you know those numbers?

Mr. TANNER. I do not know those numbers.

Mr. DAVIS. Well, this is the problem. Once again, you engaged in an analysis without knowing the numbers. And the point, Mr. Tanner, if I can just finish my observation, Mr. Chairman, you're a policy maker, sir. You are charged with enforcing the voting rights laws in the country. And if you are not fully informed about things that you're talking about and pontificating about, if you're basing your conclusions on stereotypes and generalizations, that raises a question in the minds of some of us whether or not you are the person in the best position to make these choices. You said that minorities don't become elderly the way White people do; they die first. Then you say, well, that was a horrible generalization on my part. You say you don't know how many elderly minorities vote versus the number of Whites who vote who are elderly. You make observations about people going to check cashing places. And you suggest that, well, because Blacks go to check cashing places they surely must have photo ID. And then I ask you if there's a statistical basis for that. You say you don't know it. If you are basing your conclusions on stereotypes rather than facts, then it suggests to some of us that someone else can do this job better than you can.

Mr. TANNER. I would welcome an opportunity to address that. I did not make my decisions based on assumptions. We looked at the numbers. I had been surprised by those numbers. And I was trying to——

Mr. DAVIS. Did you look at numbers regarding elderly minority voter participation, because those are the relevant numbers?

Mr. TANNER. The relevant numbers, I believe, that I looked at were whether or not there were people who did not—first, did not have photo ID in Georgia.

Mr. DAVIS. Did you look at numbers regarding elderly minority voter participation, and can you cite those numbers to the Committee?

Mr. TANNER. The data showed that everyone in Georgia, that there were more people who had the ID of all ages, all voting age people who had the ID, than there were voting age people who were eligible to have the ID.

Mr. DAVIS. Did you look at the percentage of elderly minority voters in Georgia?

Mr. TANNER. In making the decision, I looked at the facts that were relevant to the——

Mr. DAVIS. Did you look at the percentage of elderly minority voters in Georgia?

Mr. TANNER. No.

Mr. DAVIS. Thank you.

Mr. NADLER. The gentleman's time has expired.

The gentleman from Iowa.

Mr. KING. Thank you, Mr. Chairman.

Mr. Tanner, I appreciate you coming before this Committee. First, I would ask you, you have testified that your statement that brought about this hearing was clumsy. And I want to give you an opportunity with clarity to state before this Committee, do you believe that your statement remains supported by empirical data and fact?

Mr. TANNER. I, again, apologize for the statement. I do believe that the statement with respect to life expectancy, that it is a sad and sorrowful fact that in this country, or in Georgia at least, which is the place I've looked at the data, and each State should be considered separately, that life expectancy is lower among members of minority groups. I believe, as to the other observations, speculations, that there are data supporting those observations. And I very much appreciate any time when someone disagrees with a proposition I've made, to receive evidence or information that corrects my understanding; I realize that I do not know everything. I welcome new information.

Mr. KING. Thank you, Mr. Tanner.

And I'll just boil that down to if the facts support your statement, then why do you think that you're here before this Committee?

Mr. TANNER. Well, I welcome the opportunity to explain what I do before the Committee. I certainly made the statement and observation in a very clumsy way.

Mr. KING. I've asked you an inappropriate question, because in the end, you have to speculate on the motives of some of the questions that are being asked of you. And I wanted to point out that there's a difference between being factually correct.

Mr. NADLER. Would the gentleman yield for a moment?

Mr. KING. I would yield.

Mr. NADLER. Thank you. As Chair, I simply want to point out that this Committee is not having this hearing simply because of a statement made by Mr. Tanner. It is one in a series of hearings on the voter rights section and on the Civil Rights Division and would have occurred regardless of any statements he made. It had been prepared, it had been scheduled long before these recent statements, so the hearing would have occurred in any event.

Mr. KING. Reclaiming my time, I thank the Chairman for that clarification. And as I said, I really intend to withdraw the question because it put the witness in a bad position.

So I would continue on. And that would be—I think it's important to know that if a statement is made publicly and is supported by the facts, then the subject comes down to then was it insensitive or wasn't it? You've already spoken to that. I'm ready to accept that as a definition of what happened and move on.

I think it's important here that we often are debating things beyond the facts, and sometimes a person is criticized for a factual statement but there is not opposing documentation of another group of data that would rebut that. And that seems to be what I am missing here.

I wanted to ask you, you've testified that you brought 23 different cases under your jurisdiction. How many investigations have you launched? Do you know the answer to that?

Mr. TANNER. I do not know the exact number of investigations. We have had a number of investigations that are ongoing, some of which are very near to fruition.

Mr. KING. Would it be in multiples of the 23 cases?

Mr. TANNER. It would be far more than 23.

Mr. KING. Are we talking hundreds or thousands?

Mr. TANNER. It would be in the range of hundreds.

Mr. KING. Okay. That gives me some concept of that. And should the law be color-blind, Mr. Tanner?

Mr. TANNER. I think that the Constitution protects all citizens of this country from discrimination on the basis of their race.

Mr. KING. I am watching my clock tick down. And the question goes then to the Voting Rights Act, because the Voting Rights Act in fact is not color-blind, is it not?

Mr. TANNER. The Voting Rights Act is a very important remedial statute directed to address a long and, frankly, appalling history of segregation in this country.

Mr. KING. But is it color-blind?

Mr. TANNER. The Act protects all citizens without regard to their race.

Mr. KING. I will state this and then ask you to disagree. I will state it again. The Voting Rights Act is not color-blind. Do you agree or disagree?

Mr. TANNER. I think that the Voting Rights Act recognizes the special—the discrimination that has occurred against members of racial——

Mr. KING. I understand. I recognize that. So you don't disagree with my statement, but you would like to expand a little more. I just don't have time for that.

Again, I will ask you, has it been brought to your attention that there have been local jurisdictions that have passed what one would view as anti-illegal immigrant ordinances within their, say, county jurisdictions, voting jurisdictions, that you might be aware of?

Mr. TANNER. There is a great deal of tension about the immigration issue in this country. Certainly that is something that we are aware of and especially as it interacts with the voting process.

Mr. KING. Have some of these organizations that advocate in favor of illegal immigrants met with you? Have you had conversations with them? And I would say in particular maybe La Raza, MALDEF, and LULAC?

Mr. TANNER. I have met a number of times with representatives of La Raza, MALDEF and LULAC.

Mr. KING. And have they ever asked to you bring an investigation into a jurisdiction that has passed local ordinances that would be supportive of laws to enforce our illegal immigration?

Mr. TANNER. Those organizations have brought issues to our attention as they affect the Voting Rights Act.

Mr. KING. Have they asked you to intervene any of these jurisdictions; in particular, Prince William County, just across the river?

Mr. TANNER. Well, we have received inquiries about the voting situation in Prince William County, as we do from other groups all across the United States.

Mr. KING. Have they asked you to investigate in those jurisdictions?

Mr. TANNER. I don't know that we have discussed those jurisdictions. We have discussed Prince William County. I have discussed Prince William County.

Mr. KING. I thank the witness. I am watching the clock here. I have some other questions to submit in writing. I appreciate the opportunity, and I would yield back the balance of my time.

Mr. NADLER. The witness may answer the question.

Mr. TANNER. Answering questions about legal issues can sometimes be difficult to do in very short language, and I apologize for that. I was not trying to be evasive. I was trying to tell you what we had in fact done. Thank you for the time, Mr. Chairman.

Mr. NADLER. Thank you. I will now recognize the gentlelady from Florida.

Ms. WASSERMAN SCHULTZ. Thank you, Mr. Chairman. Mr. Chairman, first I would like to ask unanimous consent to submit this article for the record, from *The New York Times* of April 12, 2007. The headline is, "In 5-Year Effort, Scant Evidence of Voting Fraud."

Mr. NADLER. Without objection.

[The information referred to follows:]

The New York Times
nytimes.com

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April 12, 2007

In 5-Year Effort, Scant Evidence of Voter Fraud

By ERIC LIPTON and IAN URBINA

Correction Appended

WASHINGTON, April 11 — Five years after the Bush administration began a crackdown on voter fraud, the Justice Department has turned up virtually no evidence of any organized effort to skew federal elections, according to court records and interviews.

Although Republican activists have repeatedly said fraud is so widespread that it has corrupted the political process and, possibly, cost the party election victories, about 120 people have been charged and 86 convicted as of last year.

Most of those charged have been Democrats, voting records show. Many of those charged by the Justice Department appear to have mistakenly filled out registration forms or misunderstood eligibility rules, a review of court records and interviews with prosecutors and defense lawyers show.

In Miami, an assistant United States attorney said many cases there involved what were apparently mistakes by immigrants, not fraud.

In Wisconsin, where prosecutors have lost almost twice as many cases as they won, charges were brought against voters who filled out more than one registration form and felons seemingly unaware that they were barred from voting.

One ex-convict was so unfamiliar with the rules that he provided his prison-issued identification card, stamped "Offender," when he registered just before voting.

A handful of convictions involved people who voted twice. More than 30 were linked to small vote-buying schemes in which candidates generally in sheriff's or judge's races paid voters for their support.

A federal panel, the Election Assistance Commission, reported last year that the pervasiveness of fraud was debatable. That conclusion played down findings of the consultants who said there was little evidence of it across the country, according to a review of the original report by The New York Times that was reported on Wednesday.

Mistakes and lapses in enforcing voting and registration rules routinely occur in elections, allowing thousands of ineligible voters to go to the polls. But the federal cases provide little evidence of widespread, organized fraud, prosecutors and election law experts said.

"There was nothing that we uncovered that suggested some sort of concerted effort to tilt the election," Richard G. Frohling, an assistant United States attorney in Milwaukee, said.

Richard L. Hasen, an expert in election law at the Loyola Law School, agreed, saying: "If they found a single case of a conspiracy to affect the outcome of a Congressional election or a statewide election, that would be significant. But what we see is isolated, small-scale activities that often have not shown any kind of criminal intent."

For some convicted people, the consequences have been significant. Kimberly Prude, 43, has been jailed in

Milwaukee for more than a year after being convicted of voting while on probation, an offense that she attributes to confusion over eligibility.

In Pakistan, Usman Ali is trying to rebuild his life after being deported from Florida, his legal home of more than a decade, for improperly filling out a voter-registration card while renewing his driver's license.

In Alaska, Rogelio Mejorada-Lopez, a Mexican who legally lives in the United States, may soon face a similar fate, because he voted even though he was not eligible.

The push to prosecute voter fraud figured in the removals last year of at least two United States attorneys whom Republican politicians or party officials had criticized for failing to pursue cases.

The campaign has roiled the Justice Department in other ways, as career lawyers clashed with a political appointee over protecting voters' rights, and several specialists in election law were installed as top prosecutors.

Department officials defend their record. "The Department of Justice is not attempting to make a statement about the scale of the problem," a spokesman, Bryan Sierra, said. "But we are obligated to investigate allegations when they come to our attention and prosecute when appropriate."

Officials at the department say that the volume of complaints has not increased since 2002, but that it is pursuing them more aggressively.

Previously, charges were generally brought just against conspiracies to corrupt the election process, not against individual offenders, Craig Donsanto, head of the elections crimes branch, told a panel investigating voter fraud last year. For deterrence, Mr. Donsanto said, Attorney General Alberto R. Gonzales authorized prosecutors to pursue criminal charges against individuals.

Some of those cases have baffled federal judges.

"I find this whole prosecution mysterious," Judge Diane P. Wood of the United States Court of Appeals for the Seventh Circuit, in Chicago, said at a hearing in Ms. Prude's case. "I don't know whether the Eastern District of Wisconsin goes after every felon who accidentally votes. It is not like she voted five times. She cast one vote."

The Justice Department stand is backed by Republican Party and White House officials, including Karl Rove, the president's chief political adviser. The White House has acknowledged that he relayed Republican complaints to President Bush and the Justice Department that some prosecutors were not attacking voter fraud vigorously. In speeches, Mr. Rove often mentions fraud accusations and warns of tainted elections.

Voter fraud is a highly polarized issue, with Republicans asserting frequent abuses and Democrats contending that the problem has been greatly exaggerated to promote voter identification laws that could inhibit the turnout by poor voters.

The New Priority

The fraud rallying cry became a clamor in the Florida recount after the 2000 presidential election. Conservative watchdog groups, already concerned that the so-called Motor Voter Law in 1993 had so eased voter registration that it threatened the integrity of the election system, said thousands of fraudulent votes had been cast.

Similar accusations of compromised elections were voiced by Republican lawmakers elsewhere.

The call to arms reverberated in the Justice Department, where John Ashcroft, a former Missouri senator, was just

starting as attorney general.

Combating voter fraud, Mr. Ashcroft announced, would be high on his agenda. But in taking up the fight, he promised that he would also be vigilant in attacking discriminatory practices that made it harder for minorities to vote.

"American voters should neither be disenfranchised nor defrauded," he said at a news conference in March 2001.

Enlisted to help lead the effort was Hans A. von Spakovsky, a lawyer and Republican volunteer in the Florida recount. As a Republican election official in Atlanta, Mr. Spakovsky had pushed for stricter voter identification laws. Democrats say those laws disproportionately affect the poor because they often mandate government-issued photo IDs or driver's licenses that require fees.

At the Justice Department, Mr. Spakovsky helped oversee the voting rights unit. In 2003, when the Texas Congressional redistricting spearheaded by the House majority leader, Tom DeLay, Republican of Texas, was sent to the Justice Department for approval, the career staff members unanimously said it discriminated against African-American and Latino voters.

Mr. Spakovsky overruled the staff, said Joseph Rich, a former lawyer in the office. Mr. Spakovsky did the same thing when they recommended the rejection of a voter identification law in Georgia considered harmful to black voters. Mr. Rich said. Federal courts later struck down the Georgia law and ruled that the boundaries of one district in the Texas plan violated the Voting Rights Act.

Former lawyers in the office said Mr. Spakovsky's decisions seemed to have a partisan flavor unlike those in previous Republican and Democratic administrations. Mr. Spakovsky declined to comment.

"I understand you can never sweep politics completely away," said Mark A. Posner, who had worked in the civil and voting rights unit from 1980 until 2003. "But it was much more explicit, pronounced and consciously done in this administration."

At the same time, the department encouraged United States attorneys to bring charges in voter fraud cases, not a priority in prior administrations. The prosecutors attended training seminars, were required to meet regularly with state or local officials to identify possible cases and were expected to follow up accusations aggressively.

The Republican National Committee and its state organizations supported the push, repeatedly calling for a crackdown. In what would become a pattern, Republican officials and lawmakers in a number of states, including Florida, New Mexico, Pennsylvania and Washington, made accusations of widespread abuse, often involving thousands of votes.

In swing states, including Ohio and Wisconsin, party leaders conducted inquiries to find people who may have voted improperly and prodded officials to act on their findings.

But the party officials and lawmakers were often disappointed. The accusations led to relatively few cases, and a significant number resulted in acquittals.

The Path to Jail

One of those officials was Rick Graber, former chairman of the Wisconsin Republican Party.

"It is a system that invites fraud," Mr. Graber told reporters in August 2005 outside the house of a Milwaukeean he said had voted twice. "It's a system that needs to be fixed."

Along with an effort to identify so-called double voters, the party had also performed a computer crosscheck of voting records from 2004 with a list of felons, turning up several hundred possible violators. The assertions of fraud were turned over to the United States attorney's office for investigation.

Ms. Prude's path to jail began after she attended a Democratic rally in Milwaukee featuring the Rev. Al Sharpton in late 2004. Along with hundreds of others, she marched to City Hall and registered to vote. Soon after, she sent in an absentee ballot.

Four years earlier, though, Ms. Prude had been convicted of trying to cash a counterfeit county government check worth $1,254. She was placed on six years' probation.

Ms. Prude said she believed that she was permitted to vote because she was not in jail or on parole, she testified in court. Told by her probation officer that she could not vote, she said she immediately called City Hall to rescind her vote, a step she was told was not necessary.

"I made a big mistake, like I said, and I truly apologize for it," Ms. Prude said during her trial in 2005. That vote, though, resulted in a felony conviction and sent her to jail for violating probation.

Of the hundreds of people initially suspected of violations in Milwaukee, 14 — most black, poor, Democratic and first-time voters — ever faced federal charges. United States Attorney Steven M. Biskupic would say only that there was insufficient evidence to bring other cases.

No residents of the house where Mr. Graber made his assertion were charged. Even the 14 proved frustrating for the Justice Department. It won five cases in court.

The evidence that some felons knew they that could not vote consisted simply of a form outlining 20 or more rules that they were given when put on probation and signs at local government offices, testimony shows.

The Wisconsin prosecutors lost every case on double voting. Cynthia C. Alicea, 25, was accused of multiple voting in 2004 because officials found two registration cards in her name. She and others were acquitted after explaining that they had filed a second card and voted just once after a clerk said they had filled out the first card incorrectly.

In other states, some of those charged blamed confusion for their actions. Registration forms almost always require a statement affirming citizenship.

Mr. Ali, 68, who had owned a jewelry store in Tallahassee, got into trouble after a clerk at the motor vehicles office had him complete a registration form that he quickly filled out in line, unaware that it was reserved just for United States citizens.

Even though he never voted, he was deported after living legally in this country for more than 10 years because of his misdemeanor federal criminal conviction.

"We're foreigners here," Mr. Ali said in a telephone interview from Lahore, Pakistan, where he lives with his daughter and wife, both United States citizens.

In Alaska, Rogelio Mejorada-Lopez, who manages a gasoline station, had received a voter registration form in the mail. Because he had applied for citizenship, he thought it was permissible to vote, his lawyer said. Now, he may be deported to Mexico after 16 years in the United States. "What I want is for them to leave me alone," he said in an interview.

Federal prosecutors in Kansas and Missouri successfully prosecuted four people for multiple voting. Several claimed

residency in each state and voted twice.

United States attorney's offices in four other states did turn up instances of fraudulent voting in mostly rural areas. They were in the hard-to-extinguish tradition of vote buying, where local politicians offered $5 to $100 for individuals' support.

Unease Over New Guidelines

Aside from those cases, nearly all the remaining 26 convictions from 2002 to and 2005 — the Justice Department will not release details about 2006 cases except to say they had 30 more convictions— were won against individuals acting independently, voter records and court documents show.

Previous guidelines had barred federal prosecutions of "isolated acts of individual wrongdoing" that were not part of schemes to corrupt elections. In most cases, prosecutors also had to prove an intent to commit fraud, not just an improper action.

That standard made some federal prosecutors uneasy about proceeding with charges, including David C. Iglesias, who was the United States attorney in New Mexico, and John McKay, the United States attorney in Seattle.

Although both found instances of improper registration or voting, they declined to bring charges, drawing criticism from prominent Republicans in their states. In Mr. Iglesias's case, the complaints went to Mr. Bush. Both prosecutors were among those removed in December.

In the last year, the Justice Department has installed top prosecutors who may not be so reticent. In four states, the department has named interim or permanent prosecutors who have worked on election cases at Justice Department headquarters or for the Republican Party.

Bradley J. Schlozman has finished a year as interim United States attorney in Missouri, where he filed charges against four people accused of creating fake registration forms for nonexistent people. The forms could likely never be used in voting. The four worked for a left-leaning group, Acorn, and reportedly faked registration cards to justify their wages. The cases were similar to one that Mr. Iglesias had declined to prosecute, saying he saw no intent to influence the outcome of an election.

"The decision to file those indictments was reviewed by Washington," a spokesman for Mr. Schlozman, Don Ledford, said. "They gave us the go-ahead."

Sabrina Pacifici and Barclay Walsh contributed research.

Correction: April 14, 2007

A front-page article on Thursday about the scant evidence of voter fraud that has been found since the Bush administration began a crackdown five years ago misstated a court ruling on a 2003 Texas Congressional redistricting law. While the Supreme Court ruled that the Texas Legislature violated the Voting Rights Act in redrawing a southwestern Texas district, the court upheld the other parts of the plan. It did not strike down the law.

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Ms. WASSERMAN SCHULTZ. Thank you.

Mr. Tanner, it is a privilege to be able to spend some time talking to you about this very important issue. You mentioned in your opening remarks that the purpose of the voter purging effort from your division was the result of a pursuit of voter fraud. And my colleague, Mr. Franks, referenced the State of Florida and numbers, something like 2,000 people who were listed as voting in both Florida and in another State. When the former Attorney General Gonzalez was here and we had an opportunity to question him about voter fraud, pursuing voter fraud being a priority of the Department of Justice and what a grave concern that was, he was unable to produce any significant evidence of widespread voter fraud, particularly deliberate voter fraud.

And I will reference the Federal Election Assistance Commission analysis that specifically said that despite the Department of Justice's pursuit of voter fraud—and despite your testimony just now that it is in the hundreds as far as convictions—only about 120 people have been charged and 86 convicted as of 2006 with voter fraud. And most of those, number one, were Democrats; and, number two, were found to only have mistakenly filled out voter registration forms or misunderstood eligibility rules.

So my question is this: I would think and wholeheartedly support that the pursuit of voter fraud, particularly deliberate voter fraud designed to impact the elections, would be a worthy goal. But it doesn't appear that the Department's pursuit of voter fraud has turned up any evidence of that. Very little, in fact.

And my specific question is that at any time during your tenure as chief, have you drawn up a list of voters that were thought to be ineligible to vote or ought to be removed from the rolls as part of your section 8 enforcement activity? And if so, in what States or cases? And what methodology was used to created that list or lists?

The reason that I am asking you is that in 2000—and I am from the State of Florida—our former Secretary of State and former colleague here in the House, Katherine Harris, purged 100,000 voters from our rolls in Florida who were eligible to vote. And so a widespread effort on your part, on the part of your division to do that, especially in light of the fact that there has been scant evidence of both voter fraud and less than 100 convictions from your Department, seems that this is an overzealous activity—that rather than continue to focus on that, you should be pursuing the low-income registration that you have completely abdicated your responsibility to do, and that is part of your mandate under the law.

Mr. TANNER. I welcome the opportunity to address your question. First, our section has nothing to do with voter fraud. The Criminal Division of the Department of Justice prosecutes cases of voter fraud. Our statutes are voter access cases.

Ms. WASSERMAN SCHULTZ. But what is the purpose—then if your section has nothing to do with voter fraud, what is your Department's purpose in pursuing purging of voters from the rolls? What is the reason for doing that?

Mr. TANNER. Under the National Voter Registration Act, passed by the Congress and signed by the President, there are list maintenance requirements that first of all——

Ms. WASSERMAN SCHULTZ. Right. I understand that.

Mr. TANNER. Require notice before anyone is purged, and that also require that persons who have died are no longer——

Ms. WASSERMAN SCHULTZ. Let me just interrupt you a second, because I want to make sure that rather than expounding, you are answering my question specifically.

For example, I understand the purpose—the general purpose of purging. But the priority that your division has made it is what deeply concerns me, especially given the track record from my home State.

In 2007 a lawsuit was dismissed from the Justice Department that was filed against the Missouri Secretary of State, alleging that her office failed to make a reasonable effort to remove ineligible people from local voter registration rolls. It was dismissed because the judge ruled that the government had provided no evidence of fraud.

I don't understand why it appears to be such an important priority since voter purging really seems to mostly just be an administrative function, and, in my lifetime, has always been treated as an administrative function, but your division has elevated it to a massive priority. And you just testified that your division has no responsibility for pursuing voter fraud. So, why?

Mr. TANNER. Counties in Missouri were removing voters from the active voter list without the notice required by the NVRA: they were removing voters. Other counties were not removing voters, and there was a county that had more voters on the rolls than they had people.

Ms. WASSERMAN SCHULTZ. They purged 50,000 in 2002, and in spite of that, you pressured them in 2005 to remove more, even though they were likely being cautious about removing voters from the rolls so that they could avoid the problems that they had had 3 years before.

Mr. TANNER. I think it is accurate to say that voters were being removed in Missouri without notice to——

Ms. WASSERMAN SCHULTZ. And you were encouraging them in 2005 to remove more.

Mr. TANNER. We sued them to stop them from removing voters without notice. That was a count in our lawsuit.

Ms. WASSERMAN SCHULTZ. Well, it was—the primary purpose of your lawsuit was that Missouri was failing to make a reasonable effort to remove ineligible people from local voter registration rolls, and that was dismissed in April of 2007; isn't that correct?

Mr. TANNER. The case was dismissed because the court determined that we had to sue each of the individual counties that was removing voters without——

Ms. WASSERMAN SCHULTZ. But a component of your lawsuit was that the office in Missouri had failed to make a reasonable effort to remove ineligible people from local voter registration rolls, not what you are representing here today as the primary purpose.

Mr. TANNER. There were two purposes——

Ms. WASSERMAN SCHULTZ. And you are conveniently choosing only to talk about the one that was not related to pushing them, pressuring them to remove ineligible voters from the rolls, even though 3 years before they had made a mistake in removing 50,000 voters from the rolls. Isn't that right?

Mr. TANNER. I believe that the complaint which addresses both issues speaks for itself. We would be happy to provide additional documents to the Committee, but we are——

Ms. WASSERMAN SCHULTZ. Thank you, Mr. Chairman. My time has expired.

Mr. NADLER. Thank you. The gentleman from Minnesota is recognized for 5 minutes.

Mr. ELLISON. Exactly what are you apologizing for?

Mr. TANNER. I hurt people.

Mr. ELLISON. How did you hurt them?

Mr. TANNER. The reactions of people to my statements, which were very contrary to what I was tying to communicate.

Mr. ELLISON. So are you apologizing because of the reaction people had to your statements?

Mr. TANNER. I caused that reaction—certainly not intentionally. I made a clumsy statement.

Mr. ELLISON. So what was clumsy about what you said?

Mr. TANNER. I'm sorry?

Mr. ELLISON. What was clumsy about what you said?

Mr. TANNER. I believe—well, what I was thinking——

Mr. ELLISON. No. What was clumsy about what you said?

Mr. TANNER. I was addressing a narrow issue of the statistics needed to show a violation of Federal law in a very clumsy tone, the tenor of my remarks.

Mr. ELLISON. So you are apologizing for your tone?

Mr. TANNER. I am apologizing that my tone caused this. I believe that I am responsible——

Mr. ELLISON. So the problem is the tone?

Mr. TANNER. I certainly had a bad tone and clumsiness to the statement.

Mr. ELLISON. Is it true that minorities died so that the voter ID laws just don't affect older people of color the same way that they do young people?

Mr. TANNER. I never ever meant to suggest——

Mr. ELLISON. I don't know what you are apologizing for. You say that you were right, but your tone was wrong. I don't know what you are saying you are sorry for. Could you please help me understand; if you are claiming that you are statistically correct, why are you apologizing? Are you trying to just carry favor?

Mr. TANNER. I am—I am not. I feel that if I make remarks that people misinterpret——

Mr. ELLISON. So people misinterpreted what you said?

Mr. TANNER. I apologize for that.

Mr. ELLISON. Wait a minute. You said—I'm sorry. Did people misinterpret what you said?

Mr. TANNER. I believe I said it in a way that did not communicate effectively.

Mr. ELLISON. "minorities don't become elderly the way White people do." Is that true?

Mr. TANNER. I think that is clumsily stated.

Mr. ELLISON. Is it true?

Mr. TANNER. People age in the same way.

Mr. ELLISON. Right. My dad is almost 80.

Mr. TANNER. Absolutely.

Mr. ELLISON. He is Black.

Mr. TANNER. I don't mean to suggest there are not elderly people.

Mr. ELLISON. What does it matter—what difference does it make whether the statistics—what does that matter to the individual voter?

Mr. TANNER. It matters not at all to the individual voter.

Mr. ELLISON. So your statement was also irrelevant; is that true?

Mr. TANNER. The statement was addressing a specific assertion related to law enforcement.

Mr. ELLISON. Basically your statement that minorities don't become elderly the way White people do has no relevance to whether an individual voter ID bill should apply to minorities or seniors; isn't that right? It just doesn't matter. So if it doesn't matter, why are you making the point?

Mr. TANNER. I was trying to address how I ran—the presumptions that I made.

Mr. ELLISON. Right. Presumptions.

Mr. TANNER. Presumptions that I made.

Mr. ELLISON. Presumptions, which is similar to the word "assumptions," which is similar to the concept of stereotype, right?

Mr. TANNER. I had assumed——

Mr. ELLISON. Let me ask you this. What is a poll tax?

Mr. TANNER. A poll tax is a requirement that someone purchase or pay a tax solely for the purpose of voting.

Mr. ELLISON. Does the 24th amendment speak to poll taxes?

Mr. TANNER. It does.

Mr. ELLISON. What does it say about it?

Mr. TANNER. I do not have the text of the amendment in front of me.

Mr. ELLISON. I didn't ask you for the text. What does it say about it?

Mr. TANNER. It bans poll taxes.

Mr. ELLISON. So a poll tax is a fee that is required for a voter to pay before they can vote, right? Yes or no.

Mr. TANNER. Yes. That would—a poll tax would be such a fee.

Mr. ELLISON. What is the cost of getting an ID for a person who doesn't have one in, say, Georgia?

Mr. TANNER. The IDs are available without cost in Georgia.

Mr. ELLISON. Okay. So there is no cost to it. What about the information you need to get an ID?

Mr. TANNER. At the present time, there is no cost as I understand it.

Mr. ELLISON. So Georgia IDs are free to all people; is that right?

Mr. TANNER. Georgia now has a free ID available in every county to voters.

Mr. ELLISON. So you don't have—so I can go into Georgia and say I want an ID, and nobody is going to ask me to pay anything?

Mr. TANNER. I forget the precise things. But right, there is no fee. And the case——

Mr. ELLISON. And this is in regard to—this is in regard to income or anything? It is just free?

Mr. TANNER. At the present time, yes. Previously there had been an indigency oath requirement.

Mr. ELLISON. So the Secretary of State makes—the State of Georgia just foots the bill on that?

Mr. TANNER. I don't know about that.

Mr. ELLISON. What about in Indiana? Is it free there?

Mr. TANNER. I am not familiar with Indiana.

Mr. ELLISON. Last question. Arizona?

Mr. TANNER. I am not familiar with Arizona.

Mr. ELLISON. Maybe we will have a chance to come back.

Mr. NADLER. The time of the gentleman has expired. We have votes coming up. I would like to recognize the gentleman from Virginia, Mr. Scott, for 5 minutes.

Mr. SCOTT. Thank you.

Mr. Tanner, I just have a couple of quick questions, beginning with, under the Voting Rights Act that we passed last year, if you have a majority/minority district, you cannot dismantle that to create two districts in which the minority community cannot elect a candidate of its choice. If they had been electing a candidate of their choice in a majority/minority district, you can't dismantle that and create two districts where that is not the case; is that right?

Mr. TANNER. I believe that would be objectionable.

Mr. SCOTT. If the district is not technically, arithmetically, a majority, but the minority county has routinely elected candidates of its choice reliably and predictably, can you dismantle that district? Is that district protected under the Voting Rights Act?

Mr. TANNER. I think that the 50 percent question currently is an open question under the law.

Mr. SCOTT. Would you preclear a district, 49 percent that had been—where the African American community elected a candidate of its choice, and the submission has two districts where the community cannot elect candidates of its choice; would you preclear that?

Mr. TANNER. I do not believe that I would.

Mr. SCOTT. Okay. Now——

Mr. TANNER. I should stress that each of the submissions is decided on its own facts and the law at that time.

Mr. SCOTT. Well I'm asking you if it was submitted this afternoon, would you preclear it?

Mr. TANNER. No.

Mr. SCOTT. If the minority community can't elect a candidate of its choice on its own, but is reliably a part of a coalition that does elect the candidates and the coalition cannot elect candidates without overwhelming support from the minority community, and that submission dismantled that district, would you—it is called an influence or coalition district—would you preclear that?

Mr. TANNER. I think as we get into different issues about the facts of a specific case and the reliability of coalitions is going to affect the decision making. But the law clearly bans a retrogression in minority voting districts.

Mr. SCOTT. And you would count a coalition district going to a district where there is no influence as retrogression?

Mr. TANNER. I think a plan that reduces minority voting strength is going to be objectionable.

Mr. SCOTT. Okay. Now, do I understand that the voting rights section of the Civil Rights Division is subject to an employment discrimination—a pending employment discrimination complaint?

Mr. TANNER. I would be very happy to discuss personnel matters with the Committee in an appropriate forum. Obviously there are important privacy interests involved.

Mr. SCOTT. Is that a "yes"?

Mr. TANNER. It means that I would be very happy to discuss such issues in an appropriate forum.

Mr. SCOTT. Well, can you state whether or not partisan politics was illegally involved in employment decisions that are subject to those—that are the subject of those complaints—whether or not partisan political considerations were illegally involved in employment decisions in your division?

Mr. TANNER. In the Voting Section, they have not been a factor at all in my watch.

Mr. SCOTT. Now, you have apologized for those bizarre remarks. Following up from the comments from Mr. Ellison, after all is said and done, is it your position that the voter ID laws do or do not have disparate impact on African Americans?

Mr. TANNER. I think that each State and each law must be looked at—and I have to keep an open mind on. In Georgia, the facts showed the absence of discrimination, the Federal court found an absence of racial discrimination, and the case has been dismissed.

Mr. SCOTT. The case was dismissed after they changed the law after the first submission; is that right?

Mr. TANNER. The case was dismissed after that. But prior to that, they found the absence of——

Mr. SCOTT. Can you fail to preclear something without signoffs from higher-ups?

Mr. TANNER. Yes. I have the authority to preclear voting changes without signoff from anyone else.

Mr. SCOTT. Now as I understand it, the Georgia case, four of the five members from the team recommended disapproval. Is that right?

Mr. TANNER. I believe—I understand that there have been public comments to that effect.

Mr. SCOTT. Public comments say that Mr. Berman, Ms. Zabrisky, Ms. Moss, Mr. Moore, all recommended "no." And Mr. Rogers recommended "yes." Is that right?

Mr. TANNER. I can only speak to the public comments.

Mr. SCOTT. The public comments also say that Mr. Berman had been working in the division for 28 years; Ms. Zabrisky, 5 to 6 years; Mr. Moore, 5 years; Ms. Moss, 3 years. Is that about right?

Mr. TANNER. I don't know.

Mr. SCOTT. And—well, if you don't deny it, then it—and Mr. Rogers, how long had he been working for the division?

Mr. TANNER. A short period.

Mr. SCOTT. Three months?

Mr. TANNER. I don't know the precise time.

Mr. SCOTT. I just have one further question, Mr. Chairman. And that is, did you have an awards ceremony where everybody in your division but two received an award?

Mr. TANNER. No.

Mr. SCOTT. Have virtually all—did Mr. Rogers receive an award, an on-the-spot award?

Mr. TANNER. I have heard that.

Mr. SCOTT. And were the other people who disagreed with the Georgia decision reprimanded?

Mr. TANNER. No.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. NADLER. Thank you. We have to go vote now. I want to thank Mr. Tanner for his testimony. We have three votes. We will come back probably in about 15 minutes. Since we have another Committee following this, I urge everyone on the Subcommittee to return. As soon as we get to the last vote on the floor, we'll hear the second panel. Thank you.

The Committee stands in recess.

[Recess.]

Mr. NADLER. I thank the Members for returning, those who have. The hearing of the Subcommittee will resume. And we will begin by my introducing the Members of the second panel.

First is Laughlin McDonald. Since 1972, Laughlin McDonald has directed the Voting Rights Project with the American Civil Liberties Union in Atlanta, Georgia. Before that he taught at the University of North Carolina Law School and practiced law, specializing in voting rights and discrimination cases. He has argued cases before the U.S. Supreme Court, testified frequently before Congress, including this Subcommittee, and written for scholarly and popular publications on civil liberties issues. His most recent book is A Voting Rights Odyssey: Black Enfranchisement in Georgia.

Toby Moore, Dr. Moore, served as a political geographer and redistricting expert for the Voting Section of the Civil Rights Division of the Department of Justice from 2000 to 2006. In that position Dr. Moore analyzed local and State voting systems under the Voting Rights Act and other legislation and supported the Department litigation efforts. He also monitored the conduct of elections and negotiated redistricting agreements, winning three Department of Justice merit awards for his work. Following his government service, Dr. Moore served as project manager at the Center for Democracy and Election Management, developing a reform agenda for the Commission on Federal Election Reform, chaired by President Carter and former Secretary of State James Baker. He is the author of numerous scholarly papers and presentations on voting and elections issues.

Bob Driscoll is a partner of the Washington, D.C. office of Alston and Bird, with a diverse practice, focusing on, among other things, civil rights matters, including assisting with a preclearance of a State redistricting plan under section 5 of the Voting Rights Act. From 2001 to 2003, Mr. Driscoll served as Deputy Assistant Attorney General and Chief of Staff for the Civil Rights Division of the United States Department of Justice. In addition, Mr. Driscoll served as Commissioner of the Brown v. Board of Education 50th Anniversary Commission, a commission created by statute to commemorate that landmark decision.

Julie Fernandes is a senior policy analyst and senior counsel at the Leadership Conference of Civil Rights, the Nation's oldest, largest, and most diverse civil and human rights coalition. As Members of this Committee will no doubt recall that in 2006, Ms. Fernandes was active in the civil rights community's successful effort in support of the reauthorization of the Voting Rights Act of 1965.

Before joining the leadership conference Ms. Fernandes served as a trial attorney general in the Civil Rights Division of the Department of Justice and was counsel to Assistant Attorney General For Civil Rights, Bill Lann Lee.

Mr. NADLER. As a reminder, your written statements will be made part of the record in its entirety. I would ask that you now summarize your testimony in 5 minutes or less. To help you stay within that time, there is a timing light at your table. When the 1-minute light remains, the light will switch from green to yellow, and then red when the 5 minutes are up.

Before we begin, it's customary for the Committee to swear in its witnesses. If you could please stand and raise your right hand to take the oath.

[Witnesses sworn.]

Mr. NADLER. Thank you. Let the record reflect that each of the witnesses answered in the affirmative. You may be seated.

Mr. McDonald with—I don't know why it's in this order. It's not the order you see it in. But, Mr. McDonald, you may begin.

TESTIMONY OF LAUGHLIN McDONALD, DIRECTOR, VOTING RIGHTS PROJECT, SOUTHERN REGIONAL OFFICE, AMERICAN CIVIL LIBERTIES UNION (ACLU)

Mr. MCDONALD. Mr. Chairman, Members of the Committee.

Mr. NADLER. Can you use your mike, please?

Mr. MCDONALD. Is it on?

Mr. NADLER. Now it is.

Mr. MCDONALD. As we know, the Voting Section of the Department of Justice has a major role in protecting and enforcing voting rights. One of its most important duties is conducting administrative review of voting changes in jurisdictions governed by section 5 of the Voting Rights Act. But, unfortunately, recent revelations of partisan bias in its decision making seriously undermine the section's enforcement of section 5. Partisan bias breeds a lack of confidence and trust in the section. Indeed, it creates a lack of confidence in section 5 itself. It's a signal that partisanship may trump racial fairness and thus increase the likelihood that minorities will be manipulated to advance partisan goals. And it also shifts the burden of proof and enforcing voting rights to those who have been the victims of discrimination in contravention of the intent of Congress in passing the original Voting Rights Act of 1965.

And one recent example of partisan bias affecting Voting Section decision making is the preclearance of Georgia's photo ID law. In 2005 the legislature, in a vote that was sharply divided on both racial and partisan lines, passed a bill that required a person voting at the polls to present one of six specified forms of government-issued photo ID. Those who didn't have one would have to purchase one at the cost of $10. That was later raised to $20. The stated purpose of the bill was to prevent, quote, voter fraud, end quote. But

not only was there no evidence whatever of fraudulent in-person voting, but there were already sufficient criminal statutes on the books that could deal with the problem, which was not in fact a problem.

The photo ID requirement would also have an adverse impact upon minorities, the elderly, the disabled and the poor. Cathy Cox, the former Secretary of State, has found that nearly 700,000 Georgians who were registered to vote lacked a driver's license, which is the most commonly available form of photo ID. She also has found that voters who lacked photo ID were disproportionately elderly and minority.

Today in 2007, the State's own figures show that 50 percent of those on the voter registration list who do not have a driver's license or Department of Drivers Services photo identification are African Americans. There are 22 counties that held special elections in 2007, and 58 percent of those on the voter registration list who did not have a driver's license or identification were Black. Aside from its impact, there's also evidence that the photo ID law had been enacted with a discriminatory purpose.

Representative Sue Burmeister from Augusta, a chief sponsor of the bill, told staff members in the Voting Section that if Black people in her district, quote, are not paid to vote, they don't go to the polls, end quote. And if fewer Blacks voted as a result of the photo ID requirement, it, quote, will only be because there is less opportunity for fraud.

The Department of Justice approved Georgia's photo ID bill despite the near unanimous recommendation of the career staff to object. And according to newspaper accounts, one of those who played a central role in overriding the recommendation of the career staff was Hans von Spakovsky, a Bush appointee and counsel to the Assistant Attorney General for Civil Rights. The staff recommendation was not only overridden, but the leadership of the Voting Section instituted a new rule prohibiting the career staff from making recommendations in the future whether or not to object to proposed voting changes. This was a reversal of long standing section policy and has the effect of marginalizing the career staff with their experience and expertise in administering section 5. And also, unfortunately, it would be easier now to make partisan-driven decisions by not having to override the recommendations of the staff.

Not just the newspaper articles have made such reports but Joseph Rich, who served as chief of the Voting Section from 1999 to 2005, described the failure to object to the Georgia photo ID bill as quote, the brazen insertion of partisan politics into the decision making under section 5, end quote. And Rich's comments were echoed by Bob Kingle, a lawyer who spent 20 years in the Civil Rights Division and served as Deputy Chief of the Voting Section.

Notably in 1994, Deval Patrick, the then-Assistant Attorney General in the Civil Rights Division, objected to a similar photo ID requirement from Louisiana. He concluded the State failed to carry its burden of proof, that the change would not have a retrogressive impact upon minority voters.

And let me just conclude by saying that the Department of Justice's preclearance of Georgia's photo ID law and its continuing

support of that decision undermine seriously the effective enforcement of the Voting Rights Act.

Mr. NADLER. Are you finished?

Mr. MCDONALD. I'm finished Mr. Chair.

Mr. NADLER. I thank the gentleman.

[The prepared statement of Mr. McDonald follows:]

PREPARED STATEMENT OF LAUGHLIN MCDONALD

Mr. Chairman and members of the committee, thank you for inviting me to testify about the Voting Section of the Civil Rights Division of the Department of Justice. I would like to focus my remarks primarily on the role of the Voting Section in enforcing the special preclearance provisions of Section 5 of the Voting Rights Act.

To put my remarks in context, I have been the director of the ACLU's Voting Rights Project since 1972. As part of our work, we have brought litigation to enforce equal voting rights on behalf of racial and language minorities. During the recent hearings on extension and amendment of the Voting Rights Act, we submitted a report to Congress of the more than 290 voting cases we had been involved in since the last extension of Section 5 in 1982.[1] That report, along with substantial other evidence before Congress, documented that discrimination in voting is not a thing of the past but a continuing problem.

The Voting Rights Project has had direct contact with the Voting Section over the years involving Section 5 submissions. We have also participated with the Voting Section in vote dilution litigation brought under Section 2 of the Voting Rights Act, most recently in Charleston, South Carolina, on behalf of African Americans, and Blaine County, Montana, on behalf of American Indians.[2] I have gotten to know many of the staff members of the Voting Section and have great respect for them and the work they have done. But unfortunately, recent revelations of partisan bias in the decision making of the Voting Section seriously undermine voting rights enforcement in this country.

The Voting Section has a unique and major role in protecting voting rights. Aside from conducting administrative review of voting changes in jurisdictions covered by Section 5, it enforces the requirement that certain jurisdictions provide bilingual material and other assistance in voting to language minorities. It certifies jurisdictions for the assignment of federal observers to monitor elections. It undertakes investigations and litigation throughout the United States. It has the largest staff and resources of any entity in the country committed to protecting voting rights. It enforces the National Voter Registration Act, the Help American Vote Act, and the Uniformed and Overseas Citizens Absentee Voting Act. And, it defends against challenges to the constitutionality of the various voting rights laws enacted by Congress.

The revelations of partisan bias in the Voting Section's decision making, however, breed a lack of confidence and trust in the section. Partisan bias undermines the section's effectiveness. It calls into question the section's decisions about what to investigate and what kind of cases to bring. It calls into question the section's decisions about where and why to assign federal observers. It creates a lack of confidence in Section 5 itself and the other special provisions of the Voting Rights Act. It is a clear signal that partisanship can trump racial fairness, and thus increases the likelihood that minorities will be manipulated to advance partisan goals. It also shifts the burden of enforcing voting rights upon those who have been the victims of discrimination and who have the least resources to remedy it.

Congressional oversight is critical to restoring public trust and confidence in the Voting Section of the Department of Justice, and insuring that the nations's voting laws are fairly and adequately enforced.

One recent example of partisan bias infecting Voting Section decision making is the preclearance of Georgia's photo ID law. In 2005, the Georgia legislature, in a vote sharply divided on racial and partisan lines, passed a new voter identification bill which had the dubious distinction of being one of the most restrictive in the United States. To vote in person—but not by absentee ballot—a voter would have to present one of six specified forms of government issued photo ID.[3] Those without

[1] The Case for Extending and Amending the Voting Rights Act: Voting Rights Litigation, 1982–2006 (ACLU; March 2006).

[2] United States v. Charleston County and Moultrie v. Charleston County Council, 365 F.3d 341 (4th Cir. 2004); United States v. Blaine County, Montana, 363 F.3d 897 (9th Cir. 2004).

[3] I.e., a Georgia driver's license, a Georgia ID card, a U.S. passport, a government employee ID card, a military ID, or a tribal ID. O.C.G.A. § 21–2–417.

such an ID would have to purchase one at a cost of $10 (later raised to $20). The stated purpose of the bill was to prevent "voter fraud,"[4] but not only were there laws already on the books that made voter fraud a crime, there was no evidence of fraudulent in-person voting to justify the stringent photo ID requirement.

The new requirement would also have an undeniable adverse impact upon minorities, the elderly, the disabled, and the poor.

The League of Women Voters and the American Association of Retired Persons estimated that 152,664 people over the age of 60 who voted in the 2004 presidential election did not have a Georgia driver's license and were unlikely to have other photo ID.[5] Governor Sonny Perdue himself estimated that approximately 300,000 voting age Georgians did not have a driver's license or state issued ID card.[6] It was subsequently shown that 300,000 registered voters lacked a driver's license or state issued photo ID.[7] Getting a photo ID would not only burden those individuals, but would place a special burden on those living in retirement communities, assisted living facilities, and in rural areas. The problem was exacerbated further by the fact that while the state has 159 counties, there were only 56 Department of Motor Vehicle offices that issued drivers licenses or photo IDs, none of which were located in the City of Atlanta.[8]

According to the 2000 census, blacks in Georgia were nearly five times more likely not to have access to a motor vehicle than whites, and would thus be less likely to have a driver's license or access to transportation to purchase a photo ID. The disproportionate impact of the photo ID bill on African American voters was clear, but that was apparently the reason some white legislators supported the measure. Representative Sue Burmeister (R-Augusta), a sponsor of the photo ID bill, advised officials in the Voting Section of the Department of Justice that "if there are fewer black voters because of this bill, it will only be because there is less opportunity for fraud. She said that when black voters in her black precincts are not paid to vote, they do not go to the polls."[9] Burmeister was later quoted to the same effect in a local newspaper, that if black people in her district "are not paid to vote, they don't go to the polls," and if fewer blacks voted as a result of the photo ID bill it would only be because it ended voter fraud.[10]

Black members of the legislature were strongly opposed to the photo ID bill. During the legislative debate Senator Emmanuel Jones (D-Decatur) wore shackles to the well of the Senate, and Representative Alisha Thomas Morgan (D-Austell) brought shackles to the well of the House in protest over the bill's potential to suppress the black vote.[11]

Secretary of State Cathy Cox wrote to Governor Perdue on April 8, 2005, and urged him not to sign the photo ID bill into law. "I cannot recall one documented case of voter fraud during my tenure as Secretary of State or Assistant Secretary of State that specifically related to the impersonation of a registered voter at voting polls," she said. In her judgment the bill "creates a very significant obstacle to voting on the part of hundreds of thousands of Georgians, including the poor, the infirm and the elderly who do not have drivers licenses because they are either too poor to own a car, are unable to drive [a] car, or have no need to drive a car." She described the justification for the bill as a measure to combat voter fraud as "a pretext."[12] Despite his acknowledgment that hundreds of thousands of Georgians did not have a drivers license or ID card, Perdue signed the photo ID bill into law.

A recent study by Prof. Lorraine C. Minnite of Department of Justice records shows that between 2002 and 2005, only 24 people nationwide were convicted or pleaded guilty to federal charges of illegal voting. This number includes 19 people who were ineligible to vote, five who were under supervision for felony convictions, 14 who were not U.S. citizens, and five who voted twice in the same election. The report further found that the available state-level evidence of voter fraud, while not definitive, "is also negligible." Prof. Minnite concluded that "[t]he claim that voter fraud threatens the integrity of American elections is itself a fraud."[13]

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[4] Common Cause v. Billups, 406 F.Supp.2d 1326, 1361 (N.D. Ga. 2005).
[5] Id. at 1334.
[6] Department of Justice, Voting Section, Section 5 Recommendation: August 25, 2005, p. 20.
[7] "Lawyers: State misinforms voters," Athens Banner-Herald, October 17, 2006.
[8] Section 5 Recommendation: August 25, 2005, p. 10.
[9] Id., p. 6.
[10] "Georgia voter ID memo stirs tension," The Oxford Press, November 18, 2005.
[11] "ID Bill Could Make Georgia Unique in Turn Away Voters," The Macon Telegraph, March 19, 2005; "Firebrand 'Standing Up': Legislator Makes no Apologies for her Convictions," The Atlanta Journal-Constitution, March 24, 2005.
[12] Common Cause, 406 F.Supp.2d at 1333–34.
[13] Lorraine C. Minnite, The Politics of Voter Fraud (Washington, D.C.; Project Vote, 2007), 5, 8–9.

The New York Times similarly reported that five years after the current administration launched a Ballot Access and Voting Integrity Initiative in 2002, it had turned up virtually no evidence of any organized effort to skew or corrupt federal elections.[14] While there were a few instances of individual wrongdoing, most were the result of confusion about eligibility to vote. And most of those charged were Democrats.

The United States Elections Assistance Commission (EAC) issued a report in December 2006, in which it also concluded that many of the allegations of voter fraud made in reports and books it analyzed "were not substantiated," even though they were often cited as evidence of fraud. Overall, the report found "impersonation of voters is probably the least frequent type of fraud because it is the most likely type of fraud to be discovered, there are stiff penalties associated with this type of fraud, and it is an inefficient method of influencing an election." [15]

Georgia submitted its new photo ID bill for preclearance under Section 5 of the Voting Rights Act,[16] and the Department of Justice approved it on August 26, 2005, despite the near unanimous recommendation by the career staff (4 out of 5) to object. The recommendation concluded that "the state has failed to meet its burden of proof to demonstrate that [the photo ID bill] does not have the effect of retrogressing minority voting strength." [17]

One of those who played a central role in overriding the recommendation of the career staff was Hans von Spakovsky, a Bush appointee and counsel to the Assistant Attorney General for Civil Rights.[18] According to *The Washington Post,* "[c]areer Justice Department lawyers involved in a Georgia case said von Spakovsky pushed strongly for approval of a state program requiring voters to have photo identification," and that the recommendation of staff lawyers to object to the state's submission "was overruled by von Spakovsky and other senior officials in the Civil Rights Division." [19]

While employed in the Voting Section, Von Spakovsky had previously written an article for the *Texas Review of Law & Politics,* using the pseudonym "Publius," in which he strongly endorsed photo ID requirements. He scoffed at the critics of photo IDs and dismissed the evidence of discriminatory impact against minority groups, such as African-Americans, as "merely anecdotal" and "unsubstantiated." One of his recommendations was to "require all voters to present photo identification at their precinct polling locations." [20] There does not appear to be a benign explanation for von Spakovsky's anonymity. Instead, it seems designed to prevent the public and those with business before the Voting Section from knowing the views of one of the senior officials involved in the preclearance process.

Not only was there evidence that the Georgia photo ID bill had been enacted with a discriminatory purpose, i.e., to suppress the minority vote, but its effect would clearly be retrogressive within the settled meaning of Section 5.[21] In any event, the career staff's entirely defensible conclusion that the state had failed to carry its burden of showing the absence of a discriminatory effect was overridden.

The staff recommendation was not only overridden, but the leadership of the Voting Section instituted a new rule prohibiting the career staff from making recommendations in the future whether or not to object to proposed voting changes.[22] This was a reversal of long standing section policy and marginalized the career staff with its experience and expertise in administering Section 5. But it would obviously be easier to make partisan driven decisions by not having to override the recommendations of the career staff.

Notably, in 1994 Deval L. Patrick, the then Assistant Attorney General in the Civil Rights Division, objected to a photo ID requirement from Louisiana essentially identical to the one from Georgia. Based upon evidence that "black persons are four to five times less likely than white persons in the state to possess a driver's license

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[14] "In 5-Year Effort, Scant Evidence of Voter Fraud," The New York Times, April 12, 2007.

[15] United States Elections Assistance Commission, Election Crimes: An initial Review and Recommendations for Future Study (Washington, D.C.; December 2006), 9, 16.

[16] 42 U.S.C. § 1973c.

[17] Section 5 Recommendation: August 25, 2005, p. 20.

[18] "Official's Article on Voting Law Spurs Outcry," The Washington Post, April 13, 2005.

[19] "Bush Picks Controversial Nominees for FEC," The Washington Post, December 17, 2005.

[20] Publius, "Securing the Integrity of American Elections: The Need for Change," 9 Texas Review of Law & Politics 278, 289–300 (2005).

[21] A voting change has a discriminatory effect under Section 5 if it makes minorities worse off than under the preexisting rule or practice. Beer v. United States, 425 U.S. 130, 141 (1976).

[22] "Staff Opinions Banned in Voting Rights Cases," The Washington Post, December 10, 2005. See also Joseph D. Rich, Mark Posner and Robert Kengle, "The Voting Section," in The Erosion of Rights: Declining Civil Rights Enforcement under the Bush Administration, ed. William L. Taylor, et al. (Wash., D.C.; Citizens' Commission on Civil Rights, 2007), 38.

or other picture identification card," Patrick concluded the state failed to carry its burden of proof that the change would not have retrogressive impact upon minority voters.[23]

Shortly before DOJ precleared the Georgia photo ID bill, the legislature passed a new law increasing the fee for a five year photo ID card to $20, and a ten years card to $35.[24] On September 2, 2005, the ACLU wrote a letter to John Tanner, the Chief of the Voting Section, noting that the fee increase imposed yet an additional and disparate burden upon racial and language minorities, and warranted a reconsideration of the preclerance decision. The ACLU also pointed out that the changes were being implemented absent compliance with Section 5 and their further use should be enjoined.[25] Tanner declined to take any action and, despite the obvious impact the new law would have on minority voting rights, said in response that the amount a state charged for a drivers license was not "a change affecting voting within the meaning of [Section 5]."[26] Such logic was explicitly rejected by the Supreme Court in its 1966 decision invalidating Virginia's poll tax for state elections. The Court acknowledged a state could charge a fee for drivers and other kinds of licenses, but rejected the argument that payment of any fee for voting was constitutional.[27] The increase in the fee for a document required by the state to vote was in fact a change affecting voting.

Joseph Rich, who served as Chief of the Voting Section from 1999–2005, in testimony before a congressional committee described the failure to object to the Georgia photo ID bill as "the brazen insertion of partisan politics into the decision-making under Section 5."[28] Rich's comments were echoed by Bob Kengle, a lawyer who spent twenty years in the Civil Rights Division and served as Deputy Chief of the Voting Section. He left the section in 2005, he said, after reaching a "personal breaking point" precipitated by "institutional sabotage . . . from political appointees," "partisan favoritism," and the Administration's "notorious" Georgia Section 5 decision and its pursuit of "chimerical suspicions of vote fraud."[29]

The Voting Section has failed to object to other discriminatory voting changes, including 2001 legislative redistricting in South Dakota. The boundaries of District 27 that included Shannon and Todd Counties, which are covered by Section 5, were only slightly altered, but the demographic composition of the district was substantially changed. American Indians were 87% of the population of District 27 under the 1991 plan, and the district was one of the most underpopulated in the state. Under the 2001 plan, Indians were 90% of the population, while the district was one of the most overpopulated in the state. The new plan was more than arguably retrogressive within the meaning of Section 5 because it "packed," or over-concentrated, Indians compared to the pre-existing plan. Packing is one of the recognized methods of diluting minority voting strength.[30] The Department of Justice, however, precleared the new plan under Section 5. Tribal members subsequently challenged the plan under Section 2 and the court, making detailed and lengthy findings of past and continuing discrimination against Indians, invalidated it as diluting Indian voting strength.[31]

A challenge to the Georgia photo ID law was filed by a coalition of groups, the response to which underscored how sharply polarizing the new law was. Former President Jimmy Carter called the law a "disgrace to democracy," and said "it is highly discriminatory and, in my personal experience, directly designed to deprive older people, African-Americans and poor people of a right to vote." House Speaker Glenn Richardson (R-Hiram), however, called the lawsuit "ludicrous" and an example of "liberal special interests using unconscionable scare tactics to frighten Georgia voters."[32]

On October 18, 2005, the federal court preliminarily enjoined use of the photo ID law on the grounds that it was in the nature of a poll tax, as well as a likely violation of the equal protection clause of the Fourteenth Amendment. The court ex-

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[23] Deval L. Patrick, Assistant Attorney General, to Sheri Marcus Morris, Assistant Attorney General, November 21, 1994.

[24] O.C.G.A. § 40–5–103(a).

[25] Laughlin McDonald, ACLU Southern Regional Office, to John Tanner, Chief, Voting Section, September 2, 2005.

[26] John Tanner, Chief, Voting Section, to Laughlin McDonald, ACLU Southern regional Office, October 11, 2005.

[27] Harper v. Virginia State Bd. Of Elections, 383 U.S. 663, 668 (1966).

[28] Testimony of Joseph D. Rich, Oversight Hearing of the Civil Rights Division, House Judiciary Subcommittee on the Constitution, Civil Rights and Civil Liberties, March 22, 2007.

[29] Bob Kengle, "Why I Left the Civil Rights Division."

[30] Voinovich v. Quilter, 507 U.S. 146, 153–54 (1993).

[31] Bone Shirt v. Hazeltine, 336 F.Supp.2d 976, 987–1017 (D. S.D. 2004).

[32] "Suit slams voter ID law," The Atlanta Journal-Constitution, September 20, 2005.

pressly found the law "is most likely to prevent Georgia's elderly, poor, and African-American voters from voting."[33]

The court also noted that the Virginia poll tax invalidated by the Supreme Court was $1.50, while the fee for a photo ID for voting in Georgia was $20. The fee could be waived if a voter signed an affidavit that he or she was indigent and could not pay the $20, but the court concluded the waiver "does not reduce the burden that the Photo ID requirement imposes on the right to vote."[34]

A recent survey sponsored by the Brennan Center for Justice at the NYU School of Law concluded that 25% of African-American citizens of voting age have no current government issued photo ID, compared to 8% of white citizens of voting age.[35] Based on the 2000 census, this amounts to more than 5.5 million African American adult citizens without photo ID. The effect of photo ID laws in suppressing black—and thus Democratic—political participation is apparent. The survey also shows that the elderly and the poor are similarly adversely affected by photo ID requirements.

Cathy Cox released a report in June 2006, based on a comparison of the state's files of registered voters and persons issued valid driver's licenses. The study found nearly 700,000 Georgians who were registered to vote lacked a drivers license, the most commonly available form of photo ID for in-person voting. The study, Cox said, "provides powerful new evidence that supports the objections I've raised against the photo ID requirement from the outset—that huge numbers of Georgians are in jeopardy of being shut out of the voting process and having their voices silenced."[36] Cox issued another press release on June 23, 2006, that the voters who lacked a photo ID were disproportionately elderly and minority.[37]

Despite its grant of a preliminary injunction, the district court ultimately dismissed the complaint in the Georgia case concluding none of the plaintiffs had standing, the state was not required to document "in-person voter fraud exist[s] in Georgia," the burden the law imposed on voters was not "significant," and the photo ID requirement was "rationally related" to a legitimate state interest.[38] The plaintiffs have filed a notice of appeal.

John Tanner, in recent remarks before the National Latino Congreso in Los Angeles, defended the preclearance of Georgia's photo ID law by claiming in "Georgia, the fact was and the court found that it was not racially discriminatory. That was the finding of the initial court."[39] The court, however, made no such finding. It did not reach the merits of plaintiffs' claim that the law violated the racial fairness provisions of Section 2 of the Voting Rights Act, but instead said it "reserves a final ruling on the merits of that claim for a later date."[40] Even in its final opinion on the merits, the court did not rule on the plaintiffs' Section 2 race discrimination claim.

Tanner also claimed "the minorities in Georgia statistically, slightly, were more likely to have ID" than whites.[41] Again, he was wrong. He was apparently relying on figures compiled by the Georgia Department of Driver Services (DDS), which were recited in an October 7, 2005, letter from William E. Moschella, Assistant Attorney General, to Sen. Christopher S. Bond, responding to questions about the department's preclearance of the Georgia photo ID law. According to Moschella, "DDS has racial data on nearly 60 percent of its license and identification holders. Of those individuals, 28 percent are African-American, a percentage slightly higher than the African-American percentage of the voting age population in the Georgia." Those numbers, however, say nothing about those who did not possess a DDS license or identification, nor the 40% of those on the DDS list who were not racially identified.

But more to the point, Tanner failed to note that the Georgia Secretary of State compared the state voter registration list with the DDS list and concluded that 49.75% of those on the voter registration list who did not have a DDS license or identification were black. In the 22 counties holding special elections in 2007, 57.92% of those on the voter registration list who did not have a DDS license or

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[33] Common Cause, 406 F.Supp.2d at 1365.

[34] Common Cause, 406 F.Supp.2d at 1364.

[35] Citizens without Proof: A Survey of Americans' Possession of Documentary Proof of Citizenship and Photo Identification, Brennan Center for Justice at NYU School of Law, November 2006.

[36] News Release from Cathy Cox, June 19, 2006.

[37] Common Cause/Georgia v. Billups, 504 F.Supp.2d 1333, 1361 (N.D. Ga. 2007).

[38] Id. at 1377, 1381.

[39] TPMmuckraker.com, "DoJ Vote Chief Argues Voter ID Laws Discriminate against *Whites,*" October 9, 2007.

[40] Common Cause, 406 F.Supp.2d at 1375.

[41] "DoJ Vote Chief Argues Voter ID Laws Discriminate against Whites."

identification were black.[42] The state's own figures thus show black voters are disproportionately affected by the photo ID requirement.

Other states have also adopted photo ID requirements for in person voting. Indiana adopted such a law in 2005, which requires persons voting in person to present a valid photo ID issued by the United States or the State of Indiana. The law was challenged in federal court but was upheld by the district court. In a divided opinion, the Court of Appeals for the Seventh Circuit affirmed.[43] Judge Evans, however, in a dissenting opinion, said "the Indiana voter photo ID law is a not-too-thinly-veiled attempt to discourage election-day turnout by certain folks believed to skew Democratic."[44] The majority opinion also acknowledged there is "[n]o doubt most people who do not have photo ID are low on the economic ladder and thus, if they do vote, are more likely to vote for Democratic than Republican candidates," and that "the new law injures the Democratic Party."[45]

As Judge Evans further pointed out, the Indiana "law will make it significantly more difficult for some eligible voters . . . to vote—and this group is mostly comprised of people who are poor, elderly, minorities, disabled, or some combination thereof."[46] The majority opinion also conceded "the Indiana law will deter some people from voting."[47] Thus, the challenged law has the effect, and according to Judge Evans "a not-too-thinly-veiled" purpose, of discouraging voting by those believed to vote Democratic, and it will make it significantly more difficult for some voters, including racial minorities, to vote on election day.

The stated rationale for the Indiana law, as was the case in Georgia, was "to reduce voting fraud."[48] But it was conceded by the state, and found by the lower court, that no one in the history of Indiana had ever been charged, much less convicted, of the crime of fraudulent in-person voting.[49]

The plaintiffs filed a petition for a writ of certiorari in the Indiana case, which was granted. Oral arguments will likely be heard next year. In the meantime, the parties in the Georgia photo ID case have requested the Eleventh Circuit to stay the appeal pending a final decision by the Supreme Court.

Unfortunately, the history of voting in the United States is replete with other examples, similar to the photo ID laws in Georgia and Indiana, of efforts to disfranchise voters for partisan and racial reasons. And many of them have also masqueraded as attempts to prevent voter fraud, insure the integrity of the electoral process, or advance a reasonable state interest.

Edward McCrady, a legislator and historian from Charleston, South Carolina, was the author of a number of stringent restrictions on voting adopted by the state legislature in 1882, including the infamous Eight Box Law which imposed the functional equivalent of a literacy test for voting.[50] Eight separate ballot boxes, appropriately labeled, were provided for local, state, and national offices. In order to cast a valid ballot, each voter had to read the labels and put the ballot in the proper box. Although the McCrady laws were understood to be a legally acceptable way to dilute the black and Republican vote, McCrady touted them as good government election reform. He published a pamphlet the year before in which he urged a return to the limited franchise concept of the eighteenth century. "Raise the standard of citizenship," he wrote, "raise the qualifications of voters. But, raise them equally. If we are the superior race we claim to be, we, surely, need not fear the test."[51] Governor John Gary Evans later urged the members of the South Carolina Constitutional Convention of 1895 to enact a literacy test for voting, "for only the intelligent are capable of governing."[52] Other southern politicians of the post-Reconstruction era, including a future governor of Alabama, similarly touted restrictions on the franchise as a way to "make permanent and secure honest and efficient government."[53]

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[42] Common Cause/Georgia, Def. Ex. 35.
[43] Crawford v. Marion County Election Board, 472 F.3d 949 (7th Cir. 2007).
[44] Id. at 954.
[45] Id. at 951.
[46] Id. at 955.
[47] Id. at 951.
[48] Id. at 952.
[49] Id. at 953, 955.
[50] 1882 S.C. Acts 1115–120, No. 717.
[51] Edward McCrady, "The Necessity for Raising the Standard of Citizenship and the Right of the General Assembly of the State of South Carolina to Impose Qualifications Upon Elections" (1881), quoted in George Tindall, South Carolina Negroes 1877–1900 (Columbia: U. S.C. Press, 1952), 67.
[52] Evans, S.C. Con. Con. Journal (1895), 12, quoted in J. Morgan Kousser, Shaping of Southern Politics: Suffrage Restriction and the Establishment of the One-Party South, 1880–1910 (New Haven: Yale U. Press., 1975), 255.
[53] Mr. O'Neal, in Ala. Con. Con. Proceedings (1901), vol. 3, p. 2780, quoted in Kousser (1975), 263.

Restrictions on the franchise continued to gain support after the turn of the nineteenth century. Two historians did a survey of voting attitudes in 1918, and concluded "the theory that every man has a natural right to vote no longer commands the support of students of political science." They believed "if the state gives the vote to the ignorant, they will fall into anarchy to-day and into despotism tomorrow."[54]

The Supreme Court initially upheld poll taxes and literacy tests as good government measures.[55] There is no dispute, however, that both were adopted by the ex-Confederate states as "expedients to obstruct the exercise of the franchise by the negro race."[56] In recognition of that fact, the Supreme Court later reversed itself and invalidated poll taxes, while Congress, by passage of the Voting Rights Act of 1965, banned literacy and other test for voting because they had been adopted and administered with the discriminatory purpose of disfranchising minority voters.[57]

More than a century ago the Supreme Court described the right to vote as "preservative of all rights."[58] The white South understood that well enough, and in the years following Reconstruction disfranchised black voters as a way of depriving them of rights and maintaining white supremacy. Some of today's political office holders apparently believe that to maintain their dominance they too must suppress the minority vote. In doing so, they are repeating one of the most disgraceful chapters in our nation's history of voting rights. Unfortunately, the Department of Justice's preclearance of Georgia's photo ID law, and its continuing support of that decision, lend support to these modern disfranchising efforts.

CONCLUSION

The revelation of partisan bias in the Voting Section's decision making has seriously undermined voting rights enforcement in the country. It has created a lack of confidence and trust in the section, and has undermined its effectiveness. It has called into question the section's decisions about what to investigate, what kind of cases to bring, and where to assign federal observers. As important, it has created a lack of confidence in Section 5 and the other special provisions of the Voting Rights Act, and increased the likelihood that minorities will be manipulated to advance partisan goals. It has also shifted the burden of enforcing voting rights to minorities in contravention of congressional purpose in enacting the Voting Rights Act.

Congressional oversight is critical to restoring public trust and confidence in the Voting Section of the Department of Justice, and insuring that the nations's voting laws are fairly and adequately enforced.

Mr. NADLER. The Chair will now recognize Mr. Moore for 5 minutes.

TESTIMONY OF TOBY MOORE, FORMER POLITICAL GEOGRAPHER AND REDISTRICT EXPERT, VOTIING SECTION, CIVIL RIGHTS DIVISION, U.S. DEPARTMENT OF JUSTICE

Mr. MOORE. Mr. Chairman and Members of the Committee, thank you for the opportunity to speak about my experiences as the geographer of the Voting Section of the Civil Rights Division from

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[54] Charles Seymour and Donald Paige Frary, How the World Votes: The Story of Democratic Development in Elections, 2 volumes (Springfield, Mass.; C.A. Nichols Co., 1918), 1:12–13, 2: 320–21.

[55] See Breedlove v. Suttles, 302 U.S. 277, 283–84 (1937) (upholding Georgia's poll tax, enacted by Democrats in the aftermath of Reconstruction, as "a familiar and reasonable regulation long enforced in many states"), and *Lassiter v. Northhampton County Bd. of Elections*, 360 U.S. 45, 54 (1959) (upholding North Carolina's literacy test for voting, first enacted by a Democratic controlled legislature in 1900, as "designed to promote intelligent use of the ballot," and advancing "the desire of North Carolina to raise the standards for people of all races who cast the ballot").

[56] *Ratliff v. Beale,* 74 Miss. 247, 20 So. 865, 868–69 (1896).

[57] See Harper v. Virginia State Board of Elections, 383 U.S. 663, 666 n.3 (1966) (invalidating Virginia's poll tax for state elections and noting "[t]he Virginia poll tax was born of a desire to disenfranchise the Negro") (quoting Harman v. Forssenius, 380 U.S. 528, 543 (1965)); South Carolina v. Katzenbach, 383 U.S. 301, 333–34 (1966) (the suspension of literacy tests in jurisdictions covered by Section 5 of the Voting Rights Act was appropriate because "in most of the States covered by the Act . . . various tests and devices have been instituted with the purpose of disenfranchising Negroes, have been framed in such a way as to facilitate this aim, and have been administered in a discriminatory fashion for many years"). See also V. O. Key, Jr., Southern Politics in State and Nation (Knoxville: U. of Tenn. Press, 1984), 555 (the poll tax and literacy tests were "legal means of accomplishing illegal discrimination" against black voters).

[58] Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).

2000 to 2006. My service in the section was the highlight of my professional career. For a White southerner, born a year after the passage of the Voting Rights Act, and having devoted my career to studying both the South's sad racial history and its remarkable progress enforcing a Federal law born on the Edmund Pettus Bridge in Selma, Alabama was a high honor indeed.

I'm also somewhat uncomfortable testifying. I had a very friendly relationship with John Tanner for most of the time I worked with and for him. And speaking publicly about internal DOJ deliberations is not something I do lightly. Nonetheless, I hope that my experience at the ground level of Voting Section enforcement may be of some value to you in your oversight duties.

Mr. Tanner's public comments earlier this month in Georgia and California could be overlooked if they were merely off-the-cuff remarks. Unfortunately, for minority voters and, unfortunately, the Department of Justice, the comments are actually a fair example of Tanner's approach to facts, the truth and the law. Broad generalizations, deliberate misuse of statistics and casual supposition, in my experience, were preferred over the analytical rigor, impartiality and scrupulous attention to detail that had marked the work of the section prior to Tanner taking control in 2005.

This decline and the myriad of other problems that have developed in the section over the past several years are a direct result of the actions of political appointees, such as Hans von Spakovsky and Bradley Schlozman. It has left behind a demoralized section, a growing list of lost court cases and a severely diminished public trust in Federal voting rights enforcement.

While my written testimony discusses problems with other matters, including enforcement of section 203 and the Ohio investigation of 2004, in the interest of time I will focus here on the Georgia ID investigation.

While it's not my intent to debate the merits of the voter ID laws, I would like to point out that even by the standards of subsequent voter ID laws, the Georgia law in 2005 was a nasty piece of legislation. No State endeavoring to pass a photo ID law now is considering the kind of draconian restrictions that DOJ endorsed in Georgia in August of 2005, the restrictions that President Carter and Secretary Baker explicitly labeled as discriminatory when I worked for the Carter-Baker Commission at American University.

Personally, I think that the issue is overblown on both sides, but clearly history as well as the Federal and State courts will record that the 2005 Georgia ID law, precleared by the Department of Justice, was a discriminatory one.

All of us assigned to the investigation realized that the Department was almost certain to preclear it. Given the oft-stated views of von Spakovsky and Tanner's eagerness to please him, none of us thought the Department would lodge an objection. We simply wanted to do our jobs. That we were not allowed to do so demonstrates how the mission of the section has shifted from a search for evidence to support decision making to a search for evidence to support decisions already made.

I only have time to mention a few of the statistical errors, procedural violations, and misrepresentations that I discuss more fully in my written testimony.

First, it is not true that racial data from the Georgia Department of Drivers Services indicated that Blacks were more likely than Whites to have ID. It was not true in any of the data submissions from the State. The only way you reach that conclusion is if you include hundreds of thousands of noncitizens who are not Black in your comparison.

Mr. Tanner compares the number from the DDS to the VAP, and not the citizen VAP, which is the more appropriate comparison if you are to use that data at all. And there are reasons in my written system why I don't think the data is trustworthy at all.

It is not true that minority voters die before growing old. What this misses is the fact that Black voters in Georgia who are elderly are more likely to be impoverished, and therefore I think more likely not to have ID. This data that Laughlin referred to from Georgia in July of 2007, in fact, shows that African Americans make up 40 percent of those elderly voters who lack ID.

Behind all great lies is a kernel of truth. It is not true that Tanner's pioneering actuarial theory was ever part of the 2005 analysis but is instead a post hoc justification for an unjustifiable decision. It is not true that we were not reprimanded. We were each called into the office, one by one, and told that our performance during the Georgia ID was not up to the standards of the section. It did not result, in my case, in any letter of reprimand but we were certainly reprimanded. And Mr. Tanner needs to correct that statement.

It is not true that a group of prominent law professors made racist statements about the impact of the ID law, which Mr. Tanner dismissed as bizarre and offensive. And it's not true that we did not consider the poll tax. Mr. Ellison's questions, the IDs were not free under the 2005 law. It was only under the subsequent 2006 law that the IDs were made free.

To wrap up, John Tanner is both the cause and effect of the politicizing of the Civil Rights Division and should not be allowed to hide behind a career status watch which he has abjured by his actions. Until someone in the Department, in this Administration or the next, admits to the mistakes of the past several years and restores credible leadership, the Voting Section of the Civil Rights Division will remain a wounded institution. How long will the Department of Justice tolerate chronic mismanagement simply to save face?

Thank you for your attention to this matter and for the opportunity to testify. I would, of course, be happy to answer any questions.

Mr. NADLER. I thank the gentleman.

[The prepared statement of Mr. Moore follows:]

PREPARED STATEMENT OF TOBY MOORE

Testimony of Dr. Toby Moore
Political geographer, Voting Section, U. S. Department of Justice
2000 – 2006

Oversight Hearing on the Voting 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 on the Judiciary

U.S. House of Representatives

October 30, 2007

Mr. Chairman and members of the Committee,

Thank you for the opportunity to speak to you today about my experiences as the geographer of the Voting Section of the Civil Rights Division from 2000 to 2006. I was hired as a redistricting expert in the fall of 2000. As my job developed, I served as a sort of jack-of-all-trades for demographic, geographic and statistical analyses on a wide variety of cases. I left the Division in April of 2006 to manage the Carter-Baker election reform commission at American University, and I now work in elections and voting research at a nonpartisan, nonprofit research firm in Washington.

My service in the Civil Rights Division was the highlight of my professional career. For a white Southerner born a year after the passage of the Voting Rights Act, and having devoted my career to studying both the South's sad racial history and its remarkable progress, enforcing a federal law born on the Edmund Pettus bridge in Selma, Alabama, was a high honor indeed. The Division has done and continues to do invaluable work across its many areas of responsibility, and I am proud to have served it.

I hope that my experience at the ground level of Voting Section enforcement may be of some value to you in your oversight duties.

The public comments earlier this month by my former boss, John Tanner, in Georgia and California could perhaps be overlooked if they were merely spontaneous, off-the-cuff remarks. Unfortunately for minority voters, and unfortunately for the Department of Justice, Tanner's comments are actually a fair example of his approach to truth, facts and the law. Broad generalizations, deliberate misuse of statistics, and casual supposition, in my experience, were preferred over the analytical rigor, impartiality and scrupulous attention to detail that had marked the work of the Section prior to Tanner taking control in 2005.

For me, this change was driven home by the Section's mishandling of the analysis of a new Georgia voter ID law in the summer of 2005. The problems that plagued our work on this law, and indeed Tanner's troubled tenure since, are symptomatic of the

larger problems caused by the politicization of the Section and its career staff. The ultimate responsibility for Tanner's mismanagement of the Voting Section rests with the political appointees who promoted him, and those who now protect him.

Analysis and the enforcement of voting laws

Voting rights work is by its very nature technical and rather esoteric, and voting rights litigation notoriously complicated. Rarely are smoking guns uncovered, and the evidence is often incomplete and contradictory. Voting rights cases require a knowledge of statistics, skill with geographic information technology, and fairly advanced demographic research.

When I arrived in the Voting Section in late 2000, fresh from my doctoral program, I was impressed by the sophistication of the analyses the Section was performing. There were a number of very experienced analysts and attorneys who combined expertise in the particular methods of the Section with vast local knowledge of the communities where the Section was active. Section staff were thus in a position to cross-train new employees and to help the bright young attorneys who came into the Section from law school learn how to litigate voting rights cases. Deputy chiefs in the Section, particularly my supervisor, Bob Kengle, and Section 5 head Bob Berman, combined legal acumen with a skill and interest in the technical and statistical aspects of the Section's work. The Section Chief, Joe Rich, was a model of restraint and professionalism, mediating between the career staff and the political appointees. Our test was always: will this stand up in court? This test was applied even in instances, such as Section 5 reviews, in which we knew our work would never go before a judge.

The veteran and experienced Section leadership insulated those of us at the line level from partisan political pressures. However, the politicization of the Section through hiring, promotion and the shifting of managerial responsibilities gradually undermined the analytical process. Dozens of experienced analysts and lawyers departed in frustration, particularly in Section 5 enforcement. Joe Rich retired, and was replaced by a chief who I believe was willing to sacrifice balance, truthfulness and accuracy in order to please the political appointees who had promoted him to his position and who then granted him a large salary increase, cash bonuses and awards. In turn, the Division used his career status and long service in the Department as a shield against charges of politicization. The hiring of attorneys with little civil rights experience but solid ideological and partisan credentials blurred the lines of authority in the Division, and blurred as well the very distinction between career positions and political appointments.

The politicization of the Section really only took hold after the departure in 2003 of the first assistant attorney general for civil rights, Ralph Boyd, who in my experience acted as a check on the more aggressive political appointees. I should also note that most of the Republican lawyers who came to the Section under the politicized hiring process run by Bradley Schlozman put aside their personal beliefs and did their jobs without partisan flavor, although some unfortunately did not.

I developed deep misgivings about the way analysis was being conducted, ironically, during two Section projects whose ultimate conclusions I supported. One was the push to more aggressively enforce the language minority provisions under Section 203, and the other was the Section's investigation into election problems in Ohio during the 2004 presidential election.

The Ohio investigation, while I think reaching the correct conclusion, was cursory at best, and extraordinary in that Tanner did it basically by himself, even as he took on managerial responsibility for the Section. One only has to read Tanner's remarkable June 28, 2005, letter exonerating local officials of wrongdoing to sense his eagerness to please. The unctuous tone of the letter, and its use of generalizations and assertions unsupported by any factual evidence, portends his recent defense of voter ID laws. The statistical record in Franklin County is a complicated one, and I respectfully disagree with those who see evidence of a conspiracy to deny African-Americans an equal share of the county's voting machines, but had there been a violation of law, I am confident in Tanner's ability to overlook it. Much remains unknown about what happened. Particularly troubling to me was the evidence of long lines in African-American polling places at closing time, a situation for which we never received a satisfactory explanation. Veteran attorneys in the Section were dumbstruck that Tanner disregarded the longstanding policy of never giving reasons for closing an investigation, just as they were shortly afterwards when the Department launched a misleading public relations campaign on behalf of its misbegotten preclearance of the Georgia ID law.

In Section 203 enforcement, in which the Section analyzes how well jurisdictions are meeting the needs of language minority voters, the Section repeatedly used inappropriate methods aimed at inflating the numbers of voters who needed assistance. Time and again I pointed out what I saw as flaws in the methodologies being pushed by the Section, which were often simple errors in math or logic. I was either ignored, reprimanded or told not to work on such issues. The vast majority of these cases have been settled rather than adjudicated before a judge, which is no accident. On one of the rare instances in which the Section was required to present their statistical evidence in court, in Philadelphia in 2006, a three-judge panel soundly rejected it for precisely the same reasons I (and others) had cited for years. Some of the 203 cases brought in recent years certainly had merit, but many others were brought largely to pump up the Division's statistics, and had marginal impact. Their real purpose, to me, was to provide cover for the Division's deliberate failure to take on the more substantive voting rights work it had traditionally pursued.

The eagerness to conform analysis to decisions already made that characterized the Section's efforts in Ohio in 2004 and in 203 enforcement generally led to a Georgia voter ID investigation in the summer of 2005 in which a determined effort was made to suppress evidence of retrogression, manufacture evidence in support of voter ID laws generally, and to punish those of us who disagreed. To me, it represents the nadir of Voting Section enforcement, worse even than the Section's action in the Mississippi redistricting case.

The 2005 Georgia Voter ID law

I want to make clear that the focus of this part of my testimony is not on the decision on August 26, 2005, to preclear the Georgia law under Section 5 of the Voting Rights Act. Instead it is on the process by which the Section analyzed (or failed to analyze) the impact of that law on minority voters. All of us assigned to the investigation realized that the Department was certain to preclear the law. Given the oft-stated views of von Spakovsky, a Georgian who was the political appointee responsible for the Voting Section at the time, and Tanner's eagerness to please him, none of us thought that the Department would block it. We simply wanted to do our jobs.

At the same time, I would point out that even by the standards of subsequent voter ID laws, the 2005 Georgia law was a nasty piece of legislation. No state endeavoring to pass a photo ID law now is considering the kind of draconian restrictions the DOJ endorsed in Georgia in August of 2005. Voter ID laws tend to get lumped together in the public discussion, but they in fact vary widely, in the array of IDs allowed, the availability of fail-safes such as affidavits, and in efforts to make the IDs available to all voters. As the federal judge in Georgia rightly pointed out in enjoining the law, Georgia did not make free IDs available to all voters, lacked facilities for distributing the IDs, and had done little to make the voting public aware of the requirements. The decision to loosen the rules on absentee ballots – almost universally seen as more susceptible to fraud than voter impersonation – and inflammatory statements by the bill's sponsor regarding black voting called into question the motives behind the requirements.

Personally, I think that the impact of the laws, both on alleged voter impersonation and on disenfranchisement, is frequently overstated. However, the preclearance in 2005 was not a judgment on voter ID laws in general, but a judgment on a specific piece of ID legislation, and history records that that law was a bad one.

Those of us who were assigned to the case and who came to the conclusion that the state had not met its burden of proof were harassed, during and after the investigation. Tanner ignored or dismissed evidence that supported an objection, while he embraced without reservation evidence supporting preclearance. The paper trail inside the Section was manipulated in an effort to suppress both our evidence and our recommendation. There was no procedure; long-established Section practices were abandoned when convenient, and new rules made up literally overnight. Career staff were prevented the opportunity to analyze potentially critical data. Within a year, the four staffers who had recommended an objection were gone from the Section, including the highly admired chief of Section 5 enforcement.

Perhaps the best way to illustrate the bad faith of the Georgia ID investigation would be to give some examples of the shoddy analytical work that the Department used (and still uses) to support its decision, and some of the actions of Section leadership.

1. When a group of prominent law professors submitted a letter with analysis supporting what we had found – that rates of ID ownership and race appeared to be weakly and

negatively correlated, among other things – Tanner fabricated a new version of what they had said and took the unprecedented step of inserting, directly in the staff memo to him, language dismissing the analysis as "bizarre and offensive." It was neither.

2. The governor of Georgia himself had estimated that 300,000 Georgians lacked requisite IDs. Tanner inserted into the staff memo language that suggested, without evidence, that the governor was alluding to the state's illegal immigrant population. (In 2007, two professors at the University of Georgia independently estimated that 305,074 registered voters likely did not possess a valid driver's license or state identification card, and a separate comparison by the state of Georgia of license data and voter registration records this year has put the number at close to 200,000.

3. Census figures showing a racial disparity in access to vehicles, a key piece of evidence in past Section analyses of ID laws, were dismissed by Tanner, even though in 1994 Tanner himself had cited that exact piece of evidence in denying preclearance to an ID law in Louisiana. This time, he rejected the 2000 Census data as out-of-date, despite the relative stability of the data across time and the availability of more recent numbers.

4. Tanner continues to deliberately misuse the racial data from the records of the Georgia Department of Driver Services by saying that blacks in Georgia are more likely than whites to have IDs. Flatly, this is not true. I don't think the data is of much use in this regard, since we have racial data for less than 60% of the records, and there is ample reason to doubt that the racial data we do have is representative of the entire database. If one is going to cite the data, however, the proper comparison is not to voting age population, but to *citizen* voting age population, since the bulk of racial IDs comes from voter registration records. Unfortunately for Tanner's argument, as he knows, using the proper CVAP figure shows that blacks are actually less likely than whites to have ID. (My recollection is that we found the black percent in the database to be 28.0%, while the CVAP was projected for 2005 at 28.7% and the VAP at 27.4%). I would like to know Tanner's numbers, and where he got them.

5. Much of the DOJ's defense of the Georgia ID law rests on figures showing increased turnout in other states which have passed ID restrictions, a favorite trope of current FEC Commissioner Hans von Spakovsky, who was responsible for the inclusion of this utterly irrelevant data in the staff memo. To please von Spakovsky, Tanner edited out our analysis showing why this information was of little use in assessing the potential damage to minority voters in Georgia, which proposed a much tougher ID law than any other state had enacted. As elected officials you know that turnout can vary widely for a range of reasons. After all, if turnout goes up after an ID law is enacted, what does that say about the usefulness of ID laws in the first place? Either there is not as much voter impersonation fraud as proponents claim, or ID laws are of little use in stopping it.

6. Tanner's comment in California – that ID laws help minority voters because they discriminate against the elderly, since minorities die before reaching old age – is not only bizarre but flies in the face of his claim during the Georgia review that practically all Georgians had ID. He certainly never raised this novel hypothesis during our review of

the law. As a matter of fact, Tanner may be surprised to learn that many African-Americans do actually become elderly – more than 200,000 Georgians aged 65 and over are black, one-fifth of the total elderly population. And, of course, Tanner left out the fact that elderly African-Americans in Georgia make up *two-fifths* of the *impoverished* elderly, the population probably most likely to lack IDs. Critical new data from the state of Georgia confirms this, as their analysis shows that African-Americans make up 40% of those voters 65 and over without ID. As Tanner would say, "just the math is such as that."

7. Career staff found a study from the University of Milwaukee-Wisconsin to be one of the few attempts to estimate the number of people who lacked licenses, and valuable for its suggestion that minorities were more likely to lack ID. Tanner edited the staff memo to dismiss the study as "not helpful," because Wisconsin's black population was "almost entirely urban," which suggests that perhaps Tanner considered Atlanta to be rural.

Many of these examples may seem technical and arcane, but the nature of voting cases is often technical and arcane. Beyond the question of their evidentiary value, however, my broader point is that the choices made by Tanner and von Spakovsky, as evidenced in the nearly totally disingenuous Moschella letter released in October of 2005, suggest that the those who decided to preclear the Georgia ID law were more interested in rhetoric than analysis.

For all the problems we encountered during the investigation, which everyone agreed was a difficult one, it was Tanner's actions on Aug. 25 and 26 that I found truly objectionable. Had our recommendation simply been overruled, I would probably not be testifying today.

On the night of August 25, with our memo complete, we met with John to make clear that we wanted our recommendation be preserved in our recommendation memorandum, as had always been the case in the Section previously. It was important to us as career federal employees that the record reflect our recommendation, even if Tanner and the political appointees were free to disregard it. He promised us our recommendation would stay on the memo.

The next morning, as staff prepared the preclearance letter, Georgia officials informed us that critical data it had submitted earlier regarding ownership of photo IDs was invalid. In fact, the state had overstated the number of people who had licenses or ID cards by some 600,000. This came as no surprise, as we had informed John earlier in the week that the state's data appeared to be flawed. Despite our pleas to be given a few days to analyze this data – which would have required no extension of our deadline, and which we had previously taken an extension to obtain – we were denied the opportunity. I have never understood why, after extending our deadline and working daily with state officials to pull this data from the state databases, we were not allowed a few days to analyze it.

I have come to wonder whether a special election slated for the following Tuesday in Gwinnett County played a factor in the rush to preclear. Having the ID law enforced in an election made it the benchmark for analyzing future ID laws. That is precisely what happened with the revised Georgia voter ID bill: it was compared for retrogressive effect to the enjoined 2005 law. Von Spakovsky, as we know, was a local election official in Georgia before coming to Washington. It is also possible that Tanner and von Spakovsky wanted to block any further analysis of the new data. I do not know and certainly have no proof of their motives.

Tanner's offhand explanation to staff on August 26 – that he had analyzed the numbers himself – says much about the way he mishandled the investigation, as does the fact that his memo to the political appointees cited the 7.1 million IDs figure explicitly disavowed by the state that same day.

In addition, when Tanner distributed his edited version of our memo, our recommendation had been stripped out, and language inserted that reversed some of our critical findings. (Tellingly, it was still entitled "recommendation memo," despite having no recommendation). It is important to remember that Tanner was editing a memo *to himself*. Tanner then wrote a cover email, stating his reasons for preclearing the law, and forwarded both to the front office. That allowed Tanner to suppress the dissent of career employees, and subsequently to declare that the recommendation memo was "preliminary" and "a draft." In truth, it was the final staff memo, I'm proud to have been part of it, and its quality and intellectual honesty far exceeds anything Tanner and von Spakovsky have produced in rebuttal.

In the aftermath of the August 26 preclearance, each of us who recommended objection was reprimanded. The lone member who supported preclearance, who came to the Section through Brad Schlozman's politicized hiring process, was given an immediate cash bonus. Offended by Tanner's conduct, I felt it was my duty as a Justice employee to file a complaint with the Office of Professional Responsibility, detailing what I thought were the failures of the Section Chief to supervise an impartial and professional investigation. (Eighteen months after filing my complaint, I was told the investigation was still open. I do not know its current status). At some point, von Spakovsky and Schlozman read through my emails and apparently filed a complaint against me that I had inappropriately disclosed sensitive information in the Ohio investigation and other matters (I was exonerated). I feared my upcoming performance evaluation would be used against me, as had happened to a number of my colleagues. I was tired of the treatment, tired of the stress it placed on my family, and tired of watching the sloppy and dishonest approach the Section was taking on important matters of minority voting rights. I left in April of 2006.

Conclusion

The failure of the Justice Department to fulfill its obligations in its review of the 2005 Georgia voter ID law and in other important cases was a direct result of the politicization of the Voting Section. This has been tolerated by political appointees who

value acquiescence and political expediency more than competence. The myriad problems in the Section under Tanner's leadership – some of which have been made public and some of which have not, but which have rendered the office largely dysfunctional – are a direct result of the desire of political appointees such as Bradley Schlozman and Hans von Spakovsky to bring the Section into the service of their ideological and partisan goals.

John Tanner is both a cause and effect of that politicization.

The current political appointees are by all accounts an improvement over their predecessors. Increased media attention and Congressional oversight has spurred a flurry of Section 2 cases, for example, and hiring practices have generally improved. Good people remain in the Section. However, the managerial problems at the section chief and acting deputy chief levels created during the years of highly politicized supervision have, if anything, grown worse. Morale has plummeted, and federal judges have begun to point out the kind of sloppy analysis I've tried to explicate here. These problems have been most severe in the demoralized Section 5 unit, but have touched other parts of the Section as well. Until someone in the Department, in this administration or the next, admits to the mistakes of the past several years and restores credible leadership, the Voting Section of Civil Rights Division will remain a wounded institution. That ultimately harms not only employees of the Voting Section and minority voters, but all Americans.

Thank you for your attention to this matter and for the opportunity to testify. I would be happy to answer any questions.

Mr. NADLER. Mr. Driscoll is now recognized for 5 minutes.

TESTIMONY OF ROBERT N. DRISCOLL, PARTNER, ALSTON AND BIRD

Mr. DRISCOLL. Thank you, Chairman Nadler, Members of the Subcommittee, for the opportunity to discuss the important work of the Civil Rights Division and particularly the Voting Section. I just want to touch upon a few areas and I will deviate from my written remarks a little bit to respond a little bit to what's been said. I think this is a constructive dialogue, and this panel in particular can be very helpful to Members of the Committee and to the public in terms of how voting rights enforcement works.

We've got a Subcommittee here, Members are also of the full Committee, that has great influence on the laws of this country and what they are. And at the end of the day it's the Members of Congress that set what those laws are. And I think that's something that we all have to keep in mind when we're complaining about voter purges or things like that, that might be required under, for example, the NVRA. If there are provisions like that that are a problem, everyone needs to know that.

We've got former career employees, such as Dr. Moore, testifying today. And career employees are the backbone of the division. They work for a long time. People like Mr. Tanner worked for 30 years in the division enforcement laws passed by Congress. And everyone needs to understand the valuable work they do. I think Dr. Moore here as well, I think, provides a service to some of us, at least by making clear that the notion of career and nonpartisan are not equivalent and that career employees can have just as many partisan leanings as any political appointee to ever come down the pike.

We have adversary groups, such as Mr. McDonald and Ms. Fernandes represent, the ACLU leadership conference, and they have a valuable role to play. They come to the Department, come to Congress, encourage the Department to enforce the laws and point out where the Department's not doing a good job.

However, I think people need to keep in mind not doing what an adversary group wants is not tantamount to failing to enforce the civil rights laws. I think Mr. McDonald and Ms. Fernandes would admit, if Members would question them, they're opposed to voter ID laws, period. As a matter of policy. It's a perfectly valid policy position to take. But their groups do not need one piece of data or evidence to reach the conclusion that the Georgia ID law was objectionable. So what then needs to happen under Georgia section 5 preclearance is that in light of that entire constellation of statutes passed by Congress, regulations enforced by the Department, data submitted by the State, data submitted by adversary groups, and analyses prepared by career staff, it comes down to the Assistant Attorney General, who is confirmed by the Senate, congressionally—presidentially appointed, congressionally approved member of the Department who has to eventually make the call.

And that leads to the final point I would like to make, which I think just to—from an institutional perspective.. I say this not as a former Republican appointee, but I say it as someone with a great affection for the Department. I think it is extremely risky in-

stitutionally to call people like Mr. Tanner before this Committee and to question them as he was questioned in the first panel this morning. He's a career employee. He's dedicated his life to trying to enforce the laws as best he can. And at the end of the day, the responsibility for what the Department does lies with the Attorney General, lies with the Assistant Attorney General for Civil Rights.

And I have no problem at all if this Committee or any Committee wants to call a political appointee before them and read them the riot act. But I think when the parties are reversed or there's a different Administration in power, people could regret the precedent that was set today of taking someone who's a career employee, who is not ultimately the one who has to make the final call on something like Georgia ID before a Committee like this.

So again, I thank—these are the main points I would like to make. I look forward to engaging in dialogue with Members of the Subcommittee. And I think this can be an incredibly productive hearing. Thank you very much.

Mr. NADLER. I thank the gentleman.

[The prepared statement of Mr. Driscoll follows:]

PREPARED STATEMENT OF ROBERT N. DRISOCLL

Thank you, Chairman Nadler and members of the Subcommittee for the opportunity to discuss the important work of the Department of Justice's Civil Rights Division.

My name is Bob Driscoll and I am currently a partner at Alston & Bird LLP, here in Washington. From 2001 to 2003, I had the honor of serving as Deputy Assistant Attorney General in the Civil Rights Division of the Department of Justice. During that time I worked on a variety of issues, including racial profiling guidance to federal law enforcement, desegregation, and police misconduct.

My testimony today will touch on a few areas. First, I'll discuss the work that the Civil Rights Division does in the voting area, and the need to balance voters' access to the polls with ensuring ballot integrity. Second, I would also like to discuss the issue of advocacy before the Civil Rights Division. And lastly, I'll talk about the role of career employees in the Civil Rights Division.

THE NEED TO BALANCE VOTER ACCESS TO THE POLLS WITH ENSURING BALLOT INTEGRITY.

In my view, it is critical that the Civil Rights Division strike a balance between ensuring that voters have access to the polls and protecting the integrity of ballots cast. The failure to adequately address either of these area results in effectively disenfranchising rightful voters.

Honest voter registration lists are a requirement to ensure that honest votes are being cast. If an outdated or inaccurate voter registration list is used, this could result in allowing someone to vote who should be not voting. This effectively results in the disenfranchisement of honest votes.

One of the most important rights in this country is to have one's vote counted. If an improper or unlawful vote is cast, a legitimate voter's choice is cancelled by someone who ought not to be voting. In addition, it is likely to increase voter turnout if voters know their vote will count and will not be diluted by improper or unlawful votes.

As an example of this principle, Congress has required that states ensure that applicants are citizens of the United States before registering to vote. This is not an issue of whether one favors or disfavors more or less immigration. As a descendant of Irish immigrants who has married into a family of Cuban immigrants, I am certainly not anti-immigration in any way. It is the simple matter of making sure that only people entitled to vote do so. To do otherwise does not honor and respect those immigrants who have entered the country legally and properly earned the precious right to vote that so many have fought to achieve and maintain.

Although to the uninitiated, these principles might sound non-controversial, in fact there has been substantial disagreement about whether the Department of Justice has gone too far in enforcing these provisions. I find it remarkable that the Department has come under criticism for enforcing the law that Congress has passed

and the President has signed. While I think the law represents good public policy, it seems to me that those who disagree on that point should seek to amend the statutes in question, rather than criticize the Department of Justice for enforcing existing law.

The NVRA specifically requires that the following two "yes/no" questions be answered on a voter registration form: "Are you a citizen of the United States of America?" and "Will you be 18 years of age on or before election day?" Under the NVRA, if the citizenship question is not answered, the voter registrar "shall notify the applicant of the failure and provide the applicant with an opportunity to complete the form in a timely manner to allow for the completion of the registration form prior to the next election for Federal office (subject to State law)."

Despite the clear language in this provision that requires individuals to answer the citizenship question before their voter registration can be accepted by election officials, many states have ignored the law, and have continued to register applicants who do not answer the citizenship question.

I believe that the Subcommittee must recognize that illegally cast ballots dilute the vote of legally cast ballots, just as much as if those voters had been denied access to the polls. I could not disagree more strongly with those critics who seem to suggest that non-enforcement of any laws having to do with voter integrity is consistent with the advancement of civil rights. To the contrary, permitting or ignoring unauthorized or illegal voting is just as egregious as permitting a jurisdiction to deny a legal voter the right to vote.

ADVOCACY BEFORE THE CIVIL RIGHTS DIVISION.

I'd like to discuss now the issue of advocacy before the Civil Rights Division. There are interest groups that advocate for particular results from the Civil Rights Division, and then publicly complain when they don't get their desired results. I think much of this criticism is unfounded.

The simple fact that the Civil Rights Division doesn't agree with everything advocated for by these groups does not mean that the Division isn't doing its job. While the Division may listen to the views of different interest groups, it is the Division's job to apply the laws passed by Congress to the facts and circumstances of each case.

The Division would not be doing its job if it simply parroted the views of different advocacy groups. Indeed, in *Miller v. Johnson,* 515 U.S. 900 (1995), the Supreme Court held that when the Justice Department tried to impose an ACLU redistricting plan on Georgia rather than applying the laws to the redistricting plans proposed by Georgia, that the Department had "expanded its authority under the statute beyond what Congress intended." The Supreme Court also recognized the District Court's "sharp criticism" of the Justice Department for its close cooperation with the ACLU on the redistricting at issue in the litigation. The District Court's decision detailed the ACLU's intense advocacy of the Civil Rights Division on the Georgia redistricting at issue, observing that "Succinctly put, the considerable influence of ACLU advocacy on the voting rights decisions of the United States Attorney General is an embarrassment." Johnson v. Miller, 864 F.Supp. 1354, 1368 (S.D.Ga.1994).

The fact that the Division does not take every action requested by advocacy groups indicates that the Division is taking its role seriously, and that it reviews issues independently.

THE ROLE OF CAREER EMPLOYEES.

I have noted some criticism of career employees of the Division. I find this criticism unfortunate. It is my experience that the Division's career employees do their best to enforce the laws that Congress has passed to the best of their abilities. Career staff historically have not been subject to Congressional oversight hearings.

As in every Division of the Department, in the Civil Rights Division, the career staff carries out the day-to-day operations of the Division, litigates existing cases, and makes recommendations to open new cases. There is no question that the career staff is where the institutional knowledge of the Division generally resides and is a resource that any appointee should draw upon frequently. However, it is the Assistant Attorney General for Civil Rights and the leadership of the Department who are ultimately responsible for the actions of the Division. This is a tremendous responsibility for the AAG and his or her immediate staff—as it is the AAG who will sit before this Committee and explain the Division's position on controversial issues.

Because of this responsibility, the AAG and his or her staff must independently review, and therefore will sometimes disagree with, the recommendations of career staff. There is nothing inherently wrong with this—indeed, I think the Committee

would not react well to an Assistant Attorney General who testified that he reached no conclusions that differed in any way from the recommendations presented to him. Such a "rubber-stamp" approach would be, and should be, justly criticized.

Similarly, when the Division makes a mistake—as it did in Torrance, California when it was sanctioned nearly 1.8 million dollars for overreaching in an employment case—it would be no excuse for the AAG to say: "I was merely following the recommendations of the career staff." Therefore, it is the responsibility to "get it right" that obligates the AAG and his or her staff to closely scrutinize the recommendations that come before them.

The important question for the Committee is whether a particular decision to proceed (or not) with a case was correct. The Committee should focus on the quality of the Division's decisions and hold the political appointees accountable when issues arise. It seems to me that it is harmful to the Department from an institutional perspective to bring career employees such as Mr. Tanner up to be questioned by the Subcommittee about their reasoning in matters that may be controversial. Although some may sense a political opportunity to criticize him today, the questioning of a dedicated civil servant rather than political appointees does not serve the long-term interests of the Department.

Thank you for the opportunity to appear before the Subcommittee and I look forward to answering whatever questions the Subcommittee may have.

Mr. NADLER. Ms. Fernandes is recognized for 5 minutes.

TESTIMONY OF JULIE FERNANDES, SENIOR POLICY ANALYST & SPECIAL COUNSEL, LEADERSHIP CONFERENCE FOR CIVIL RIGHTS (LCCR)

Ms. FERNANDES. Good afternoon, Chairman Nadler, Ranking Member Franks and Members of the Subcommittee. Thank you for the opportunity to appear before you today to discuss the Voting Section of the Civil Rights Division. Every week it seems there's another article in the news that calls into question the integrity of the managers and political staff who run the Voting Section at the Civil Rights Division and the priorities they choose to enforcement.

We read of political hiring, unethical conduct, partisan interests trumping law enforcement. We also learn that while there has been an increase in some areas of enforcement, much of the core work of the section has been significantly diminished. In many ways, the Voting Section has become the truest example of civil rights gone wrong at the Department of Justice.

The voting rights movement was born of a need to repair decades of State-sanctioned denial of political equality to millions of American citizens. In years past, addressing this unfinished agenda guided the Voting Section's work. However, in recent years, the Voting Section has turned away from its historic mandate. Since 2001, the Civil Rights Division has brought two cases alleging voting discrimination against African Americans. One in Crockett County, Tennessee, was authorized under the previous Administration, with the complaint finally filed in April 2001. The other was in 2006 in Euclid, Ohio. No cases involving voting discrimination against African Americans have been brought in the deep south throughout the entire Administration. None. The only case brought alleging racial discrimination in the deep south was a case to protect White voters in Mississippi. Of course, White voters are protected by the Voting Rights Act. But it strains the imagination to believe that the only example of racial discrimination in voting in the deep south for the past 6 years was a case involving White voters.

While all of us understand that different Administrations have different enforcement priorities, it simply can't be a priority for the Civil Rights Division not to bring cases on behalf of African Americans. In recent years, instead of promoting access to the polls, the Voting Section has used its enforcement authority to deny access and promote barriers to block legitimate voters from participating in the political process. This effort was driven in large part by partisan political operatives like Hans von Spakovsky and Bradley Schlozman, though in some instances, with the complicit acts of career staff.

For example, the division's failure to block the implementation of Georgia's draconian voter ID law in 2005, an outcome driven by von Spakovsky, and later held unconstitutional and characterized as a modern-day poll tax by a Federal judge, opened the door for States across the country to pass similar onerous laws.

In recent years, the Voting Section has sent a strong message to States that the Federal Government will not challenge voter ID laws no matter how restrictive and no matter what the impact on minority voters. The section's abdication of their role to challenge discriminatory voter ID laws gives the impression that the section is being used as a tool to press a partisan interest in promoting voter ID.

Furthermore, the division has rejected numerous requests from voting rights advocacy groups to enforce that part of the NVRA that requires social service agencies to provide voter registration opportunities despite substantial evidence that registration at those agencies has plummeted.

At the same time, the section has shifted its priorities to enforcement of voter purge provisions of the law, which in many cases, as Congressman Wasserman Schultz pointed out as in Florida 2000, resulted in thousands of legitimate voters being taken off the rolls and denied their right to vote.

And the Department of Justice's Voter Integrity Initiative established in 2001 by former Attorney General John Ashcroft has created unnecessary comingling between criminal prosecutors in the U.S. Attorney's offices and civil rights division attorneys.

These efforts can, if done improperly, result in a chilling effect on the participation of minority voters, particularly in jurisdictions where there is a history of disfranchisement efforts targeting racial and ethnic minorities.

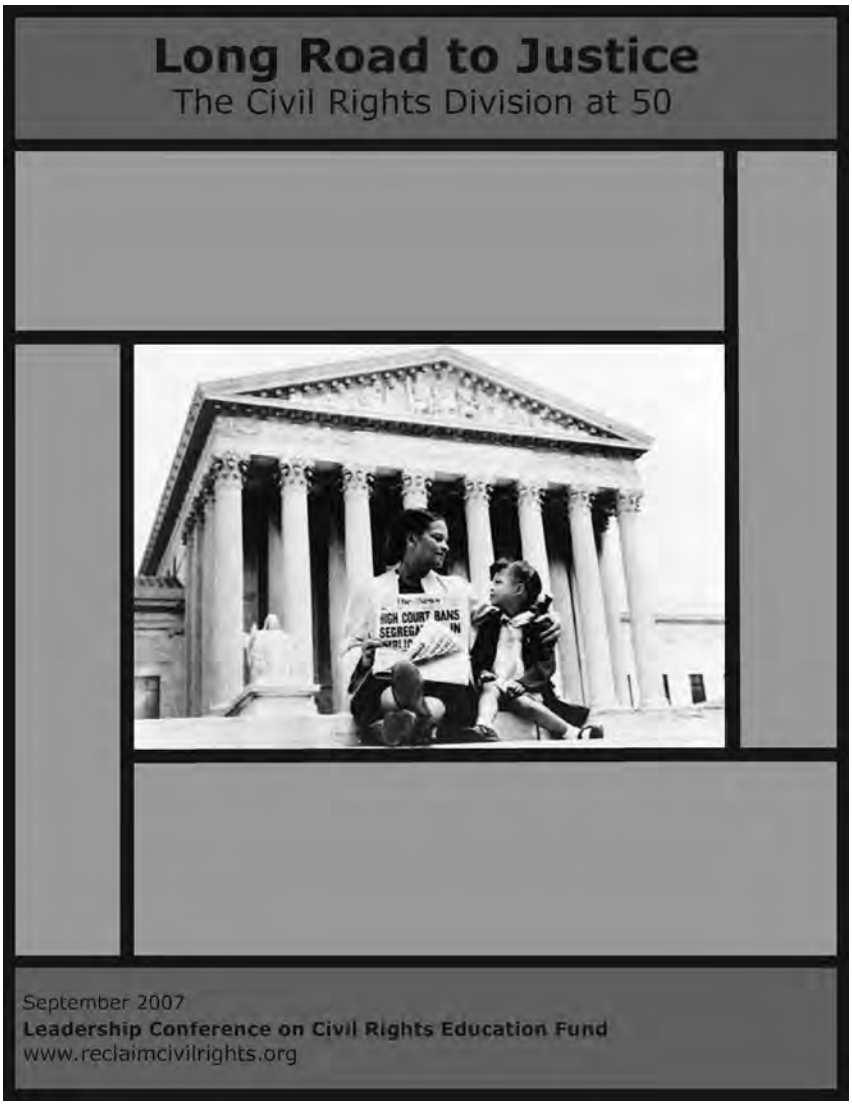
Rather than promoting schemes to deny equal opportunity for citizens to vote, the Civil Rights Division should be focused on: one, combatting voter ID laws that have a disproportionate negative impact on racial, ethnic or language minorities, like those passed by the Georgia legislature; two, ensuring that States are complying with the NVRA's access requirements and ensuring that those registrations are processed appropriately; and, three, reinforcing the firewall that exists between the Civil Rights Division and the Criminal Division's work to combat voter fraud.

Members of the Committee, the work of the Civil Rights Division over the past 50 years has helped to transform our Nation into a place where equal opportunity can be more than a dream. Today we must not allow those who seek to undermine civil rights destroy the power and credibility of one of our most important institutions

in the fight for equal justice. We must expect the Civil Rights Division to enforce the Nation's voting rights laws without fear or favor, and we must demand accountability when they don't. Thank you very much.

[The prepared statement of Ms. Fernandes follows:]

PREPARED STATEMENT OF JULIE FERNANDES



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We would especially like to thank Richard Jerome, the author of the report. Thanks are also due to members of the LCCR coalition who provided substantive input, useful advice, and counsel throughout the process: Michael Foreman and Sarah Crawford, Lawyers' Committee for Civil Rights Under Law; Debo Adegbile and Kristen Clarke, NAACP Legal Defense and Educational Fund; Anita Earls, UNC Center for Civil Rights; Anne Sommers and Andrew J. Imparato, American Association of People with Disabilities; Lisa Rice, National Fair Housing Alliance; and Karen Narasaki, Asian American Justice Center.

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The authors and publisher are solely responsible for the accuracy of statements and interpretations contained in this publication.

The substance and recommendations of the work are dedicated to the career men and women of the Civil Rights Division. For 50 years, they have worked tirelessly to help our nation meet its constitutional ideals of equal justice.

Karen McGill Lawson
President and CEO
LCCREF

Wade Henderson
Counselor
LCCREF

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FOREWORD

The American people have traditionally shown high national regard for civil rights…But the need for leadership is pressing. That leadership is available in the national government and it should be used.

President Truman's Committee on Civil Rights, *To Secure These Rights,* 1947[1]

Momentum for the civil rights struggle has historically emerged from within the people and communities of this nation, but the federal government continually plays a central role in determining the outcome of this struggle. When Congress authorized the creation of the Civil Rights Division at the Department of Justice in 1957, the federal government made a formal and ongoing promise to defend the civil rights of its people. It has honored this commitment over the last 50 years by enforcing anti-discrimination laws and by removing discriminatory provisions from its own policies and programs. In so doing, the Division has strived to reflect some of America's highest democratic ideals and aspirations: equal treatment and equal justice under the law.

We feel honored to have worked with the lawyers and professional staff of the Division during the time that we served as Assistant Attorneys General. We have experienced a strong bipartisan national consensus over the years regarding the need for federal civil rights protections and take great pride in the Division's response. It is through the Division's institutional knowledge and dedication to the promise of civil rights that we have been able to affect substantial and continued change. What began as a mission to strengthen the Department's resolve to end racial segregation and Black disenfranchisement in the South has expanded over the years to include protections from discrimination on the basis of ethnicity, sex, religion, disability, and national origin.

It remains clear that the work of the Civil Rights Division has the bipartisan support of both Houses of Congress and the American people. This bipartisan approach must continue, and the Civil Rights Division must not falter in pursuing strong enforcement efforts and relief. It was only through the resources of the federal government, and the credibility of the Department of Justice, that many of the more difficult and complicated cases were won.

Though questions regarding the Division's credibility and its precise civil rights agenda may arise throughout different administrations, the Division's fundamental commitment to equal justice and opportunity must remain steadfast. As President Truman's Committee for Civil Rights heralded 60 years ago, it must be the imperative of the federal government to enforce the law and to ensure fair and impartial administration of justice for all Americans. Today, which marks 50 years in the life of the Civil Rights Division, we commend its achievements and

[1] President Truman's Committee on Civil Rights. *To Secure These Rights: The Report of the President's Committee on Civil Rights.* 1947, 100.

assess its limitations. We ask that Congress and the American people join us today in renewing our commitment to civil rights enforcement.

Drew Days
Assistant Attorney General
Civil Rights Division
1977-1980

John Dunne
Assistant Attorney General
Civil Rights Division
1990-1993

Deval Patrick
Assistant Attorney General
Civil Rights Division
1994-1997

Bill Lann Lee
Assistant Attorney General
Civil Rights Division
1997-2001

INTRODUCTION

My friends, to those who say that we are rushing this issue of civil rights, I say to them we are 172 years late.
Vice President Hubert H. Humphrey, 1948[2]

Until the late nineteenth century, African Americans in the United States, particularly in the American South, were regarded both politically and socially as second-class citizens. Though the 13th, 14th, and 15th Amendments to the Constitution had been ratified, they were not being implemented with the full force of the law. Moreover, the courts and the federal government had nullified much of the Reconstruction-era Civil Rights Acts.[3]

In 1939, the Justice Department established a Civil Rights Section within its Criminal Division for criminal prosecutions of peonage and involuntary servitude cases, as well as for prosecutions under the remaining Civil Rights Acts.[4] The Section was given limited authority and a small staff. Fighting a World War against Nazism, however, made it increasingly difficult for the United States to defend racial discrimination within its own borders, especially while African-American troops were committed to the struggle for anti-discrimination abroad. The return of Black veterans to the home front provided local leadership and a political framework for civil rights protest that the federal government could no longer ignore.

President Truman established a Committee on Civil Rights in 1946. Its 1947 report, *To Secure These Rights*, recommended comprehensive civil rights legislation as well as the creation of a Civil Rights Division within the Justice Department.[5] Although President Eisenhower did not embrace civil rights as a political priority within the Administration, Attorney General Herbert Brownell advocated additional governmental efforts. Brownell collaborated with civil rights organizations, including the Leadership Conference on Civil Rights, to propose a civil rights bill that would require both civil remedies and criminal penalties for civil rights violations.

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[2] Humphrey, Hubert H. "1948 Democratic National Convention Address" (1948). Available at: http://www.americanrhetoric.com/speeches/huberthumphrey1948dnc.html

[3] The Justice Department was limited to criminal prosecutions under these statutes. From the Civil War to 1940, the Justice Department brought only two prosecutions for racial violence, one in 1882 and one in 1911.

[4] In addition to civil rights cases, the Civil Rights Section was also responsible for administering the criminal provisions of the Fair Labor Standards Act, the Safety Appliance Act, the Hatch Act, and certain other statutes. It also processed most of the mail received by the federal government relating to civil rights issues.

[5] The Truman Committee believed that increasing the level of federal civil rights enforcement from a Section within the Criminal Division to its own separate Division "would give the federal civil rights enforcement program prestige, power, and efficiency that it now lacks." President Truman's Committee on Civil Rights, *To Secure These Rights*, 152.

On September 9, 1957, President Dwight Eisenhower signed the Civil Rights Act of 1957, the first civil rights legislation since Reconstruction. While the Act could not implement everything necessary to protect the political, social, and economic rights of African Americans, it did authorize three important features: a position for an Assistant Attorney General for Civil Rights within the Department of Justice; the creation of the United States Commission on Civil Rights; and the use of civil suits against voting discrimination.

On December 9, 1957, Attorney General William P. Rogers signed AG Order No. 155-57, formally establishing the Civil Rights Division of the Department of Justice. In the 50 years since its creation, the Division has been instrumental in promoting equal justice for all Americans.

The following report discusses the efforts of the Civil Rights Division over the past 50 years to eliminate discrimination in the areas of education, employment, housing, voting, criminal justice, and public accommodations. We provide the historical context for the Division's involvement in each area, outline the Division's landmark achievements, and assess the challenges it currently faces in securing equal and impartial administration of justice under the law. Finally, we provide recommendations for the Division to consider as it sets out to achieve its mission of effective civil rights enforcement over the next 50 years. We invite the Division, Congress, and the public to examine and reflect on this report as a piece of an ongoing dialogue regarding how best to secure and protect the civil rights of the American people.

I. VOTING RIGHTS

We cannot, we must not, refuse to protect the right of every American to vote… But even if we pass this bill, the battle will not be over. What happened in Selma is part of a far larger movement which reaches into every section and State of America...It is all of us, who must overcome the crippling legacy of bigotry and injustice. And we shall overcome.

President Lyndon Baines Johnson, 1965[6]

In 2004 and 2005, *Forbes* magazine ranked Secretary of State Condoleezza Rice the most powerful woman in the world. A Phi Beta Kappa at age 19, with a doctorate degree in the politics of the former Soviet Union, she was the first female, first minority, and youngest Provost at Stanford University before serving in President George H.W. Bush's administration as Soviet and East European advisor. She served the current President Bush first as National Security Advisor and then Secretary of State. As the first African-American woman and the second woman ever to head the United States Department of State, Secretary Rice's race and gender are always noted but rarely invoke surprise. But 50 years ago, an African-American Secretary of State, from Birmingham, Alabama, would have been impossible.

In mid-twentieth century America, African Americans were regarded both socially and politically as second-class citizens. Prior to the Civil War, Blacks were disenfranchised throughout the states – Blacks in the South were still enslaved and their Northern counterparts were, for the most part, denied the rights of citizenship. Latino voters faced similar barriers to voting in Texas and other parts of the Southwest, as did Native American and Asian-American voters in the West. Fifty years ago, the vast majority of Blacks living in the South, like Secretary Rice's parents in Birmingham, Alabama, were barred from voting.

Americans born after the civil rights era of the 1960s may find it difficult to imagine that there was ever a period in which advocating the right to vote for African Americans and other racial minorities provoked controversy. Yet, in Alabama and throughout the South, it generated widespread hostility and even violence. In 1963, Birmingham Police Commissioner Eugene "Bull" Connor ordered police to open fire hoses on hundreds of young, nonviolent Blacks – both children and adults – who were protesting for their civil rights. Later that year, members of the Ku Klux Klan planted a dynamite bomb in the basement of Birmingham's 16th Street Baptist Church, a center for those resisting segregation and demanding the vote. The explosion killed four young girls, including one of Secretary Rice's classmates – 11-year old Denise McNair.

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[6] President Lyndon B. Johnson. Speech Before Congress on Voting Rights. 15 March 1965. Available at:
http://millercenter.virginia.edu/scripps/digitalarchive/speeches/spe_1965_0315_johnson?print

Far from intimidating the Black community and its many supporters, the deaths of innocent children shocked the nation and the world. Then, in March 1965, on a bridge outside Selma, Alabama, civil rights activists, led by Dr. Martin Luther King, Jr., and others, took to the streets in a peaceful protest for voting rights. They were met with clubs and violence. Many were beaten and severely injured, including a young activist named John Lewis – now Congressman Lewis. But the activists did not march in vain. Television brought this conflict of angry violence against peaceful, moral, protest into living rooms across America. Five days later, President Johnson announced to a joint session of Congress that he would bring them an effective voting rights bill. Echoing the spiritual anthem of the civil rights movement, he said simply, "We shall overcome." Shortly thereafter, Congress passed the Voting Rights Act.

This landmark legislation, called the most effective civil rights law ever enacted, would not have passed without the stirring words of Martin Luther King, Jr., the daily local struggles of civil rights activists, and the congressional arm-twisting of President Johnson. But it was the early cases under the 1957 and 1960 Civil Rights Acts, brought both by the Civil Rights Division and a core of private civil rights lawyers, that ultimately shaped the contents of the 1965 Voting Rights Act.[7]

From 1960 to 1964, Division attorneys traveled throughout the South to investigate voting discrimination and compiled overwhelming evidence of inequity. In a county-by-county and state-by-state campaign in Alabama, Georgia, Louisiana, and Mississippi, the Division challenged voting discrimination in federal courts. The Division faced hostile judges, defiant state and local officials, and widespread tactics of violence and intimidation toward Blacks attempting to register to vote.

In statewide cases against Louisiana and Mississippi in 1961 and 1962, respectively, the Civil Rights Division argued that some state laws were designed with discriminatory intent while others had the effect of preventing Blacks from voting. In Mississippi, for example, state provisions required Blacks applying to vote to copy and interpret provisions of the state constitution to the satisfaction of the White registrars, which allowed them to summarily deny qualified Black residents the opportunity to register. In Louisiana, District Judge John Minor Wisdom ruled that parishes could no longer give Blacks any tests more onerous than those that had previously been given to Whites – which generally meant no tests at all.[8] The Supreme Court upheld the decision, ruling that a court not only has "the power but the duty to render a decree which will, so far as possible, eliminate the discriminatory effects of the past as well as bar like discrimination in the future."[9]

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[7] See Landsberg, Brian K. *Free at Last to Vote: The Alabama Origins of the 1965 Voting Rights Act.* Lawrence: University Press of Kansas, 2007.
[8] *United States. v. Louisiana*, 225 F. Supp. 353 (E.D. La. 1963), aff'd 380 U.S. 145 (1965).
[9] *United States. v. Louisiana*, 380 U.S. 145 (1965).

Even when the Division obtained favorable rulings from some federal judges, striking down discriminatory voting practices, new barriers were quickly put into place. Those struggling for voting equality could not keep up with those fighting against it. The limits of the 1957 and 1960 Civil Rights Acts and the inability of the Division's case-by-case litigation to secure and enforce the necessary changes to local practices, pushed Congress to consider more rigorous, ground-breaking provisions in the final voting rights bill, including Section 5 of the Act, which required states and counties with the most egregious histories of entrenched discrimination against minority voters to have their voting changes pre-approved by the federal government before they could be implemented. The Act also prohibited discrimination against racial minorities in voting and authorized the Department of Justice to appoint federal examiners to register voters where local officials refused and to monitor whether elections were being conducted fairly. Civil Rights Division lawyers, particularly Harold Greene – who later became a federal judge in D.C. – drafted the initial proposal and language to be included in the final version of the Voting Rights Act.

On August 6, 1965, the day President Johnson signed the Voting Rights Act into law, he directed the Attorney General to file suit against the Mississippi poll tax.[10] The Attorney General immediately sent letters to every county registrar in every state covered by the Voting Rights Act to note the Act's suspension of discriminatory devices previously used to bar Blacks from voting. The following week, the Civil Rights Division brought poll tax suits against Texas, Alabama, and Virginia, and federal examiners were dispatched to 14 counties to register Black voters. During that first week alone, federal examiners registered over 15,000 Blacks, and another 27,000 by the end of the first month.[11] As of June 30, 1966, over 117,000 African Americans were registered by federal examiners in Alabama, Mississippi, Louisiana, and South Carolina. Within 10 years of passing the Voting Rights Act, Black registration in the Deep South had increased by over 1 million people.

The priorities of the Civil Rights Division's Voting Section have shifted periodically since passage of the Voting Rights Act, concurrent with Supreme Court interpretations of its meaning. The Supreme Court ruled in 1969, for instance, that all voting changes in covered jurisdictions – including redistricting and reapportionment – were subject to Section 5 preclearance; is also ruled in 1973 that the 14th Amendment prohibited "vote dilution."[12] In light of these decisions, the range of objections the Voting Section could raise – which subsequently included all voting changes with a discriminatory purpose or effect – became a powerful lever in prodding many jurisdictions to abandon at-large election systems, discriminatory annexations, and racial gerrymandering.

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[10] Twice earlier, in 1937 and in 1951, the Supreme Court had upheld the poll tax as constitutional. It overruled these cases in 1965 in *Harper v. Virginia*, 383 U.S. 663 (1965).
[11] In the first year after the Act went into effect, the Attorney General dispatched examiners to 43 counties and observers to another 23.
[12] *White v. Register*, 412 U.S. 775 (1973).

In 1980, however, the Supreme Court dealt voting rights enforcement a significant setback. In *City of Mobile v. Bolden*,[13] the Court held that in order to prove voting discrimination under Section 2 of the VRA, the plaintiff had to show that the policy or procedure in question was motivated by a discriminatory purpose. This temporarily limited the range of election practices to which the Voting Section could legally object. Thankfully, when it renewed the Voting Rights Act in 1982, Congress overturned the *Bolden* ruling, making clear that it is unnecessary to prove that certain registration and voting practices have been established with discriminatory intent. Instead, a Section 2 violation occurs if a court concludes that a voting practice has the *effect* of discriminating against minority voters, whether or not it was motivated by bias. The re-establishment of the discriminatory "results" test as the standard for bringing a Section 2 challenge again allowed the Civil Rights Division to intervene more effectively to combat discriminatory election policies.

From the late 1970s through the 1980s, the Section 5 preclearance requirement and the Voting Section's litigation under Section 2 of the Voting Rights Act curbed efforts to dilute minority voting strength. Following both the 1980 Census and the 1990 Census, Division efforts yielded remarkable gains in the ability of minority voters to participate in the political process. After the 1990 Census and the resulting round of redistricting, the number of Black and Latino representatives in Congress and in state houses across the country increased dramatically. Intervening when redistricting had a discriminatory purpose or effect has made voters increasingly able to elect candidates of their choice at every level of government.[14]

While some voting enforcement has continued in recent years, most notably to ensure that the minority language provisions of the Act – Sections 203 and 4(f)(4) – are vigorously prosecuted, much of the core work of the Voting Section has been significantly diminished. In the last several years, the Section has brought only a handful of Section 2 cases on behalf of African Americans, Hispanics, Asian Americans, and Native Americans. Though Congress added the National Voter Registration Act (NVRA) – also known as the "Motor-Voter" bill[15] – to the Civil Rights Division's enforcement arsenal in 1993, the Section has been pressing states to purge the voter rolls rather than ensure that states allow registration at social service agencies. Moreover, in pursuing the newest voting legislation, the Help America Vote Act (HAVA), a political appointee in the Division urged Arizona to apply the most cramped interpretation. This restrictive view of the new law would have limited voters' opportunities to use provisional

[13] 446 U.S. 55 (1980).
[14] See *Busbee v. Smith*, 549 F. Supp. 494 (1982), regarding Georgia's legislative redistricting in 1981. See *Garza v. County of Los Angeles*, 756 F. Supp. 1298 (C.D. Cal. 1990), regarding Section 2 litigation in L.A. County that resulted in the creation of a Hispanic majority district and the first Hispanic County Commissioner in 1992.
[15] The NVRA requires states to provide voter registration materials to departments of motor vehicles and offices that provide public assistance and/or disability benefits.

ballots, thus defying the position of the Election Assistance Commission, which has the principle role in implementing HAVA.

Ensuring the voting rights of all Americans in the twenty-first century demands more innovative tactics and approaches than were required during the period of overt segregation and racial discrimination. The Civil Rights Division, in changing its approach, must not stray from its original mission to ensure political equality.

II. EDUCATION

The plurality's postulate [in the recent Supreme Court decision regarding school desegregation efforts in Seattle and Louisville] that 'the way to stop discrimination on the basis of race is to stop discriminating on the basis of race,'…is not sufficient…To the extent the plurality opinion suggests the Constitution mandates that state and local school authorities must accept the status quo of racial isolation in schools, it is, in my view, profoundly mistaken.
Justice Kennedy, *Parents v. Seattle School Dist. No. 1*[16]

The school bell rings at T.C. Williams High School in Alexandria, Virginia. A group of students from Mr. Harrison's Advanced Placement Government class pours out into the hall, discussing last week's basketball game against West Potomac. The cafeteria boasts a racially, ethnically, and socioeconomically diverse scene. Of the two thousand students enrolled at T.C. Williams, a quarter is Hispanic, a quarter is White, and forty-three percent are Black. Dozens of flags exemplifying the student body's diversity of nationality hang in the school lobby; meanwhile, the city's payment for its students' AP exams and T.C. Williams' initiative to provide every student with a laptop confirm its commitment to leveling the playing field for its students of diverse socioeconomic backgrounds.[17]

The diversity of Mr. Harrison's class, while perhaps not typical, was unimaginable 50 years ago in Virginia. Efforts to racially integrate public schools in Virginia have been met with periods of widespread resistance since the Civil War. While many school districts employed tactics to stall integration and to avoid questions as to the racial equality of their facilities, perhaps nowhere was massive resistance more successfully employed than in 1950s Prince Edward County, Virginia. Recounting the story of Prince Edward County sheds light on the progress that has been made regarding issues of educational equality over the past 50 years and, more importantly, the civil rights work in public education that remains our business to resolve.

Prince Edward County is located in a Southside area of Virginia in the region known 50 years ago as the "Black Belt."[18] Stretching from the shores of the Chesapeake Bay down south through the Carolinas and Georgia and west toward East Texas, the counties in that region were predominantly rural and at least one-third Black. Each one embraced stringent laws and social norms enforcing the separation of the races. In 1939, Robert Russa Moton High School was constructed for Blacks in Prince Edward County in an attempt to avoid legal challenge from the NAACP regarding inadequate educational facilities. The new

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[16] *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 127 S. Ct. 2738 (2007); Kennedy, J., concurring.
[17] "T.C. Williams High School Profile." *Alexandria City Public Schools* (2007); Available at: www.acps.k12.va.us/profiles/tcw.php; www.en.wikipedia.org/wiki/T._C._Williams_High_School.
[18] *Prince Edward County: The Story Without An End—A Report Prepared for the U.S. Commission on Civil Rights*. July 1963; Available at www.library.vcu.edu/jbc/speccoll/pec03a.html.

school, however, was overcrowded and underfunded – it lacked a gymnasium, cafeteria, desks, lockers, restrooms, and an auditorium with seats. When the school's repeated requests for additional funds were denied by the all-white school board, students at R.R. Moton took matters into their own hands.

In 1951, some 450 students walked out of the school in protest against the educational conditions in Black Prince Edward schools. Supported by the Richmond NAACP, the students' case, *Davis v. County School Board of Prince Edward County*, became one of the five cases combined under the name *Brown v. Board of Education* in the 1952-1953 Supreme Court term. This decision, which overturned *Plessy v. Ferguson* (1896) and declared racial segregation to be unconstitutional, was met with massive resistance in Prince Edward County. Since the Supreme Court specified no time frame for desegregation in *Brown I* (1954), local White leadership delayed its implementation and organized plans to underwrite White teacher salaries to insure that quality White education would continue untouched. Following the 1957 decision in *Brown II* that schools must desegregate "with all deliberate speed," the Prince Edward County school board epitomized Virginia's recalcitrant policy of massive resistance in its 1959 decision to close its doors to all public education.

Though the county government refused to appropriate funds for the public school system, various organizations raised money for White families to send their children to private or parochial schools. In 1961, the State of Virginia allocated funds for tuition grants and tax concessions for White children to go to private segregated schools, while Black children were either denied public education or forced to relocate to other counties. It wasn't until 1964 in the Supreme Court case *Griffin v. County School Board* that Prince Edward County's and the State of Virginia's actions were declared unconstitutional. County schools were subsequently ordered to reopen and to integrate.

In 1964, only 1.2 percent of Black students in the entire South attended schools with Whites. In reaction to the dismal state of racial integration throughout the South, Congress passed the Civil Rights Act of 1964. A comprehensive measure mandating nondiscrimination in public education, facilities, accommodations, employment, and federally assisted programs, the Act authorized the Justice Department to intervene in race-based equal protection cases.[19] Though the Civil Rights Division was not a plaintiff in the *Brown v. Board* or the *Griffin* litigation, Title IV of the 1964 Act authorized the Department thenceforth to bring suit against racial segregation. Additionally, Title VI dictated that federal agencies, including the Department of Health, Education, and Welfare, be responsible for ensuring nondiscrimination in federally funded programs – including public schools. The Act also provided for rescinding federal funds for noncompliance.

[19] Congress also included national origin, sex, and religion in the categories of people to whom equal protection under the Civil Rights Act of 1964 would extend.

In 1966 alone, the Civil Rights Division brought 56 school desegregation cases under Title IV, Title VI, and Title IX.[20] The Department challenged the legitimacy of dual school systems throughout the South and endeavored to equalize facilities while integrating teaching staff, school activities, and athletics. The decisions resulting from cases brought by the Civil Rights Division required that the school systems not only allow Black children to attend previously all-white schools, but that they "undo the harm" created by the segregated system.[21]

Leading up to the 1968 school year, many school boards sought to rely on "freedom of choice" plans as a response to the desegregation mandate. Under these plans, while all students were given a choice of which school to attend, Whites typically levied intense pressure and intimidation to steer Black families away from previously all-white schools, and practically no White families chose to attend previously all-black schools. Thus, the practical effect of such plans was to continue to perpetuate segregation. In 1968, in a challenge to the use of such plans, the Supreme Court held that the plan in question was insufficient to address the problem of segregation and that school boards must accept "the affirmative duty to take whatever steps might be necessary" to convert to a unitary system and to eliminate racial discrimination "root and branch."[22]

Nevertheless, intense resistance to desegregation continued. In 1969, in a consolidated case involving over 30 Mississippi school boards, Civil Rights Division attorneys pressed to eliminate and replace "freedom of choice" proposals with affirmative desegregation plans. In August of that year, the Fifth Circuit ruled that the new desegregation plans must be implemented by September. One week later, however, the Division's Assistant Attorney General sought to delay the new integration plans until the 1970 school year. In response to this change of position, career attorneys in the Division publicly protested.[23] Later that year, the Supreme Court issued a unanimous decision that the school districts must integrate without delay in the middle of the school year.[24] At that point, the Division resumed its efforts to actively pursue desegregation, and at the end of 1970 had undertaken a total of 214 active school cases.

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[20] Title IX of the Civil Rights Act of 1964 allowed the Justice Department to intervene in private suits.

[21] *United States v. Jefferson County Board of Education*, 372 F.2d 836 (5th Cir. 1966), adopted en banc, 380 F.2d 385 (5th Cir. 1966)—immediate desegregation for all states of the 5th Cir., 417 F. 2d 834 (5th Cir. 1969); see also *United States v. Montgomery County Board of Education*, 395 U.S. 225 (1969)—desegregation of faculty and staff required.

[22] See *Green v. New Kent County School Board*, 391 U.S. 430, 438 (1968).

[23] The United States Commission on Civil Rights also called this reversal a "major retreat in the struggle to achieve meaningful school desegregation." Cited in Appellee's Brief, 1969 WL 120225.

[24] *Alexander v. Holmes County Board of Education*, 396 U.S. 19 (1969).

In addition to challenging "freedom of choice" policies in the South, the Division attempted to desegregate Northern and Midwestern public schools[25] and challenged dual systems in higher education.[26] The Division's education work over the past 50 years, however, is not limited to securing public school desegregation. The Education Section has committed itself over the years to equal education for students with limited-English proficiency (LEP), to equal access for disabled students through enforcement of the Americans with Disabilities Act, and to equal opportunity for female students to participate in sports programs.

Since the closing of Prince Edward County schools in 1959, the region has made great strides towards integration and racial reconciliation. In 2003, the Virginia General Assembly passed a resolution apologizing for massive resistance, and in June 2003, Prince Edward County granted honorary diplomas to the students who would have graduated from R.R. Moton High School. Currently the largest public high school in the area, Prince Edward County High, is fully integrated with a population that is 56 percent Black and 43 percent White. T.C. Williams High School in Alexandria, while not constructed until after the Civil Rights Act of 1964, has also overcome significant resistance to integration. Though the city's public schools were desegregated in 1959, the three area high schools were consolidated and subsequently integrated in 1971 to remedy pervasive racial imbalances in the 1960s. While these school districts have made significant local progress, further protections by the Civil Rights Division are necessary nationwide, for schools are increasingly becoming resegregated.[27]

While the Justice Department committed to aggressive desegregation efforts in the late 1960s, those efforts have been consistently scaled back in subsequent decades. The courts have undermined progress in achieving racial equality and diversity by limiting possible remedies for segregation. In *Milliken v. Bradley* (1974), for instance, the Supreme Court blocked a desegregation plan in Detroit that relied on inter-district busing, ruling that dismantling a dual school system did not require any particular racial balance in each school. In rejecting inter-district busing and emphasizing the importance of local control over the operation of public schools, the decision exempted suburban districts from assisting in the desegregation of inner-city school systems. Limitations such as this sanction *de facto* segregation as a replacement for the *de jure* system outlawed by *Brown*.

Recent decisions such as that from the *Seattle* and *Louisville* cases, though continuing to endorse diversity as a compelling state interest, may undermine local school districts' voluntary strategies to combat segregation. The work of the

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[25] *Reed v. Rhodes*, 607 F.2d 714 (6th Cir. 1979) (Cleveland, OH); *Liddell v. Bd. of Ed.*, 667 F.2d 643 (8th Cir. 1981)(St. Louis, MO); *United States v. Yonkers*, 837 F.2d 1181 (2nd Cir. 1989)(Yonkers, NY).
[26] *Ayer and United States v. Fordice*, 505 U.S. 717 (1992).
[27] Orfield, G., Eaton, S., and the Harvard Project on School Desegregation. *Dismantling Desegregation: The Quiet Reversal of Brown v. Board of Education*. New York: New Press, 1998.

Education Section of the Civil Rights Division, which contributed greatly in the early years to fuel the fire of integration, has stalled in recent years. It is the responsibility of the Civil Rights Division to contest efforts to scale back the federal government's promise to ensure equal protection and educational opportunity for all its students.

III. EMPLOYMENT DISCRIMINATION

We…are not interested in Negroes getting more work, Negroes have too much work already. What we want Negroes to get is less work and more wages.
A. Philip Randolph, "Our Reason for Being." March 1919[28]

Born in Karachi, Pakistan, but living in the United States since he was one year old, New Yorker Mohammad Salman Hamdani was equally proud of his Muslim heritage and American citizenship. On September 11, 2001, it was believed that the 23-year-old part-time ambulance driver and police cadet heard about the terrorist attack on his way to work and rushed over to help. Unfortunately, his whereabouts that day remained unconfirmed until 2002 when his remains were positively identified at the World Trade Center site. "A compassionate, warm-hearted young man," says Salman Hamdani's mother, his "greatest desire in life was to help others."[29]

The terrorist attack on September 11, 2001, was a singular act of horror not seen on U.S. soil since Pearl Harbor. The quick response of New York City firefighters, law enforcement officers, and medical workers like Mohammad Salman Hamdani to the tragedy made them heroes. These officers – men and women of all races and ethnicities – are the best that New York has to offer. They risked their lives for others and did so with honor.

Fifty years ago, many of these local heroes would not have had the opportunity to serve their city and their country as first responders. The doors to professions such as law enforcement and firefighting were all but locked in 1957 to people of color. Fire stations were notoriously segregated in the days preceding the civil rights movement. In San Francisco, for instance, there were no black firefighters at all before 1955 and women were not allowed to apply before 1976. [30]

Too often, in the 1950s and 1960s, Blacks were relegated to lower paying and less desirable jobs, and were excluded by many traditionally "white" industries and professions – particularly in the South. In many manufacturing industries, for example, Blacks held the jobs that were more physically strenuous, and often hotter or dirtier, while only Whites could compete for better paying supervisory positions. To make matters worse, unions at the time boasted many restrictions and employment hierarchies. Women were also relegated to low-paying jobs, thus earning about half that of men in 1960.

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[28] Randolph, A. Philip. "Our Reason for Being." First editorial of *The Messenger*, March 1919. Available at: http://historymatters.gmu.edu/d/5125/
[29] U.S. Department of State's Office of International Information Programs. *September 11: Victims and Heroes*. Available at: http://usinfo.state.gov/albums/911/homepage.htm.
[30] Yi, M. "Minorities Named to Key Posts at SFFD." *Examiner*. 26 July 2000, A1; Available at: http://sfgate.com/cgi-bin/article.cgi?file=/examiner/archive/2000/07/26/NEWS11839.dtl

Much of the change that we have seen in employment with respect to racial and gender discrimination can be directly attributed to the Civil Rights Division's enforcement of Title VII of the Civil Rights Act of 1964, which prohibits discrimination in employment based on race, sex, religion and national origin.[31]

Initially, few cases were brought following under Title VII. At that time, the Equal Employment Opportunity Commission (EEOC), created by the 1964 Civil Rights Act, had no enforcement authority. It could only investigate, conciliate, or refer cases to the Justice Department to litigate. A few years later, the Civil Rights Division put employment litigation on its priority list, filing six discrimination suits in the summer of 1967 and another 26 in 1968. At issue in the early employment cases was whether Title VII prohibited only purposeful discrimination or whether it also prohibited practices that appeared to be neutral but had a discriminatory effect.

The Justice Department first raised this issue in suits challenging union hiring practices. In one suit, an all-white asbestos workers union restricted membership to sons (or nephews raised as sons) of union members. Without union membership, individuals could not get hired in the insulation and asbestos trade. A second suit challenged a seniority system that perpetuated the effects of past discrimination. Both practices – restricted union membership and the seniority system – were ruled unlawful under Title VII by lower federal courts.[32] The Supreme Court addressed the issue of discriminatory hiring practices in 1971, after a divided Fourth Circuit ruled that Duke Power could require new hires for previously all-white jobs to have a high school degree and pass a written "ability" test. The Justice Department supported the plaintiffs in the case, noting that Duke Power's new hiring criteria were neither expected of previously hired White employees nor necessary to fill the job description.[33] The plaintiffs prevailed unanimously in the Supreme Court, which held that facially neutral "practices, procedures or tests that are discriminatory in effect cannot be used to preserve the 'status quo' of employment discrimination."[34]

In 1969, the Division sought back pay for the first time in an employment discrimination lawsuit. The Justice Department also determined that the affirmative action practice of requiring numerical goals and timetables for hiring

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[31] Also, Executive Order 11,246, issued by President in Johnson in September 1965, gave the Labor Department the responsibility of enforcing nondiscrimination for federal contractors and subcontractors.

[32] *Vogler v. Asbestos Workers 53,* (E.D. La. 1967); *United States v. Local 189 United Papermakers*, 282 F. Supp. 39 (E.D. La. 1968).

[33] See *Griggs v. Duke Power*, 401 U.S. 424 (1971).

[34] *Vogler*, *supra* note 32, at 430. "The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited. … [G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built in headwinds' for minority groups and are unrelated to measuring job capability." *Ibid*, 431.

could be required for federal contractors as part of Executive Order 11246, which prohibited discrimination based on race, national origin, or religion by employers with federal contracts. The Division included goals and timetables in the relief and in settlements it sought in Title VII litigation. Following suits against Bethlehem Steel and United States Steel, the Division brought a nationwide suit against the entire basic steel industry in 1974, covering more than 700,000 employees at that time. A nationwide suit against over 250 trucking companies was brought that same year, resulting in a consent decree with the employers. These suits combined "brought over two million employees under the coverage of consent decrees with goals, timetables, and back pay."[35] In the same vein, a case was brought against the Alabama Department of Public Safety in 1972, in which the district court found that there had never been a Black trooper in the 37 years of the state patrol. The court required a one-for-one hiring of Black and White troopers until the Department met a goal of 25 percent Black troopers.[36]

In 1974, the federal government reorganized Title VII enforcement and the litigation authority against private employers was transferred to the EEOC. The Division's Employment Litigation Section was tasked with aggressively enforcing the provisions of Title VII against state and local government employers. From 1975 to 1982, the Civil Rights Division brought cases covering recruiting, hiring and promotional practices of local and state governments, predominately against police and fire departments, which opened up their ranks to minorities and women.[37] Similar cases were brought against states and counties to include minorities and women in jobs in correctional institutions.

In 1978, the Civil Rights Division also worked with the EEOC and other agencies to issue the *Uniform Guidelines on Employee Selection Procedures*. These guidelines provided employers, labor organizations, and the courts with uniform federal guidance on what employers could and should do to create and implement hiring practices and standards that are non-discriminatory. These guidelines applied to federal government hiring as well.

The policies and practices of the Employment Section of the Division shifted dramatically under the Reagan Administration. In 1983, the Department filed an *amicus* brief in a private suit against the New Orleans Police Department, arguing that no affirmative action remedies – including race conscious measures

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[35] Rose, D. "Twenty-Five Years Later: Where Do We Stand on Equal Employment Opportunity Law Enforcement." *Vanderbilt Law Review*, Vol. 42, May 1989: 1122, 1145.

[36] *NAACP and United States v. Allen*, 340 F. Supp. 703 (M.D. Ala. 1972). Later, the District Court ordered a similar race-conscious requirement for promotions to higher ranks, and the Supreme Court upheld the relief in 1987 despite the United States' reversal of position and opposition to the remedy. See *United States v. Paradise*, 480 U.S. 149 (1987).

[37] See *United States v. City of Alexandria*, 614 F.2d 1358 (5th Cir. 1980) (covering 45 municipal police and fire departments in Louisiana), and *Vulcan Pioneers, Inc. v. New Jersey*, 832 F.2d 811 (3rd Cir. 1987) (covering 12 fire departments in New Jersey). Cases were brought during this time against state police agencies in Florida, Maryland, Michigan, New Hampshire, New Jersey, North Carolina, Vermont and Virginia.

– are lawful to correct past discrimination under Title VII except those that assist individual and specific victims of discrimination. The Fifth Circuit rejected that position.[38] However, in 1984 the Division began systematically revising its consent decrees with over 50 public employers that had required affirmative action remedies, to eliminate numerical goals. As one commentator put it, "[t] he cumulative effect of the Justice Department's positions was that the lawyers for the executive branch, who had been in the forefront of advocating the civil rights of blacks, other minorities, and women since the days of President Truman, became the advocates for a restrictive interpretation of the civil rights laws."[39]

One area in which the Division *did* continue equal employment enforcement during the 1980s was in residency requirements. In 1983, the Division brought suit against the city of Cicero, Illinois, for requiring applicants for employment to live in the city. Because the city was over 99 percent White, the city work force was all White. Twelve similar suits followed in other white suburbs of Chicago. The court ruled that the residency requirements violated the disparate impact standard of *Griggs v. Duke Power,* and settlements or summary judgments were entered in all 13 suits. Lawsuits against 18 suburbs of Detroit were also successful.

In the 1990s, the Civil Rights Division renewed its efforts to enforce Title VII against public employers through "pattern or practice" cases and individual cases referred by the EEOC. The Employment Section also took on a critical role in defending the federal government's affirmative action programs. In July 1995, President Clinton confirmed that the federal government would "mend, not end" affirmative action and ensure that federal programs were consistent with the Supreme Court's new, more rigorous, standard for evaluating whether such programs were constitutional.[40] The Justice Department subsequently undertook a meticulous review of all federal programs to ensure their fairness, flexibility, and constitutionality.

In recent years, prosecution of employment cases by the Division has been drastically reduced. A review of the Division's enforcement activity in recent years reveals a considerable decline in the number of Title VII lawsuits being undertaken, particularly as related to the issue of "disparate impact." The Division must consider these cases a higher priority, as they seek systemic reform of employment selection and promotion practices that adversely affect the employment opportunities of women and minorities. Strong evidence suggests that the problem of systemic employment discrimination persists, and because these cases are complex and difficult, the Justice Department is oftentimes the only entity that can successfully intervene.

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[38] *Williams v. New Orleans*, 729 F. 2d 1554 (5th Cir. 1984).
[39] Rose, *supra* note 35, at 1155, 1157.
[40] See *Adarand Constructors v. Pena*, 515 U.S. 200 (1995).

IV. FAIR HOUSING

MAMA: *'Course I don't want to make it sound fancier than it is…It's just a plain little old house – but it's made good and solid – and it will be* ours…
RUTH: *Where is it?*
MAMA: *Well – well – it's out there in Clybourne Park – …*
RUTH: *…Mama, there ain't no colored people living in Clybourne Park…*
MAMA:*…I just tried to find the nicest place for the least amount of money for my family…Them houses they put up for colored in them areas way out all seem to cost twice as much as other houses. I did the best I could.*
Lorraine Hansberry, *A Raisin in the Sun*[41]

Even though the housing boom has cooled and the downturn in the subprime market is rippling through the credit markets, home ownership continues to sit at the heart of the American dream. For many prospective homeowners today, the chief concern is whether they can afford their neighborhood of choice or whether they should take out a fixed or variable rate loan.

Fifty years ago, however, many families across the country faced much graver challenges to homeownership than we consider today – whether their houses would be bombed upon moving in. This happened to Percy Julian – the famed African-American chemist – when he and his family moved into Oak Park, Illinois, in 1950. The Julian home was fire-bombed on Thanksgiving Day just before they moved in. The attacks galvanized the community, which supported the Julians; but for years afterward, father and son often felt compelled to watch over their property by sitting in a tree with a shotgun.

In 1968, Congress responded to mounting evidence of intractable housing discrimination by enacting the Fair Housing Act. The Act prohibits both public and private discrimination on the basis of race, color, religion, and national origin in the sale and rental of housing. For the first time, it also allowed money damages to be collected in Justice Department suits.

The Civil Rights Division quickly applied this new authority, and a number of its first cases resulted in negotiated consent decrees. Developers of residential housing and owners and managers of urban rental apartments agreed to use objective, nonracial sales and rental criteria, as well as to engage in affirmative marketing efforts to seek minority customers. One of the first litigated cases resulted in similar affirmative relief.[42] Other early cases involved racial steering, in which real estate agents only showed minority applicants apartments or houses in areas that were already predominantly occupied by people of color. High profile cases were brought against Chicago real estate agents, Fred and Donald Trump in New York City, and the owners of the LaFrak housing complex – also in New York City

[41] Hansberry, L. *A Raisin in the Sun*. New York: Random House Inc., 1995, 76-77.
[42] *United States v. West Peachtree Tenth Corp.*, 437 U.S. 221 (5th Cir. 1971).

Another case of note involved the City of Black Jack, Missouri, just outside St. Louis. In 1969, a community organization in St. Louis began planning to construct multifamily apartments for low and moderate income residents in a predominantly Black area of the city. It found a location outside the city, in an unincorporated part of St. Louis County called Black Jack, which was already designated for multi-family units. When they learned of this plan, Whites in the area (Black residents made up less than 2 percent), successfully petitioned the county to incorporate as the City of Black Jack. They then enacted a zoning ordinance prohibiting the construction of any new multifamily dwellings. The Civil Rights Division challenged the zoning ordinance and the court ruled that the racial effect of the zoning ordinance was sufficient to violate the Fair Housing Act, and that the Division did not need to prove racial intent: "Effect and not motivation is the touchstone, in part because clever men may easily conceal their motivation."[43] Allowing the Division to focus on discriminatory effect rather than only intent empowered it to take on significantly more cases in recent years.

In 1980, the Civil Rights Division and the Yonkers branch of the NAACP filed suit against the City of Yonkers and the Yonkers School Board, charging that the city had engaged in systematic housing and school segregation for 30 years. This was the first case in which both school and housing segregation were challenged in the same lawsuit. After a three-month trial, the court found that the city had restricted housing projects to southwest Yonkers, a predominantly minority area, for the purpose of enhancing racially segregated housing and intentionally to limit minority children to schools with predominantly minority student bodies.[44]

In 1988, Congress enacted a Fair Housing Amendments Act that provided stiffer penalties, expanded the Act's coverage to include disabled persons and families with children, and established an administrative enforcement mechanism through the Department of Housing and Urban Development (HUD). The Act also required the design and construction of new multifamily dwellings to meet certain adaptability and accessibility requirements. With these amendments, the Division's Housing Section tripled; and in 1991, it established a fair housing testing program, wherein individuals pose as prospective buyers or renters to assess whether the housing providers discriminate. The Division generally uses both Black and White non-volunteers from other parts of the Justice Department as individual testers. From 1992 to 2005, the Division filed 79 pattern or practice cases using evidence from the fair housing testing program.

In the 1990s, the Division began its Fair Lending program. Discrimination in lending generally involves one of three types of issues; (1) marketing practices in

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[43] *United States v. City of Black Jack*, 508 F2nd 1179, 1186 (8th Cir. 1975).
[44] *United States v. Yonkers Board of Education*, 624 F.Supp. 1276 (S.D.N.Y. 1985), aff'd, 837 F.2d 1181 (2nd Cir. 1987). As a remedy, the court ordered the City to provide for 200 units of public housing in white areas of the city, as well as to allocate its federal housing grants for several years in ways that would advance racial integration. It also ordered the school board to create magnet schools and implement a school assignment program furthering desegregation.

which the availability of loans depends on the racial or ethnic composition of neighborhoods (also known as redlining); (2) underwriting policies and practices in which lenders use different standards to assess the credit worthiness of applicants, and offer different levels of assistance to applicants based on race; and (3) pricing practices in which minorities and other protected groups are charged more for credit than other similarly situated borrowers.

The Department's first case related to underwriting practices, which was brought in 1992, stemmed from an *Atlanta Journal* series on the Decatur Federal Savings and Loan. Black and Hispanic applicants were rejected for mortgage loans in significantly higher proportions than White applicants. Bank employees also assisted White applicants with the loan process, but not Black applicants. A consent decree was entered that required fair lending training for loan officers, advertising and marketing to minority neighborhoods, and the creation of new branches in minority neighborhoods. In 1993, the Division settled with Blackpipe State Bank in South Dakota for redlining; the bank had refused to make secured loans to Native Americans living on Reservation lands. Loans to purchase cars, mobile homes, and farm equipment were simply unavailable to Native American borrowers. The bank that purchased Blackpipe agreed to set up a fund to compensate victims, to establish a marketing program and conduct financial seminars on Native American reservations, and to recruit qualified Native American applicants for job openings at the bank.

In 1994, the Division entered into a consent decree with Chevy Chase Bank, after it alleged that the bank was not marketing loans in predominantly African American neighborhoods of Washington, D.C. and Prince Georges County. Chevy Chase Bank agreed to pay $11 million to the neglected areas through a special loan program and through service efforts geared toward those neighborhoods. Other fair lending cases involved allegations of racially discriminatory practices relating to the sale of homeowners insurance (Milwaukee), discriminatory pricing (Brooklyn, Long Beach, CA), and predatory lending (New York City, Washington, D.C.).

The results of these efforts were remarkable in such a short period of time. Due in part to the Division's work and its general impact on the banking profession, the availability of loans to minorities expanded dramatically. At the same time, however, the Division has done little over the past 10 years to require conventional lenders to penetrate the African-American and Latino homeownership markets nationwide. It has failed to challenge the discriminatory predatory practices – such as steering Blacks and Latinos to subprime loans and lenders when they could qualify for conventional loans – that affect the lending market so dramatically today. Although indications of redlining in the homeowners insurance industry continue to surface, the Division has not been aggressive enough in recent years in confronting this discrimination directly or in correcting underlying practices.

Additionally, despite its promising start in addressing residential segregation based on race, the Division has not in recent years used its authority to address real estate sales discrimination and discriminatory zoning practices that exclude or limit housing opportunities for African Americans and Latinos. The loss of the Division's momentum in this area has left a significant vacuum in the efforts of the federal government to end residential segregation. This failure is particularly disheartening in the face of the Supreme Court's recent school desegregation rulings, which leave fair housing enforcement as one of the few remaining options to promote school desegregation.

The general criticisms of politicization, anemic enforcement, and a disregard of mission further affect housing discrimination enforcement, as they do with regards to other civil rights issues. The Fair Housing Act clearly states that the Division "shall" file cases investigated and charged by the Department of Housing and Urban Development. With increasing frequency, however, the Division has rejected responsibility for filing these cases – declining to conduct additional investigations or declining the cases altogether, thereby prolonging and duplicating the legal process. In one Chicago case, for example, the Division refused to file a federal suit after a referral from HUD. The Division stalled on the case for so long that Representative Jesse Jackson, Jr. requested that the Division investigate the case. The case was eventually settled, but the Division's delays undercut the promise of full enforcement of the Fair Housing Act, and thus the relief provided to the complainant in the case.

The number of enforcement cases brought by the Division – both "pattern or practice" and HUD election cases – has dropped significantly in recent years; and that decrease is most evident in cases alleging racial discrimination. The Division's fair housing testing program has been reduced, and the Division has not advanced a strong fair lending or homeowners insurance enforcement portfolio for years. Given both the problems evident in the subprime market and the persisting patterns of residential segregation, predatory lending and sales and zoning practices that discriminate based on race and national origin should be at the top of the Division's agenda. It is evident that the Division has not wielded its voice to the fullest extent in combating these injustices.

Unfortunately, as with many other sections of the Civil Rights Division in recent years, many qualified attorneys have left and/or been pushed out by the administration. A diminishing staff promises a loss of both institutional memory and familiarity with the Fair Housing Act, thus reducing the ability of the Section to get back on its feet. As homeownership continues to sit at the heart of the American dream, the Division must recommit itself to redressing these ongoing setbacks; for while minority home ownership has undoubtedly advanced over the last 50 years, it still remains out of reach for too many Americans.

V. PUBLIC ACCOMMODATIONS

All of Africa will be free before we can get a lousy cup of coffee.
James Baldwin[45]

Richard and Angela Edmond of Greenville, Mississippi are planning a summer vacation to Daytona Beach with their high-school-aged kids, Kevin and Marcus. Heading out on a Friday, they plan to spend a night in Selma, Alabama, to break up the drive and to have dinner with Mrs. Edmond's parents, the Hurstons. Having resided in Selma their whole lives, Mr. and Mrs. Hurston are well-known within their tight-knit neighborhood, particularly for their ongoing involvement in local civil rights issues. Over dinner, the family discusses the Hurstons' participation in the famous 1965 voting rights march from Selma to Montgomery and the voter registration drives they organized after moving back home from college. It doesn't take much to convince the grandkids to accompany them in the morning to see the A.M.E. Church where Dr. King spoke on voting rights in the 1960s.

On their way to the local Comfort Inn after dinner, the Edmonds are reminded of how differently they navigate public life in Alabama from their parents. Fifty years ago, they would not have been welcomed at most hotel chains in their area, nor would they have been served dinner in a racially integrated environment.

While pockets of injustice in customer service still exist throughout the nation, the law no longer supports them. Fifty years ago, segregation in public accommodations – particularly in the South – was the norm. Whether it was in restaurants, bars, movie theaters, buses, hotels, or drinking fountains, African Americans were routinely denied service and relegated in the social realm to second-class citizens. Through local efforts in the early 1960s, such as the sit-in movement in Greensboro, North Carolina, students and civil rights organizations alike forced the issue of segregation into the public arena. Over the course of a year and a half, the sit-in movement had attracted over 70,000 participants and generated over 3,000 arrests in the name of equal protection under the law.[46] As a result of these and other civil rights efforts, the Civil Rights Act, passed by Congress in 1964, included provisions outlawing discrimination in public accommodations.

Title II of the Act requires that restaurants, hotels, theaters, sales or rental services, health care providers, transportation hubs, and other service venues afford to all persons "full and equal enjoyment of the goods, services, [and] facilities" without discrimination or segregation. Consequently, federal law prohibits privately owned facilities from discriminating on the basis of race, color,

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[45] Quoted in Kasher, S. *The Civil Rights Movement: A Photographic History, 1954-1968*. New York: Abbeville Press, 1996, 35.
[46] Carson, C., Garrow, D., Gill, G., Harding, V., and Clark Hine, D., eds. *The Eyes on the Prize Civil Rights Reader*. New York: Penguin Books, 1997.

religion, or national origin, and the Americans with Disabilities Act extends this provision to include disability. In 1964, including a directive to address segregation in public accommodations was particularly controversial because the 1883 civil rights cases held that equal protection under the law did not extend to privately owned and operated establishments and facilities. In order to pass Title II, Congress used its constitutional authority over interstate commerce to authorize its actions. The provision succeeded, therefore, due to Congress' ability to intercede in the buying, selling, and trading of services. The year the Act was passed, the Supreme Court upheld Title II as a constitutional application of the commerce clause in *Heart of Atlanta Motel v. United States*.[47] The Supreme Court also upheld the Act in a companion case regarding Ollie's Barbeque – a family owned restaurant in Birmingham, Alabama, that served barbeque and home-made pies.[48]

In the *Heart of Atlanta* and the *Katzenbach* (Ollie's Barbeque) cases, both the hotel and the restaurant, respectively, had brought declaratory judgment cases against the United States in an attempt to force the courts to declare Title II unconstitutional. The Department prevailed in these cases, after which it continued a vigorous enforcement program throughout the late 1960s. Subsequently, thousands of hotels, restaurants, bars, pools, movie theaters and transportation facilities were forced to integrate. Though these efforts were extensive, few cases went to trial and resulted in reported decisions, as the majority of defendants settled and agreed to change their patterns and practices of discrimination. Additionally, most of the public accommodations cases in which the Department intervenes originate as private suits.

While drastic changes in the administration of public services have occurred over the past 50 years, discrimination in public accommodations has weakened but not disappeared. In recent years, the Civil Rights Division has been involved in multiple cases alleging overt racial and ethnic discrimination. In 1994, the Justice Department sued Denny's restaurants for discriminatory service. In *U.S. v. Flagstar Corporation and Denny's*, the Division filed and resolved a Title II action in California alleging that the chain consistently required Black customers to prepay for their meals, ordered them to show identification, discouraged their patronage, and removed them from selected restaurants entirely. On the same day the Department filed a consent decree in the California case, six Black uniformed Secret Service officers assigned to protect President Clinton set out to have breakfast with 15 other officers and were discriminated against at a Denny's in Maryland. A private class-action suit was filed and won. In the California case, the Civil Rights Division entered into a settlement that provided approximately

[47] 379 U.S. 241 (1964).
[48] See *Katzenbach v. McClung*, 379 U.E. 294 (1964). The Supreme Court also applied the 1964 Act to Piggy Park drive-in barbeque restaurants in South Carolina. See *Newman v. Piggy Park Enterprises*, 390 U.S. 400 (1968). This secured the law's application in drive-in (rather than only in sit-down) facilities.

$54 million to 300,000 customers and required Denny's to implement a nationwide program to prevent future discrimination.

In 1999, the Division investigated the Adam's Mark Hotel chain for discrimination against African-American hotel guests in Daytona, Florida, during the city's Black College Reunion. The Division's settlement included compensation to the reunion attendees as well as a substantial contribution to Florida's historically black colleges to develop scholarships and cooperative education programs in hotel and hospitality management.[49] It was not until the Civil Rights Division filed a complaint against Satyam, L.L.C., which owns and operates the Selma Comfort Inn, that the management and employees officially promised to stop discriminating against African-American guests at their hotel. According to the complaint, employees charged Black guests higher prices than Whites, denied them equal access to hotel services and facilities, and consistently steered them toward the back of the hotel until the Department of Justice intervened in 2001.[50]

Cases such as this remind us that while the landscape of public life today is a far cry from life in 1957, substantial work remains to eliminate the pattern and practice of discrimination in public accommodations. The Division must continue to commit itself to aggressive civil rights enforcement in the area of accommodations so that all Americans are protected equally from the systematic denial of public services.

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[49] See *U.S. v. HBE Corporation d/b/a Adam's Mark Hotels* (2000).
[50] See *U.S. v. Satyam, L.L.C. d/b/a Selma Comfort Inn, et al.* (2001).

VI. POLICING THE POLICE and PROSECUTING THE KLAN

You may have heard a radio news report which aired briefly during the days after the jury's acquittal of the policemen in the Rodney King beating case. The report stated that public officials of the judicial system of Los Angeles routinely used the acronym N.H.I. to refer to any case involving a breach of the rights of young Black males…N.H.I. means "no humans involved." By classifying this category as N.H.I. these public officials would have given the police of Los Angeles the green light to deal with its members in any way they pleased.

Sylvia Wynter[51]

The beating of Rodney King by officers of the Los Angeles Police Department on March 3, 1991, captured on videotape and broadcast around the world, shocked America. The tape all but confirmed the officers' use of excessive force and exposed to the public longstanding racial tensions in Los Angeles, with which its residents were all too familiar. The state prosecution of the four officers involved resulted in a complete acquittal. Within hours, riots broke out across Los Angeles that left 55 people dead and over 2000 wounded. In light of what appeared to many to be a wholesale miscarriage of justice, the Civil Rights Division opened a new investigation and initiated a federal prosecution. On August 4, 1992, the same four officers were indicted on two counts of intentionally violating Mr. King's constitutional rights by the use of excessive force.

In the federal trial, there was a racially mixed jury, expert medical testimony regarding King's injuries, and a dismissal of the defense's use-of-force "expert." By prosecuting this case, the Civil Rights Division expressed a commitment to racial justice not shown in the state system. The two-month federal trial of the four Los Angeles police officers ultimately ended with the conviction in April 1993 of two of the four officers, Sgt. Stacey Koon, the supervising officer at the scene, and Officer Laurence Powell, the officer who had delivered the most number of blows to Mr. King. Both defendants were sentenced to 30 months in prison.

Fifty years ago, many people living under Jim Crow could not envision a legal system in which equal protection under the law would extend to all Americans. From the Civil War until the 1950s, lynching was accepted as a method of imposing law and order in the South and maintaining a social caste system. An anti-lynching campaign was gradually legitimized and supported by the NAACP through legal challenges, but the law continued to criminalize Black behavior.[52]

The Jim Crow system of *de jure* segregation in the South not only relegated Blacks to second-class citizens for whom voting, education, and housing rights were restricted; it also denied Blacks adequate government protection from the racial violence employed to maintain this caste system as the status quo. Black

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[51] Wynter, S. "No Humans Involved: An Open Letter to My Colleagues." *Forum N.H.I.: Knowledge for the 21st Century*, Vol. 1, No. 1, Fall 1994: 42.
[52] Davis, A. Y. *Are Prisons Obsolete?*, New York: Seven Stories Press, 2003, 23.

codes, racist statutes, and government unwillingness to protect Blacks from impending racial violence allowed members of the Ku Klux Klan (KKK) to carry out a racist regime of public violence with impunity. Since local officials were not interested in prosecuting white-on-black violence, police officers could also avoid culpability for abusing the civil rights of Black residents.

The brutal murder of Emmett Till in the summer of 1955 exemplifies the extent to which southern extremists were able to preserve Jim Crow under the guise of law and order. During the initial period following the *Brown v. Board* decision in 1954, the South witnessed tactics of massive resistance that resulted in pockets of highly publicized racial violence. In 1955, fourteen-year-old Emmett Till, who traveled from Chicago to visit relatives in Mississippi, was viciously murdered and disposed of in the Tallahatchie River for whistling at a White woman. Although the crime was prosecuted by state authorities, the defendants were acquitted by an all-white jury after deliberating for just over one hour. Immediately following the acquittal, the defendants publicly and shamelessly admitted their guilt.[53] These and other murders persisted unabated.

In the early years of the Civil Rights Division, criminal cases were limited in number and had limited effect. While the Division had the statutory authority to prosecute police brutality, the legal systems in the South were not prepared to cooperate. From January 1958 to July 1960, the Division brought 52 prosecutions, but only obtained convictions in four cases and *nolo contendere* pleas in two others. As former Assistant Attorney General for Civil Rights Burke Marshall recalled, "the problem of police misconduct was totally beyond reach" because of little resources, no local cooperation, and total exclusion of minorities from grand juries and trial juries.[54] Consequently, the Division brought few prosecutions for police violence against civil rights volunteers during voter registration drives, sit-ins, and protests.[55]

Widespread publicity of the Freedom Summer bus rides in 1964, however, garnered national attention for the issue of racial violence in the South. On June 21, 1964, the brutal KKK murder of three civil rights workers in Neshoba County, Mississippi – James Chaney, Andrew Goodman, and Michael Schwerner – placed the issue of Klan violence, in particular, on the public radar. National outrage over these murders prompted President Johnson to order the FBI to find the perpetrators, and sparked a federal government commitment to respond to Klan violence.[56]

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[53] Lawson, S.F., and Payne, C. *Debating the Civil Rights Movement, 1945-1968*. Lanham, MD: Rowman & Littlefield Publishers, Inc., 1998, 12.
[54] Vera Institute of Justice, "Prosecuting Police Misconduct: Reflections on the Role of the U.S. Civil Rights Division." *Vera Institute of Justice*, 1998. Available at: http://www.vera.org/publication_pdf/misconduct.pdf.
[55] See, Stewart, J. "NAACP v. The Attorney General: Black Community Struggle Against Police Violence." *The Social Justice Law Review* , Vol. 29, 2006.
[56] Lawson and Payne, *supra* note 54, at 30-31.

In December 1965, the Division obtained its first successful prosecution of a Klansman. It was the case of Viola Gregg Liuzzo, a White civil rights volunteer and mother of five, who was murdered by four KKK members after the 1965 march from Selma to Montgomery, Alabama. One of the Klansmen in the car with the shooters was an FBI informant, so the killers were arrested the next day. Because the KKK wielded considerable power, the state's prosecution of this case resulted first in a mistrial and then in an acquittal in the second state trial. The Civil Rights Division interceded to bring the case to federal court in Montgomery, Alabama, where it achieved its first ever conviction in a civil rights death case.

In 1967, the Civil Rights Division was able to prosecute and convict some of the Neshoba and Lauderdale County deputy sheriffs who were responsible for the murders of Chaney, Goodman and Schwerner. In 1968, Assistant Attorney General Stephen Pollak instructed Division attorneys to intervene more forcefully in police brutality allegations. Also In 1968, Congress broadened the scope of protection afforded by civil rights statutes by making it a crime to interfere by force or threat of force with certain federal rights (such as employment, housing, use of public facilities, etc.) because of someone's race, religion, color or national origin. This is commonly known as the federal hate crimes statute.[57] The impetus for the passage of the federal hate crime law was the assassination of Martin Luther King, Jr. on April 4, 1968.

Today, the Civil Rights Division's criminal prosecutions of police brutality cases remain an important tool to redress wrongful criminal conduct of law enforcement officers. After the Simi Valley, California, jury acquitted the officers who beat Rodney King in a 1992 state trial, the Division confirmed the importance of policing the police by prosecuting and convicting the officers in federal court under the federal statute. The Division's work to prosecute hate crimes has expanded over the years to include an increased number of successful prosecutions of Klansmen in the South and White supremacists across the nation who have engaged in racially motivated violence.

Nevertheless, while criminal prosecutions address individual police misconduct, they fail to hold police departments accountable for perpetrating rather than protecting against widespread civil rights violations. Efforts to create federal accountability for patterns or practices of violations of civil rights within state and local police departments were met with resistance for decades. In the late 1970s, a court determined that the Division did not have the authority to bring a civil lawsuit against the Philadelphia Police Department alleging systematic abuse despite widespread evidence of routine brutality, illegal actions, and racist behavior.[58] In 1994, however, in response to the Rodney King incident and subsequent L.A. riots, Congress authorized the Attorney General to bring civil

[57] 18 U.S.C. 245.
[58] *United States v. City of Philadelphia*, 482 F. Supp. 1248 (E.D. Pa. 1979).

actions against state and local law enforcement agencies for a "pattern or practice" of police misconduct.[59]

In January 1997, the Division brought its first enforcement action under its civil pattern or practice authority against the Pittsburgh, Pennsylvania, police department. The Division's investigation found a pattern or practice of officers using excessive force, falsely arresting, and improperly stopping, searching and seizing individuals and evidence of racially discriminatory action. As a result, the Division entered into a consent decree with the police department that spelled out a series of reforms to address its systemic problems. Similar cases were brought against police departments in Los Angeles, Washington, D.C., Detroit, Prince Georges County, Maryland, and Cincinnati, Ohio, as well as against the New Jersey State Police. However, the Division has not entered into a single consent decree or settlement for alleged violations of the civil police misconduct statute since January 2004.

The Division's anemic enforcement of police pattern or practice cases in recent years has weakened the Department's overall effort to protect civil rights and to help police departments identify practices that undermine their law enforcement work. Without the Justice Department opening new investigations, there is little impetus for police departments to police themselves.

[59] Passed as part of the 1994 Crime Act, the provision is 42 U.S.C. 14141. The types of conduct investigated include excessive force, discriminatory harassment, false arrests, coercive sexual conduct, and unlawful stops, searches or arrests.

RECOMMENDATIONS

The best way to solve any problem is to remove its cause.
Martin Luther King, Jr., *Stride Toward Freedom*[60]

Fifty years ago, the attempt to integrate Little Rock High School demonstrated the need for the federal government to finally say "enough" – enough of allowing the states to defy the U.S. Constitution and the courts, and enough of Congress and the Executive Branch sitting idly by while millions of Americans were denied their basic rights of citizenship. The 1957 Civil Rights Act and the creation of the Civil Rights Division were first steps in responding to a growing need.

For years, we in the civil rights community have looked to the Department of Justice as a leader in the fight for civil rights. As this report outlines, in the 1960s and 1970s, it was the Civil Rights Division that played a significant role in desegregating schools in the old South. In the 1970s and 1980s, it was the Civil Rights Division that required police and fire departments across the country to open their ranks to racial and ethnic minorities and women. It was the Civil Rights Division that forced counties to give up election systems that locked out minority voters; and it was the Civil Rights Division that prosecuted hate crimes when no local authority had the will.

In recent years, however, many civil rights advocates have been concerned about the direction of the Division's enforcement. Over the last six years, politics too often appears to have trumped substance and altered the prosecution of our nation's civil rights laws in many parts of the Division. We have seen career Civil Rights Division employees – section chiefs, deputy chiefs, and line lawyers – forced out of their jobs in order to drive political agendas.[61] We have seen whole categories of cases not being brought, and the bar made unreachably high for bringing suit in other cases. We have seen some outright overruling of career prosecutors for political reasons,[62] and also many cases that have been "slow walked" to death.

In order for the Division to once again play a significant role in the struggle to achieve equal opportunity for all Americans, it must rid itself of the missteps of the recent past, but also work to forge a new path. It must respond to contemporary problems of race and inequality with contemporary solutions. It must continue to use the old tools that work, but must also develop new tools when they don't. It must be creative and nimble in the face of an ever-moving target. The following are recommendations for a way forward.

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[60] King, Jr., M.L. *Stride toward Freedom: The Montgomery Story*. New York: Harper, 1958.
[61] Savage, C. "Civil Rights Hiring Shifted in Bush Era: Conservative Leanings Stressed." *The Boston Globe*, 23 July 2006.
[62] Eggen, D. "Criticism of Voting Law Was Overruled: Justice Dept. Backed Georgia Measure Despite Fears of Discrimination." *The Washington Post*. 17 November 2005: A01; Eggen, D. "Justice Staff Saw Texas Districting As Illegal: Voting Rights Finding On Map Pushed by DeLay Was Overruled." *The Washington Post*. 2 December 2005: A01.

A. De-Politicize the Civil Rights Division

Perhaps the most troubling aspect of the change in the Division in recent years is the extent to which politics has driven its decisionmaking. Changes in Administration have often brought changes in priorities within the Division; but these changes have never before challenged so directly the core functions of the Division, nor has there ever been such a concerted effort to structurally alter the Division through personnel changes at every level.

The Division's record on every score has undermined effective enforcement of our nation's civil rights laws. It is the personnel changes to career staff, however, that are in many ways most disturbing – for it is the staff that builds trust with communities, develops the cases, and negotiates effective remedies. Career staff has always been the soul of the Division, and it is under attack.

The blueprint for this attack appeared in a *National Review* article in 2002. The article, "Fort Liberalism: Can Justice's civil rights division be Bushified," [63] argues that previous Republican administrations did not succeed in stopping the Civil Rights Division from engaging in aggressive civil rights enforcement because of the "entrenched" career staff. The article proposed that "the administration should permanently replace those [section chiefs] it believes it can't trust," and further, that "Republican political appointees should seize control of the hiring process" rather than leave it to career civil servants – a radical change in policy. It appears that those running the Division got the message.

To date, four career section chiefs and two deputy chiefs have been forced out of their jobs, including the long-serving veteran who was responsible for overseeing enforcement of Section 5 of the Voting Rights Act. The criteria for hiring career attorneys have become their political backgrounds instead of their experience in civil rights. Longtime career attorneys have left the Division in large numbers. The amount of expertise in civil rights enforcement that has been driven out of the Division will be difficult to recapture.

The Civil Rights Division must restore its reputation as the place for the very best and brightest lawyers who are committed to equal opportunity and equal justice. It is not a question of finding lawyers of a particular ideology. Rather, it is a recommitment to hiring staff who share the Division's commitment to the enforcement of federal civil rights laws. That is not politics; it is civil rights enforcement.

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[63] Miller, J. "Fort Liberalism: Can Justice's civil rights division be Bushified?" *National Review*, Vol. 6, May 2002.

B. Promote Access to Voting

The mission of the Voting Section at the Civil Rights Division is to protect the voting rights of racial, ethnic, and language minorities, thus making it easier for them to access the political process. The voting rights movement was born of a need to promote access as a cure for decades of it being denied to racial, ethnic, and language minority citizens.

In their work to protect the rights of language minority voters through the enforcement of Section 203 of the Voting Rights Act, the Division has pursued a vigorous enforcement program. However, in recent years, the Division has more often used its enforcement authority to deny access and to promote barriers that prevent legitimate voters from participating in the political process. For example, the Division's failure to block the implementation of Georgia's draconian voter ID law – later deemed unconstitutional and characterized as a "modern day poll tax" by a federal judge – opened the door for states across the country to pass similar onerous laws. Strong evidence exists that requiring a photo ID as a prerequisite to voting disproportionately disenfranchises people of color, the elderly, individuals with disabilities, rural and Native American voters, and homeless and low-income people, who are far less likely to carry a photo ID. Up to 10 percent of the voting-age population does not have state-issued photo identification.[64]

Nevertheless, the Civil Rights Division has sent a strong message to states in recent years that the federal government will not challenge voter ID laws, no matter how restrictive and no matter what the impact on minority voters.

The Division has also recently rejected numerous requests from voting rights advocacy groups to enforce that part of the National Voter Registration Act (NVRA) which requires social service agencies to provide voter registration opportunities, despite substantial evidence that registration at social service agencies has plummeted.[65] At the same time, the Division has shifted its enforcement priorities to enforcement of voter purge provisions of the law, which in many cases – as in Florida in 2000 – denied the right to vote to thousands of legitimate voters who were taken off the rolls.

Moreover, the Division has pushed states to implement the Help America Vote Act (HAVA) in an exceedingly restrictive way. For instance, it advocates keeping eligible citizens off the voter rolls for typos and other mistakes in registration forms made by election officials.

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[64] Weiser, W., Levitt, J., Weiss, C., and Overton, S. "Response to the Report of the 2005 Commission on Federal Election Reform," Brennan Center for Justice at NYU School of Law, 2005. Available at: http://www.brennancenter.org/dynamic/subpages/download_file_47803.pdf

[65] An Election Assistance Commission report from July 2007 concluded that many states continue to ignore the requirements of the NVRA that public assistance agencies offer voter registration to clients, and noted that enforcement of the law by the Division has been virtually non-existent.

Finally, the Department of Justice's voter integrity initiative, established in 2001 by former Attorney General John Ashcroft, has created unnecessary commingling between criminal prosecutors in the U.S. Attorneys' offices and Civil Rights Division attorneys. These efforts can, if done improperly, result in a chilling effect on the participation of minority voters in the political process, particularly in jurisdictions with a history of disfranchising racial and ethnic minorities.

Rather than promote schemes that deny equal opportunity for citizens to vote, the Civil Rights Division should vigorously pursue enforcement of the Voting Rights Act and other existing statutes, as well as (1) combat voter ID laws that have a disproportionate negative impact on racial, ethnic, or language minorities – like those passed by both the Georgia and Arizona legislatures; (2) ensure that states comply with the NVRA's access requirements, such as those that compel social service agencies to afford their clients opportunities to register and to vote, and confirming that those registrations are processed appropriately; and (3) reinforce the firewall that exists between the Criminal Division's work to combat voter fraud and the Civil Rights Division's efforts to promote voter access.

C. Enforce Fair Housing Laws

The United States Department of Justice's Housing and Civil Enforcement Section has the powerful authority to bring cases involving a pattern or practice of discrimination that violates the Fair Housing Act to federal court. In recent years that authority has been used infrequently to address significant patterns of discrimination based on race and national origin, and almost never to challenge deeply entrenched residential segregation.

Fresh attention is being paid to racial and ethnic segregation in housing because of the recent Supreme Court decision that refused to permit race conscious school assignment policies in Louisville and Seattle. Although the Court has, over the years, pointed to ending housing segregation as a key way to avoid racially and ethnically segregated schools, the Justice Department has been turning a blind eye. The federal government's chief fair housing litigation agency has repeatedly failed to challenge discriminatory housing practices that potentially or actually segregate neighborhoods, as well as other types of discriminatory practices that affect many people of color. Discrimination in real estate sales and racial steering, discrimination in lending that destroys neighborhoods, and discrimination in zoning and land use practices that exclude people of color or limit their housing opportunities all continue virtually unchecked by today's Justice Department.

The Division should develop, on its own or in conjunction with advocates and enforcers, cases that focus directly on the key causes and perpetuators of residential segregation: real estate sales discrimination, lending discrimination including discriminatory steering and predatory practices by lenders,

homeowners and renters' insurance discrimination, and zoning and land use practices. Its testing program should expand to examine discrimination in sales and lending. Its pattern and practice authority should be used broadly to address segregative practices that cut across communities in the same way that its early cases, like its case against Black Jack, did.

The Civil Rights Division's Housing and Civil Enforcement Section has also suffered from the loss of many career employees over the past six years and has experienced internal turmoil similar to that which has made headlines in the Division's Voting Rights Section. Hiring choices should focus on the fair housing expertise of applicants and the need to build capacity to take on the more challenging and important task of addressing systemic discrimination in our communities and providing meaningful enforcement of all of protections that the Fair Housing Act offers.

D. Ensure Compliance with the Americans with Disability Act (ADA)

In 1990, Congress enacted the Americans with Disability Act (ADA), and the Disability Rights Section is now one of the largest sections within the Civil Rights Division. Since 1990, the Section has brought suits to remove architectural and other barriers and ensure access to public accommodations (including all hotels, retail stores, restaurants, and places of recreation) and public transportation for person with disabilities, litigated against state and local governments, certified state and local building codes to ensure compliance with the ADA standards for accessible design, and instituted an extensive mediation program to promote voluntary compliance with the ADA.

The disability rights activities of the Division have historically enjoyed bipartisan support under Attorneys General Richard Thornburgh and Janet Reno. In recent years, the Civil Rights Division launched a successful "ADA Business Connection" series of forums designed to bring together business leaders and disability advocates to build a stronger business case for accessibility and disability as a diversity issue.

Moving forward, the Department will need to show leadership in making the judicial and the executive branches of the federal government true models of how to conduct the business of justice and government in a manner that is accessible and welcoming for all people. The federal government can and should do more to measure its compliance with accessibility requirements and to address deficiencies on a systematic basis. Enforcement of civil rights requirements is especially needed in the areas of access to higher education and access to voting, as widespread noncompliance with accessibility requirements exists in both of these important areas. There is also a need for stronger leadership on the issue of access to long-term services in non-segregated settings for people with significant disabilities.

In recent years, the Supreme Court has questioned the history of unconstitutional discrimination against people with disabilities by the States and has whittled away at the scope of the protected class in the ADA. In the years to come, disability advocates look forward to strong leadership from the Department of Justice to help stem the tide of Supreme Court federalism that has restricted disability rights.

E. Combat Employment Discrimination

The importance of the Department of Justice to the effective enforcement of Title VII of the Civil Rights Act of 1964 cannot be overstated. It is the organization with the prestige, expertise, and financial and personnel resources to challenge discriminatory employment practices of state and local government employers. As a general rule, private attorneys and public interest organizations lack the financial and personnel resources to act as private "Attorneys General" in the Title VII enforcement scheme.

Combating discrimination against African Americans has remained a central priority of the Division through both Republican and Democratic administrations. Unfortunately in recent years, enforcement of Title VII's protections for racial and ethnic minorities has dramatically decreased. In fact, over the past several years, the Employment Section has chosen to devote precious resources to a number of controversial "reverse discrimination" cases on behalf of Whites. As long as race discrimination against minorities remains a sad, harsh reality in this country, battling the persistent scourge of workplace discrimination against minorities must remain a central priority of the Employment Section.

Similarly, throughout most of its history, the Employment Section has recognized and fought for appropriate use of race- and gender-conscious relief. In many cases, the Justice Department entered into consent decrees with race-conscious relief provisions aimed at eliminating the last vestiges of this country's shameful legacy of race discrimination. The Employment Section must support the continued use of constitutional affirmative action programs to remedy past discrimination and promote equal employment opportunity. The Supreme Court has given its stamp of approval to many forms of race-conscious measures, including remedial affirmative action programs. Yet, in recent years, the Employment Section has sought to abandon existing consent decrees that included race-conscious relief and has targeted other employers who attempt to achieve a diverse workforce. Such a change in position threatens to set back the progress that has been made since the passage of the 1964 Civil Rights Act.

As the face of discrimination has changed over the years, so too must the methods by which we attack discrimination. Though egregious forms of individual employment discrimination persist, we find much of today's discrimination buried in a gauntlet of more covert screening and hiring processes. These include but are not limited to psychological profiling, written cognitive ability tests, personality

inventory assessments, polygraph examinations, background screens, criminal background histories, credit score evaluations, and physical ability tests. Even well-intentioned employers and supervisors must grapple with the very real issue of hidden bias. The Employment Section must be dedicated to rooting out discrimination even where unlawful bias takes a more subtle form. Title VII prohibits not only the type of discrimination that is evident through "smoking gun" proof of malicious intent; it also outlaws less overt types of discrimination that play out through facially neutral policies or practices that disfavor a particular group.

The Section must continue to use all of the enforcement tools in its arsenal to address these more subtle forms of discrimination. The most powerful of these tools is the authority to bring pattern or practice cases with the support of statistical evidence. As employers engage in questionable practices like conducting credit checks on applicants and abusing information contained in background checks, the Employment Section should be at the forefront of the effort to ensure that employers utilize valid selection procedures. At a time when discrimination based on sexual orientation in various states is on the rise, it is important for Congress to give the Civil Rights Division the authority necessary to enforce the Employment Non-Discrimination Act (ENDA).

The Employment Section is uniquely positioned to tackle widespread discrimination that affects large numbers of public employees. The Section must use its statutory authority effectively to combat the persistent problems of discrimination in the workplace. If the Section returns to vigorous enforcement of the law, it can regain its reputation as a true defender of civil rights.

F. Promote and Maintain Integrated, High Quality Schools

The Supreme Court's opinion in the Seattle and Louisville cases, which limits the discretion of local school boards to take the race of students into account in seeking to voluntarily achieve racially and ethnically diverse learning environments for students, makes the work of the Civil Rights Division's Educational Opportunities (EO) Section more crucial than ever before. At the same time, those decisions mean the EO Section must reorder its priorities in a few fundamental ways.

First, the United States remains a party in many desegregation cases where there continue to be outstanding orders requiring school districts to eliminate the vestiges of prior discrimination. Currently the Section appears to be seeking to have as many of those districts as possible be declared unitary. Now that it is clear that once declared unitary, as was the Louisville school district, a school district may be forced to dismantle student assignment zones and other policies used to foster integration, the Department needs to stop districts from being declared unitary until it is clear that even post-unitary status, the district will remain integrated. The presence of an ongoing desegregation decree gives a

school district more tools at its disposal to eliminate the effects of segregation. The Department needs to evaluate how to use the decrees it has obtained to maintain integrated school systems.

Second, the Department now must devote significant resources to determining how to use its enforcement powers under Title VI of the Civil Rights Act to prohibit discrimination by entities receiving federal funds. Most Local Education Authorities (LEAs) receive some form of federal funding. While Title VI complaints go to the Department of Education for investigation in the first instance, the EO Section has a significant role to play in advising the Department of Education Office of Civil Rights on how to interpret and enforce Title VI, and the Department of Justice is the entity that should be litigating those Title VI cases where the Department of Education finds that a recipient of federal financial assistance has been operating in a manner that has a disparate impact on minority students. There are numerous policies by school boards that are ripe for investigation under the disparate impact regulations of Title VI, such as zero tolerance disciplinary policies, practices resulting in the overrepresentation and mistaken categorization of minority students as having learning disabilities, and under-representation in academically gifted programs. The EO Section can contribute significantly to ensuring that the government vigorously enforces Title VI of the Civil Rights Act of 1964.

Finally, the Educational Opportunities Section has, in the past, initiated a number of creative programs to foster integrated schools at the K-12 level – such as those investigating how desegregated housing patterns contribute to integrated educational opportunities – by working carefully with all stakeholders, LEAs, parents, teachers and local governments, The Section must continue to undertake these and other creative initiatives in order to assist those school districts that are willing to create diverse learning environments but are daunted by the Supreme Court's limits on their discretion. The Section is, in many ways, the last hope for parents and children who want to see fulfillment of our nation's commitment to equal educational opportunities for all. The Section must re-order its priorities to achieve this mission.

G. Prosecute Police Misconduct and Hate Crimes

In 1994, Congress passed 42 U.S.C. 14141, the police misconduct provision of the Violent Crime Control and Law Enforcement Act of 1994. The provision authorizes the Attorney General to file lawsuits to reform police departments engaging in a pattern or practice of violating citizens' federal rights. The Division also enforces the Omnibus Crime Control and Safe Streets Act of 1968 and Title VI of the Civil Rights Act of 1964, which together prohibit discrimination on the basis of race, color, sex, or national origin by police departments receiving federal funds.

Starting in the late 1990s, the Special Litigation Section began to conduct investigations and implement consent decrees and settlement agreements where evidence demonstrated a violation of the police misconduct statutes. The investigations addressed such systemic problems as excessive force, false arrest, retaliation against persons alleging misconduct, and discriminatory harassment, stops, searches, and arrests. The decrees require the police departments to implement widespread reforms, including training, supervising, and disciplining officers, as well as implementing systems to receive, investigate, and respond to civilian complaints of misconduct. The decrees have had a widespread impact and are being used as models by other police departments. The Section has also used its authority under the Civil Rights of Institutionalized Persons Act (CRIPA) to reform restraint practices in adult prisons and jails and to obtain systemic relief in juvenile correctional facilities.

In recent years, however, the Section has retreated in its enforcement of these important statutes. This rollback has resulted in less accountability on the part of police agencies and a retreat in efforts to ensure that law enforcement and integrity go hand in hand. Given the lack of enforcement of these statutes by the Department of Justice, it is more important than ever to amend 42 U.S.C. 14141 to allow for a private right of action to enforce the statute. In addition, the Department needs to support an expansion of its authority, as outlined in the End Racial Profiling Act (ERPA). ERPA builds on the guidance issued by the Department of Justice in June 2003, which bans federal law enforcement officials from engaging in racial profiling. It would apply this prohibition to state and local law enforcement, close the loopholes to its application, include a mechanism to enforce the new policy, require data collection to monitor government progress toward eliminating profiling, and provide best practice incentive grants to state and local law enforcement agencies to enable them to use federal funds to bring their departments into compliance with the bill. The Justice Department guidance was a good first step, but ERPA is necessary to "end racial profiling in America," as President Bush pledged to do.

Moreover, while the Civil Rights Division has committed to vigorously enforcing the federal hate crimes statute, the statute itself is flawed. To strengthen its effectiveness, unnecessary obstacles to federal prosecution must be removed and authority must be provided for federal involvement in a wider category of bias motivated crimes. For instance, we have seen a rise in recent years in the number of hate crimes perpetrated due to discrimination based on sexual orientation. To enhance the federal response to this growing crisis, the Civil Rights Division must have the authority to prosecute *all* violent crimes based on race, color, religion, national origin, gender, sexual orientation, and disability. Expanding the authority needed to prosecute such cases is critical to protecting members of these groups from this most egregious form of discrimination.

CONCLUSION

If Congress lacks the authority to remedy discrimination, if states cannot be sued in federal court when they discriminate, and if federal agencies do not vigorously enforce the landmark laws of the 1960s, then civil rights protections lack the federal guarantee promised in the 14th and 15th Amendments.

Leadership Conference on Civil Rights Education Fund, 2003[66]

The 50th anniversary of the creation of the Civil Rights Division is a time to reflect on where we have been, where we are, and where we need to go in the struggle for civil rights and equal justice in America. We have undoubtedly come a long way – a very long way from racial violence, segregated lunch counters, poll taxes, and "Whites only" job advertisements. But we are not finished. Today, we face, among other things, predatory lending practices directed at racial minorities and older Americans, voter ID requirements that often have a discriminatory impact on minority voters, and English-only policies in the workplace; and so our work continues.

As this report confirms, one of the critical tools to our collective progress in civil rights has been the Civil Rights Division of the Department of Justice. And the heart and soul of the Division is and has always been its career staff. For 50 years, they have worked to help make our country what it ought to be: a place where talent trumps color and opportunity knocks on all doors; where you cannot predict the quality of the local school system by the racial or ethnic composition of the school's population; where access is a right, not a privilege; and where difference is both tolerated and valued.

We have concerns with the direction of the Civil Rights Division in recent years. Our hope is that the Division can meet those concerns with positive action for our future. This report begins to map out the way forward. We look forward to the continuing conversation.

[66] Leadership Conference on Civil Rights Education Fund. "The Bush Administration Takes Aim: Civil Rights Under Attack." *LCCREF*, April 2003, 9.

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Mr. NADLER. Thank you very much.

The Chair will now recognize himself to begin the questioning with 5 minutes of questioning.

Mr. McDonald, you said a recent study by Professor Minnite shows that, between 2002 and 2005, only 24 people nationwide were convicted or pleaded guilty to Federal charges of illegal voting.

We heard a previous witness—or, actually, I don't think it was a previous witness; I think it was the Ranking Member—talk about how 400,000—or maybe it was both—anyway, 400,000 people allegedly were enrolled in Florida and some other States—140,000—lots of people—and 2,000 people actually voted in two States.

Can you comment on this? I recall seeing reports that this was not true, but do you have information on this, especially given the studies you cite?

Mr. MCDONALD. We are involved in litigation, both in Georgia, against the constitutionality of the photo ID law, and also in Indiana. And there is absolutely no evidence of any kind that there has ever been any fraudulent in-person voting. And that's the only kind of election fraud that the photo ID bills are allegedly designed——

Mr. NADLER. So there's no evidence that 2,000 people voted in New York and Florida at the same election, the same 2,000 people?

Mr. MCDONALD. Well, I'm not familiar with those facts. But what I do know is that the justification for the photo ID law as a way of combatting in-person voter fraud—and, in fact, there is no evidence whatsoever that there has ever been any in-person voter fraud. So it is a bill that addresses a problem that does not exist.

And about the double voting, I would just remind Members of the Committee that the courts have held that it is not unlawful to vote in two different jurisdictions. There are some States that will allow you, if you're a nonresident, to vote in that jurisdiction's elections if you're a property owner.

Mr. NADLER. But you can't vote in a presidential election in two different States in the same day?

Mr. MCDONALD. No, that would not be appropriate. That would not be appropriate. But the mere fact that you're voting in two different jurisdiction doesn't necessarily mean that that's unlawful under the State law.

Mr. NADLER. Okay.

Now, Mr. Moore, you heard Mr. Tanner testify that he made the decision on the Georgia case. Did I hear you say that Mr. Spakovsky made the decision?

Mr. MOORE. No. I think that the two of them handled it pretty well. I mean, I think John knew what Hans wanted it to be; Hans had made it pretty clear. So technically who made the decision is almost immaterial.

Mr. NADLER. Now, I understand that Georgia sent information on the 26th of August. On the 25th, the section people said don't preclear. On the 26th, Georgia sent information about 600,000—incorrect data about 600,000 people. And on the 26th, it was precleared.

Did they have time to analyze the correction of the data about the 600,000 people? Did they bother? Was it analyzed?

Mr. MOORE. No, sir, I don't think they ever analyzed it at all.

Mr. NADLER. So even though they knew it was mistaken, because Georgia told them, "We are correcting our data that we gave you"?

Mr. MOORE. I don't think that it was ever analyzed.

Mr. NADLER. And, now, it is your testimony that—Mr. Tanner refused to answer the question whether he overruled four of the five analysts, but he did overrule four of the five analysts?

Mr. MOORE. Absolutely.

Mr. NADLER. And the only analyst who thought that the law should be upheld, should be precleared, was a fellow who had been hired politically in the what we now know as politicized hiring of the Justice Department only a few months previously?

Mr. MOORE. That's what—yes.

Mr. NADLER. Okay. Let me ask you. It is my understanding that of the 26 analysts that were present—prior to 2001, there were 26 civil rights analysts and six attorneys who reviewed submissions, gathered facts and made recommendations on over 4,000 section 5 submissions each year. It has been reported there are significantly fewer staff members prosecuting the same section 5 submissions, many of whom are recently hired employees with no prior experience with section 5.

So my understanding is that, of the 26 analysts, only eight are left. Is that correct?

Mr. MOORE. I have not worked in the section since 2006, so I don't know how many analysts work there.

Mr. NADLER. How would you characterize the—does anybody know about those figures on the panel?

Okay.

Mr. Moore, do you know about the capability of the voting rights section, of the section 5 section, to do its work today, in terms of its staffing?

Mr. MOORE. From conversations with my former colleagues, I have some picture of what it is like to work in the section 5 enforcement. My opinion is that there are a small number of analysts who are very overworked and who work for an acting deputy chief who has created somewhat of a hostile work environment. It is a very bad situation.

Mr. NADLER. What do you mean by "hostile work environment"?

Mr. MOORE. I'm sorry. This is kind of secondhand. But my conversations have been that it is a very unhappy place to work.

Mr. NADLER. And why do you think so many staff have left the voting division, the Voting Section?

Mr. MOORE. I think, like me, they didn't really feel that there was any sense in doing their work if it didn't make any difference on the decisions that were being made.

Mr. NADLER. And you think that the work of the analyst does not make a difference to the decisions?

Mr. MOORE. Well, there are a number of section 5 submissions that are not controversial, and their work is enormously valuable. But on anything of significance and of controversy, no. The decisions are being made for political expedience, in my experience.

Mr. NADLER. Political decisions on important section 5 matters are being made for political expediency and not on the merits?

Mr. MOORE. That was my experience in Georgia.

Mr. NADLER. Thank you.

I thank the gentleman.

I now recognize for 5 minutes the Ranking minority Member.

Mr. CONYERS. Thank you, Chairman Nadler.

Oh, excuse me.

Mr. FRANKS. Thank you, Mr. Chairman.

And thank you, Mr. Chairman.

Mr. Chairman—and I hate to start off my questions here with a little bit of a downer, but I was disappointed in some of Mr. Moore's characterizations of the former witness, Mr. Tanner, in that——

Mr. NADLER. I think they were very generous.

Mr. FRANKS. Well, they were pretty generous. But, unfortunately, to suggest that Mr. Moore was saying that Black people and White people age differently—I think, you know, if you read the context, the man made a very clumsy and awkward statement, for which he apologized for the awkwardness of it and the misunderstanding of it, and simply tried to explain that his purpose in making the statement was to point out that, due to some of the circumstances in society, that sometimes minorities in our country, tragically and sadly, live to a lesser average age than some of the majority members of society. And that is a tragedy, but, unfortunately, Mr. Tanner's remarks seem to be pretty twisted here.

And I didn't come to defend the guy. But Mr. Moore also says he thinks someone did that or he didn't think someone did that or that—I don't know if he's relying on his experience or he's just, kind of, trying to add, kind of, a partisan element to the situation. And I just had to point that out.

The Carter-Baker report concluded that voters in nearly 100 democracies use a photo identification card without fear of infringement on their rights. These include many countries that are much less wealthy than the United States, including India and Pakistan. They don't agree on too many things, but they do agree on the need for photo IDs for voters.

Mr. Driscoll, would you comment on that?

In other words, you know, let me put it like this. Oftentimes the reason people don't vote is because they don't have confidence in the system. They don't know that their vote is going to be counted. They don't know that somehow that other distortions in the system are going to diminish their vote.

And one of the things that I believe increases that confidence is having a consistent voter ID to where people know that the people voting are the ones of that district and that they are citizens and that they have the right under the Constitution to vote.

And so, Mr. Driscoll, would you just comment on the confidence factor and what do you think that means in the bigger picture?

Mr. DRISCOLL. Thank you for the question. I would like to answer that in two parts.

The first is that I think both the Carter-Baker Commission and, more recently, I think, the Supreme Court in Purcell have recognized the point you're making, that voter integrity provisions can increase confidence, that the system works, and therefore can drive turnout up, which is something everyone wants. And I think that it is a policy matter that I happen to personally agree with.

The 1 second only caveat that I want to put on that—and this is a very legitimate caveat—is we can't forget that we are in a country with a huge history of discrimination and that the Voting Rights Act was passed for a reason and section 5 exists for a reason. And so, in that context, the Civil Rights Division needs to analyze any particular ID requirement to determine whether or not it, in fact, has a retrogressive effect. Because if it did have a retrogressive effect, it should not be precleared and it should not go into effect if it is in a covered jurisdiction.

And so, I think that there is a legitimate policy debate. I happen to think voter ID on the whole is a good thing and the benefits outweigh the costs by far. But I think that is a separate question from whether or not any particular law in a covered jurisdiction should be precleared, and I think that question will come out differently on a case-by-case basis. I think that Georgia was precleared; I think there are other laws that might not be. And, unfortunately, you need to be a professional statistician, I think, to make those calls on a case-by-case basis.

But I think that's how I would answer the question, that I think you're absolutely right that people have pointed out the need for confidence in the system, and ID helps to enhance that in some respects. But, certainly, the section 5 analysis needs to be done independent of that policy judgment.

Mr. FRANKS. Thank you, Mr. Driscoll.

Mr. Chairman, I guess I just want to point out here, without asking additional questions, that I truly believe that it is one of the critical things in our country to make sure that people of all races, all factions have every opportunity to exercise their constitutional and God-given right to vote in this country. And I want to see that happen in every case.

But I'll just quote a little something that came from the discussion between Mark Hearne and one of the Democratic members of the Carter-Baker Commission. And it echoes the feelings of the former mayor of Atlanta, Andrew Young. He said, "For our base, who may not believe their vote will count, a photo ID will give them greater confidence that they will be allowed to cast a ballot when they go to the poll. And a greater confidence will increase participation." We can say, Go to the polls, show the election officials your card with your picture on it, and they will guarantee you can vote, and your vote will count. And I truly believe that if we make sure people have confidence in the system, we will help minorities more than we will any other way.

Thank you, Mr. Chairman.

Mr. NADLER. I thank the gentleman.

We have another Committee waiting to use the room, so we are going to be a little more strict in enforcing the 5-minute rule.

Who is next? The gentleman from—the distinguished Chairman of the Committee, Mr. Conyers.

Mr. CONYERS. Thank you very much, Chairman Nadler.

First of all, I want to thank Trent Franks for being here during and throughout and contributing to this Subcommittee hearing, because, to me, this is extremely important.

And I want to commend Bob Driscoll, as the minority witness, who brings a committed attitude to this subject. When you say that

we all want to increase voter registration and turnout, that's the key to what we are all doing, and then have the votes count. That sums it all up.

And I thank you both very much.

We are in such a time constraint, Chairman Nadler, that I want to recommend that we consider holding an additional hearing, because there is so much to go through here.

I'm going to be going through this testimony very carefully, because, look, there's two views of this. One is that this voter rights section is red-hot, it is going great, things have never been so good, we are getting more votes, we are getting more cases prosecuted, everything is hunkydory. And then we have the other view, in which a number of people are calling for the section chief's resignation as we speak. The Inspector General's Office has multiple investigations going on, not only about the activities publicly and privately of the section chief but of career members as well.

So, look—and this isn't the first time I've ever heard this kind of a disparity in a Committee hearing.

But there's only one thing that I'm here for right now: Where do we go from here, lady and gentlemen? What is it that we need, as the Committee of jurisdiction, both the Subcommittee and full Committee—what are we to do?

And the three ideas that have been presented here is to review the effectiveness of senior management of the Voting Section and determine whether we need to make replacements or additions; then, number two, a plan to rebuild the core in section 5 analysts. The attrition of 28 to eight is far too drastic when we are racing against the clock to the first Tuesday in next November.

The third, we must examine whether voter protection laws are being used to restrict voter rights. My bill, the second bill President Clinton signed in 1993, was the Motor Voter Act. And now it is being used to purge voters, and it is being underutilized to register voters.

I heard Ms. Fernandes make a couple of recommendations, and I would like her to tell me about hers now. And then we want to look at them together for any additional comments that you may have.

Ms. FERNANDES. Thank you, Chairman Conyers.

I think you've touched on a few of them already. I think that because we have the inspector general's investigation ongoing within the Department, my understanding is that we should be anticipating a report coming out of that office fairly soon. And I think the Committee may want to inquire with that office how quickly you can get access to that report, and then review the recommendations and see if there are things that have gone on that could be changed, whether it's in management or the politicization question.

Mr. CONYERS. You're asking me to trust a report, and that's a good way to start.

Ms. FERNANDES. I'm asking you to start with the report, not necessarily to trust it, but to at least start there, because I do think that there is likely to be a fairly thorough discussion around the politicization issue, though I have no inside knowledge of that at all.

And I also think that the Committee's work is so helpful in focusing attention on the NVRA and the way the NVRA has been used to do these broad purges that wipe out so many eligible voters for no gain.

And even this question about people voting in—just to tie this together with the voter ID issue—people voting in Florida and New York, well, if they're registered in both Florida and New York, no voter ID is going to stop them from voting twice. So voter ID is not a cure for whatever kind of problem—which I don't know that much about it—is presented.

But I think that this Committee putting pressure to build up that firewall between Criminal and Civil Rights——

Mr. CONYERS. Is my time up already?

Well, could I ask the gentlemen here to please submit to me your recommendations. I would be deeply grateful for them.

Thank you, Mr. Chairman.

Mr. NADLER. The gentleman from Minnesota is recognized for 5 minutes.

Mr. ELLISON. Thank you, Mr. Chair.

Ms. Fernandes, let's say that there have been, over the last 3, 4 years, perhaps as many as 24 people who have been convicted for voting in a name that was not their own.

How many people are we going to lose with these voter ID bills?

Ms. FERNANDES. Tens of thousands, perhaps hundreds of thousands, depending on which bill it is. Some bills are much more onerous than others.

Mr. ELLISON. Yeah.

I mean, now, you do this kind of work; and, Mr. McDonald, you do this kind of work; and, Mr. Moore, you do this kind of work, too; I'm sure Mr. Driscoll, as well.

Is the main complaint of Black voters, Latino voters, is their main problem, their barrier to voting the fact that some States don't have a voter ID requirement?

Ms. FERNANDES. No. And, in fact, what this really is, I think, Mr. Ellison, I think this is people who are interested in having fewer people vote have kind of whipped up this whole notion of voter fraud in person. We are talking about polling place impersonation, right? So intentionally impersonating someone else in the polls to vote, which is a high-risk proposition, carries criminal penalties. You would have to create 500 to 1,000 coconspirators to do it. It is an inefficient way to steal an election if you even want to do that, right? So we are talking about whipping up a fear of that practice, which is apparently nonexistent, to justify voter ID law.

Mr. ELLISON. Now, Ms. Fernandes, if you're an immigrant person and you don't have a legal right to vote and you vote, isn't that like a felony?

Ms. FERNANDES. You could be deported.

Mr. ELLISON. And so, you're going to risk your life in America, that you're trying to have, to cast a vote?

Ms. FERNANDES. Yeah, for what.

Mr. ELLISON. You know, in my experience, I have trouble getting people to vote once in their own name, as opposed to trying to round up a bunch of people to steal an election.

Mr. McDonald, I want to ask you this question: Do you think that voters of color who want confidence in an election and want to believe that their vote really matters, is their biggest advocacy to have a voter ID bill passed in the various States? Is that what they think the answer is?

Mr. MCDONALD. Well, I think that a photo ID bill that was passed, at least in part, to discriminate, that plainly has a discriminatory impact, does nothing at all to create confidence in the fairness of the electoral system.

Mr. ELLISON. Mr. McDonald, let me ask this question: Would having people in Black police-uniform-looking outfits standing around polls, questioning people and telling them that they better have their child support paid or they're going to be arrested if they vote, do you think that might intimidate voters from voting?

Mr. MCDONALD. Well, of course it would. And we know that those sort of voter intimidation tactics have been used in the past, and they ought to be addressed.

Mr. ELLISON. What about recent elections where they have these fake little memos and letters around saying that if you don't have your child support paid or your parking tickets paid that you can't vote? There are letters like this; I'm sure you're aware of them. And this isn't 10, 20 years ago. This is the last election.

Mr. MCDONALD. Well, we have done monitoring of elections since the 2000 election. And we found many examples of things that are unconscionable, efforts to target minority precincts, to deprive people of the opportunity to have access to assistance in voting and also strong-arm tactics.

Mr. ELLISON. Forgive my interruption, but these are the things that people are concerned about; isn't that right?

And I'm just going to state for the record my own opinion—and forgive me for my interruption. I believe that voter ID bills are intentional voter suppression of minority voters and have the effect and intent of suppressing people's rights.

Mr. MCDONALD. There's one thing that I would definitely like to respond to, which has not been responded to, and that's Mr. Tanner's statement that the District Court in Georgia found that the photo ID law did not violate the racial fairness provisions of section 2. That is incorrect. The court granted a preliminary injunction, found that the photo ID law would have a negative impact on racial minorities, but it did not reach the section 2 issue. It reserved a ruling on that. Then, when it issued its opinion on the merits, in which it reversed itself, it expressly did not reach the section 2 vote that we should claim.

And, more importantly, last week we got a letter from the Court of Appeals questioning whether or not it had jurisdiction over the appeal we had taken of the case, because the court had not reached some of the claims that were raised, including section 2.

So the court did not resolve the section 2 claim.

Mr. ELLISON. Mr. Chair, may I just say for the record that I think Mr. Moore is highly commendable, and he has done what I would expect a person born in the mid-1960's to do: carry on the legacy of the civil rights movement, make sure America is free and fair for everybody.

I think you're a hero, Mr. Moore, and I'm so grateful for your advocacy and your honesty.

Mr. MOORE. Thank you.

Mr. NADLER. Thank you.

The gentleman's time is expired. The gentleman from Virginia is recognized for 5 minutes.

Mr. SCOTT. Thank you. Thank you, Mr. Chairman.

Mr. McDonald, I asked in the earlier panel some questions that need to be resolved before we go into another round of redistricting, specifically whether or not coalition districts are protected under the Voting Rights Act.

Are there any questions like that that we need to make sure are resolved before we get into the next round of redistricting?

Mr. MCDONALD. Well, I think that if there is a coalition composed of racial minorities and others that has the ability to elect candidates of its choice, that that's protected against retrogression by section 5.

Mr. SCOTT. Are there other questions that we need to look at to make sure that they are resolved ahead of time, so that, as States start doing their redistricting and localities start doing their redistricting, are there questions that we need to look at?

Mr. MCDONALD. Well, there's a question about whether majority-minority districts can be reduced on the assumption that there is sufficient White crossover voting to maintain the ability to elect candidates of choice. And I've discussed this issue with people in the State legislature whose opinions I deeply respect—African American members Tyrone Brooks, Robert Holmes. They have assured me that not a single member of the Black legislative caucus would support reducing majority-Black districts below 50 percent.

And the reason is that, once a district becomes majority-White, it behaves in a different way. You no longer have the level of White crossover voting that you might have had when it was a majority-minority district. You no longer have the confidence that minority voters have in it. And you no long have as many minority candidates who are willing to run. So those districts will perform differently. And I take my cue from Tyrone and Bob Holmes.

Mr. SCOTT. Well, if you have districts that have, in fact, performed—you have Members of the Congressional Black Caucus who are in districts less than 50 percent Black. Are those protected as minority districts where there minority community can elect a candidate of its choice?

Mr. MCDONALD. I think so. That's me speaking now, not Mr. Tanner or the Department of Justice.

Mr. SCOTT. Okay.

Are there other issues we need to make sure we look at, Ms. Fernandes?

Ms. FERNANDES. No, I think that's the central issue, and I agree with Laughlin.

Mr. SCOTT. Mr. Moore, is there any question that the voter ID bill had a disparate impact on the minority community?

Mr. MOORE. We believe the State had not met its burden to prove that it did not. It was a complicated statistical record with no smoking guns.

Mr. SCOTT. Were there memos to that effect that were written?

Mr. MOORE. I believe *The Washington Post* published the memo that we wrote, yes.

Mr. SCOTT. Did *The Washington Post* suggest that memos had been changed?

Mr. MOORE. The memo that *The Washington Post* published, which was the final staff memo, was, in my view, doctored to remove the recommendation and to reverse many of our key findings.

Mr. SCOTT. In the previous panel, I asked whether or not anyone had been reprimanded who did not agree with the final decision on the Georgia case. And he said no one had been reprimanded. Was that accurate?

Mr. MOORE. No, not if "reprimand" is an oral reprimand. If it was a written reprimand, perhaps.

Mr. SCOTT. The four that disagreed were orally reprimanded?

Mr. MOORE. I don't know about Mr. Berman. The other three of us were reprimanded.

Mr. SCOTT. Was partisan politics involved in any employment decisions in the voting rights section?

Mr. MOORE. I was not involved with hiring. From the series of attorneys who joined the section, in the last couple of years while I was there, either it was politicized or they got very lucky.

Mr. SCOTT. In investigating the Ohio irregularities, Mr. Tanner, a political appointee did the investigation himself, is that right?

Mr. MOORE. Mr. Tanner is a career employee, yes.

Mr. SCOTT. He's a career or political?

Mr. MOORE. That's a good question. He's technically a career—he's a career employee.

Mr. DRISCOLL. That's a good question for you, too.

Mr. SCOTT. I'm sorry?

Was there a reduction in staff while you were there.

Mr. MOORE. Yes, there was. But how much of that was a result of people leaving out of unhappiness and how much of it was the natural cycle as the census of 2000 became further ago.

Mr. SCOTT. I have no further questions, Mr. Chairman. I'll yield to the gentleman from Wisconsin.

Mr. NADLER. I thank the gentleman.

On behalf of the Subcommittee, I want to thank our witnesses for appearing here today and for your testimony on this very important question.

As you heard the Chair suggest, we may have an additional hearing at some point.

Without objection, all Members will have 5 legislative days to submit to the Chair additional written questions for the witnesses, which we will forward and ask the witnesses to respond as promptly as you can, so that their answers may be made part of the record.

Without objection, all Members will have 5 legislative days to provide and extend their remarks and to submit any additional materials for inclusion in the record.

And, with that and the thanks of the Chair, this hearing is adjourned.

[Whereupon, at 1:08 p.m., the Subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

LAUGHLIN MCDONALD
DIRECTOR
VOTING RIGHTS PROJECT

Committee on the Judiciary

Subcommittee on the Constitution, Civil Rights, and Civil Liberties

Oversight Hearing on the Voting Section of the Civil Rights Division of the U. S. Department of Justice

Supplemental Statement of Laughlin McDonald
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November 6, 2007 – Addendum

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November 6, 2007 – Addendum

This testimony supplements my written testimony and oral testimony presented at the Subcommittee's Oversight Hearing on October 30, 2007. This supplemental statement: (1) corrects a statement made by John Tanner during his testimony with respect to the court decisions involving the Georgia voter photo identification law; (2) provides additional examples of political partisanship in Section 5 decision-making; (3) provides additional data on the percentage of the U.S. electorate lacking government issued photo identification; and (4) sets forth specific recommendations for strengthening Congressional oversight of the Voting Section of the Civil Rights Division of the Department of Justice.

I. Inaccuracies in John Tanner's Testimony

John Tanner, in recent remarks before the National Latino Congreso in Los Angeles, defended the preclearance of Georgia's photo ID law by claiming in "Georgia, the fact was and the court found that it was not racially discriminatory. That was the finding of the initial court."[1] Tanner repeated those comments before this Subcommittee. The court in the Georgia case,

[1] TPMmuckraker.com, "DoJ Vote Chief Argues Voter ID Laws Discriminate against *Whites*," October 9, 2007.

however, made no such finding. In its initial opinion granting a preliminary injunction against enforcement of the photo ID law, the court found the law "is most likely to prevent Georgia's elderly, poor, and African-American voters from voting." It did not, however, reach the merits of plaintiffs' claim that the law violated the racial fairness provisions of Section 2 of the Voting Rights Act, but instead said it "reserves a final ruling on the merits of that claim for a later date."[2] Even in its final opinion on the merits dismissing the complaint, the court did not rule on the plaintiffs' Section 2 race discrimination claim.[3] The case is currently on appeal.

II. Additional Examples of Partisanship in Section 5 Decision Making

In both my written testimony and oral testimony at the Oversight Hearing on October 30, 2007, I described examples of improper political partisanship driving Section 5 decision making. I would like to elaborate on several other instances.

In Mississippi, the state legislature failed to adopt a congressional redistricting plan following the 2000 census. A state court then ordered into effect a plan, favored by Democrats, which was submitted to the Department of Justice for preclearance. However, another law suit was filed in federal court by the Republican Party. The federal court adopted a plan drawn by the Republican Party, which it ruled would go into effect if the state court plan was not precleared by February 27, 2002. The career staff unanimously recommended that the state court plan be precleared because it did not have a discriminatory purpose or effect. Department of Justice political appointees, however, delayed acting on the Section 5 submission so that the

[2] Common Cause v. Billups, 406 F.Supp.2d 1326, 1365, 1375 (N.D. Ga. 2005).
[3] Common Cause/Georgia v. Billups, 504 F.Supp.2d 1333, 1342 (N.D. Ga. 2007).

plan drawn by the Republican Party could be adopted.[4] According to former Voting Section Chief Joe Rich, Deputy Section Chief Bob Kengle, and career section attorney Mark Posner, it was "perhaps unprecedented for the Division's political staff to override a unanimous staff recommendation to preclear a submitted change."[5]

Another example of partisan bias driving Section 5 decision making took place in Texas in 2003. At the urging of Rep. Tom Delay, then Republican House Majority Leader, the state legislature adopted a mid-decade congressional redistricting plan solely to increase the number of Republican controlled districts. In doing so it diluted minority voting strength in several areas of the state. The career staff in a lengthy and detailed memo concluded the plan was retrogressive and violated Section 5. The political staff, nonetheless, precleared the plan.[6] The Supreme Court later invalidated the plan as diluting minority voting strength in violation of Section 2 of the Voting Rights Act.[7]

III. Further Studies on the Lack of Government Issued Photo Identification

The National Commission on Election Reform released its final report to Congress and the White House in 2001. The Commission, co-chaired by former Presidents Ford and Carter, was formed in the wake of the 2000 election crisis to offer a bipartisan analysis to the Congress, the administration, and the American people. The Task Force Reports, which accompanied the

[4]The somewhat complex facts of the redistricting process are set out in Smith v. Clark, 189 F.Supp.2d 503 (S.D. Miss. 2002), and Smith v. Clark, 189 F.Supp.2d 548 (S.D. Miss. 2002).
[5]The Erosion of Rights (2007), 37.
[6]Id.
[7]LULAC v. Perry, 126 S.Ct. 2594 (2006).

2001 report of the Commission, estimated that some "6 to 10 percent of the American electorate does not have official state identification."[8] A report released in November 2006 by the Brennan Center for Justice at NYU School of Law found that as many as 11% of United States Citizens, more than 21 million people, do not have government issued identification.[9] Thus, literally tens of millions of United States citizens lack government issued photo identification.

The Court of Appeals for the Seventh Circuit rejected a recent challenge to Indiana's photo ID requirement for in-person voting, but acknowledged "the Indiana law will deter some people from voting." In a dissenting opinion Judge Evans pointed out that the "law will make it significantly more difficult for some eligible voters . . . to vote - and this group is mostly comprised of people who are poor, elderly, minorities, disabled, or some combination thereof."[10] The Supreme Court has agreed to review the decision of the Seventh Circuit.

IV. Specific Recommendations for Strengthening Oversight of the Voting Section

The Voting Section must return to its historic mission of protecting voters and eliminating barriers to registration and voting. The goals of restoring public trust and confidence in the Voting Section of the Department of Justice, and ensuring that the nation's

[8]National Commission on Election Reform,Task Force Reports, Ch. 6, Verification of Identity (July 2001), 4.
[9]Brennan Center for Justice, NYU School of Law, Citizens Without Proof: A Survey of Americans' Possession of Documentary Proof of Citizenship and Photo Identification (November 2006), 3.
[10]Crawford v. Marion County Election Board, 472 F.3d 949, 951, 955 (7th Cir. 2007).

voting laws are fairly and adequately enforced, could be advanced by the Voting Section adopting the following policies:

1. There is no room for partisanship in Section 5 preclearance. Voting changes are to be precleared or not based upon whether they have a discriminatory purpose or effect.
2. Career staff should be required to make recommendations whether a proposed change should be precleared, and the basis for the recommendation should be explained and documented.
3. No decision should be made to grant or deny preclearance without full review of the recommendations of the career staff. In the event the recommendation of the career staff is overruled by political appointees, the reasons for overruling should be stated and documented.
4. More information letters (MFIs) should be sent to submitting jurisdictions if there is doubt whether or not submitted changes should be precleared.
5. The comments of affected racial and language minorities submitted in connection with preclearance requests should be read and considered before a preclearance decision is made.
6. Partisanship can play no role in enforcing the requirement that certain jurisdictions provide bilingual material and other assistance in voting to language minorities, in the certification and assignment of federal observers to monitor election, in investigations conducted by the Voting Section, or in decisions whether or where to bring litigation.

7. Section 2 litigation on behalf of language minorities, including American Indians and Alaskan Natives, should be a priority of the Voting Section.

Thank you for this opportunity to supplement my testimony of last week. I applaud the Subcommittee's commitment and continuing oversight of the Voting Section of the Civil Rights Division in order to ensure protection of the franchise for all Americans.

Chronology of Major Articles Regarding the Department of Justice Civil Rights Division (2002 - 2007)

Mar. 2, 2002 - [Mississippi Redistricting Plan] - The U.S. Supreme Court turned down an emergency appeal of a Mississippi congressional redistricting plan, which involves the creation of a new congressional district that would pit two incumbents against each other by cutting the Mississippi delegation from five to four House members. Senator Leahy has begun an inquiry into the role GOP political appointees at the Civil Rights Division, while other Democrats are challenging the ethics of federal judges who ruled on the case. Specifically, critics argue that Justice Scalia should have recused himself because of his close relationship with Rep. Charles Pickering, one of the incumbent House member who would be affected by the plan. Thomas Edsall, *Supreme Court Rejects Redistricting Appeal*, Washington Post.

Mar. 17, 2002 - [Internal Gag Orders] - The Civil Rights Division has issued a warning that career lawyers who talk to "outside entities" about "internal legal deliberations" would face discipline, including possible disbarment. The memo comes after a Washington Post story citing concerns among career lawyers who said that political appointees are compromising the enforcement of civil rights laws. Ellen Nakashima, *Justice Lawyers Get New Warning; Discussing 'Internal Deliberations' With Outsiders Discouraged,* Washington Post.

May 31, 2002 - [Mississippi and Florida Redistricting] - Democrats are criticizing the Justice Department of misusing its authority to ensure redistricting plans favor Republicans. In 2001, the Justice Department took months to decide whether a Mississippi redistricting plan supported by blacks and Democrats met the requirements of Voting Rights Act. Now, the Justice Department is promising to rule quickly in a Florida redistricting map that was drawn by Republicans. David Rosenbaum, *Justice Dept. Accused of Politics in Redistricting,* NY Times.

Dec. 11, 2003 - [Prosecution] - Lawyers in and out of the Justice's Department say the Civil Rights Division has been less aggressive in bringing discrimination cases. Particularly, the department has eased up on several traditional areas of civil rights enforcement, such as housing, employment and disability discrimination. As evidence, the article cites to the decreasing prosecution numbers, the demotion of the division's aggressive housing section chief, Joan Magagna, and the failure to carry on pending cases. Shannon McCaffrey, *U.S. Backs off Discrimination Cases,* Detroit Free Press.

Mar. 7, 2005 - [Religious-Rights Unit] - "The Justice Department's religious-rights unit, established three years ago, has launched a quiet but ambitious effort aimed at rectifying what the Bush administration views as years of illegal discrimination against religious groups and their followers." Richard Schmitt, *Justice Unit Puts Its Focus on Faith; A Little-Known Civil Rights Office has been Busily Defending Religious Groups,* LA Times.

Sept./Oct. 2005 - [Civil Rights Division] - A Justice Department attorney who served as an attorney in the Division for 23 years writes a article extensively discussing his experiences at the

Division, emphasizing political influences, efforts to silence conversation between career attorneys and political appointees, and other controversial issues regarding the Division. William Yeomans, *An Uncivil Division,* Legal Affairs.

Nov. 13, 2005 - [Prosecution] - The Civil Rights Division is "in the midst of an upheaval that has driven away dozens of veteran lawyers and has damaged morale for many of those who remain." "Nearly 20 percent of the division's lawyers left in fiscal 2005, in part of a buyout program that some lawyers believe was aimed at pushing out those who did not share the administration's conservative views on civil rights laws. Longtime litigators complain that political appointees have cut them out of hiring and major policy decisions, including approvals of controversial GOP redistricting plans in Mississippi and Texas." Dan Eggen, *Civil Rights Focus Shift Roils Staff at Justice; Veterans Exit Division as Traditional Cases Decline,* Washington Post.

Nov. 17, 2005 - [Georgia's Voter-ID Law] - According to a Aug. 25 staff memo, a team of attorneys and analysts of the Civil Rights Division who reviewed a Georgia voter-identification law recommended the law's rejection, because they determined that the law was likely to discriminate against black voters. However, high-ranking officials overruled the team's recommendation. Dan Eggen, *Criticism of Voting Law was Overruled,* Washington Post.

Dec. 2, 2005 - [Texas Redistricting] - "Justice Department lawyers concluded that the landmark Texas congressional redistricting plan spearheaded by Rep. Tom DeLay violated the Voting Rights Act," according to a previously undisclosed memo. Senior officials overruled the lawyers and approved the plan. Dan Eggen, *Justice Staff Saw Texas Districting As Illegal Voting Rights Finding On Map Pushed by DeLay Was Overruled,* Washington Post.

Dec. 5, 2005 - [Texas Redistricting] - The Justice Department has been "suppressing for nearly two years a 73-page memo in which six lawyers and two analysts in the voting rights section, including the group's chief lawyer, unanimously concluded that the Texas redistricting plan of 2003 illegally diluted the votes of blacks and Hispanics in order to ensure a Republican majority in the state's Congressional delegation." The Editorial notes that Tom Delay, who pushed the redistricting, now faces criminal charges over how he raised money to support the redistricting. Editorial, *Fixing the Game,* NT Times.

Dec. 8, 2005 - [Redistricting] - Critics argue that "justice higher-ups have moved to rein in career Voting Rights Section staffers by ending their ability to make recommendations in [high-stakes redistricting cases]." The article discusses extensively the "pre-clearance" procedure for states submitting controversial redistricting plans. Michelle Mittelstadt, *Voting-Rights Fricgion Building Inside Justice,* Dalls News.

Dec. 10, 2005 - [Internal Gag Orders] - "The Justice Department has barred staff attorneys from offering recommendations in major Voting Rights Act cases, marking a significant change in the procedures meant to insulate such decisions from politics." Dan Eggen, *Staff Opinions Banned In Voting Rights Cases,* Washington Post.

July 2, 2005 [John Tanner] Dr. Robert Fitrakis lawyer and political science professor writes a letter to John Tanner, Chief, Voting Section, U.S. Department of Justice addressing his partisan leadership and its impact on minority voters. Bob Fitrakis *An Open Letter to John Tanner, Chief, Voting Section, U.S. Department of Justice* The Press Press

January 23, 2006 - [Civil Rights Division] - (1) "Many current and former lawyers in the section charge that senior officials have exerted undue political influence in many of the sensitive voting-rights cases the unit handles." (2) "Most of the department's major voting-related actions over the past five years have been beneficial to the GOP." (3) "The section also has lost about a third of its three dozen lawyers over the past nine months. Those who remain have been barred from offering recommendations in major voting-rights cases and have little input in the section's decisions on hiring and policy." Dan Eggen, *Politics Alleged in Voting Cases; Justice Officials are Accused of Influence.* Washington Post.

April 13, 2006 - [Hans von Spakovsky] - An division of ACLU is challenging the integrity of the Civil Rights Division, particularly that of a former senior lawyer, Hans von Spakovsky, who apparently used a pseudonym to publish a law review article endorsing photo identification, before a Georgia law using photo identification was even submitted to Justice for review. He played a central role in approving the controversial voter identification program over the objections of staff lawyers. Dan Eggen, *Official's Article on Voting Law Spurs Outcry,* Washington Post.

July 23, 2006 - [Civil Rights Division] - Relying on job applications material obtained by the Paper, the article argues that the Bush administration is quietly remaking the Civil Rights Division, filling the permanent ranks with lawyers who have strong conservative credentials but little experience in civil rights. Charlie Savage, *Civil Rights Hiring Shifted in Bush Era: Conservative Leanings Stressed,* Boston Globe.

June 26, 2006 - [Civil Rights Division] - The Editorial criticizes the administration for loosening the qualification for hiring attorneys in the Civil Rights Division and by politicizing the process, thereby disregarding its responsibility to ensure fairness for all Americans. Editorial, *A Weaker Rights Enforcer,* Boston Globe.

July 29, 2006 - [Civil Rights Division] - The Editorial makes the argument that this administration is a "civil rights mausoleum." Editorial, *Division of Uncivil Rights,* Boston Globe.

January 23, 2006 - [Voting Rights Section] - Examines politicization of the Voting Section at DOJ, focusing on cases in Georgia, Mississippi, and Texas. Dan Eggen, *Politics Alleged In Voting Cases; Justice Officials Are Accused of Influence*, The Washington Post.

March 30, 2007 - [Civil Rights Division] - This article offers a comprehensive overview of the Bush administration's quiet dismantling of the DOJ's Civil Rights Division, from ideological hiring to recess appointments, to an emphasis on religious issues. Alia Malek, *Bush's Long History of Politicizing Justice*, Salon.com.

April 8, 2007 - [Religion at DOJ] - Examines how the DOJ under the Bush Administration has emphasized the religious credentials of potential hires. Focuses on Monica Goodling, Regent University graduates, and how these individuals may have conflated God's work with Bush's. Dahlia Lithwick, Justice's Holy Hires, The Washington Post

April 8, 2007 - [Religion at DOJ] - In depth look at Regent University and its role in new hires at the DOJ. Charlie Savage, *Scandal puts spotlight on Christian law school Grads influential in Justice Dept.*, The Boston Globe

April 17th, 2007 [Employee Discrimination- CR Division] An in-depth account into why veteran redistricting expert Toby Moore left the CR Division in April 2006. Moore feared for his professional career if he remained in the hostile environment which entailed; being reprimanded for his opposing views, discriminatory gossip, intimidation and monitoring of his email account. Paul Kiel *Inside the Bush DOJ's Purge of the Civil Rights Division* TPM Muckraker

April 18, 2007 - [Voter suppression] - Outlines efforts by DOJ and the Bush Administration to crack down on illusory voter fraud as a strategy to restrict voter turnout in key battleground states in ways that favor Republicans. Greg Gordon, *Administration Pursued Aggressive Legal Effort to Restrict Voter Turnout*, McClathy Newspapers.

April 28, 2007 [Partisan Hiring at DOJ] "The Justice Department is removing appointees from the hiring process for rookie lawyers and summer interns, amid allegations that the Bush Administration had rigged the programs in favor of candidates with connections to conservative or Republican groups." Now the selection process will be returned to career lawyers after four years during which political appointees were in charge of the process.

May 6, 2007 - [Schlozman] Examines Bradley Schlozman's involvement in Missouri voter fraud litigation as well as his tenure as chief of the Voting Section, during which time he emphasized conservative ideology over academic credentials in making new hires. Charlie Savage, *Missouri Attorney a Focus in Firings: Senate bypassed in appointment of Schlozman*, May 6, 2007.

May 6, 2007 [Partisan Hiring at DOJ] "Congressional investigators are beginning to focus on accusations that a top civil rights official at the Justice Department illegally hired lawyers based on their political affiliations, especially for sensitive voting rights jobs" Bradley Schlozman, senior civil rights official, is charged with telling applicants to take references off their resumes in an attempt to make them look more apolitical. Greg Gordon and Margaret Talev *Congress Considers Broadening Justice Department Inquiry* McClatchy Newspapers

May 14, 2007 [Civil Rights Division-Employee Discrimination] Employees have reported racial discrimination in the Civil Rights Division of the DOJ, the Voting Rights section in particular. This division has seen a dramatic decrease in African American staff over the last administration. Complaints include "minority employees continually being passed over for jobs that are given to white employees" and enduring explicit racial comments from attorneys. Leaving that division one employee stated "I am gladly escaping the 'Plantation' it has become.

For my colleagues still under the 'whip' hold on. Paul Kiel *In Civil Rights Division, Employees Claim Discrimination* TPM Muckraker

May 20, 2007 [Hans von Spakovsky] Justice Department Civil Rights Lawyer Hans von Spakovsky claims his efforts were used to stop voter fraud. Ironically however, von Spakovsky strongly advocated that every voter should produce a photo-identification card, despite the fact studies suggest such requirements would heavily burden minority voters. Other department lawyers say von Sparkovsky "steered the agency toward voting right policies never seen before, pushing to curb minor instances of election fraud by imposing sweeping restrictions that would make it harder, not easier, for Democratic-leaning poor and minority voters to cast ballots." Greg Gordon *Efforts to Stop 'voter fraud' May Have Curbed Legitimate Voting* McClatchy Newspapers

May 31, 2007 - [Civil Rights Division] Reports that the Justice Department has launched an internal investigation concerning political hiring at the Civil Rights Division.
Charlie Savage, *Justice Dept. probes its hirings Investigating for bias toward conservatives*, The Boston Globe.

June 2, 2007 - [Partisan Hiring at DOJ] - Examines how Mark (Thor) Hearne, a Republican operative who served as election counsel for the 2004 Bush-Cheney campaign, pushed Bush Administration officials to use the Justice Department for partisan purposes in Arkansas and Missouri.

June 6, 2007 - [Partisan Hiring at DOJ] - Covers Senate Judiciary Committee oversight hearing with Brad Scholzman. Scholzman admits to ideological/political hiring. Also discusses Missouri election fraud case. Charlie Savage, *Bush aide admits hiring boasts Says he broke no rules giving jobs to conservatives*, The Boston Globe

June 6, 2007 - [NVRA] - The article takes a look at how, under the Bush Administration, enforcement of the NVRA has shifted away from facilitating registration through public service agencies under Section 7 towards purging voters from registration lists under Section 8. After helping 2.6 million people to vote in 1995-1996, public assistance agencies only registered 1 million people under Section 8 in 2003-4. Greg Gordon, *Complaints Abound Over Enforcement of Voter Registration Law*, McClatchy Newspapers.

June 14, 2007 - [Civil Rights Division] - The article examines how the Civil Rights Division has placed a greater emphasis on religious discrimination and human trafficking over complex litigation related to racial discrimination. Also briefly touches on preferential hiring for career positions for those with conservative or religious bona fides. Neil A. Lewis, *Justice Dept. Reshapes Its Civil Rights*, New York Times.

June 22, 2007 - [Civil Rights Division] - Covers the recent Senate Judiciary Committee hearing on the Civil Rights Division. Emphasis on how Schlozman removed women attorneys to make

room for more conservative male attorneys. Amy Goldstein and Dan Eggen, *Senators Deride Justice Reassignments; Prosecutor Firings and Staff Decisions Draw Hill Criticism*, The Washington Post

October 19, 2007 [Obama Criticizes John Tanner] Appearing before the National Latino Congreso in LA Chief of the Voting Rights Section John K. Tanner said. "Minorities don't become elderly the way white people do. They die first" His assertion was that minority deaths come earlier in life and therefore they would not be impacted by the voter-ID laws. "Tanner has been under fire for his career decision to overrule department lawyers who considered the voter ID requirements in Georgia to be discriminatory against blacks." Paul Kane *Obama: DOJ Official Must be Fired* WashingtonPost.com

October 20, 2007 [Obama Wants Official Fired for Comments] Addressing the National Latino Congreso about the effects of Voter ID requirements on minorities, Chief of the Voting Rights Section, John K. Tanner said. "Minorities don't become elderly the way white people do. They die first" Senator Obama expressed his concern in a letter to Acting Attorney General Peter D. Keisler "Such comments are patently erroneous, offensive and dangerous and they are especially troubling coming from the federal official charged with protecting voting rights in this country" Nedra Pickler *Obama Wants Officials Fired for Comments* AP- WashingtonPost.com

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Criticism of Voting Law Was Overruled

Advertisement

Justice Dept. Backed Georgia Measure Despite Fears of Discrimination

By Dan Eggen
Washington Post Staff Writer
Thursday, November 17, 2005; A01

A team of Justice Department lawyers and analysts who reviewed a Georgia voter-identification law recommended rejecting it because it was likely to discriminate against black voters, but they were overruled the next day by higher-ranking officials at Justice, according to department documents.

The Justice Department has characterized the "pre-clearance" of the controversial Georgia voter-identification program as a joint decision by career and political appointees in the Civil Rights Division. Republican proponents in Georgia have cited federal approval of the program as evidence that it would not discriminate against African Americans and other minorities.

But an Aug. 25 staff memo obtained by The Washington Post recommended blocking the program because Georgia failed to show that the measure would not dilute the votes of minority residents, as required under the Voting Rights Act.

The memo, endorsed by four of the team's five members, also said the state had provided flawed and incomplete data. The team found significant evidence that the plan would be "retrogressive," meaning that it would reduce blacks' access to the polls.

A day later, on Aug. 26, the chief of the department's voting rights section, John Tanner, told Georgia officials that the program could go forward. "The Attorney General does not interpose any objection to the specified changes," he said in a letter to them.

Eric Holland, a Justice Department spokesman, said in a statement this week that "disagreements are healthy in a debate" and that voting rights decisions are made "after reviewing both the pros and cons very carefully."

"At the end of the day, the section chief is responsible for tendering a recommendation" to the assistant attorney general for civil rights, he said.

The Georgia voter ID program has been the subject of fierce partisan debate since it was approved by the state's Republican-controlled legislature in March. The plan was blocked on constitutional grounds in October by a U.S. District Court judge, who compared the measure to a Jim Crow-era poll tax. A three-judge appellate panel, made up of one Democratic and two Republican appointees, upheld the lower court's injunction.

The program requires voters to obtain one of six forms of photo identification before going to the polls, as opposed to 17 types of identification currently allowed. Those without a driver's license or other photo identification are required to obtain a special digital identification card, which would cost $20 for five years and could be obtained from motor vehicle offices in only 59 of the state's 159 counties.

Proponents said the measure was needed to combat voter fraud, but opponents charged that Republicans were trying to keep black voters, who tend to vote Democratic, away from the polls.

Section 5 of the Voting Rights Act of 1965 requires Georgia and eight other states, mostly in the South, to submit any voting rule changes that might affect minority groups to the Justice Department for review. The department can either halt the proposed changes with an objection or issue a "pre-clearance" letter allowing

them to proceed. Portions of the act, including Section 5, are up for renewal in Congress, and Attorney General Alberto R. Gonzales has said that he supports reauthorizing the law.

The Justice Department's decision to approve the Georgia measure was the latest in a series of disputes within the Civil Rights Division, which lost nearly 20 percent of its lawyers in 2005 and has assigned dozens of those who remain to handle immigration cases instead of civil rights litigation. In the voting rights section, which handles election-related issues such as the Georgia plan, political appointees also overruled career lawyers in approving GOP-backed redistricting maps in Mississippi and Texas in recent years, current and former employees have said.

The Voting Rights Act puts the legal burden on Georgia to show that proposed election-related changes would not be retrogressive. According to the Aug. 25 memo from the Justice review team, Georgia lawmakers and state officials made little effort to research the possible racial impact of the proposed program.

The 51-page memo recommended several steps that Georgia could take to make the ID program fairer to minority voters, such as continuing to allow the use of non-photo identification, such as birth certificates and Social Security cards, that have not been shown to pose security problems.

Those in favor of issuing an objection were Robert Berman, deputy chief of the voting rights section; Amy Zubrensky, a trial lawyer; Heather Moss, a civil rights analyst; and Toby Moore, a geographer, according to the memo. A fifth member of the team, trial lawyer Joshua Rogers, recommended approval, but the memo does not include his reasoning.

Berman did not return a call made to his office.

A key area of disagreement between the staff and their supervisors appears to be the reliability of data provided by the Georgia Department of Driver Services and other state agencies.

The staff memo noted that the records were riddled with errors, including the unexpired licenses of dead people, and were "of a quality far below what we are accustomed to using in the Voting Section." And other sources, including the U.S. Census Bureau, showed that Georgia blacks were much less likely than whites to own vehicles and also less likely to have photo IDs, the memo said.

"While no single piece of data confirms that blacks will [be] disparately impacted compared to whites, the totality of the evidence points to that conclusion," the memo said. It added later: "The state has failed to meet its burden of demonstrating that the change is not retrogressive."

But Assistant Attorney General William E. Moschella cited the state's data in an Oct. 7 letter to a senator that argues the number of eligible voters without a photo ID is "extremely small."

"All individual data indicates that the state's African-American citizens are, if anything, slightly *more* likely than white citizens to possess one of the necessary forms of identification," Moschella wrote to Sen. Christopher S. Bond (R-Mo.) in defense of the department's decision.

State Sen. Bill Stephens, a Republican who helped win passage of the legislation, said the Justice Department's approval was vital because of the restrictions faced by Georgia under the Voting Rights Act.

"That is the most crucial part of any elections legislation we pass," said Stephens, who is a candidate for secretary of state. "We know we have to await the Justice Department's pre-clearance of virtually anything we do."

State Rep. Tyrone L. Brooks Sr., a Democrat and president of the Georgia Association of Black Elected Officials, said he was not surprised by the Justice Department's position in the case.

"Some of my colleagues told me early on that, because of politics in the Bush administration, no matter what the staff recommendation was, this would be approved by the attorney general," Brooks said. "It's disappointing that the staff recommendation was not accepted, because that has been the norm since 1965."

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SECTION 5 RECOMMENDATION MEMORANDUM: August 25, 2005

Re: Act No. 53 (H.B. 244)(2005), which amends and provides: definitions of election terms, summaries of proposed constitutional amendments, duties of municipal governing authorities, training requirements for election officials, candidate qualification schedules and procedures, nonpartisan election schedules and procedures, ballot procedures and format, voter registration procedures, polling places and election equipment, voting method and machines for municipalities, absentee voting procedures, poll watchers, electioneering prohibitions, provisional voting requirements and procedures, voter information at polling places, majority vote requirement, special election procedures, penalties for violation of election code, Uniformed and Overseas Citizens Absentee Voting Act changes, and voter identification requirements.

TIME LIMIT

Submission Received:	June 13, 2005
Supplemental Information Received:	July 25, 2005
	July 28, 2005
	August 1, 2005
	August 22, 2005
Interim Letter Sent:	August 2, 2005
Due Out Date:	September 30, 2005

FACTUAL INVESTIGATION AND LEGAL REVIEW

By: Robert Berman, Deputy Chief
Amy Zubrensky, Trial Attorney
Heather Moss, Civil Rights Analyst
Joshua Rogers, Trial Attorney
Toby Moore, Geographer/Social Science Analyst

RECOMMENDATION: Objection to Section 59 (supported by Berman, Zubrensky, Moss, and Moore); no objection to remaining changes;[1] no objection to all changes including Section 59 (supported by Rogers).

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[1] A complete description and analysis of all changes other than Section 59, which amends the state's voter identification requirements, are contained in a separate memorandum, and the proposed letter informs state officials that no objection will be interposed to these changes.

I. BACKGROUND

A. Demographics and statistics

According to the 2000 Census, the State of Georgia has a total population of 8,186,453, of whom 2,348,626 (28.7%) are black and 5,128,661 (62.6%) are white. The state has a total voting age population of 6,017,219, of whom 1,595,631 (26.5%) are black and 3,925,585 (65.2%) are white. On August 11, 2005, the Census Bureau released its 2004 estimates of a total population for the state of 8,829,383, of whom 2,658,068 (30.1%) were black and 5,936,829 were white.

B. Benchmark standard, practice, or procedure

Voters in Georgia may present any one of the following 17 forms of voter identification to establish their eligibility to cast a ballot:

(1) Valid Georgia driver's license;
(2) Valid identification card issued by a branch, department, agency, or entity of the State of Georgia, any other state, or the United States authorized by law to issue personal identification;
(3) Valid United States passport;
(4) Valid employee identification card containing a photograph of the elector and issued by any branch, department, agency, or entity of the United States government, the State of Georgia, or any county, municipality, board, authority or other entity of Georgia;
(5) Valid employee identification card containing a photograph of the elector issued by any employer of the elector in the ordinary course of business;
(6) Valid student identification containing a photograph of the elector from any public or private college, university, or postgraduate technical or professional school located within the State of Georgia;
(7) Valid Georgia license to carry a pistol or revolver;
(8) Valid pilot's license;
(9) Military ID;
(10) Birth certificate;
(11) Social security card;
(12) Naturalization documentation;
(13) Copy of court records showing adoption, name, or sex change;
(14) Utility bill;
(15) Bank statement showing name and address of the elector;
(16) Government check or payment with name and address of the elector; or
(17) Other government document showing name and address of the elector.

Ga. Code. Ann. § 21-2-417

An elector who is unable to produce an acceptable form of identification may sign a statement under oath swearing and affirming that he is the person identified on the elector's voter certificate under penalty of law and may vote a regular ballot,[2/] unless he is a first time registrant by mail in which case he may vote a provisional ballot.

To vote absentee, an elector must qualify according to the following list of enumerated acceptable reasons:

- I am required to be absent from my precinct all day on primary or election day (7:00 a.m. to 7:00 p.m.).
- I am unable to vote in person because of a physical disability.
- I am unable to vote in person because I am required to give constant care to someone who is physically disabled.
- I am an election official who will perform official acts or duties in connection with the primary or election.
- I will be unable to be present at the polls because the date of the primary or election falls on a religious holiday which I observe.
- I will be unable to be present at the polls because I am required to be on duty in my place of employment for the protection of the health, life, or safety of the public during the entire time the polls are open and my place of employment is within my precinct.
- I am 75 years of age or older.
- I am a citizen of the United States permanently residing outside the United States, was last domiciled in Georgia, and am not domiciled or voting in any other state.
- I am a member of the Armed Forces or Merchant Marines of the United States, or a spouse or dependent of the member, residing outside the County.

These are the benchmark standards, practices, and procedures for our analysis.

C. Proposed standard, practice, or procedure

Act No. 53 (H.B. 244)(2005) amends portions of state's election code. The Act contains numerous changes that are not controversial and do not raise retrogression concerns. Controversy centered on Section 59, which amends Ga. Code Ann. § 21-2-417 regarding the state's voter identification requirement.

The proposed practice eliminates twelve forms of identification accepted under the benchmark practice and adds one new form, resulting in the six following forms of acceptable identification:

[2/] Under the benchmark practice, falsely swearing or affirming such a statement under oath is punishable as a felony. This penalty is distinctly set form on the face of the statement. Additional penalties may apply (e.g., repeat voting in the same election, a violation of Ga. Code Ann. § 21-2-572, is punishable as a felony).

(1) Georgia driver's license, which was properly issued by the appropriate state agency;
(2) Photographic identification card issued a branch, department, agency, or entity of the State of Georgia, any other state, or the United States authorized by law to issue personal identification;
(3) United States passport;
(4) A valid employee identification card containing a photograph of the elector and issued by any branch, department, agency, or entity of the United States government, Georgia, or any county, municipality, board, authority or other entity of Georgia;
(5) United States military photographic identification card; or
(6) Tribal photographic identification card.

The identification need not contain the elector's address. The affidavit of identity for electors who cannot produce acceptable photo identification is eliminated. As proposed, a voter who cannot produce an acceptable photo identification may vote a provisional ballot, but must thereafter produce a valid photographic identification to the registrar within 48 hours of the election in order for his vote to be counted.

Section 66 of the bill permits indigent persons who do not otherwise have approved photo identification and cannot afford to pay the fees to obtain such identification to receive one free of charge from the Georgia Department of Public Safety. Section 50 broadens the ability of electors to vote absentee without providing a reason. Absentee voters are not subject to the identification requirement, though "advance" voters who vote in person at clerks' offices must present photo ID pursuant to these requirements.

Finally, there is a new provision applicable to first time voters who registered by mail and who have not otherwise verified their identification through government issued photographic identification. Such voters shall present to the poll workers one of the six forms of acceptable photographic identification listed above, or may present a copy of a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the elector. If the elector does not have any of the acceptable forms of identification, he may vote a provisional ballot upon swearing or affirming that the elector is the person identified in the elector's voter certificate. Such provisional ballot shall only be counted if the voter is able to produce current and valid identification to the registrar for verification with 48-hours as provided Ga. Code Ann. § 21-2-419.

II. FACTS

A. Information obtained from the submitting authority

The state's initial submission, received on June 13, 2005, consisted of a nine-page cover letter, copies of Act No. 53 including a "redlined" copy of the Act, charts identifying changes to

and the Section 5 history of each affected provision, a list of minority community contacts, newspaper articles regarding the legislative process, and editorials regarding the Act. The cover letter references the legislature's website for the legislative history, including previous versions of the bill, proposed amendments, and roll call votes.

In its initial submission, the state indicated that the Act contains a number of provisions designed to clarify provisions of the Georgia Election Code in order to increase the efficiency of the electoral process, especially as it relates to municipal elections in many instances. The state also indicated that the state enacted the voter identification provisions to address legislative concerns regarding voter fraud.

During a June 25, 2005, telephone conversation with Deputy Attorney General Dennis Dunn (W), we requested information regarding the legislative history of the bill, including expert testimony, witness statements, and transcripts or tapes of hearings. The state provided this information on July 25, 2005. Upon our informal request, the state also provided a spreadsheet containing data from the Georgia Department of Driver's Services ("DDS") regarding persons holding valid driver's licenses and state identification cards. We received these data on July 28, August 1, and August 22, 2005. The data are set forth in part II.C.2.

Additionally, Deputy Attorney General Dunn clarified that with regard to implementation of Subpart (c) of Section 59, first-time voters who had provided identification upon registering would be required to show photo identification at the polls, while those first-time voters who had not previously provided identification upon registration would be permitted to show any of the non-photo IDs listed in Subpart (c) (e.g. current utility bill, bank statement, government check, paycheck, or other government document) or a photo ID.

According to the Georgia General Assembly's website, Representative Sue Burmeister (W) of Augusta sponsored HB 244. Numerous amendments were proposed during the bill's consideration; a majority of the amendments were proposed by members of the Black Caucus who sought to retain some forms of voter identification that were eliminated by the bill. Senator Kasim Reed (B) also proposed an amendment making the identification requirement effective after the state appropriated funds to educate voters about the proposed identification and registration requirements. All of these proposed amendments failed.

The legislation passed the House on March 11, and the Senate on March 29, 2005. The vote on final passage in the House was 91 yea, 7 nay (with 9 abstaining and 5 excused), and in the Senate was 31 yea, 20 nay (with 2 abstaining and 3 excused). All black legislators with the exception of Representative Willie Talton voted against, abstained or were excused from voting on the bill. Of the three Hispanic legislators in the General Assembly, two, Senator Sam Zamarripa and Representative Pedro Martin, joined with the Black Caucus in opposing the bill. The third Hispanic legislator, Representative David Casas, supported the bill.

B. Information obtained from other sources

1. Proponents and Arguments in Favor of Preclearance

We received numerous letters from elected officials, both in the state legislature and in other offices, and private individuals expressing their views that the proposed legislation was not retrogressive either in purpose or effect. Many of the letters presented similar points in support of their position; all are set forth at Tab 6A to this memorandum. We have summarized those of state officials above, as well as a representative sample of letters from other supporters.

Representative Burmeister, the sponsor of the legislation, informed Voting Section staff that September 11 caused her to reflect on the ease with which the terrorists obtained IDs. She stated that voter fraud is serious but hard to prove because fraud, by its nature, is subversive. She is aware of vote buying in certain precincts, and specifically related an incident in which the former mayor of Augusta, Mayor Ed McEntyre, approached her and offered to put her name on a palm card, pick up voters in a van, and pay them to vote for the candidates on the card, in exchange for $2,000. Rep. Burmeister also read "Stealing Elections" by John Fund and was concerned about how elections could be stolen by such means. Rep. Burmeister said that if there are fewer black voters because of this bill, it will only be because there is less opportunity for fraud. She said that when black voters in her black precincts are not paid to vote, they do not go to the polls. She added the 48-hour provisional ballot allowance so that people who legitimately have identification can vote in response to concerns about voters whose identification is stolen.

Rep. Burmeister also explained the exemption of absentee ballots from the identification requirement. She does not support this but accepted this into the final version because the absentee voting process creates a paper trail which will prevent vote fraud, and will ensure that rural voters can vote even if they cannot make it to a DDS office.[3] Senator Cecil Staton (W), who authored the parallel Senate bill, supports preclearance and provided a letter mirroring the arguments made by Rep. Burmeister.

Susan Laccetti Meyers, Chief Policy Advisor to the Georgia House of Representatives, who worked with Rep. Burmeister in developing the legislation, told us that the Legislature did not conduct any statistical analysis of the effect of the photo ID requirement on minority voters. Instead, they relied on the statistic that more citizens had driver's licenses than were registered to

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[3] Rep. Burmeister stated that the Governor had passed legislation to mandate a DDS office in every county, and that individuals can obtain state IDs in Kroger grocery stores. Neither statement is correct. The Governor's Office has confirmed that the Georgia General Assembly has passed no legislation mandating a DDS office in every county. The latter statement refers to a program that was discontinued in 2003 whereby the state had operated satellite diver's license renewal centers in some Kroger stores.

vote, the John Fund book, and other anecdotal information. Members of the leadership noted that citizens need identification for everything these days, so concluded that the requirement did not seem arduous. In addition, Rep. Talton (B) told her that minorities were more vulnerable to having mail, such as bills and checks, stolen from their mailboxes. She said that private-sector employee and student ID cards were eliminated because members felt insecure about private sector controls, and believed that procedures used by government entities would be more reliable. She said that legislators heard testimony from several county election board members about the potential for vote fraud; and also considered the experience of states such as Florida, Wisconsin, and Indiana with voter ID laws, along with the National Conference of State Legislatures list of state voter ID requirements. Ms. Meyers said that opponents simply denied that there was any fraud of which they were aware, but did not present evidence or witnesses to contradict the evidence that proponents brought forth.

Representative Talton (B), who is Chief Deputy Sheriff in the Houston County Sheriff's Department, supports preclearance. He stated that identity fraud is common, and that officers in Houston County arrest individuals every day with fraudulent driver's licences and IDs. He concludes that the law is color blind, and does not unduly burden any race, class, or ethnic group.

We received several comment letters from members and directors of county boards of registrars, including Gary J. Smith, Director of Registrations and Elections of Forsyth County, and Frank Strickland and Harry MacDougald, members of the Fulton County Board of Registrations and Elections. The registrars emphasized that requiring photo ID would diminish the potential for fraud. Each provided the following additional information.

Mr. Smith reviewed the affidavits of identity that had been used by voters who lacked identification at the November 2004 election. In Forsyth County, 37 voters had signed affidavits of identity in lieu of presenting identification. This constituted 0.08 percent of those voting at precincts (i.e., excluding absentee and early voters) in Forsyth County.

Mr. Strickland stated that 2,456 fraudulent voter registration forms were submitted to the Fulton County elections board prior to November 2004. These have been referred to the FBI. Mr. Strickland also stated that he relied on data from the Secretary of State that showed 6,675,100 driver's licenses and state identification cards issued to Georgians aged 18 or older, and 4,414,663 Georgians registered to vote, as of February 2005. He concluded that these numbers demonstrate that an overwhelming majority of registered voters already have a state-issued ID.

Mr. MacDougald stated that prior to November 2004, Fulton County received 8,112 applications containing "missing or irregular" information. The board sent letters to all 8,112 applicants and received only 55 responses. Mr. MacDougald concluded that all of the remaining applications were "bogus." He also stated that 15,237 of 105,553 precinct cards mailed to registered voters in the county were returned as undeliverable. In addition, 3,071 precinct cards

mailed to 45,907 new registrants were returned as undeliverable. Of these 3,071 returned cards, 921 persons voted. He concludes that 11,128 total registration applications were either "bogus or problematic in a serious way" and that this crisis will be addressed by requiring photo identification for voter registration.

2. Proponents and Arguments in Favor of Objection

As with those who support the legislation, we received many letters from elected officials, organizations and individuals urging the Attorney General to interpose an objection to the proposed changes. Many of the letters presented similar points which are summarized below; the complete set of letters are set forth at Tab 6B. Opponents of the changes argue that the proposed changes are retrogressive in both purpose and effect based on the following factors: (1) the discrepancy between black and white ownership of photo identification; (2) the discrepancy between black and white access to motor vehicles as a proxy for driver's license ownership; (3) the poverty gap between blacks and whites, which both causes blacks to have less ownership of acceptable photo ID, and creates higher barriers for blacks without ID to obtain it; and (4) the ineffectiveness of the mitigating factors (i.e., no-fault absentee voting and free ID for indigent persons) to counteract the potential retrogressive effects on minority voters.

Representative Stan Watson (B), Chairman of the Georgia Legislative Black Caucus, stated that proponents provided no evidence to support the elimination of each form of identification. They spoke only generally about voter fraud and mail being stolen. He responded that mail is stolen for financial gain (credit card fraud, benefit checks, etc.) and that persons are unlikely to risk being caught by using stolen mail to impersonate a voter. Rep. Watson believes that proponents knew they had a majority and thus made little effort to gain support during the legislative process, and that this bill is an attempt to test Section 5.

Senator Ed Harbison (B) can testify that many of his constituents do not drive or have a non-driver's identification card, though they have types of ID that are eliminated. Senator Harbison stated that the majority would not hear the concerns of the Black Caucus during consideration of the bill, so they staged a walk out of the proceedings, which was reported nationally.[4]

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[4] Media accounts reflect that members of the Georgia Legislative Black Caucus expressed outrage at the enactment of the revisions to the photographic identification provisions. African-American and some white Democratic lawmakers staged walkouts in the House and Senate on March 11, 2005, to protest the photo identification requirements that they likened to poll taxes. Nancy Badertscher, Carlos Campos, "ID Debate Gets Heated," *Atlanta Journal-Constitution*, March, 13, 2005. Senator Emmanuel Jones (B) wore shackles to the well of the Senate, and Representative Alisha Thomas Morgan (B) brought shackles to the well of the House to symbolize the bill's potential to repress the black vote. Mike Phillips, "ID Bill Could Make Georgia Unique in Turn Away Voters," *Macon Telegraph*, March 19, 2005; Carlos Campos, "Firebrand 'Standing Up': Legislator Makes No

Senator Emanuel Jones (B), a member of the Senate State and Local Government Committee, attended all meetings regarding the bill, and proposed numerous amendments to retain specific forms of identification because there were no justifiable reasons for their elimination. Senator Jones stated that these amendments were voted down without any debate. Senator Jones stated that the Black Caucus requested postponement of implementation of the ID portions until DDS locations are established in every county. Senator Jones stated that this request was dismissed and that he knows of no plan by the Governor to make such expansions.

Senator Robert Brown (B) stated that proponents never specifically addressed the reasoning behind the elimination of each form of ID or the discrepancies between whites and blacks ownership of driver's licenses and ID cards. Senator Brown can testify that black voters prefer to vote in person rather than absentee. He noted that he has advocated absentee voting within the black community, particularly to the elderly who have always been authorized to vote absentee, but has found that they still prefer to vote in person on election day. Senator Brown asserted that for these reasons, the extended absentee voting period and the addition of "no excuse" absentee voting will not mitigate the retrogression caused by the proposed ID restrictions.

Secretary of State Cathy Cox (W) opposed HB 244 in an April 8, 2005 letter to Governor Perdue, urging him to veto the law, and submitted a letter opposing preclearnce. She provided a list of registered voters who lack birth certificates for whom obtaining a photo ID would be particularly difficult. She can also testify to the absence of any complaints of voter fraud via impersonation during her tenure. Secretary Cox stressed that there are DDS offices in only one-third of the counties, none within the City of Atlanta, and that DDS headquarters is not served by any form of public transportation.

The Mayor of Atlanta, Shirley Franklin (B), opposes preclearance, and can testify to the experience of her mother, who recently moved to Atlanta from Philadelphia, in attempting to obtain a Georgia identification card. Her mother went to several DDS offices before finding one that was open. Her expired Pennsylvania identification was rejected as sufficient documentation to obtain a Georgia ID card, and she was told to produce her original birth certificate. Mayor Franklin's mother has never had a birth certificate, but is currently attempting to obtain an analogous document from North Carolina, where she was born. Mayor Franklin noted that this process would be much more arduous for someone without resources or supportive family in the area. Mayor Franklin believes that even if the intent of the legislation is not to disenfranchise minority voters, it will "inarguably have that result."

Apologies for Her Convictions," *Atlanta Journal-Constitution*, March 24, 2005. Representative Morgan then refused to leave the well of the House after her time to speak expired, instead singing the civil rights anthem, "Ain't Gonna Let Nobody Turn Me Around." Id.

A coalition of voting rights organizations[5] provided a letter urging an objection. The coalition states that the photo identification requirements carry a retrogressive racial impact because blacks in Georgia are six times more likely than whites to live below the poverty level, and five times less likely than whites to have access to a motor vehicle than whites. As 103 counties lack a DDS location, these two factors result in disparately less access by blacks than whites to DDS locations. In addition, the limited transportation alternatives for those who lack access to motor vehicles, particularly in rural Georgia, add to the economic burdens related to obtaining an identification card, and remain unchanged even if an indigent citizen qualifies for the free ID. The coalition states that the legislature failed to investigate the racial impact of Act 53, and took no action to mitigate the potential racial impact of the legislation by, for example, providing funds for voter education about the new requirements. Finally, the letter asserts that the stated purpose of the photo identification requirement is pretextual because the purported justification of preventing fraud is undermined by the exemption of absentee ballots from the photo identification requirement.

The NAACP Legal Defense and Educational Fund opposes preclearance of HB 244. In addition to arguments similar to those above, Director-Counsel Theodore Shaw analogizes the identification requirements to "reregistration" and "reidentification" measures that the Department has objected to in the past.

C. Public Source Data

1. Process & Fees to Obtain Driver's Licenses and Identification Cards

The initial submission provided no information regarding DDS locations, hours, fees, or requirements to obtain a photo ID. Our research shows that the Georgia General Assembly created the Department of Driver Services in House Bill 501 (2005) as a successor to the Department of Motor Vehicles. Effective July 1, 2005, Georgia residents can apply for driver's licences and a state-issued photo identification cards at one of the state's 56 DDS locations, 53 of which are full service centers and 3 part-time sites. The City of Atlanta has not had a DDS location for the past year, although the Governor's August 6, 2005, press release states that negotiations are underway to lease a new site. DDS customer service centers are open to the public Tuesday through Saturday, from 9:00 am to 5:00 pm. Monday hours have been added for select locations for appointment-only road tests. According to the Governor's August 6, 2005, press release, DDS will also begin to issue photo identification cards at certain designated locations on Mondays. According to DDS Commissioner Greg Dozier, the designated sites are all located in the Atlanta area and are as follows: Shannon Mall, North Cobb, Lawrenceville, and Conyers.

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[5] The groups include the Voting Rights Project of the Lawyers' Committee for Civil Rights Under Law, National Voting Rights Institute, National Voting Rights Project of the ACLU, MALDEF, Georgia Association of Black Elected Officials, Georgia Association of Latino Elected Offices, AARP Georgia, and others.

According to Commissioner Dozier, five DDS locations are accessible via public transportation: the South DeKalb, Shannon Mall, and Sandy Springs sites in the Atlanta area are accessible via the Metropolitan Atlanta Rapid Transit Authority (MARTA); the Marietta location is accessible by Cobb Community Transit; and the Norcross location is accessible via Gwinnett County Transit.[6] The remaining 51 sites are accessible only by personal transportation or taxi service.

The Governor recently announced the creation of the Georgia Licensing on Wheels ("GLOW") program. Announced on August 6, 2005, the GLOW program will use a mobile licensing bus to travel the state with the capacity to issue up to 200 photo identification cards per day. The state estimates that if the mobile unit is operational four days per week, the program has the capacity to serve 38,400 persons a year. According to Commissioner Dozier, the bus will be staffed by four DDS employees licensed to operate the ID-issuing equipment. Commissioner Dozier has stated that the GLOW tours will initially run weekly from Tuesday through Saturday, and may eventually also run on Mondays. DDS is currently mapping out routes and schedules, dividing the state into corridors which the GLOW program will visit based on the following factors: (1) the geographical need based on lack of DDS locations, (2) the population's need regardless of the presence of a DDS location; (3) requests from citizen groups; (4) geographic accessibility for groups and citizens; and (5) convenient times for groups and citizens. Dozier reported that community groups have already begun contacting DDS to make GLOW tour requests.

No information about the GLOW program is currently posted on the DDS website, though Dozier anticipates posting tour information when the routes are determined. Dozier has identified the first 36 counties to be visited by the GLOW program, starting on August 30, 2005 in Fulton County. The initial schedule and map of counties anticipated to be served by the program is attached at Tab [redacted]. DDS will also conduct a public service campaign, focusing on radio announcements and informational pamphlets issued to organizations by request. Dozier states that DDS plans to continue the program indefinitely.

Individuals may also register to vote through the GLOW program while obtaining an ID card. If an individual wants to register to vote, the DDS employee will click "yes" on the computer, and the registration applications will be batched and transmitted to the SOS every night or when the computers are returned to DDS headquarters. Voter registration applications will be transmitted electronically with no additional forms for applicants to complete.

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[6] Public transportation costs are as follows: Marta round-trip fare is $3.50. Out-of-District Routes, which are routes that travel to Cobb, Clayton, or Gwinnett Counties are an additional $1.50. Seniors citizens, disabled riders and Medicare recipients pay $1.70 round-trip within the district and $2.50 out-of-district. Gwinnett County Transit is $3.50 round-trip ($6 express bus round-trip), $1.70 round-trip for Senior/Youth/Disabled, $7 for paratransit round-trip. Transfers to MARTA trains and buses are free. Cobb Community Transit is $2.50 round-trip for an adult, $1.60 youth round-trip, $1.20 for senior citizens and disabled, and $5 for paratransit round-trip.

According to Commissioner Dozier, 31 DDS customer service centers will offer appointments for those who need an ID for voting purposes beginning in September 2005. Appointments will be reserved for groups, such as senior centers, church groups, and others. It will be the department's intention to schedule individuals and small groups together to ensure that the allocated appointment times are maximized. There will be a minimum of 3,960 slots per month available for appointments, which would provide the opportunity for 47,520 appointments on an annual basis.

According to the DDS website, first-time applicants for a Georgia driver's license, learner's permit, or state identification card must show an acceptable form of identification that indicates the applicant's full name and date of birth. Acceptable items include: original or certified copy of birth certificate issued by an office of vital records; certified copy of birth registration; certified copy of court records (adoption, name change, or sex change); certified naturalization records; immigration ID card; and valid United States passport. Anyone applying for a Georgia driver's licence or identification card must provide a Social Security number at the time of issuance. It is not required for an applicant to have his original Social Security card. United States citizens must provide proof of citizenship, in the form of a birth certificate, United States passport, or certificate of citizenship. Non-United States citizens must present proper INS documentation in English or translated into English by an approved translator.

To obtain a certified copy of one's birth certificate in Georgia, a citizen must provide the following information: full name as shown on birth certificate, date of birth, place of birth, current age, sex, full name of mother (including maiden name), and full name of father to the State Vital Records Office. The requester must also provide a photocopy of a valid photo identification card, such as a driver's license, state issued photo ID card, or employer issued photo identification. If a person is requesting a birth certificate in order to obtain a photo ID card, and does not already possess the ID required for the request, he or she may present a signed Social Security card as ID based upon the comparison of the signatures from the card and the application.[7] If the requestor has no ID at all, the State Vital Records Office will mail out the certified copy of the birth certificate under the assumption that it will not be delivered by the post office to a location where a person of that name does not live.

According to the Georgia Division of Public Health's Vital Records website, applicants should allow 10 to 12 weeks to process routine requests for certified copies received by regular mail that do not involve any changes or directions and do not require filing of a new certificate. Requests made by overnight delivery are usually processed within three to five business days of receipt.

Georgia law requires non-refundable pre-payment before a record such as a birth

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[7] Some county offices (e.g Fulton County) will only accept a photo ID and will refer people who lack ID to the State Office in Atlanta. Dunn told us that vital records offices are independently run in each county so we have been unable to ascertain what the practices are in every county within the state.

certificate can be provided. A $10 search fee is required in order to receive one certified copy. Additional certifications of the same record ordered at the same time may be acquired for a $5 fee. A multi-year search requires an additional $10 fee. Records are sent by overnight for an additional fee of $16.81. An additional fee of $9.95 is also charged for credit card payments made through VitalChek.[8] There is no additional charge for payment by certified check or money order. All credit card payments must be made through VitalChek.

Some state residents were born outside of hospitals and were never issued birth certificates. According to the United States Department of Health and Human Services, Centers for Disease Control and Prevention, and the National Center for Health Statistics, over 40 percent of live births in the United States occurred outside of a hospital as late as 1940. Midwifery was not certified in Georgia until the late 1940s. The Lay Midwifery Act of 1955 empowered the Georgia Department of Human Resources (DHR) to set educational requirements and certify lay midwives. As a result, some Georgia citizens were delivered at home before this time and were never issued birth certificates because they not were delivered by a certified medical professional. We have been unable to obtain an estimate of the number of persons without birth certificates. According to the 2000 Census, there were 616,935 whites aged 65 and over, and 273,486 whites aged 75 and over; and 154,469 blacks aged 65 and over, and 67,051 aged 75 and over.

Individuals may use expired and suspended driver's licenses as acceptable photo ID for voting. Licenses can be suspended for criminal misconduct such as failure to pay child support. Suspension of a driver's license cannot occur for non-payment of parking tickets. The court is responsible for the collection of a driver's license upon conviction of a crime for which suspension is a punishment. If the court fails to do so, DDS sends the person a letter to collect it. Deputy Attorney General Dunn stated that if the voter has not yet surrendered his license, he could use it as photo ID for voting, even if it is suspended.

Any person old enough to sign his name or make a mark indicating his legal signature can apply for a Georgia photo identification card. A suspended or revoked licence does not prohibit a resident from applying for an identification card. A Georgia ID cardholder is not required to surrender his ID card when a driver's licence is secured or reinstated. In order to secure a Georgia ID card an applicant must furnish proof of residency in the State of Georgia. The following items showing a valid Georgia address are accepted: utility bill; bank statement; rental contracts and/or receipts; employer verification; or Georgia license issued to parent, guardian, or spouse. The applicant must surrender all previous driver's licences, identification cards, and permits. A certified Motor Vehicle Report or status letter from a previous state can be used if an applicant had a previous license or ID card, but does not have in his possession a license or identification to surrender.

The cost for an license or identification card is $20 for 5 years or $35 for 10 years. For those eligible, licences can be renewed via the internet, mail, or telephone. According to the

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[8] The VitalChek Network is a private entity that is not affiliated with the State of Georgia.

Governor's July 1, 2005, press release, almost 1.4 million citizens have renewed a license by one of these means.

2. Driver's License/DDS Card Ownership

Prior to signing HB 244 into law, Governor Perdue estimated that 300,000 Georgians do not have a driver's license or other acceptable photo identification that could be used at the polls, but that 50,000 are incarcerated persons. See Jim Tharpe, Nancy Badertscher, "Voter ID Bill Likely to be Law," *Atlanta Journal-Constitution*, April 2, 2005. The United States Department of Transportation released data that in 2003, the latest available date, Georgia had 5,757,953 licensed drivers and a driving-age population of 6,632,373. This would constitute 86.8% of the voting age population who had driver's licenses.

The Georgia Department of Driver Services has provided data in response to our request. The DDS data contains counts of persons 18 and over with driver's licences and state ID cards.[9] According to the DDS database, Georgia currently reports that 6,108,560 voting age persons have unexpired driver's licenses, which include commercial licenses, DUI permits,[10] suspended and revoked licenses. Georgia also reports that 690,538 voting age persons have unexpired ID cards, and 288,883 voting age persons have both a driver's license and ID card. This totals 7,087,981 persons of voting age with a photo ID from DDS. Of this group, 1,260,780 are black (17.7%), 2,687,706 (37.9%) are white, and 2,870,984 (40%) are of "unknown" race. The remaining 268,511 are comprised of Asian/Pacific Islander, Hispanic/Latino, Indian, multi-racial, other, and "refused to state."

Of the 4,216,997 voting age persons in the database who are of known racial background or refused to state, 29.8% are black and 65.1 % are white. Discussion of the reliability of this data is contained in Part II. D, *infra*.

3. Access to Vehicles

Data regarding access to vehicles is often used as a reasonable proxy for driver's license ownership, as persons who do not have a vehicle are less likely to have a driver's license. According to the Census Bureau data tabulations (SF-3), a total of 390,414 Georgia voting-age individuals lack access to a vehicle. When examined at the household level, this constitutes 242,929 households without access to a vehicle. The racial breakdown of these households reflects that there are 142,171 black non-Hispanic households without access to a vehicle, and 89,232 white non-Hispanic households without access to a vehicle. This constitutes 17.7 percent

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[9] Individuals may have both a Georgia driver's licence and a Georgia ID card, or one or the other. For convenience, we sometimes refer to a person who holds either type as having a "DDS card" because for voting purposes, it is access to the card, rather than the type of card, that is significant.

[10] DUI permits are driving permits issued to persons whose regular license are revoked for DUI convictions so they can drive to and from work.

of black households and 4.4 percent of white households.

Ms. Meyers provided a 2004 report conducted by Georgians for Better Transportation containing vehicle access data that are consistent with the census numbers. The report, "Blueprint 2030: Affordable Mobility and Access for All of Atlanta and Georgia," notes that 250,000 households in Georgia lack access to a vehicle, and that 140,000 of those are headed by an African-American householder. Id. at 22. It also finds that nine counties contain half of the vehicle-less households in the state: Fulton, DeKalb, Chatham, Richmond, Cobb, Muskogee, Gwinnett, Bibb, and Dougherty, and that each of these nine counties have more than 5,000 households with no vehicle. Id. at 23. The report also finds that six of these nine counties would be on the list of counties with more than 5,000 African-American households without vehicles. Id.

Table 1: No vehicle households in counties with more than 5,000 total population

	All households with no vehicle	Households with no vehicle headed by African-Americans	Percentage of households with no vehicle headed by African-American
Fulton	48,859	36,221	74.1%
DeKalb	22,763	14,458	63.5%
Chatham	10,678	7,309	68.4%
Richmond	8,969	6,207	69.2%
Cobb	8,675	N/A	N/A
Muscogee	8,154	5,715	70%
Gwinnett	6,294	N/A	N/A
Bibb	7,423	5,541	74.6%
Dougherty	4,597	N/A	N/A

The report further notes that Georgia does not have large disparities in shares of households without vehicles between urban and rural areas. Id. at 24. It states that across Georgia, levels of African-American households without vehicles are higher in the smaller urbanized areas of the state in than Atlanta, often at levels of 20 percent, yielding on overall statewide rate of 18 percent in no vehicles available for African-American households. Ibid. In contrast, the statewide rate for white households with no vehicles available is 4.41 percent.

We also compared access to vehicles by race in counties with DDS offices versus counties without DDS offices. Census data show that five times more black households in counties without DDS offices lack access to a motor vehicle compared to white households. This data can be expressed as follows:

Table 2: Households in counties with no DDS offices with no vehicle, by race

Race of household	Households in counties without DDS offices	Households with no vehicle	Percent
White non-Hispanic	554,971	25,843	4.7%
Black non-Hispanic	140,148	28,085	20.0%
Hispanic households	11,882	1,329	11.2%

4. Other currently acceptable forms of voter identification

United States passport: According to the United States Department of State website, there are approximately 210 passport acceptance facilities in the State of Georgia. The basic fee for obtaining a passport is $97. To obtain a passport, proof of United States citizenship must be presented with any of the following: previous United States passport, certified birth certificate, consular report of birth abroad, naturalization certificate, or certificate of citizenship. If an applicant does not have a previous United States passport or a certified birth certificate, he must provide a letter of no record issued by the State Vital Statistics office, and as many of the following as possible: baptismal certificate, hospital birth certificate, census record, early school record, family bible record, and doctor's record of post-natal care. Routine passport service takes approximately six weeks.

Fewer than 20 percent of all United States citizens hold a valid passport. We were unable to obtain the total number of Georgia citizens with passports. The United States Passport application, Form DS-11, does not contain a field for self-identification of a racial category, and we were unable to obtain information regarding access to United States passports by race.

Government checks/paychecks/documents: With 620,620 black persons in poverty compared to 564,970 white persons, black persons in Georgia are more likely to fall below the poverty line than are white persons. These census statistics indicate 26 percent of the black population and 11 percent of the white population fall below the poverty line. Median household income in 1999 was $30,998 for blacks and $48,002 for whites. Per capita income in 1999 was $12,576 for blacks and $25,133 for whites.

Among individuals who lack access to a vehicle in the state, a greater number of blacks are below the poverty line and receive public assistance as compared to whites. The Public Use

Microdata Sample [PUMS][11] of the 2000 Census reflects that among individuals who lack access to a vehicle in the state, 101,522 (46.3%) blacks were beneath the poverty line, compared to 35,605 (28.3%) whites. In addition, approximately 74,912 voting-age blacks without access to a vehicle in the state receive either Social Security, Supplemental Security Income or public assistance, compared to 56,750 whites.

According to the Georgia Department of Human Resources, the total number of persons receiving Temporary Aid to Needy Families ("TANF") subsidies as of February 2000 was 129,822 (99,817 children, 30,005 adults). The racial/ethnic breakdown of TANF recipients was 80.9 percent black, 17 percent white, 1.3 percent Hispanic, and 0.3 percent Asian.

Firearms permit/hunting or fishing license/pilot's license: We were unable to obtain any data regarding the number of persons, by race, who hold permits or licenses for hunting, fishing, piloting aircraft, or carrying firearms.

College and university issued identification: We were unable to obtain data regarding the number of persons, by race, who attend private colleges and universities, and who would therefore hold photo identification from such institutions. According to the Regents of the University of Georgia, there were 56,831 black students enrolled in all state colleges and universities in Georgia, and 154,924 white students, in Spring 2005. This constitutes 3.16 percent of black voting age population and 3.76 percent of white voting age population based on estimated 2005 voting age population. According to the National Center for Education Statistics there were 13,476 students enrolled in degree-granting historically black private colleges and universities in Georgia in 2000.

Employer-issued identification: According to the Bureau of Labor Statistics survey of employment, in 2004, the average unemployment rate for blacks in Georgia was 7.7 percent, for whites 3.5 percent, and for Hispanics 4.6 percent. The most recent workforce numbers are based on the 2000 Census, which indicates that 36.6 percent of blacks, aged 16 and over, were not in the labor force, compared to 33.1 percent of non-Hispanics whites in the same age group.

According to the 2000 Census, 14.3 percent of white and 19.4 percent of black Georgians work for local, state, or federal government, while 78.6 percent of white and 76.9 percent of black Georgians work for private employers. These figures do not include those who are self-employed in unincorporated businesses or are unpaid family workers.

The submitting authority did not provide, and we were unable to obtain, information about the prevalence of photo identification issued by private or public employers. Deputy

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[11] The Public Use Microdata Samples are a sample (usually 5%) of the individual household or individual records used in the census data. These files contain records for a sample of housing units with information on the characteristics of each unit and each person in it. While preserving confidentiality (by removing identifiers), these microdata files permit users with special data needs to prepare virtually any tabulation.

General Counsel of the Association of County Commissioners Ken Kimbro stated that most counties probably issued photo identification to their employees, but that some of the smaller and more rural counties might not. He provided a list of county managers and administrators. We contacted 30 of the individuals listed in a range of counties of varying size and location. We found that six of the seven largest counties we contacted (pop. 59,000 and over) provide photo identification to their employees, none of the nine smallest counties contacted (pop. 15,000 and under) provide photo identification to their employees, and ten out of sixteen of the mid-size counties (pop. 15,500 to 49,000) provide photo identification to some employees, based on the employee's position (e.g., building inspector) or location of employment (e.g., courthouse).

We were also unable to obtain information about the issuance of photo identification by private employers. We know anecdotally that some Georgia employers such as Delta Airlines and Home Depot issue photo identification, but there is no central source for this type of data.

Certified naturalization documents: According to the 2000 Census, there were 169,232 naturalized citizens residing in the State of Georgia; of whom 29,490 (17.4%) were non-Hispanic black persons and 45,760 (27%) were non-Hispanic white persons. All naturalized citizens are issued an official certificate by Citizenship and Immigration Services at the time of naturalization. Those applying for naturalization are required to provide two photographs that adhere to passport photo standards. Since 1929, all naturalization certificates issued include a photograph of the new citizen. Copies of certified naturalization documents can be obtained from the Bureau of Citizenship and Immigration Services and requires payment of a fee of $210.

Although naturalization certificates were specifically repealed by Section 59 of HB 244 as acceptable voter ID, the statute allows a voter to show any valid identification card issued by a branch, department, agency or entity of the United States provided that the card contains the elector's picture. Deputy Attorney General Dunn was unsure whether naturalization certificates contained a photograph of the elector, but stated that if they did, they would be considered acceptable photo ID for voting.[12]

Tribal Identification: The 2000 Census reports that 21,737 persons in Georgia who identified themselves as American Indian or Alaska Native. Of these, 16,104 persons, or 0.3 percent of the total population, were voting age. Of the 8,036 households headed by an American Indian/Alaska Native, 671 (8.3%) had no vehicle available.

There are no federally recognized Native American tribes in Georgia. The state code does recognize the following tribes as legitimate American Indian tribes pursuant to Ga. Code Ann. § 44-12-300: Georgia Tribe of Eastern Cherokee, the Lower Muscogee Creek Tribe, and the

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[12] Because specific reference to naturalization certificates as valid voter ID is removed under the proposed statute and as such documents are valid indefinitely, we anticipate that, in certain circumstances, such as a citizen who naturalized as a child, election officials may require additional confirmation of the voter's identity with a current photo.

Cherokee of Georgia Tribal Council. Only the Lower Muscogee Creek Tribe has a reservation in the state. The census reports that this reservation, the Tama Reservation, had a population of 57 persons (45 persons of voting age) in 2000. The Lower Muscogee Creek Tribe does not issue tribal photo identification to its members according to Principal Chief Vonnie McCormick. Additionally, the Bureau of Indian Affairs does not issue identification to non-federally recognized tribes.

To the best of our knowledge, each tribe has its own practice with respect to issuance of identification, including whether ID is issued and whether it contains a photograph of the member. Anecdotal evidence suggests that most tribal IDs do not contain photographs.

Affidavit alternative: Under the benchmark statute, voters who are unable to produce any of the 17 forms of identification may sign a statement swearing or affirming to their identity. For the purpose of determining the number of people who lack appropriate identification, an analysis of the number of affidavits used in recent elections by county would be informative. In addition, because voter registration records are kept by race, the proportion of black and white persons who lack identification could have been tabulated and analyzed. The submitting authority did not provide any analysis of these records, which remain in the custody of county officials after an election.

D. Factual analysis

Georgia's voter ID law was enacted in 1997 with the following forms of acceptable identification for voting: valid driver's license or state ID card, U.S. Passport; U.S. military ID; photo identification from any employer; student photo identification from any private or public college, university, or technical school; valid pilot's license; Social Security card; certified naturalization documents; certified copy of birth certificate; certified copy of specified court records; valid hunting or fishing license; or valid permit to carry a pistol or revolver. Any voter who was unable to produce one of these forms was allowed to sign a statement under oath, swearing or affirming that he is the person identified on the voter's certificate under penalty of law. The voter was then permitted to vote a regular ballot without delay.

We precleared the benchmark procedure based on two main factors: (1) the fail-safe procedure ensured that voters were not turned away for lack of authorized identification, and (2) minority contacts did not urge an objection, primarily because no voters would be turned away if they did not have proper identification.

The current voter identification requirement was modified in 2003 when the legislature added the acceptable forms of identification specified in the Help America Vote Act. Added forms of identification included: utility bills, bank statements, government checks or paychecks, and government documents that show the name and address of the elector. We precleared this change because it added, rather than subtracted, acceptable forms of ID for voting.

The appropriate analysis of the restriction of the voter ID requirement first identifies whether there are individuals who are permitted to vote under the benchmark procedure who will now be precluded from casting a ballot at the polls under the current procedure, and if so, ascertains whether minorities are disproportionately represented in that group.

The submitting authority provided almost no information regarding the availability of the seventeen forms of identification that are acceptable under the benchmark, the method to obtain them, or any discrepancies in ownership of these forms of identification by race. As it is the jurisdiction's burden to demonstrate that the proposed voting change is not retrogressive, it has failed to do so. However, we have made significant efforts to obtain as much information as possible about each form of identification to conduct a thorough analysis. We were somewhat hampered by the lack of data on the availability and distribution of many forms of identification, but draw the best conclusions we can given the data limitations.

Driver's Licenses & DDS Cards: Governor Perdue estimated that approximately 300,000 voting age Georgians do not have a driver's license or ID card. Legislators did not acknowledge whether this fact was correct, nor seek any data regarding the racial composition of the group of individuals without ID during debates over HB 244. Proponents stated that more persons had a valid driver's license or ID card than there were registered voters. Ms. Meyers stated that the legislature's intention was "color-blind," but acknowledged that they did not investigate or consider any data regarding racial disparities among persons who held driver's licenses or DDS cards. She stated that in terms of statistical analysis, the legislature relied on the numbers showing that more Georgia residents overall had DDS cards than were registered to vote.

(i) Statewide Totals

We requested data from the Georgia Department of Driver Services regarding persons who hold valid driver's licenses and/or ID cards to attempt to estimate any potential shortfall and the racial makeup of such a group. In examining the data provided by DDS, we have determined that it is not reliable for purposes of estimating the number of people with and without DDS-issued identification.[12] This is due to an apparently unknowable number of records that are no longer valid due to death, persons moving out of the state, and other reasons. The data received from the state showed a total of 7,087,981 people of voting age with either a DDS drivers license, a photo ID issued by DDS, or both, on August 16, 2005. This total is broken down in the following table. Note that each category is mutually exclusive.

Table 1. Numbers of DDS-issued cards in Georgia, Aug. 16, 2005

[12] The statistical analysis contained in this section was conducted internally by Dr. Toby Moore, Geographer/Social Science Analyst.

Total	License only	ID Card only	Both license and ID card
7,087,981	6,108,560	690,538	288,883

The voting-age population of Georgia in 2005 is available only as an estimate or as a projection. In April 2005, the Census Bureau projected the VAP of Georgia to be 6,565,095 on July 1, 2005. However, the latest estimate for county-level totals, necessary for the analysis below and released in January 2005, had Georgia with a VAP of 6,496,816 in 2004. Extending that estimate to July 1, 2005 based on each county's 2003-2004 growth rate yielded a 2005 VAP estimate of 6,621,137.

The data from the state, then, suggests 466,844 more persons with a DDS card than the higher of the two estimates of current VAP, or 7 percent. The state has been unable to quantify this discrepancy. When pressed to explain the difference, DDS Data Manager Loraine Piro stated to Voting Section staff that unexpired licenses remain in the database until they expire, so they could belong to persons who have died, moved out of the state without cancelling their licenses, or had their licenses suspended or revoked (including persons who are incarcerated). As licenses issued prior to July 1, 2005 have a four-year expiration, we can assume that these records contain no more than four years' worth of individuals who died, moved, or had licenses revoked or suspended within that time frame.

There is no way to reliably estimate this number. The death rate in Georgia is approximately 66,016 per year, which could result in an extra 264,064 records in the database over four years. The Census Bureau's 2003 American Community Survey estimated that 243,100 Georgia residents had moved into the state in the past year.[14] Given a net migration of around 40,000, on average, it would appear that another 200,000 or so people are leaving the state each year. In a four year period, persons who move into Georgia may obtain a DDS card, and persons who move out of Georgia may leave an unexpired DDS card behind, thus creating additional bad records. The American Community Survey also found that another 335,734 people had moved from a different county within the state; these in-state migrants also complicate the DDS database if they change county of residence without submitting a change of address with the DDS. Prison population numbers would be unhelpful without information regarding length of sentences being served by such population to determine whether their licenses might still be unexpired in the database.

This unavoidable "churn" is associated with a live data base that was not designed to be used for statistical analysis or predictive purposes. Deaths, people moving from county to county, in and out of the state, and in and out of license status all create disruptions in the data, particularly in quickly growing counties, of which Georgia has a significant number. As a result of these factors, the "overage" in the DDS database is of no use in estimating the total number of

[14] This refers only to persons who moved into the state from another state, not international migration.

persons with a DDS card, or whether a shortfall exists of state residents who lack DDS cards.

A second cause for concern regarding the reliability of the data for predictive purposes is that it appears to show many more "bad records" than in two previous sets of data provided by the state. This third set of spreadsheets, which was supposed to eliminate 16 and 17 year olds who were included in the prior query, resulted in an increase in the number of DDS card holders by approximately 393,000, eliminating what had previously appeared to be a shortfall statewide and creating the impossible statistic of an "overage." The state has provided no explanation of why the numbers diverged so significantly from the first two submissions, although Ms. Piro suggested that commercial licenses and DUI permits may have been added and could explain some of the increase, however, she was not certain that these categories of licenses were not present in the first data sets. Given the difference between this data and data submitted earlier by the state, as detailed at Tab 3, there is reason to doubt its accuracy. Combined with unavoidable error in estimating current VAP, it appears that the quality of the DDS dataset is not sufficient to estimate the size or even the existence of the voting-age population of Georgia that lacks a DDS card.

(ii) County-Level Totals

To the extent that one wanted to compare the data provided by the state at the county level with estimated VAP, projections for 2005 VAP were produced by repeating the 2003-2004 growth rate. Clearly this estimate is inexact and the source of additional unavoidable error. Nevertheless, these two variables, people of voting age with a DDS-issued card and people of voting-age, represent the key variables for further analysis. These two variables were compared in a ratio to determine the number of licenses per 100 residents of voting age. The full results are given in the table attached to this memo at Tab 3.

The county-level ratios of licenses to 100 population ranged from 41.7 in Chattahoochee County to 117.7 in Bartow County.[15] The Chattahoochee County ratio was a clear outlier caused by the large military base in the county. The next lowest county was Wheeler County, with 76.2 cards per 100 population. In all, 47 counties had fewer people with cards than voting-age population, while the remaining 112 counties had more people with cards than voting-age population.

Ten of the 47 counties with few cards had a DDS office, or 21.3 percent. Forty-three of the other 112 counties had DDS offices, or 38.4 percent. However, the average size of counties with more cards was about 52,000, compared to only 16,000 in those counties with few cards. It

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[15] Note that these figures do not take group quarters populations or other elements that might skew the population figures into account. It is also important to note that the reliability at the county level is low; that is, our ability to use individual counties as illustrations or evidence is far less reliable than aggregate measures. It appears that much of the overage at the county level stems from the "churn" generated by population growth in dynamic counties.

is assumed that DDS locations are located in or near population centers.

(iii) Correlations between Race and ID Card Ownership

For a number of reasons, not the least of which is the apparently poor quality of the DDS data, it is a difficult enterprise to examine the data for correlations between race and card ownership. The data on both population and licensing is of poor quality for these purposes and thus prevent a conclusive finding of a clear correlation between race and identification ownership.

Nevertheless, some evidence supports the Census data suggesting that blacks have fewer drivers licenses than whites. For example, the 10 counties (not including Chattahoochee) with the lowest rates of card ownership had a black 20-and-over population of 29.4 percent, while the 10 counties with the highest rates had a black population of 18.3 percent. On the other hand, the number of licenses per 100 people in the 10 blackest and 10 whitest counties were nearly identical.

Correlations across the 158 counties were inconclusive. The following table shows the results of Pearson's correlation between percent non-white and the ratio of card ownership. The correlation coefficient is the measure of the strength of the relationship between two variables. Correlation scores vary between 1 and -1, with 0 meaning no correlation. Unlike regression, it does not provide a means of predicting one variable from the other, but only gives an indication of how closely the two variables are associated. In the current instance, a negative correlation would mean that as counties increase in minority population, they decrease in card ownership.

Table 2. Correlations between race and card ownership

correlation between race and:	correlation across 158 counties
ID:VAP	-0.15
ID:VAP minus correctional population	0.03
ID:VAP minus all group quarters population	0.13

The correlations in each case were weak, but notice that the trend reversed when the group quarters population is subtracted. The group quarters population is a difficult issue for two reasons, and appears to be key to gleaning what evidence is in the data:

1. It includes people who may or may not have cards, and whose cards may or may not be issued from the county in which they reside. College students, prisoners and military personnel all pollute the database at the county level. One solution would be to subtract all or part of the group quarters population, but doing so

would remove people whom we know have cards from the population figures without removing them from the license figures.

2. A greater problem is that concentrations of group quarters populations are themselves correlated with race. That is, counties with higher black populations tend to have a higher percentage of their population in group quarters, particularly prisons. Subtracting group quarters populations, while intuitively defensible, skews the resulting data by taking population out of non-white counties and eliminating evidence of any shortfall of licenses.

In fact, a curious correlation between race and the degree of license ownership emerges when counties with large group quarters populations begin to be removed from the data set. The following table summarizes a set of correlations performed on successive subsets of Georgia counties, as counties with large (and skewing) populations of students, prisoners and military personnel are removed from the correlation.

Table 3. Correlations between race and card ownership as group quarters is controlled

	number of counties	population	correlation
counties with less than 10% GQ VAP	138	6,266,518	-0.02
all counties with less than 5% GQ VAP	108	4,658,445	-0.08
all counties with less than 2% GQ VAP	62	2,873,075	-0.19
all counties with less than 1% GQ VAP	23	592,531	-0.35

Dr. Moore stated that while there might be other explanations for the emergence of this correlation, his professional opinion at this point is that group quarters populations, along with "noise" in the data, obscures the modest correlation between race and card ownership that surfaces when counties with significant group quarters populations are removed from the study. Removing those counties from the sample appears to uncover a relationship that is otherwise hidden. On the other hand, the final correlation, while statistically significant, is based on less than 10 percent of the state's VAP and 14 percent of its counties. It is possible that further work in refining the query of the DDS data would result in a more convincing set of correlations.

The bottom line is that the DDS data provided by the state is not sufficient to answer the question of whether race correlates with lack of DDS card ownership in Georgia. The poor quality of the DDS data; the unavoidable error in the estimation of VAP for 2005 (particularly at the county level); the inter-correlations between race and poverty, educational attainment, county growth, group quarters population, and so on; and the other hypothesized correlations with card ownership (e.g., age), make it extremely difficult to derive meaningful patterns from the DDS

data.

(iv) Racial Identifications in the DDS Database

The DDS data base contains racial identifications for approximately 4.2 million Georgians who have a DDS card, or approximately 59 percent of the people for in the data set. The database contains records for approximately 2.88 million people without racial IDs, or 41 percent of the records. Roughly half of the records with racial ID these come from voter registrations submitted at DDS offices since April 1, 2001. The other half are left over from previous Georgia policies of collecting racial information during the license (or ID card) application process. That practice ended at some point in the past, but exactly when is unclear, as is how that information was originally collected. Individuals who renewed their licenses or cards had their racial identifications preserved in their records. "Motor voter" registrants constitute approximately 29 percent of the records in the database, and "old records" constitute approximately 28 percent of the records in the database. Racial identity information regarding persons who register to vote at motor vehicles agencies compared to other locations is not available in the EAC Report to Congress, the Georgia 2005 Voter Registration Report to the EAC,[16] nor other available sources. Therefore, we cannot draw conclusions about the representativeness of the records that have race identification other than to say they are a non-random sample of the total number of records.

Accordingly, Dr. Moore stated his strong belief that these racial identifications are not useful for determining the race of people in Georgia who do not have DDS cards. This based on two reasons:

> 1) No reputable statistician would infer characteristics of a population by analyzing the characteristics of a non-random sample. The people for whom we have racial identifications are undeniably a non-random sample of the entire data set. The state has provided no evidence of the old practice of obtaining racial identifications, so we have no way of knowing how representative that is, or of knowing whether blacks or whites fail to renew these old licenses at the same rate. Similarly with the "motor voter" registrations: it reflects not people who come into DDS locations for cards, but those people who a) come in for cards; b) have not registered to vote; c) choose to register to vote; and d) give their racial identity. Each step in that process makes the end group less and less representative of the total pool of ID card holders.
>
> 2) Even if the motor voter registrations were reliable indicators of who has obtained a DDS card since 2001, that rate in comparison to black voting-age population does not tell

[16] Approximately 57.5 % of all new voter registration applications in Georgia between the close of registration for the November 2002 general election and the November 2004 general election were received from Georgia motor vehicle offices, according to Georgia's response to the EAC Voter Registration Survey. Available at: http://www.epic.org/foia_docs/eac/georgia.pdf. However, this report does not discuss the racial identity of persons who register to vote at DDS.

whether blacks are ahead or behind whites in card ownership. Were blacks behind on April 1, and registered at the same rate, or even at a higher rate, they might well still be behind in comparison to whites. If blacks were five times more likely to lack a DDS card on April 1, and obtained cards at a higher rate than whites, they might well be only four times more likely to lack a card by 2005.

(v) Other Data Limitations

The DDS data, and the population data, are of a quality far below what we are accustomed to using in the Voting Section. The number of people we are trying to identify, those without a license, is a fraction of the total VAP. There is also reason to believe that lack of card ownership varies with many attributes beyond race, including age, poverty, and perhaps urban or rural location. Even with good data on both sides of the equation (population and licenses), it would be a considerable task to derive conclusive relationships on an ecological basis. Survey work, Census data on vehicle accessibility, or qualitative data may provide better evidence.

Removing segments of the population at the county level eliminated one source of error and bias only to replace it with another, given the correlation between group quarters population and race at the county level, and the uncertainty surrounding ID ownership by military personnel, students and prisoners. Nonetheless, dealing with the issue appears to be key to deriving any usable estimates.

We also do not have a perfect grip on the current VAP in Georgia, particularly at the county level, although the error here is more unavoidable and probably less significant across counties. But our grasp of the base population, particularly in fast-growing counties, is shaky. This is a source of error but one that can only be minimized, not eliminated.

In sum, Dr. Moore concluded that use of the Georgia DDS data to infer the number or race of people who lack DDS cards is unsupportable.

Analogous Wisconsin Study

A similar analysis of race and driver's license ownership was recently conducted in Wisconsin based on data from that state's Department of Transportation, which appears to contain more complete records, particularly with respect to racial identification, than Georgia. The study compared Wisconsin licensed drivers contained in the database of driver records on January 31, 2002, along with age, race, gender, and geography, and compared this information to Census population estimates. See John Pawasarat, "The Driver License Status of the Voting Age Population in Wisconsin," Employment and Training Institute, University of Wisconsin-Milwaukee (June 2005), available at http://www.uwm.edu/Dept/ETI/barriers/DriversLicense.pdf. The study found that minority and poor populations "are the most likely to have drivers license problems." Among voting age Wisconsin residents statewide, 80 percent of white males and 81 percent of white females have driver's licenses, compared to 45 percent of black males and 51

percent of black females. In Milwaukee County, 80 percent of white males and 75 percent of white females have driver's licenses, compared to 61 percent of black males and 56 percent of black females.

Moreover, the study finds that 24 percent of the African-American voting age population in Wisconsin live in a household with no vehicle, compared to eight percent of white VAP. See id. at 16. This is nearly the same ratio as the disparity among black and white vehicle access in Georgia households, four times more black households lack access to vehicles compared to white households. This data suggests that complete records, or at least a more representative sample, from Georgia would be expected to yield a stronger correlation between driver's license ownership and race. As this study shows strong patterns of racial disparity among driver's license ownership in Wisconsin, it further underscores our concerns about the reliability of the Georgia DDS data, and suggests that predictions of driver's license ownership may be better analogized from vehicle access data.

Vehicle Access Data

Vehicle access has been used as a proxy for drivers license ownership on the assumption that people who lack access to a vehicle have less reason to get a license, as well as a more difficult time reaching a licensing office. Vehicle access data from the Census and Blueprint 2030 shows that 20 percent of black households and 4.4 percent of white households in Georgia lack access to a vehicle. Further, the Blueprint 2030 data show that among the nine counties with the largest lack of vehicle ownership, among households that lack access to a vehicle, 65 to 75 percent are headed by an African-American householder. This strongly supports an inference that African American residents in Georgia are less likely to have driver's licences compared to whites.

If the relationship between driver's license ownership and vehicle access is similar in Georgia and Wisconsin, this would indicate potential gaps in driver's license ownership of 20-35% between blacks and whites. Approximately 9.7 percent of records in the Georgia DDS database are persons who hold only state ID cards, which would close this gap somewhat. As it is logical to infer that the relationship between owning a car and having a driver's license are similar in the two states, and the ratio of black to white households without vehicles are similar in Georgia and Wisconsin, an inference that a racial gap exists in driver's license ownership is appropriate.

United States passports: Rates of passport ownership by Georgia citizens were not addressed in the Senate and House debates, nor is it discussed by the submitting authority or any of the proponents in support of preclearance. As less than 20 percent of all United States citizens hold passports, it is reasonable to assume that no more than 20 percent of all Georgia citizens hold passports. Among this group, a much smaller proportion are likely to be black, given that blacks' per capita income is less than half that of whites, their representation in poverty more than twice that of whites, and the fact that passports are held in greater numbers by wealthier

individuals for the purpose of international travel. Moreover, the pool of individuals who lack a driver's license or ID card is very unlikely to include persons who hold passports, since the latter document is more expensive and difficult to obtain.

Employer-Issued ID: Our analysis of employer-issued identification points to no demonstrable conclusions. Approximately 77 percent of employed black Georgians work for private sector employers, and 19 percent work for public sector employers. Those in the public sector would not be affected by the change to the voter ID law if they have been issued photo identification by their employer. Our research showed employees of the state's largest counties were the most likely to have county-issued photo identification, while employees of small counties were generally not issued such identification. Most employees of mid-size counties were also not routinely issued photo identification unless they were in certain professions or locations such as courthouses. As a result, the option to use one's government issued photo identification will apply primarily to residents of large counties in urban centers.

For those individuals working for the private sector, any such persons with an employer-issued photo identification would now be unable to use that ID for voting. This will affect employees of the state's largest employers, including Delta Airlines, Wal-Mart, Home Depot, Brown & Williamson Tobacco, and others. However, outside of limited anecdotal information, we have no information regarding the issuance of photo identification by private employers, it is difficult to draw conclusions about whether any voters who previously had acceptable employer identification will now be excluded.

Among all persons employed in either the public or private sector, all are more likely to have access to other photo identification compared to those who are unemployed. The Department of Labor statistics reveals that the unemployment rate for blacks in Georgia is double the rate of unemployment for whites. Unemployed individuals have no access to any employer-issued identification, and are likely to fall below the poverty line.

College and university ID: Analysis of college and university-issued identification also points to no demonstrable conclusions. Without data regarding the number of white and black students who attend private colleges, universities, community colleges and technical schools in Georgia, we cannot compare the rates of acceptable student ID ownership between public and private schools among whites and blacks.

As a general matter, students are less likely than other segments of the adult population to have acceptable photo identification aside from their college identification. Since students move frequently during their school years, they often retain their parents' address on driver's licenses or bank accounts. Contemporary student photo identification cards usually have a magnetic stripe and bar code containing students' personal information, which they use to gain access to libraries, gyms, and dining halls, cash checks, access health care, purchase tickets to university events, and even use as a debit or credit card on campus and at nearby businesses. Opponents of the legislation point to students at historically black colleges and universities as particularly

burdened by the elimination of private school identifications. However, because we do not have data regarding private school ID ownership among students, or financial status by race by type of institution, we cannot draw meaningful conclusions about the potential retrogressive effect of retaining public school identification while eliminating private school identification.

Non-Photo ID/Government documents: The higher rates of poverty and participation in government benefit programs among African-Americans suggest that the elimination of government documents as acceptable ID for voting will disproportionately affect African-American voters. Black citizens in Georgia receive government benefits such as TANF, food stamps, and unemployment insurance, in higher proportions than whites due to their over representation in poverty and unemployment status. Neither the submitting authority nor any of the proponents addressed the potential for retrogression that is likely from repealing the use of government documents as identification for voting.

Ms. Meyers noted that mail can be stolen, suggesting that a utility bill would be unreliable as proof of identity because it could be presented by an individual who had stolen it. However, as Rep. Watson responded, persons who steal mail, such as benefits checks, do so for economic gain and would be unlikely to risk getting caught by presenting such documents to commit voter fraud. Additionally, as noted earlier, there have been no reported instances of voter fraud involving stolen non-photo identification.

For certain low-income populations, individual citizens may have one form of ID but not another, such as a TANF check but not a bank statement if they receive government benefits but do not have sufficient assets to open a bank account. Another citizen may have a Social Security card, but not a driver's license if they do not own a car. The ability to present any of the seventeen forms of photo or non-photo identification gives low income individuals a wider range of acceptable options and may be the only key to such persons' ability to vote.

Tribal ID: The addition of tribal identification containing a photo as a form of acceptable identification could potentially offset the retrogressive effect of the photo ID requirement for those tribal members who lack other forms of ID. This would be the case if the tribal ID contained the voter's photograph, which is currently unknown, but anecdotal evidence suggests that for Native Americans in Georgia it is doubtful. We conclude that the addition of this form of identification is not retrogressive because it adds, rather than removes, an option for voters.

Firearms permit/hunting or fishing license/pilot's license: In the absence of any data in this area, we can draw no conclusions about the potential retrogressive effect of the elimination of firearm permits, hunting and fishing licenses, or pilot's licenses, as acceptable voter identification.

Affidavits: As the data above show that blacks have disproportionally fewer driver's licenses and DDS cards compared to whites, and lack access to a motor vehicles at higher rates than whites, it is reasonable to assume that blacks and low income persons might have a higher

use of affidavits in lieu of identification particularly under the proposed voter ID restrictions. The information concerning the use of this "fail-safe" procedure during the November 2004 election is maintained by the individual counties within the state. The state did not collect and present an analysis of these data by race, nor did it submit the raw data to the Department for our analysis. The only data we have was provided by Forsyth County finding that .08 percent of residents used an affidavit in lieu of identification. However, Forsyth County is in the bottom tenth of Georgia counties ranked by black population, with a BVAP of 9.7 percent, so it is not particularly representative of how elimination of the affidavit will affect black citizens. Additionally, this figure reflects those voters utilizing affidavits under the current procedure, which provides for 17 forms of acceptable voter identification, and cannot be used to predict the usage rate under the proposed restrictions.

Even those individuals who are indigent[17] and, therefore, eligible for the waiver of the ID card fee would be required to pay various other fees to purchase the documents necessary to obtain a photo ID if they did not already possess such documents. These fees would be incurred for purchasing certified copies of a birth certificate or naturalization document, which are not waived by the indigence clause. These costs can range from $10 for the basic birth certificate, to $46 if additional services such as rush delivery are necessary, to $210 if a naturalization document is needed. For someone earning the median income for African-American individuals, $12,576, or someone who is below the poverty line of $9,570, these fees are significant. This supports the argument made by opponents of preclearance that the fees constitute a poll tax.

In addition, transportation costs to the DDS to obtain a free photo ID for voting can be relatively burdensome. There are DDS locations in less than one-third of all Georgia counties. Three of the four locations within metropolitan Atlanta are accessible by public transportation. There are no offices, however, within the city limits. As a result, most Georgians must travel significant distances to reach a DDS office. Only five DDS locations are accessible by any form of public transportation. Therefore, most are only accessible via personal transportation, taxi service, or a combination of public transportation and taxi service resulting in potentially prohibitive transportation costs for those who lack access to a vehicle. Such cost for round-trip travel can be significant for a person with a median income or poverty level subsistence. The

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[17] Persons who sign an affidavit of indigence can obtain a state ID card for voting purposes at no cost. The statute contains no definition of indigence, nor does the law contain income tables or formulas whereby indigence is determined. Rather, it appears to be a self-certifying determination made under oath or affidavit. The Affidavit of Eligibility for the voting identification card contains the following language:

1. I am indigent and cannot pay the fee for an identification card;
2. I desire an identification card in order to vote in a primary or election in Georgia;
3. I do not have any other form of identification that is acceptable under O.C.G.A. § 21-2-417 for identification at the polls in order to vote;
4. I am registered in Georgia or I am applying to register to vote as part of my application for an identification card;
5. I do not have a valid driver's license issued by the State of Georgia.

Affidavit of Eligibility, Georgia Identification Card for Voting Purposes *available at* http://www.dds.ga.gov/drivers/dldata.aspx?con= 1749371755&ty =dl.

lower level of vehicle access among African-Americans, combined with the lack of public transportation accessibility of DDS offices, will contribute to the disproportionate effect of the proposed voter ID restrictions on African-American voters.

To the extent that the GLOW program goes into effect and becomes a mobile photo ID distribution center that reaches underserved areas, this may mitigate the barriers to obtaining ID for some voters. Of the counties on the state's initial schedule through November, 12 have black populations of 50 percent of higher (2004 estimate of persons age 20 and over), 11 have black populations between 35 percent and 49.9 percent, and 12 have black populations between 23.8 percent and 34.9 percent. This demonstrates that the program is planning to visit counties with higher than average BVAP, and may serve to assist minority voters in those counties, assuming that the program is adequately advertised and fully operational.

While no single piece of data confirms that blacks will disparately impacted compared to whites, the totality of the evidence points to that conclusion. Governor Perdue estimated that 300,000 Georgia residents were without an acceptable DDS-issued identification card. Census data reflects that blacks lack access to vehicles at roughly four to five times the rate of whites. Other publicly available data reflects that blacks are less likely to have passports, employer ID, and other forms of acceptable photo identification compared to whites, and greater access to some of the forms of non-photo identification that are repealed. Blacks' over-representation in the lowest socioeconomic classes hampers the ability of many individuals to obtain photo IDs. Finally, it appears that neither the legislature nor the submitting authority conducted any analysis or presented any data regarding these racial disparities in access to various forms of photo identification. This leads us to conclude that the state has failed to meet its burden of demonstrating that the change is not retrogressive.

III. LEGAL ANALYSIS

Under Section 5 of the Voting Rights Act, the submitting authority has the burden of showing that a submitted change has neither a discriminatory purpose nor a discriminatory effect. Georgia v. United States, 411 U.S. 526 (1973); Procedures for the Administration of Section 5 of the Voting Rights Act, 28 C.F.R. 51.52.

A voting change may not be implemented unless and until the submitting authority establishes that, when compared to that jurisdiction's benchmark standard, practice, and procedure, the proposed change does not diminish the ability of minority voters to participate in the political process and that it was not adopted with such an intent. Beer v. United States, 425 U.S. 130, 141 (1976). Georgia v. Ashcroft, 539 U.S. 461 (2003). The Court has emphasized that "§ 5* * * *is designed to combat only those effects that are retrogressive," i.e., those that will "worsen the position of minority voters" The voting change at issue must be measured against the benchmark practice to determine whether the opportunities of minority voters will be "augmented, diminished, or not affected by the change affecting voting." Beer, 425 U.S. at 141.

A. Retrogressive effect

Under the benchmark procedure, Georgia voters may meet the state's voter identification requirement either by presenting one of 17 enumerated forms of identification before voting, or by signing an affidavit of identity under penalty of perjury. Thus, the retrogression analysis focuses not on whether Georgia may require voters to present identification, but whether the reduction in the number of acceptable forms of acceptable identification, combined with the elimination of the fail-safe procedure, is retrogressive for minority voters. In our standard Section 5 analysis, we consider whether the state could have achieved its stated purpose while avoiding retrogression. We would consider retrogression to be "unavoidable" in certain contexts such as redistricting or annexation when, for example, it results from either a numerical or constitutional impossibility, such as population growth. However, retrogression is not considered unavoidable when it results from the mere failure or an unwillingness to enact a method that is not retrogressive.

Moreover, in the redistricting context, if a jurisdiction submits a plan that is retrogressive, it will ordinarily occasion an objection if the jurisdiction could have drawn a reasonable alternative that could ameliorate or prevent that retrogression. See Procedures for the Administration of Section 5 of the Voting Rights Act, 28 C.F.R. 51.52. Accordingly, if we determine that Georgia could have fulfilled its stated purpose of preventing election fraud, while preventing or ameliorating the retrogression, an objection is appropriate.

Proponents of preclearance identify two cases in which federal district courts upheld voter identification requirements. See Colorado Common Cause v. Davidson, 2004 WL 2360485 (D. Col. Oct. 18, 2004); and Bay Co. Democratic Party v. Land, 347 F. Supp. 2d 404 (D. Mich. 2004). In both cases, plaintiffs challenged the constitutionality of voter identification requirements that were enacted after HAVA to conform state law to the federal law requirements, but such challenges were rejected by the courts. Both holdings are inapposite to the instant retrogression analysis, however, because neither state is subject to Section 5 review, so retrogression was not an issue. Moreover, both voter ID laws allowed numerous types of photo and non-photo ID, and both states retained fail-safe options for voters who lacked ID, so any discriminatory effect would have been lesser than the impact on black voters stemming from the restriction on acceptable ID under the Georgia law.

Here, we have not uncovered, nor has the state presented, any information or evidence to overcome the inferences drawn from the data discussed at length above that blacks are more likely than whites to lack acceptable photo identification. The most that can be concluded from the legislative history and discussions with proponents is that legislators failed to consider statistical evidence of whether blacks were more likely than whites to lack acceptable ID. Moreover, Section 59 of Act 53 also fails the retrogression analysis set forth in Georgia v. Ashcroft of whether minority representatives believe that the proposed change will decrease minority voters' effective exercise of the electoral franchise. See Georgia, 539 U.S. at 484. In this instance, all black members of the Georgia legislature save one opposed the photo ID

provisions of Act 53. Senator Jones emphasized that the Senate received no evidence addressing the racial effect of the photo identification provisions on Georgia citizens, and that the only data presented were general numbers regarding valid driver's license and ID card ownership, which were never broken down by race. Senator Brown stated that proponents never tried to prove that minorities have proportionate numbers of the proposed forms of ID nor did they substantially address allegations of retrogression. Rep. Watson concurred that there was no response to allegations of the potentially retrogressive effect of the photo identification provisions offered in the House.

Senator Harbison believes that a narrowing of the acceptable types of identification will harm black voters because many of his constituents have voter identification currently accepted by the state, but do not drive or have a non-driver's identification card, and as a result, will not have an acceptable photo ID for voting purposes if the change is implemented. Senator Reed, who has served two terms in the Georgia House and was recently re-elected to the Senate, stated that "this is the most aggressive bill and attack on the rights of minorities and African-Americans that I have seen in my tenure in the House and Senate." Sonji Jacobs, Carlos Campos, "Voter ID Bill Stirs Furor," *Atlanta Journal-Constitution*, March 30, 2005.

The sole black representative who supported these provisions, Willie Talton, understood that his opinion would be scrutinized more closely than that of other proponents because he was a minority. Rep. Talton stated that he "kept an eye on this legislation to make sure it did not disenfranchise voters of any race or class." He based his conclusion that the law was "color blind" on the fact that more Georgians of voting age had a driver's license or ID card than were registered to vote. However, even Rep. Talton did not seek an analysis of potential disparities among black and white ownership of acceptable ID.

In light of the overwhelming objections voiced by black legislators, including the 47 members of the Georgia Legislative Black Caucus as well as U.S. House of Representatives John Lewis who do not support the bill, compared to the one black representative who supports the bill, the weight of the minority legislators clearly falls on the side opposing the proposed voter ID restrictions.

Non-Retrogressive Alterative

The jurisdiction has failed to demonstrate that it could not satisfy its stated goal of combating voter fraud while avoiding retrogression. As we determined with the state's original adoption of a voter identification requirement, states have the authority to adopt measures to ensure the security of elections and such measures are not inherently retrogressive. However, in light of the apparent retrogressive effect of the proposed restriction on acceptable IDs, the availability of non-retrogressive alternatives raises substantial concerns regarding the manner in which the state amended its current voter identification requirements.

The state could have avoided retrogression by retaining various forms of currently

accepted voter ID for which no substantiated security concerns were raised. Supporters of the ID restriction suggested that the risk of mail being stolen compromised the security of bank statements and government checks as acceptable ID. Even though no evidence was raised to support these claims, if true, the state could have addressed this issue by removing these specific forms of ID but retained other forms of non-photo ID such as birth certificates, Social Security cards, and other government documents, which were not described as likely to be stolen from voters' mailboxes. Retention of these items as acceptable ID would have had a greater likelihood of accommodating the low income black population that is least likely to have a photo ID.

Moreover, there was no evidence presented to demonstrate that any of the existing forms of non-photo ID were unreliable or that their retention would not have reasonably allowed the state to prevent voter fraud. First-time voters who register to vote by mail without providing ID are still permitted to show any of the non-photo IDs set forth in HAVA, including government checks and bank statements, so the reliability of this type of ID for all other voters should not be in question.

Ms. Meyers and other proponents also expressed doubts about the controls over private sector ID, but presented no evidence to support these doubts. Photo identification issued by private colleges and universities are accepted for financial transactions by businesses not affiliated with the universities. Private sector employee IDs allow individuals access to highly restricted areas such as airports, factory floors, office buildings containing confidential information, and other restricted spaces, which suggests that businesses have an incentive to use reliable, non-duplicable ID cards. It is likely that the retention of these forms of identification would have, at minimum, lessened the impact of the restrictions for minority voters.

Although individuals may counterfeit non-photo identification, they usually do so for financial gain or to obtain permanent resident status. As the holder is desirous of not being caught, it is less plausible that the individual will attempt to use the counterfeit document for voting purposes. If anything, requiring a driver's license for voting does not preclude the possibility that a voter may present a counterfeit ID with his current photo. Rep. Talton, stated that in his capacity as Deputy Sheriff, he encounters numerous counterfeit driver's licenses weekly. Even the 9/11 hijackers obtained official driver's licenses at state DMV offices by bribing motor vehicle employees.

Another non retrogressive alterative would have been to retain the affidavit alternative so that no voters would be barred from voting at the polls if they lacked photo ID. Proponents of the bill presented no evidence that the penalty of law is an insufficient deterrent to falsely signing an affidavit of identity, and the affidavit document itself reflects that falsifying or making a fraudulent statement or representation in connection with signing is a felony. If legislators were concerned that an affidavit is not verified before the vote is cast electronically, they could have amended the current affidavit procedures to allow an affidavit voter to cast a provisional ballot, to be counted after the affidavit is verified by the registrar, similar to the current procedure for first-time registrants by mail who use an affidavit of identity. Under such a change, qualified

voters who lacked the requisite identification would still be allowed to vote and that vote would still be counted without requiring further action by the voter, thus obviating any retrogression concerns.

Other alternatives that the state could have explored would have been the addition of additional forms of photo identification allowed by other states with voter ID laws. These forms of ID could include store club cards, credit and debit cards, association cards, or any other identification card with the voter's name and photo, which would have broadened the available forms of acceptable ID. This is a practice allowed by many other states, as discussed below in Part IV.A.

The failure of the state to adopt any of these non- or less-retrogressive alternatives to satisfy its goal of preventing voter fraud weighs strongly in favor of interposing an objection.

No-Excuse Absentee Voting

Proponents of preclearance have suggested that the proposed changes are not retrogressive because the restriction of voter ID and the elimination of the affidavit procedure are balanced by the expansion of absentee voting to anyone who requests an absentee ballot. Under this analysis, anyone who is barred from voting at the polls is not disenfranchised because they may vote an absentee ballot.

Although the expansion to no-excuse absentee voting is a positive step, it does not obviate the retrogressive effect on black voters who lack the necessary identification, as data shows that blacks are only half as likely as whites to vote by absentee ballot. According to the 2000 U.S. Census, one in nine white voters nationally voted by absentee ballot, compared to only one in 21 black voters. This data is a national composite, so does not distinguish between states where absentee voting is restricted and those where it is available to all.

The Task Force Report, "To Assure Pride and Confidence in the Electoral Process," (Aug. 2001), part of the Carter-Baker National Commission on Election Reform, concurs with the Census data on absentee voting data, finding that blacks are half as likely as whites to vote absentee. See Chp. 5, p.3. The report accounts for this by noting that absentee ballots are used more by people with better educations, higher incomes, and more prestigious jobs; to wit, voters "who have the resources to know to arrange to vote in advance." Id. The highest rates of absentee voting are among holders of graduate and professional degrees and people in managerial and professional occupations. Id. Again, it appears that the lowest income voters, who are the least likely to have acceptable photo ID, are also the least likely to participate in absentee voting.

Even states that change their absentee voting rules to adopt no-excuse absentee voting generally do not experience an increase in voter turnout. According to a 50-state study by the Committee for the Study of the American Electorate (CSAE), those states that adopted early voting or no-fault absentee voting "performed worse in terms of either greater average turnout

declines" in years when turnout went down such as 1996 and 1998, and experienced "lesser average turnout increases" in years when turnout increased such as 1992 and 1994, compared to states that did not adopt either of these voting procedures. See Report released Feb. 8, 1999, by the Committee for the Study of the American Electorate. In a recent update analyzing the November 2004 election, CSAE found that in the 24 states with no-excuse absentee voting, turnout was at virtually the same levels as in states without that provision. See Report released Jan. 14, 2005, by the Committee for the Study of the American Electorate. The Carter-Baker Task Force report concurs that absentee voting rules appear to have very little effect on voter turnout. See id. at 6.

This disparity in absentee ballot useage between white and black voters is confirmed by those with experience in the voting patterns of minority citizens in Georgia. Senator Brown told us that many older black voters prefer to vote in person on election day to celebrate their civil rights victory. The significance of publically voting is heightened for these voters because of their personal struggle to obtain the electoral franchise. Importantly, the change to no-excuse absentee voting was not proposed nor supported by Black Caucus members as a mitigating factor to potential retrogression, according to Senator Jones.

The material presented by the Lawyers Committee for Civil Rights includes testimony from an African-American voter that others in his community fear that their votes may be excluded if submitted by absentee ballot, a concern that is alleviated by casting one's vote at the polls. When they vote in person, no one handles the ballot but the voter, who places it personally into the ballot box. As voters over age 75 have always been permitted to vote absentee under Georgia law, there is little reason to believe that they would change their behavior under the state's liberalized no-excuse absentee voting rules.

Finally, absentee voting requires the voter to obtain an application for an absentee ballot, receive the application through the mail, fill out and mail the request, receive the ballot through the mail, and finally mail the ballot back to the registrar before the close of polls. This requires four instances of mailing documents back and forth. Allowing two to three days per mailing, this can add up to twelve extra days, not including weekends, to the voting process. As a result, voters must begin the process at least two weeks before every election, and make their decision long before the campaigning ends. Complying with these requirements also requires knowledge of the deadlines and the application process, which may be harder for illiterate and less well-educated voters, who are disproportionately black.[18] In addition, many individuals are reluctant to rely on the mail to deliver ballots to and from absentee voters on time and without error. See, e.g., Associated Press, "Florida Republicans, Democrats Trade Accusations," Oct. 29, 2004 (reporting 58,000 missing absentee ballots in Broward County, FL in 2004 general election).

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[18] According to the 2000 Census, there were 109,729 illiterate people age 25 and over, defined as persons with no schooling or who had completed the 4th grade or less. Of those, 37,204 were white non-Hispanics and 42,274 were black non-Hispanics.

From both the statistical and anecdotal evidence we have obtained, it appears that the expanded availability of absentee voting, although a positive measure, is unlikely to change voters' behavior and will not ameliorate the retrogressive effect caused by the reduced number of acceptable forms of identification and the elimination of the affidavit of identity. The state has not provided any evidence to show that voters will behave any differently under the proposed "no-excuse" absentee ballot rules, and therefore has not met its burden of showing that the concomitant change to no-excuse absentee voting will remedy any potential retrogression caused by the restricted ID requirements.

GLOW Program

One positive effect of our numerous contacts with state officials appears to have been the development of the GLOW program. If this program goes into effect as described, it may well have beneficial effects in providing DDS cards in underserved areas to the most impoverished and isolated residents. However, the program has not yet gone into effect, and has designated only 36 counties on its tentative schedule to be visited through the end of November 2005. Most of these counties have black populations that are at least comparable to the statewide average or higher, which reflects targeting that may help to serve African-American voters. We cannot evaluate the effectiveness of the program's publicity measures, however, its responsiveness to citizen groups who call for its service to be directed to their counties and/or organizations, or quantify its actual output of photo ID cards compared to its projected maximum capacity of ID card distribution. Moreover, the GLOW program will not help those voters who do not have birth certificates or other documents necessary to obtain an ID card, nor the means to obtain them.

As a result, we conclude that the GLOW program may enhance the ability of some voters to access photo ID cards. Finally, even if we could measure the enhanced access that this program will provide, we cannot rely upon such measures to remedy the potential retrogression, as the program may be subject to Section 5 review, and without preclearance, may be subject to change or elimination at any time.

B. Retrogressive purpose

A voting change adopted with the intent to retrogress black voting strength, whether in the present or in the future, does not meet the standards of Section 5. Reno v. Bossier Parish School Board, 528 U.S. 320, 321 (2000). The Supreme Court has emphasized that the "purpose must be retrogressive" because "§ 5 prevents nothing but backsliding." Id. at 335, 340. The purpose inquiry under Section 5 should be guided by the Arlington Heights standard. See Reno v. Bossier Parish School Board, 520 U.S. 471, 488 (1997), quoting Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 266 (1977) ("assessing a jurisdiction's motivation in enacting voting changes is a complex task requiring a "sensitive inquiry into such circumstantial and direct evidence as may be available"). The relevant factors in such a "purpose" inquiry are: the impact of the change on black voters; the historical

background of the decision; the specific sequence of events that led up to the challenged decision; procedural and substantive departures from normal considerations; and the legislative or administrative history -- especially where there are contemporary statements by members of the decision making body, minutes of its meetings or reports. Arlington Heights, 429 U.S. at 266.

Opponents of Act 53 have alleged that the state acted with retrogressive intent. The Lawyers' Committee letter in particular asserts that justification for the state's action is not found in the legislative history, points to the exclusion of absentee ballots from the revised identification requirements as evidence that fraud prevention is a pretextual justification, and notes that less retrogressive alternatives to the fraud problem were not debated. Opponents also note that there was no discussion in the legislative history regarding the reliability of IDs issued by private colleges and universities, or private employers. Proponents such as Representative Talton, who identified his specific motivation for tightening voter IDs to those with photographs, did not directly address the potential use of fake IDs themselves for voting purposes.

On the one hand, legislative proponents have been unable to provide examples of fraud in voting, with Representative Burmeister stated that this information is unavailable because fraud is, by its nature, subversive. Secretary Cox stated that she is unaware of any cases of voter impersonation during her tenure as Secretary of State. The state's recitation of United States v. McCranie, 169 F.3d 723 (11th Cir. 1999), which upheld convictions for voter fraud in Dodge County, Georgia, does not support the stated purpose of Act 53 in that the fraud in McCranie was vote buying and selling, not impersonation or voting under a false identity. In fact, the vote buying and selling activities were performed openly, by county officials, and with the knowledge of the county clerk. Voters' identities were well known to county officials. As such, the case does not support the need for reducing the types of acceptable IDs or the elimination of the affidavit procedure as a means of reducing criminal activity.

However, there is no direct evidence that proponents intended to restrict the types of acceptable voter ID and eliminate the affidavit procedure for the specific purpose of retrogressing minority voting strength. It appears that proponents did not analyze the potential gaps in access to acceptable identification amongst blacks and whites, or seek out data regarding the racial distribution of persons who lack such identification. Several Georgia legislators stated that their intent was to combat voter fraud, and that their approach was considered and color-blind, relying on several sources for the approach it eventually adopted. Save for Rep. Burmeister's inflammatory statement that blacks in her district vote only because they are paid, we have found no evidence to suggest that proponents had data pointing to the retrogressive effect of the legislation and nevertheless intentionally adopted the voter identification restrictions for the purpose of disenfranchising black voters.

IV. OTHER POLICY CONSIDERATIONS

A. Voter Identification Laws of Other States

According to Electionline.org, 22 states currently require all voters to present some form of identification before voting.[19] See Tab 8. In 16 of these states, the identification need not be photo identification. In five of the six states that request photo ID, other procedure allow voters to cast a valid ballot without possessing photo identification, thereby providing a "fail-safe" mechanism, which allows individuals who are, in fact, validly registered voters an opportunity to vote at the polls.

1. Non-Photo Identification Provisions

In addition to Georgia's benchmark practice, the following 15 states allow various forms of non-photo identification: Alabama, Alaska, Arizona,[20] Arkansas, Colorado, Connecticut, Delaware, Kentucky, Missouri, New Mexico, Montana, North Dakota, Tennessee, Virginia, and Washington.[21] Examples of non-photo identification accepted by these states are:

- Voter registration card;
- Social Security card;
- Bank statement;
- Utility bill;
- Government check;
- Paycheck;
- Gun permit;
- Hunting/fishing license;
- Pilot's license;
- Birth certificate;
- Medicare/Medicaid card;
- Credit card;
- Entertainment/ buyer's club card;
- Change of address verification letter from U.S. Postal Service;
- Any government document that shows the voter's name and address.

2. Fail-safe Provisions

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[19] Electionline.org, "Voter ID requirements," (viewed August. 9, 2005), available at www.electionline.org/Default.aspx?tabid=364; see also National Conference of State Legislatures, "State Requirements for Voter Identification," available at www.ncsl.org/programs/legman/elect/taskfc/voteridreq.htm (updated May 10, 2005). These two documents along with an comparison chart attachments to this memorandum. The time constraints imposed on our analysis of the submission precluded an independent 50-state survey of voter identification laws.

[20] Not yet implemented.

[21] South Carolina is classified by the NCSL report as "requesting photo identification" but seems mis-categorized because a voter registration card is considered acceptable identification.

Many states also permit fail-safe mechanisms for voters who lack any of the above forms of identification. Examples of these fail-safe mechanisms are a sworn affidavit of identity (e.g., Connecticut, Delaware, Florida,[22] Kentucky, Louisiana, Tennessee, and Virginia) or personal recognition by poll workers (e.g., Alabama, Alaska, Missouri, and North Dakota). For example, North Dakota law permits an elector to vote a regular (i.e. non-challenged, non-provisional ballot) if he or she completes an affidavit of identity, or if a poll worker knows the voter and is willing to vouch for the voter and his or her eligibility to vote in the precinct. Alabama law permits an elector to vote a regular ballot if two poll workers identify him or her as an eligible voter in the poll book and sign by the voter's name. Ala. Code § 17-11A-1.

Although Arkansas law requires presentation of identification, it does not bar electors who are unable to present identification from voting. Arkansas law states that if a voter is unable to provide identification, the election official shall indicate on the precinct list that the voter did not provide identification, and the elector is then permitted to vote a regular ballot. Ark. Code Ann. § 7-5-305(a)(8).

Arizona's newly adopted statute allows voters to present either a photo identification card, or two forms of non-photo identification. Az. Rev. Stat. § 16-579. Additional details regarding implementation of this requirement are pending.

3. Photo Identification Provisions

The following six states request photo identification from all voters: Florida, Hawaii, Indiana, Louisiana, South Carolina, and South Dakota. Although not yet implemented, Indiana is the only state that prohibits voters from casting a valid ballot without possessing photo identification.[23]

In Florida, all voters must show a current valid photo identification with the voter's signature. Approved forms of photo identification include a driver's licence, U.S. passport, any student ID, any employee badge, buyer's club card, credit card, retirement center ID, neighborhood association ID, entertainment ID, or public assistance ID. If the identification does not contain the voter's signature, he or she will be asked for an additional form of ID containing the voter's signature. A voter who lacks an approved photo identification may sign an affidavit of his or her identity, unless he or she is a first-time by-mail registrant. The voter may then vote a regular ballot. Fl. Stat. Ann. § 97.0535(3)(a); § 101.043. The Florida legislature has recently

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[22] *Chapters 2005-277 and 2005-278, Laws of Florida, approved by the Governor on June 20, 2005,* eliminates an entertainment card as an acceptable form of voter ID and discontinues the use of an affidavit for affirmation of a voter's identity. This law is not yet legally enforceable and is currently under Section 5 review in Submission No. 2005-2390.

[23] The law was enacted in April 27, 2005, and has an effective date of January 1, 2006. It is currently being challenged in a lawsuit by the Indiana Civil Liberties Union, Indianapolis NAACP, United Senior Action of Indiana and other organizations, as well as in a separate lawsuit filed by the Indiana Democratic Party.

amended the law to eliminate the affidavit provision and require voters without acceptable identification to vote a provisional ballot. See Florida HB 1589; SB 2176. This change is currently pending before us on Section 5 review.

In Hawaii, a voter has to provide picture identification with the voter's signature on it. Acceptable forms of identification are not specified by law. If the voter has no identification, the voter will be asked to recite his or her date of birth and residence address to corroborate the information provided in the poll book. Haw. Rev. Stat. § 11-136. The voter can then vote a regular ballot.

In Louisiana, voters must show a picture identification card to vote at the polling place. This can include a Louisiana driver's license, a Louisiana Special ID card, or other "generally recognized" picture identification card. Voters who lack a photo identification may sign an affidavit of their identity and then can vote a regular ballot. La. Rev. Stat. Ann. § 18:562. The law requires the voter to sign an affidavit and provide either a current voter registration certificate or other information stated in the precinct register requested by the commissioners. Id.

In South Carolina, a voter is required to present identification before voting a regular ballot. The voter may present a driver's licence or state ID card, but may also use his or her voter registration card as identification. A voter who has lost his or her voter registration card may obtain a duplicate copy at no cost, including on election day. A voter who cannot present either photo identification or a voter registration card may cast a provisional ballot. The provisional ballot will be counted if the Board of Voter Registration is able to certify that the voter is a qualified elector of the precinct in which he voted his provisional ballot. S.C. Code Ann. § 7-13-830. The voter is not required to bring his or her identification or voter registration card to the registrar for his or her ballot to be counted.

In South Dakota, all voters are to provide photo identification before voting or obtaining an absentee ballot. The personal identification that may be presented shall either be: (1) a South Dakota driver's license or nondriver identification card; (2) a passport or an identification card, including a picture, issued by an agency of the United States government; (3) a tribal identification card, including a picture; or (4) an identification card, including a picture, issued by a high school or an accredited institution of higher education, including a university, college, or technical school, located within the State of South Dakota. If a voter is not able to present personal identification, the voter may complete an affidavit in lieu of the personal identification. S.D. Codified Laws § 12-18-6.1, 12-18-6.2.

In Indiana, a voter who desires to vote an official ballot at an election shall provide proof of identification. Ind. Stat. § 3-5-2-40.5. Identification must be issued by the State of Indiana or the United States and must show the name and photo of the individual. Ind. Stat. § 3-10-1-7.2. Specific forms of identification are not listed. Voters who are unable or decline to produce proof of identification may vote a provisional ballot. The ballot is counted only if (1) the voter returns

to the election board by noon on the Monday after the election and: (A) produces proof of identification; or (B) executes an affidavit stating that the voter cannot obtain proof of identification, because the voter: (i) is indigent; or (ii) has a religious objection to being photographed; and (2) the voter has not been challenged or required to vote a provisional ballot for any other reason. Ind. Stat. § 3-11-8-25.

Compared to the voter ID laws of other states, Georgia is the only state (aside from Indiana) in which voters must present photo identification as a prerequisite for voting with no fail-safe alternative. All other states allow voters to present a voter registration card or other non-photo identification as proof of identity, sign an affidavit of identity, be recognized by poll workers, or verify their personal information as proof of identity before voting. Only one other state (aside from Indiana) requires an elector who votes a provisional ballot to return to the registrar's office with ID before such ballot will be counted, thus placing the burden on the voter to bring ID, rather than on the registrar to confirm the elector's registration. Voters may not have a method of transportation to return to the clerk's office, as they do on election day when rides to the polls are widely provided, or may not have time off from work to do so. These features make Georgia's voter ID law, along with Indiana's, the most restrictive in the nation.

B. Past Section 5 Determinations on Voter Identification Laws

1. South Carolina

South Carolina's voter identification requirement predates Section 5 coverage. Under the original statute, a voter was required to produce his registration certificate in order to vote. Act No. R623 (1984) was the first post-coverage amendment to this provision. (Submission No. 1984-4081). The Act added a driver's license and a Highway Department identification card as acceptable forms of voter identification. The Act provided that any person who registered "prior to the effective date of this act who does not possess a driver's license or other form of identification containing a photograph [to] vote upon production of a valid registration certificate." We sent a written request for additional information on September 11, 1984, indicating that requiring a voter to pay for identification may constitute a poll tax and asking the state to clarify the provision regarding the acceptability of a registration certificate as voter ID.

South Carolina's response stated that voter registration certificates would continue to be accepted as identification for all voters and that at the time of registration, a voter would be advised that he could show any of the three forms of acceptable identification to vote. Additionally, the state assured us that those who lose their notification may obtain a duplicate. Our preclearance letter noted these assurances, quoting the state's letter which maintained that "[t]he purpose of [the] act was to allow voters to have an additional means to provide identification in order to vote."

South Carolina further amended its voter identification requirement in 1988. (Submission No. 1988-4769). Act No. R571 (1988) reinstated a statutory provision requiring

registration boards to issue certificates of registration to all voters as well duplicates to those who had lost their original notification. According to the state, although the practice had been maintained, the State Election Commission felt that reinstating the statutory provision was preferable. The Act also amended the state's voter identification requirement to clarify that any voters who lacked photo identification could present a voter registration card in lieu of a photo ID. As we determined that the changes largely reflected procedures already in place for the state, we again interposed no objection.

2. Alabama

In 2002, Alabama enacted a requirement that all voters present identification before voting. (Submission No. 2003-2245). The law applies to both in-person as well as absentee voters. The law authorizes numerous forms of identification to be shown in order to vote, as follows:

- Alabama driver's license or state ID card;
- Valid identification card from another state or U.S. government entity;
- Employee card (public or private employer);
- Student identification (public or private school);
- Utility bill;
- Bank statement;
- Social Security card;
- Social Security check;
- Veterans check;
- Paycheck;
- Medicare/Medicaid card;
- Hunting/fishing license;
- Gun permit;
- FAA pilot's license;
- Electronic Benefits Transfer (EBT) card;
- U.S. Passport;
- Military ID;
- Birth certificate;
- Naturalization document;
- Adoption record;
- Name change record;
- Other government document showing the voter's name and address.

The law also provided two interim fail-safe methods for voting in the election scheduled for the month following the state's submission of the requirement: the elector could vote a challenged ballot or vote a regular ballot if identified by two election officials. The legislature has also enacted a separate law that provides a permanent fail-safe method for future elections, which utilizes a provisional ballot fail-safe procedure similar to that required by HAVA. The

provisional ballot is counted if the voter provides the registrar with an acceptable form of identification by 5 pm on the Monday following the election. The voter identification requirement was supported by eight out of 27 black caucus members, and opposed by 17, with two voting present or excused.

As in other Section 5 analyses of voter identification provisions, our conclusion that the Alabama voter identification requirement was not retrogressive in purpose or effect focused on two factors, the inclusion of a fail-safe procedure and the numerous forms of identification accepted. The inclusion of a fail-safe procedure allowing voters who do not possess the required identification, or who neglect to bring it to the polls, to fill out an affidavit attesting to their identity assures that no voters are barred from voting for not possessing an approved identification. The numerous forms of identification accepted by the state also ensured that most voters would possess at least one acceptable form. Primarily because of these factors, we determined that any potential retrogressive effect would be ameliorated.

3. Louisiana

In 1994, the Attorney General interposed an objection to a voter identification requirement proposed by the State of Louisiana. (Submission No. 1994-2922). The state would have required first-time voters who had registered by mail to show a driver's license or other photo identification at the polls. The submitting authority represented that the statute did not limit the type of photo identification that would have been acceptable, and listed employer identification issued by public and private employers, as well as college and university identification from public and private institutions, as acceptable. The use of non-photo identification, such as a current voter registration card, Social Security card, or utility bill, would not have been acceptable for first-time voters, and there was no fail-safe procedure for voters who did not possess such identification. Additionally, there was no provision for a identification card fee waiver for indigent voters.

Our objection was based upon the conclusion that the photo identification provision would have a retrogressive effect. The objection memorandum noted that "minority persons are far less likely to possess the most common forms of picture identification specified by the statute – driver's license, employee identification cards and college and high school identification cards." See Tab 7. The memorandum noted that 97.6 percent of voting age whites had a valid driver's license, compared to 70.6 percent of voting age blacks. The memorandum also noted that a greater proportion of voting age whites were in the labor force, and therefore more likely to have employee identification, compared to blacks. It also noted that whites comprised 68 percent of the total university population, and were disproportionately more likely to have a student identification compared to blacks. The memorandum finally noted that 12.7 percent of voting age whites and 39 percent of voting age blacks earned a salary below the poverty line, which made it reasonable to assume that more blacks would have trouble affording the $15 fee for a photo identification card.

The memorandum concluded that because blacks were more likely to live below the poverty line, and were less likely to possess an acceptable form of photo ID, the law was more burdensome than existing law and thus retrogressive. This finding was made even though the form of photo identification card was not restricted by law, and allowed college and employer identification from any public or private entity. The analyst's memorandum and reviewers' memoranda are attached. See Tab 7.

As an objection was interposed, the law did not take effect. See Tab 7 (Letter from Deval L. Patrick to Sheri Marcus Morris, Nov. 21, 2004; and Letter from Loretta King to Sheri Marcus Morris, Feb. 22, 1995). Our letter noted that the state had not met its burden of proof to demonstrate that the change was not retrogressive in purpose or effect. It stated that socio-economic data showed that black persons were "four to five times less likely than white persons in the state to possess a driver's license or other picture identification card . . ." and therefore the provision would have a disproportionately adverse impact on black voters in the state, thereby lessening their opportunities for political participation. See Tab 7. The state requested reconsideration, but the objection was continued as no new factual information or legal argument was presented to support our withdrawal of the objection. See Tab 7.

In 1997, the state submitted a modified version of the requirement which overcame the concerns that led to our earlier objection. (Submission No. 1997-2338). The 1997 law permitted voters to sign an affidavit and provide a current voter registration certificate or information in the precinct register in lieu of a photo ID. It also included a waiver of the fee for obtaining a special identification card from the State. See Tab 7. The 1997 law did not enjoy minority support, and was opposed by black legislators, including New Orleans Mayor Marc Morial, as well as several voting rights organizations and the Louisiana ACLU.

However, our analysis of the revised procedure found that it contained several safeguards that would diminish any potential adverse impact on minority voters. The most important was the affidavit provision, which removed the bar to voting for electors who did not possess photo identification. The second key factor was that the list of acceptable identifications included "other generally recognized picture identification cards" in addition to a driver's license. These other identification cards are not defined by statute, and presumably could include a credit card, school or employer identification issued by any public or private entity, buyers club card, or other photo identification. Based upon these two factors, as in Alabama, we concluded that the law was not retrogressive and informed the state that the Attorney General interposed no objection.

4. Arizona

Earlier this year, the State of Arizona submitted for Section 5 review, Sections 3, 4 and 5 of the Arizona Taxpayer and Citizen Protection Act (Proposition 200). The Act appeared as a statewide ballot initiative on November 2, 2004, at which time it was passed by a majority of Arizona voters. The proposition requires that voter registration applicants submit evidence of U.S. citizenship and that county recorders shall reject the application if no evidence of

citizenship is attached. Satisfactory evidence of citizenship includes the following forms of identification:

(1) AZ Department of Transportation-issued license or ID card, or equivalent out of state agency-issued license or ID;
(2) birth certificate or legible photocopy to the satisfaction of county recorder;
(3) U.S. passport or legible photocopy;
(4) U.S. naturalization documents or number of certificate (if only the number is provided, completed registration is contingent upon INS verification of number);
(5) other proof pursuant to the Immigration Reform and Control Act of 1986;
(6) U.S. Bureau of Indian Affairs (BIA) card number, tribal treaty number or tribal enrollment number.

The proposition also amended the procedure by which an elector obtains a ballot to require photo identification or two forms of non-photo identification bearing the elector's name and address to be produced at the polls.

Native American and Hispanic state legislators as well as numerous organizations submitted comments opposing the changes. Many commenters were concerned that voter registration rates among Hispanics and Native Americans would decrease, that the law would retrogress minority voting strength, and would constitute an illegal poll tax. Commenters contended that Native Americans were disproportionally less likely to have satisfactory evidence of citizenship. MALDEF also raised concerns regarding the potential "chilling" effect on Hispanic voter registration drives, which often register voters on the spot and typically lack fixed offices with photocopiers and fax machines. Concerns were also raised that the voter registration requirements did not include clear procedural guidelines for implementation and that the voter identification requirements would be applied in a racially discriminatory manner.

Our analysis found that while younger Native Americans tended to possess birth certificates, many Native Americans over the age of 55 did not have a birth certificate. However, the Arizona Indian Health Service reported that most Native Americans relied on documents issued by tribal governments and the BIA to receive health benefits, which were acceptable for voter registration purposes. Moreover, any Native American citizen could register by stating their tribal ID number without presenting the document. As such, most Native Americans would have sufficient tribal identification to satisfy proof of citizenship for registration, thus obviating retrogression concerns.

Our analysis nevertheless raised concerns regarding the state's plan for implementation, and Voting Section staff recommended requesting more information. The proposed letter also requested the racial composition of the approximately seven percent of Arizonans without an driver's license or state-issued ID, in part because the submission lacked sufficient information to determine the potential impact of these changes on Hispanics. The state asserted implementation procedures would be submitted at a later date. On January 24, 2005, no objection was

interposed.

The preclearance of Arizona Proposition 200 is not analogous to the review of the instant restrictions on Georgia's voter ID requirement and does not weigh in favor of preclearance here. The Arizona statute permits any identification with the elector's name and address, thus allowing for numerous forms of photo identification and non-photo identification (e.g. utility bill, bank statement, government check, or government document) to be accepted.

Moreover, little comparison can also be drawn between Arizona's voter registration requirements and Georgia's proposed restriction of its voter identification requirements. The forms of acceptable identification to prove citizenship in Arizona are distinctly different from the proposed photo identification required in Georgia, and were specifically designed to provide a method of verification of citizenship that avoided retrogression among Native Americans and Hispanics, who were thought to be least likely to have driver's licenses or birth certificates. Finally, our preclearance reflects only a determination that Arizona's voter registration requirements did not retrogress Hispanic and Native American voting strength in that state, where such populations possess different demographic characteristics than African-Americans in Georgia.

The closest analogy in past Section 5 determinations of voter ID laws is to Louisiana's 1994 enactment, due to the similarity of population characteristics and the effect on minority voters of a restrictive voter identification requirement without a fail-safe alternative. Such comparisons weigh in favor of an objection here.

C. Identification Laws & Effect on Voter Turnout

We have calculated voter turnout in Georgia, Louisiana, Florida, South Carolina, and Alabama to consider the effect of these states' voter identification laws. This information is set forth below.

1. Georgia (ID requirement enacted in 1997, expanded in 2003)

Year	Pct. total VAP registered	Pct. black VAP registered	Pct. white VAP registered	Pct. total VAP turnout	Pct. black VAP turnout	Pct. white VAP turnout
2004	62.3%	64.2%	68.0%	52.6%	54.4%	57.4%
2002	61.5%	61.1%	65.3%	40.0%	38.6%	43.0%
2000	61.1%	67.0%	61.0%	49.0%	49.6%	52.2%
1998	62.1%	60.9%	67.9%	41.9%	40.0%	46.5%
1996	66.1%	64.6%	67.8%	49.6%	45.6%	52.3%
1994	55.2%	57.6%	55.4%	35.7%	30.9%	38.3%
1992	62.0%	53.9%	67.3%	54.1%	47.1%	58.7%
1990	57.4%	57.0%	58.1%	42.3%	42.3%	42.6%

1988	61.4%	56.8%	62.9%	49.6%	42.4%	53.2%

Georgia's voter identification requirement was first effective for the presidential election in 2000. There was little change in Georgia's overall voter turnout rates between the presidential elections of 1996 and 2000, although black turnout showed a four percent increase. The adoption of the 1997 voter identification requirement does not appear to have depressed black turnout in the state. Importantly, however, the voter ID law allowed persons without acceptable identification to sign an affidavit of identity, so we would not expect to see reduced turnout because no one would have been turned away for lack of ID. The expansion of the acceptable forms of voter ID in 2003 also appears to have no impact on black turnout, as both the overall turnout rate and the black turnout rate increased between the 2000 and 2004 presidential elections.

2. Louisiana (state statistics) (ID requirement enacted in 1997)

	registered	black reg.	black reg. as pct. of total	white reg	total voted	black voted	blck. voted as pct. of reg.	white voted	wht. voted as pct. of reg.
2004	2,923,395	870,201	29.8%	1,936,724	1,956,673	531,744	61.1%	1,363,396	70.4%
2002	2,806,202	820,628	29.2%	1,885,330	1,267,225	328,443	40.0%	913,259	48.4%
2000	2,796,531	809,203	28.9%	1,894,957	1,776,133	472,211	58.4%	1,261,905	66.6%
1998	2,686,560	773,935	28.8%	1,836,840	990,239	296,509	38.3%	680,093	37.0%

Louisiana's post-election reports prior to 1998 have been removed from the state's website. The only data we have from prior to 1998 is the total statewide turnout as a percent of voting age population. This information is as follows:

Year	LA Turnout	National Turnout
1996	54.2%	49.08%
1992	56.98%	55.09%
1988	51.28%	50.11%
1984	54.55%	53.11%

Because we have no data regarding the percentage of black registration and turnout, we cannot draw significant conclusions about the effect of the voter identification law enacted in 1997. However, we would not expect to see any significant effect on turnout caused by imposition of the identification requirement because Louisiana permits voters who lack identification to sign an affidavit of their identity. Therefore, any voter who does not have a photo identification is not barred from voting at the polls. The resulting effect on turnout should be negligible. The table shows that black turnout was highest in 2004 and 2000, which is consistent with high national turnout due to the presidential elections.

3. South Carolina (state statistics) (1962) (ID requirement last modified 1988)

	tot. reg	non-white reg.	pct.	white reg.	total voted	non-white voted	non-white turnout as pct. of reg.	white voted	white turnout as pct. of reg.
2004	2,315,187	659,366	28.5%	1,655,816	1,631,148	433,732	65.8%	1,197,416	72.3%
2002	2,047,368	557,342	27.2%	1,490,026	1,116,936	284,354	51.0%	832,582	55.9%
2000	2,266,199	622,244	27.5%	1,643,955	1,433,533	350,749	56.4%	1,082,784	65.9%
1998	2,021,763	552,066	27.3%	1,469,697	1,098,484	281,289	51.0%	817,195	55.6%
1996	1,814,777	489,850	27.0%	1,324,927	1,203,486	294,983	60.2%	908,503	68.6%
1994	1,499,589	376,981	25.1%	1,122,608	953,120	203,243	53.9%	749,877	66.8%
1992	1,537,140	387,624	25.2%	1,149,516	1,237,467	286,911	74.0%	950,556	82.7%
1990	1,354,402	358,469	26.5%	995,933	793,614	184,743	51.5%	608,871	61.1%
1988	1,435,977	388,255	27.0%	1,047,722	1,041,846	245,304	63.2%	796,542	76.0%
1986	1,297,721	368,954	28.4%	928,767	770,556	197,746	53.6%	572,810	61.7%
1984	1,394,675	392,845	28.2%	1,001,830	1,018,701	264,546	67.3%	754,155	75.3%

The South Carolina requirement that electors show their voter registration certificate before voting was present in the 1962 code, prior to the coverage date of the Voting Rights Act. The law was modified in 1984 to add driver's licenses and photo ID cards as acceptable proof of identity before voting. The law was further amended in 1988 to clarify that any voters who lacked photo identification could present a voter registration card in lieu of a photo ID and to require county election registration boards to issue duplicate voter registration certificates upon request to any voter who lost his or her original certificate.

As the state's requirement that voters show their certificates of registration as proof of identity predated the 1984 amendment, which added photo IDs rather than requiring that only photo IDs be used as proof of identity, voters had additional forms of acceptable identification beginning in 1984. Additionally, because all voters were issued certificates of registration and any voter could obtain a copy of his or her registration certificate on election day, no significant change in turnout in South Carolina in 1984 is expected as a result of changes in the voter identification law.

4. Florida (Census self-reported) (ID requirement enacted 1998)

	total reg.	black reg.	pct.	white reg.	total voted	black voted	blk. turnout as pct. of reg.	white voted	white turnout as pct. of reg.
2004	8,219,000	994,000	12.1%	6,251,00	7,372,00	841,00	84.6%	5,656,00	90.5%

				0	0	0		0	
2002	7,290,000	846,000	11.6%	5,488,000	5,334,000	583,000	68.9%	4,073,000	74.2%
2000	7,043,000	773,000	11.0%	5,391,000	6,006,000	620,000	80.2%	4,658,000	86.4%
1998	6,653,000	714,000	10.7%	5,183,000	4,403,000	473,000	66.2%	3,468,000	66.9%
1996	6,727,000	754,000	11.2%	5,927,000	5,516,000	575,000	76.3%	4,901,000	82.7%
1994	6,002,000	633,000	10.5%	5,298,000	4,601,000	398,000	62.9%	4,160,000	78.5%
1992	6,486,000	772,000	11.9%	5,643,000	5,772,000	652,000	84.5%	5,062,000	89.7%

Florida's photo ID requirement was enacted in 1998. Because Florida allows a wide range of identification to be used, including all photo ID cards including store cards, credit cards, public assistance identification, and retirement center ID cards, it is more likely that all voters would have one acceptable form of identification. More importantly, like Louisiana, Florida permits voters who are unable to present identification at the polls to execute an affirmation of his or her identity. Fla. Stat. § 101.49. As a result, we would expect to see a negligible effect on turnout because no voter is barred from voting on the ground that he or she lacks acceptable identification. The main trend evident in the Florida data is the high turnout rates in 2004, 1992, and 2000, which is consistent with national turnout.

5. Alabama (Census self-reported) (ID requirement enacted 2002)

	total reg.	black reg.	pct. of tot.	white reg.	total voted	black voted	blk. turnout as pct. of reg.	white voted	white turnout as pct. of reg.
2004	2,418,000	590,000	24.4%	1,822,000	2,060,000	517,000	87.6%	1,537,000	84.4%
2002	2,347,000	524,000	22.3%	1,798,000	1,585,000	336,000	64.1%	1,242,000	69.1%
2000	2,411,000	619,000	25.7%	1,776,000	1,953,000	491,000	79.3%	1,448,000	81.5%
1998	2,398,000	621,000	25.9%	1,755,000	1665,000	431,000	69.4%	1,223,000	69.7%
1996	2,318,000	532,000	23.0%	1,783,000	1,744,000	417,000	78.4%	1,324,000	74.3%
1994	2,212,000	557,000	25.2%	1,654,000	1,436,000	328,000	58.9%	1,106,000	66.9%
1992	2,317,000	775,000	33.4%	1,753,000	1,913,000	450,000	58.1%	1,456,000	83.1%

The Alabama identification requirement was passed in 2002, and took effect in that year. Turnout in Alabama among African-Americans was high in 2000, lower in 2002, and rose again in 2004. One could argue that the decrease in 2002 was attributable to the imposition of the identification requirement, but it is far more likely attributable to the fact that 2002 was not a presidential election year. The subsequent spike in 2004 occurred due to the high interest in the national election. In addition, because Alabama's identification law allows a wide range of

photo and non-photo identification to be used, including Medicaid/Medicare cards, utility bills, bank statements, government checks, sporting permits, or any government document with a voter's name and address, the expected effect on voter turnout would be minimal since most voters would likely have at least one acceptable form.

In conclusion, it is difficult to estimate the effect that these voter identification laws have had on turnout or to use the experience of other states in an attempt to predict the effect in Georgia of the proposed restrictions to the acceptable forms of voter identification. With the exception of Indiana, each of the laws discussed above is materially different than the requirement proposed in Georgia. Overall such laws permit a wider range of acceptable forms of identification and provide crucial fail-safe options for voters. Additionally, differences in turnout in the four states discussed are attributable to many other social factors, particularly spiking in presidential years when the national turnout was also highest, in 2004, 2000, and 1992. Persons who fail to vote or are turned away because they lack identification are also not counted in the same way as persons who sign in at the polls. As a result, their impact on the turnout percentage cannot be calculated.

V. CONCLUSION

For all the reasons set forth above, we recommend that an objection be interposed to Section 59 of Act No. 53 (2005) on the ground that the state has failed to meet its burden of proof to demonstrate that it does not have the effect of retrogressing minority voting strength. The attached letter also informs state officials of the determination not to interpose an objection to the remaining changes contained in the legislation.

AGREE:

DISAGREE:

COMMENTS:

APPROVE:

DISAPPROVE:

COMMENTS:

August 18, 2005

Mr. John Tanner
Chief, Voting Section
Civil Rights Division
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Re: Georgia's Elimination of Affidavit Identification Option under Section 5 (#2005-2029)

Dear Mr. Tanner:

We are law professors who specialize in voting rights. In the absence of additional information, we write to urge you to object to Georgia House Bill 244 pursuant to Section 5 of the Voting Rights Act.

Georgia law currently permits registered voters to cast a ballot after presenting various forms of identification, including a birth certificate, social security card, certified naturalization documentation, a current utility bill, bank statement, government check, or any government document bearing the name and address of the voter. Voters who do not bring one of seventeen forms of identification to the polls may, under current law, confirm their identity by executing a sworn affidavit stating that they are qualified to vote.

House Bill 244 would alter Georgia's voting procedures by reducing the permissible forms of identification from seventeen to six (all government issued photo identification) and eliminating the affidavit identification option (the "affidavit ID option"). The bill was signed into law by Governor Perdue on April 22, 2005 and has been submitted to you for preclearance.

Under Section 5 of the Voting Rights Act, 42 U.S.C. Section 1973c, a covered jurisdiction may not implement a change in its election laws or practices unless **the jurisdiction carries the burden** of demonstrating that the change will be free of any racially discriminatory purpose or effect. Georgia v. United States, 411 U.S. 526, 538 (1973). The objective of Section 5 "has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise."[1] **Georgia has not carried its burden** to show that H.B. 244 does not have a retrogressive impact.

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[1] Beer v. United States, 425 U.S. 130, 141 (1973) (emphasis added); see also Reno v. Bossier Parish Sch. Bd., 520 U.S. 471, 478 (1997) ("Retrogression, by definition, requires a comparison of a jurisdiction's new voting plan with its existing plan. . . . It also necessarily implies that the jurisdiction's existing plan is the benchmark against which the 'effect' of voting changes is measured."); Holder v. Hall, 512 U.S. 874, 883 (1994) (plurality opinion) (under Section 5, "the proposed voting practice is measured against the existing voting practice"); State of Texas v. United States, 866 F. Supp. 20, 27 (D.D.C. 1994) (non-retrogression requirement "mandates that preclearance be denied under the "effects" prong of Section 5 if a new system places minority voters in a weaker position than the existing system").

[4] Letter dated July 7, 2005, from Seth A. Cohen, Esq., to John Tanner, Chief, Voting Section, at 3.

I. Eliminating the affidavit ID option and disenfranchisement of minority voters in Georgia.

Existing law allows voters without photo identification to sign a sworn affidavit of identity as an alternative to presenting identification. Georgia has not shown that House Bill 244's elimination of this affidavit "safety net" is not retrogressive.

Georgia has failed to produce critical information relevant to the retrogressive impact of the new law. Each county in Georgia retains affidavits submitted by voters for two years. The affidavits executed by voters to establish their identity can be matched with Georgia's statewide computerized voter registration list, which includes racial identification for at least 97.3% of voters. An alternative approach would require that Georgia provide the number of affidavits submitted by precinct and county, and would cross reference this data against U.S. Census county and precinct-level demographic data on race. Examination of this data would provide important insights about the extent to which racial minorities previously made use of the sworn statement provision because they failed to bring a photo identification or other documentary identification with them on Election Day. Such data is essential to determining the retrogressive impact of eliminating the affidavit ID option.

In other states, data shows that an elimination of an affidavit ID option would have a retrogressive impact. South Dakota, for example, allows voters who do not to bring photo identification to the polls to sign an affidavit to establish their identity. According to a July 15, 2004 *Aberdeen News* article written by Chet Brokaw, during a June 2004 statewide election voters in South Dakota counties with large concentrations of American Indians were 2 to 8 times more likely to sign affidavits than voters in other parts of the state. The article indicates:

> Voter turnout was up in both reservation and non-reservation areas, and the use of affidavits was particularly high in reservation counties, [Republican Secretary of State Chris] Nelson said. While affidavits were signed by about 2 percent of the voters statewide, affidavits were used by 16 percent of the voters in Shannon County, 9 percent in Todd County, about 7 percent in Corson and Dewey counties, and 5.3 percent in Ziebach County.

American Indians make up only 8.3% of South Dakota's population, but a much higher percentage of the population in Shannon County (94.2% American Indian), Todd County (85.6%), Corson County (60.8%), Dewey County (74.2%), and Ziebach County (72.3%).

While Georgia could easily compile similar information that shows the racial identity of those who use affidavits in the state, it has failed to do so. Granted, affidavit data might be less than perfect due to under-trained or overworked poll workers in particular precincts who either barred voters lacking documentary ID from voting without telling them about the affidavit ID option, or let such voters cast ballots without providing affidavits to avoid the hassle of extra paperwork. Nevertheless, the affidavits provide essential information and should be examined by the Department of Justice. Georgia's failure to provide available data on the actual use by minority citizens of affidavits prevents it from meeting its burden of establishing a lack of retrogressive effect under Section 5.

II. Eliminating the affidavit ID option is especially problematic in light of the state's reduction of permissible forms of identification from seventeen dowu to six.

By reducing the permissible forms of identification from seventeen down to six, Georgia has enhanced the likelihood that eliminating the affidavit ID option will be retrogressive. Under prior law, a voter could show a variety of documents to establish identity, including a birth certificate, social security card, certified naturalization documentation, a current utility bill, bank statement, government check, or any government document bearing the name and address of the voter. Existing evidence suggests that in the absence of these acceptable forms of identification, an elimination of the affidavit ID option would be retrogressive, and Georgia has failed to provide adequate evidence to the contrary.

For example, existing data suggests that minorities have less access to the government agencies that can provide one of the six forms of identification required under H.B. 244. In Georgia's 159 counties there are only 56 Department of Driver Services ("DDS") locations where driver's licenses or other government-issued photo identification are available to the general public (on July 1, 2005, the Department of Motor Vehicle Safety became the Department of Driver Services). The state recently eliminated the two locations that previously served Atlanta, the state's largest population center where, according to the 2000 Census, over 65% of the population, or more than a quarter-million people, are African-American or Hispanic.[4]

Moreover, in ten Georgia counties with the highest percentage of African-American residents, only one (Dougherty) has a DDS office.

County	Perceut Black Population	DDS Office
Hancock	77.8	0
Talbot	61.6	0
Stewart	61.5	0
Terrell	60.7	0
Calhoun	60.6	0
Clay	60.5	0
Dougherty	60.1	1
Randolph	59.5	0
Warren	59.5	0
Macon	59.5	0

Moreover, to obtain a photo identification card, voters must obtain documentation such as a birth certificate or passport, requiring payment of fees ranging from $10.00 to $85.00.[5] The poverty rate is 26% for African Americans in Georgia and 30% for Hispanics, compared to only 11% for whites.[6] Georgia has provided no evidence that establishes that these fees—which one

[5] Id. at 4.

[6] Kaiser Family Foundation, Georgia: Poverty Rate by Race/Ethnicity, 2002-2003 (available at http://www.statehealthfacts.kff.org/cgi-bin/

could construe as de facto poll taxes in the absence of an affidavit ID option—will not fall most heavily on persons of color.

Further, census data demonstrate that in the United States African Americans and Latinos are more than three times more likely than whites to register to vote at a public assistance agency. Whites are more likely than either African Americans or Latinos to have registered to vote when seeking a driver's license.[7] In Georgia, 77.3% of citizens who are served by the Temporary Assistance for Needy Families program are black, compared to 20.1% who are white.[8] Public assistance offices in Georgia, unlike DDS offices, do not provide photo IDs to clients as a regular part of their services to the public. Accordingly, a form of voter registration far more likely to be used by minorities than by whites will no longer provide the voter with full eligibility to vote in Georgia. Unlike voters who register at DDS, voters who register at public assistance offices must visit another government office to become fully eligible, with no option of proving their identity by affidavit if they do not make the additional visit. Georgia has failed to meet its burden under Section 5 by demonstrating that the disproportionate use of public assistance voter registration by minorities as reflected in national data is not the case in Georgia.[9]

The findings of independent studies of photo identification requirements elsewhere also suggest that H.B. 244's elimination of the affidavit ID option would substantially burden minority voters. The Report of the National Commission on Federal Election Reform, chaired by former Presidents Gerald Ford and Jimmy Carter, identified two problems with voter identification provisions: the burden the requirements place on voters; and the risk of selective and discriminatory enforcement. The report found that rural poor and urban voters are disproportionately represented among the 6 to 10 percent of registered voters who do not possess official state identification. Additionally, the Task Force report found that identification requirements create the opportunity for selective enforcement that can take either innocuous or invidious forms when poll workers request photo identification only from voters unknown to them.[10]

Studies conducted in other states confirm the evidence and conclusions above. The University of Wisconsin-Milwaukee Employment and Training Institute published a report in June 2005 highlighting the disparate rates of driver's license possession between white and minority citizens in that state.[11] The study found that the rate of driver's license possession

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healthfacts.cgi?action=profile&area=Georgia&category=Demographics+and+the+Economy&subcategory=People+in+Poverty&topic=Poverty+Rate+by+Race%2Fethnicity).

[7] U.S. Census Bureau, Voting and Registration in the Election of November 2000, Detailed Tables for Current Population Report, P20-542, Table 14, "Method of Registration Among Those Who Registered After January 1, 1995, By Selected Characteristics: November 2000 (available at http:www.census.gov/population/www/socdemo/voting/p20-542.html).

[8] Georgia Department of Human Resources, Fact Sheet, "TANF in Georgia," November 2003 (available at http://dfcs.dhr.georgia.gov/DHR-DFCS/DHR-DFCS_CommonFiles/4922055TANF_in_Georgia.pdf).

[9] Georgia's new structure also runs counter to the purpose of the National Voter Registration Act, which was designed to remove bureaucratic hurdles to voter participation.

[10] JOHN MARK HANSEN, TASK FORCE ON THE FEDERAL ELECTION SYSTEM: VERIFICATION OF IDENTITY (Jul. 2001) (available at http://millercenter.virginia.edu/programs/natl_commissions/commission_final_report/task_force_report/hansen_chap6_verification.pdf).

[11] JOHN PAWASARAT, THE DRIVER LICENSE STATUS OF THE VOTING AGE POPULATION IN WISCONSIN (June 2005) (available at http://www.uwm.edu/Dept/ETI/barriers/DriversLicense.pdf).

among African-Americans was half that for whites. This disparity increased among younger drivers, where white adults 18-24 were three times as likely as their black peers to possess a driver's license. Only 22% of black males in that age group had a driver's license.

The Department of Justice is familiar with these facts and has denied pre-clearance to similar photo identification schemes. In 1994, Louisiana passed legislation that would require only first-time voters, who registered by mail, to produce photo identification before they could vote.[12] The Department objected, pointing out that African-Americans are "four to five times less likely than white person in the state to possess a driver's license . . . ."[13] The Attorney General concluded that such a disparity "will eliminate certain of the gains to minority voters . . . and 'would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.'"[14] Louisiana now allows voters to establish their identity through signed affidavit.

Georgia's African-American population is five times less likely than whites to have access to a motor vehicle. However, Georgia's H.B. 244—unlike the Louisiana statute that applied only to first-time voters who registered by mail—requires a driver's license or other photo identification to be presented *every* time *any* voter attempts to cast a ballot.[15]

In August 2005, the state of Georgia provided the Justice Department with data regarding racial identity of those with government-issued identification cards such as driver's licenses, organized by county. Of the Georgians with state-sponsored ID whose racial identity is known, the racial breakdown is as follows: 67% white, 27.5% black, 2% Hispanic, 1.3% Asian American. At first glance, this appears to roughly track the demographics of the state's broader population. The racial categorization data is inconclusive, however, because Georgia does not know the race of 42% of those to whom a driver's license or identification card was issued.

Indeed, closer examination of the county data suggests that African Americans in Georgia may be less likely to possess a driver's license or other form of government identification. The data provided by Georgia allows a comparison of the total number of driver's licenses and identification cards per county. United States Census data identifies the 10 Georgia counties with the highest percentage of African-Americans as those listed above on page 3 of this letter, and the 10 counties with the highest percentage of whites as Towns, Fannin, Union, Dade, Dawson, Catoosa, Pickens, Walker, Brantley, and White. The African-American counties

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[12] 1994 La. ALS 10 § 115(F).

[13] Letter from Deval L. Patrick, United States Assistant Attorney General, to Sheri Morris, Louisiana Assistant Attorney General (Nov. 21, 2004).

[14] Id. (quoting Beer v. United States, 425 U.S. 130, 141 (1976)).

[15] Georgia has also failed to produce adequate data that grapples with the practical consequences of its law. Without the affidavit ID option, for example, a Georgia voter whose wallet or purse is stolen on or just before election day may also suffer the theft of her right to vote. National data show that blacks are almost three times more likely than whites to be victims of purse snatching and pocket picking. See U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, Criminal Victimization in the United States, 2003, Table 5 "Personal Crimes 2003: Number of victimizations and victimization rates for persons age 12 and over, by type of crime and race of victims" (available at http://www.ojp.usdoj.gov/bjs/pub/pdf/cvus0301.pdf).

have only 87.7% of the IDs per 1000 voting-age residents as the overwhelmingly white counties.[16]

Jurisdiction	Racial Population	# of IDs per 1000 Voting-Age Residents
10 Georgia counties where greatest percentage of population is black	59.5%-77.8% black	913
State of Georgia	28.7% black 65.1% white	986
10 Georgia counties where greatest percentage of population is white	93.4%-97.1% white	1041

This data does not indicate that 91.3% of voting-age African Americans have state-issued identification. While the predominantly white counties are only 2.9% to 6.6% minority, the predominantly black counties range from 21.5% to 39.2% white. It is possible that by omitting the whites in these predominantly black counties the disparities would be even starker.

This county analysis, however, is valuable in that it demonstrates the need for Georgia to provide better data about whether H.B. 244 is retrogressive. Indeed, the ultimate question is *not* whether state records show that minorities are just as likely as whites to have applied for a driver's license or other government-issued ID. ***The most important question is what minorities bring to the polls on Election Day to establish their identity***. On that score, Georgia has failed to satisfy its burden by providing the most relevant information—racial data on those who have utilized the affidavit ID option. Under the earlier law, voters used affidavits not simply because they were never issued a valid photo identification, but also because they may have misplaced or forgotten that information when coming to their polling place. Thus, the affidavit data provides critical insight into whether or not H.B. 244 will have a retrogressive impact.

III. Eliminating the affidavit ID option is particularly severe in light of loosened restrictions to cast an absentee ballot.

Georgia has failed to show that its elimination of the affidavit ID option will not be retrogressive, especially in light of its liberalization of absentee ballot use. Georgia law currently limits absentee voting to persons who are required to be absent from their precinct of residence throughout election day, are 75 years of age or older, disabled, or meet other narrow requirements.[18] House Bill 244 would allow any voter to cast an absentee ballot by mail without

[16] U.S. Census, County Population Estimates by Age, Sex, Race, and Hispanic origin, July 1, 2004 (available at http://www.census.gov/popest/datasets.html).
[18] Ga. Code 21-2-380.

an excuse within a 45-day period. Absentee voters are exempt from any photo identification requirement.

The Georgia Legislature loosened absentee voting requirements even though it had far more evidence of past fraud arising from absentee ballots than from casting ballots at the polls. In 2001, Georgia's Secretary of State established an Election Fraud Task Force to investigate problems with Georgia's election administration. The Task Force was "especially concerned about absentee ballot abuse . . . ."[19] In terms of voting at the polls, however, Georgia's Secretary of State has written that she is not aware of a single instance of such fraud occurring during her tenure as both Assistant Secretary of State, and Secretary of State. The Secretary also points out that such fraud would be discovered when the actual voter voted either before or after the impersonator. The record of the first vote would prevent a second vote, a fact likely to be protested by the legitimate voter.

According to Hans A. von Spakovsky, the former vice chairman of Fulton County's elections board and current Counsel to the Assistant Attorney General of the Civil Rights Division, "absentee ballots represent the easiest way to steal an election."[20]

Proponents of H.B. 244 most frequently cited a case of *absentee ballot fraud* in Dodge County in 1996 as justification for restricting permissible identification for voters at the polls. But H.B. 244 expands the pool of absentee voters while exempting them from identification requirements imposed on those who vote at the polls.

A national study has found that whites are about twice as likely as blacks to vote by absentee ballot.[21] House Bill 244 makes voting by absentee ballot easier, and makes voting at the polls more difficult. To the extent that Georgia fails to show that its absentee voters are not disproportionately white and that significant numbers of minority voters have not used affidavits at the polls, the state fails to meet its burden of showing that H.B. 244 is not retrogressive. One can create colorful hypotheticals in which most minority voters who fail to bring government-issued ID to the polls suddenly muster the foresight to apply for a no-excuse absentee ballot and submit the absentee ballot weeks before the election. But speculation and conjecture do not substitute for evidence establishing lack of retrogressive impact that Section 5 requires Georgia provide to meet its legal burden.

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[19] Editorial, *Focusing on Fraud; Numbers and anecdotes show the need for a task force targeting flaws in Georgia's election process*, Atlanta Journal-Constitution, Aug. 17, 2001, at 20A.

[20] Memorandum from Hans A. von Spakovsky, Attorney and Government Affairs Consultant, on No Fault Absentee Balloting, p. 1 (Mar. 29, 2001) (available at http://www.hss.caltech.edu/~voting/von_spakovsky-1.pdf).

[21] JOHN MARK HANSEN, TASK FORCE ON THE FEDERAL ELECTION SYSTEM: EARLY VOTING, UNRESTRICTED ABSENTEE VOTING, AND VOTING BY MAIL (Jul. 2001) (available at http://millercenter.virginia.edu/programs/natl_commissions/commission_final_report/ task_force_report/ hansen_chap5_early.pdf).

IV. A Note on Partisan Application of Section 5

Recently, various commentators have called into question the stellar nonpartisan credentials of the Justice Department. We continue to have faith that the Department of Justice can administer Section 5 in a nonpartisan way.

Given that Georgia's racial minorities vote predominantly Democratic, this bill obviously raises partisan concerns. But questions of whether H.B. 244 advantages one political party or an individual's personal policy preference for or against the affidavit ID option are irrelevant to a Section 5 analysis. The burden is on the state of Georgia to show that the elimination of the affidavit ID option does not worsen the political position of minorities. The state of Georgia has not provided the most important information needed to determine this objective fact—the racial identity of those who have used affidavits in past elections.

This matter is therefore an excellent opportunity for the Voting Section to reaffirm its commitment to protecting minority voters while demonstrating its ability to administer Section 5 in a nonpartisan fashion.

V. Questions for Letter for Additional Information

Georgia cannot carry its burden without providing additional data culled from affidavits. Specifically, the Department of Justice should ask the following questions regarding Georgia's 2004 Primary and General Elections, as well as the March 2004 Presidential Preference Primary:

a) How many affidavits affirming identity were submitted by minority voters?

b) How many affidavits affirming identity were submitted in each county in Georgia? How many were submitted in each precinct?

c) How many affidavits affirming identity were submitted by voters in predominantly minority precincts? What was average percentage of voters who submitted affidavits in predominantly minority precincts? What percentage of all voters statewide submitted affidavits?

d) How many absentee ballots were cast? How many were cast by minority voters? How many absentee ballots were cast in each county in Georgia, and how many from voters who live in each precinct?

Conclusion

Section 5 requires a particularly searching examination of Georgia's elimination of the affidavit ID option because it affects access to the franchise itself. The preclearance requirements of Section 5 were designed in direct response to the history of exclusionary tactics that denied black citizens the opportunity to register and cast a ballot. South Carolina v. Katzenbach, 383 U.S. 301, 308-317 (1966). Accordingly, new hurdles that prevent qualified and eligible voters from casting a ballot on Election Day require the most stringent scrutiny under Section 5.

Based on the evidence submitted, Georgia has failed to carry its burden pursuant to Section 5. Without additional information regarding those who have used affidavits in past elections, H.B. 244 should be denied preclearance under Section 5 of the Voting Rights Act.

Very truly yours,

Professor Adam Cox
University of Chicago Law School

Professor Heather Gerken
Harvard Law School

Professor Michael Kang
Emory Law School

Professor Spencer Overton
George Washington University Law School

Professor Daniel Tokaji
Moritz College of Law
Ohio State University

washingtonpost.com

Justice Staff Saw Texas Districting As Illegal

Voting Rights Finding On Map Pushed by DeLay Was Overruled

By Dan Eggen
Washington Post Staff Writer
Friday, December 2, 2005; A01

Justice Department lawyers concluded that the landmark Texas congressional redistricting plan spearheaded by Rep. Tom DeLay (R) violated the Voting Rights Act, according to a previously undisclosed memo obtained by The Washington Post. But senior officials overruled them and approved the plan.

The memo, unanimously endorsed by six lawyers and two analysts in the department's voting section, said the redistricting plan illegally diluted black and Hispanic voting power in two congressional districts. It also said the plan eliminated several other districts in which minorities had a substantial, though not necessarily decisive, influence in elections.

"The State of Texas has not met its burden in showing that the proposed congressional redistricting plan does not have a discriminatory effect," the memo concluded.

The memo also found that Republican lawmakers and state officials who helped craft the proposal were aware it posed a high risk of being ruled discriminatory compared with other options.

But the Texas legislature proceeded with the new map anyway because it would maximize the number of Republican federal lawmakers in the state, the memo said. The redistricting was approved in 2003, and Texas Republicans gained five seats in the U.S. House in the 2004 elections, solidifying GOP control of Congress.

J. Gerald "Gerry" Hebert, one of the lawyers representing Texas Democrats who are challenging the redistricting in court, said of the Justice Department's action: "We always felt that the process . . . wouldn't be corrupt, but it was. . . . The staff didn't see this as a close call or a mixed bag or anything like that. This should have been a very clear-cut case."

But Justice Department spokesman Eric W. Holland said the decision to approve the Texas plan was vindicated by a three-judge panel that rejected the Democratic challenge. The case is on appeal to the U.S. Supreme Court.

"The court ruled that, in fact, the new congressional plan created a sufficient number of safe minority districts given the demographics of the state and the requirements of the law," Holland said. He added that Texas now has three African Americans serving in Congress, up from two before the redistricting.

Texas Republicans also have maintained that the plan did not dilute minority votes and that the number of congressional districts with a majority of racial minorities remained unchanged at 11. The

total number of congressional districts, however, grew from 30 to 32.

The 73-page memo, dated Dec. 12, 2003, has been kept under tight wraps for two years. Lawyers who worked on the case were subjected to an unusual gag rule. The memo was provided to The Post by a person connected to the case who is critical of the adopted redistricting map. Such recommendation memos, while not binding, historically carry great weight within the Justice Department.

Under the Voting Rights Act of 1965, Texas and other states with a history of discriminatory elections are required to submit changes in their voting systems or election maps for approval by the Justice Department's Civil Rights Division.

The Texas case provides another example of conflict between political appointees and many of the division's career employees. In a separate case, The Post reported last month that a team was overruled when it recommended rejecting a controversial Georgia voter-identification program that was later struck down as unconstitutional by a court.

Mark Posner, a longtime Justice Department lawyer who now teaches law at American University, said it was "highly unusual" for political appointees to overrule a unanimous finding such as the one in the Texas case.

"In this kind of situation, where everybody agrees at least on the staff level . . . that is a very, very strong case," Posner said. "The fact that everybody agreed that there were reductions in minority voting strength, and that they were significant, raises a lot of questions as to why it was" approved, he said.

The Texas memo also provides new insight into the highly politicized environment surrounding that state's redistricting fight, which prompted Democratic state lawmakers to flee the state in hopes of derailing the plan. DeLay and his allies participated intensively as they pushed to redraw Texas's congressional boundaries and strengthen GOP control of the U.S. House.

DeLay, the former House majority leader, is fighting state felony counts of money laundering and conspiracy -- crimes he is charged with committing by unlawfully injecting corporate money into state elections. His campaign efforts were made in preparation for the new congressional map that was the focus of the Justice Department memo.

One of two DeLay aides also under indictment in the case, James W. Ellis, is cited in the Justice Department memo as pushing for the plan despite the risk that it would not receive "pre-clearance," or approval, from the department. Ellis and other DeLay aides successfully forced the adoption of their plan over two other versions passed by Texas legislators that would not have raised as many concerns about voting rights discrimination, the memo said.

"We need our map, which has been researched and vetted for months," Ellis wrote in an October 2003 document, according to the Justice Department memo. "The pre-clearance and political risks are the delegation's and we are willing to assume those risks, but only with our map."

Hebert said the Justice Department's approval of the redistricting plan, signed by Sheldon T. Bradshaw, principal deputy assistant attorney general, was valuable to Texas officials when they defended it in court. He called the internal Justice Department memo, which did not come out during the court case, "yet another indictment of Tom DeLay, because this memo shows conclusively that the map he produced violated the law."

DeLay spokesman Kevin Madden called Hebert's characterization "nonsensical political babble" and echoed the Justice Department in pointing to court rulings that have found no discriminatory impact on minority voters.

"Fair and reasonable arguments can be made in favor of the map's merits that also refute any notion that the plan is unfair or doesn't meet legal standards," Madden said. "Ultimately the court will decide whether the criticisms have any weight or validity."

Testimony in the civil lawsuit demonstrated that DeLay and Ellis insisted on last-minute changes during the Texas legislature's final deliberations. Ellis said DeLay traveled to Texas to attend many of the meetings that produced the final map, and Ellis himself worked through the state's lieutenant governor and a state senator to shape the outcome.

In their analysis, the Justice Department lawyers emphasized that the last-minute changes -- made in a legislative conference committee, out of public view -- fundamentally altered legally acceptable redistricting proposals approved separately by the Texas House and Senate.

"It was not necessary" for these plans to be altered, except to advance partisan political goals, the department lawyers concluded.

Jerry Strickland, a spokesman for Texas Attorney General Greg Abbott, said he did not have any immediate comment.

The Justice Department memo recommending rejection of the Texas plan was written by two analysts and five lawyers. In addition, the head of the voting section at the time, Joseph Rich, wrote a concurring opinion. Rich has since left the department and declined to comment on the memo yesterday.

The complexity of the arguments surrounding the Voting Rights Act is evident in the Justice Department memo, which focused particular attention on seats held in 2003 by a white Democrat, Martin Frost, and a Hispanic Republican, Henry Bonilla.

Voting data showed that Frost commanded great support from minority constituents, while Bonilla had relatively little support from Hispanics. The question to be considered by Justice Department lawyers was whether the new map was "retrogressive," because it diluted the power of minority voters to elect their candidate of choice. Under the adopted Texas plan, Frost's congressional district was dismantled, while the proportion of Hispanics in Bonilla's district dropped significantly. Those losses to black and Hispanic voters were not offset by other gains, the memo said.

"This result quite plainly indicates a reduction in minority voting strength," Rich wrote in his concurring opinion. "The state's argument that it has increased minority voting strength . . . simply does not stand up under careful analysis."

Staff writer R. Jeffrey Smith and researcher Julie Tate contributed to this report.

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SECTION 5 RECOMMENDATION MEMORANDUM: December 12, 2003

Re: House Bill 3 (Congressional redistricting plan enacted by the Texas Legislature) (2003-3885) and House Bill 1 (Extension of congressional candidates filing period, moving primary election date, procedures for canvassing, late counting of ballots) (2003-3917)

TIME LIMIT

Submission Received:	October 21, 2003
Supplemental Information Received:	October 23 through December 11, 2003
Due Out Date:	December 22, 2003

FACTUAL INVESTIGATION AND LEGAL REVIEW

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RECOMMENDATION: Objection

I. BACKGROUND

A. Demographics and statistics

According to the 2000 Census, the State of Texas has a total population of 20,851,820, of whom 2,399,083 (11.5%) are African American and 6,669,666 (31.9%) are Hispanic. Of the state's 14,965,061 residents of voting age, 1,639,173 (10.9%) are African American and 4,282,901 (28.6%) are Hispanic. During the past decade, the state's population increased by over ten percent. Overall, the white population percentage decreased, the black population percentage remained constant, and the Hispanic population has increased.

B. The benchmark plan

Under the apportionment resulting from the 2000 Census, the state has 32 congressional districts, an increase of two from the previous apportionment.

During its first regular session following the release of the census data, the state legislature adjourned without enacting redistricting legislation for either legislative or congressional districts. Under such circumstances, the state constitution creates the five-member Legislative Redistricting Board [LRB] to redistrict the legislature. The LRB, however, does not have the authority to reapportion congressional districts. As a result, the congressional redistricting plan enacted in 1996 after the Bush v. Vera, 517 U.S. 952 (1996), decision remained in effect.

From 2000 to 2001, several lawsuits were filed in both state and federal courts to redraw the congressional districts. As required by Growe v. Emison, 507 U.S. 25 (1993), the three-judge federal panel hearing the case issued a deadline for the state to redraw its congressional plan. When that deadline passed, the court federal panel redrew Texas' congressional districts and issued its opinion on November 14, 2001. Balderas v. Texas, Civil No. 6:01-CV-158, slip op. (E.D. Tex. Nov. 14, 2001) (per curiam), aff'd mem., 122 S. Ct. 2583 (2002). A copy of the court's opinion is appended at Tab 7. This plan preserved the basic configuration of the 1991 plan enacted by the legislature and protected all incumbents while adding the required two seats.

In 11 of the districts, minority persons constitute a majority of the total population with Hispanics making up a majority in seven, while African Americans do not constitute a majority of the total population in any district. In the remaining four districts, a combined minority population constitutes a majority of the population. The benchmark plan also has 11 districts in which minority persons constitute a majority of the voting age population [VAP]. With regard to those districts, Hispanics are a majority of the VAP in seven, while again African Americans are a majority in none. The remaining four districts have a combined minority majority VAP. Under the benchmark plan, nine districts have a majority minority citizenship voting age population [CVAP]. In six of these, Hispanics are a majority of the CVAP, while none have a majority African American CVAP. The three remaining districts have a combined majority minority CVAP. The complete demographics for the benchmark plan are set forth at Tab 2.

This is the benchmark for our analysis.

C. The proposed plan

On October 21, 2003, the state submitted its congressional redistricting plan. The plan changed the composition of 31 of the 32 districts.

The submitted plan results in 11 districts in which minorities comprise a majority of the total and voting age populations: Hispanics are a majority in eight of these, and in three, the combined minority population exceeds fifty percent; in none of the districts are African Americans a majority of either population. With regard to citizen VAP, black persons are a majority in one and Hispanics are a majority in six. The complete demographics for the proposed plan are set forth at Tab 2.

II. FACTUAL ANALYSIS

A. Information from the state

1. The redistricting process

After the 2002 elections gave Republicans control over both houses of the legislature and the governorship, the new house speaker, Rep. Tom Craddick (A), appointed a Committee on Redistricting [House committee]. Supporters of mid-term redistricting argued that the current distribution of congressional seats, 17 occupied by Democrats and 15 by Republicans, did not accurately reflect the majority-Republican voting behavior of the current electorate. In response to a request by the chairman of the new Redistricting Committee, Joe Crabb (A), the Texas Attorney General provided an advisory opinion stating that the legislature could adopt a new redistricting plan based on 2000 Census data even though the Balderas court had issued a plan which would suffice for the rest of the decade. Tex. Atty. Gen. Op. GA-0063 (Apr. 23, 2003).

The House committee held hearings on redistricting May 2-4, 2003, in Austin. On May 6, 2003, it adopted a plan named 1180C[1/] and sent it to the House floor. Under house rules, a two-thirds quorum (100 of 150) was needed for debate. To deny the house of its quorum, 53 of 62 Democratic members traveled to Ardmore,

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[1/] The state adopted a sequential numbering system for identifying all redistricting plans considered in the process. For example, the 1996 plan was 1000C with the "C" denoting a congressional plan, and the benchmark plan adopted by the Balderas court is 1151C.

Oklahoma and remained there through May 15, 2003, the house's deadline for introducing new legislation for that session. Consequently, the session ended without passage of a redistricting bill. On June 26 and 28, 2003, the House committee held interim regional hearings on Plan 1180C in San Antonio, Lubbock, Brownsville, Houston, Dallas, and Nacogdoches.

On June 30, 2003, Governor Rick Perry called a special legislative session to address redistricting. The house, now with a quorum, approved Plan 1268C on July 7, 2003. The Senate Committee on Jurisprudence held hearings in Laredo, San Angelo, McAllen, Houston, Corpus Christi, Dallas, Waco, and Austin from June 28 through July 14, 2003. On July 23, the Senate Committee approved Plan 1327C and sent it to the senate floor. The bill did not advance because, under the senate's rules, it could not be debated without the consent of two-thirds, or 21 of the 31 members, a total which could not be reached.

The first special session ended on July 28, 2003, without senate action on redistricting. Later that same day, Governor Perry called a second session. Lieutenant Governor David Dewhurst, the senate's presiding officer, announced that he would not introduce a "blocker bill" in the second session. Previously, the senate often began its legislative sessions by introducing and immediately reporting out of committee a pro forma bill for the sole purpose of keeping that bill, not intended for passage, at the top of its legislative calendar. Once there, this bill prevented the senate from considering any other bills without suspending the legislative order of business by a two-thirds vote.[2/]

In response, 11 Democratic senators refused to attend the second special session and traveled to Albuquerque, New Mexico to deny the senate the two-thirds quorum needed to convene the body. The house again passed Plan 1268C, but the second special session ended on August 26, 2003, without action by the senate. On September 2, 2003, one of the 11 senators, Sen. John Whitmire (A), returned to Texas, declaring that he would provide the needed presence for a quorum. The state has characterized these efforts to deny a quorum in each chamber as partisan moves intended solely to keep incumbent Anglo Democratic Members of Congress in power.

[2/] On August 15, 2003, Texas submitted this action for review under Section 5 as a voting change. We responded that the practice was an internal legislative parliamentary rule or practice outside of the purview of Section 5.

Governor Perry called the third special session on September 15, 2003. The house approved Plan 1268C again. The senate debated Plan 1353C, which had been approved by the Senate committee, made two amendments to it, and approved it as 1362C. To resolve differences between the two versions, a conference committee was appointed which produced a new plan, 1374C. This plan was approved by the house on October 10, by the senate on October 12, and signed by the Governor on October 13, 2003, as H.B. No. 3.

The state informs us that more hearings were held and testimony received during this redistricting process than during the 1991 or 2001 redistricting debates or in consideration of any other legislative proposal in memory. Beyond the typical notification and publicity accompanying legislative hearings, the house sent interested parties Spanish and English announcements and faxed notices in Spanish and Vietnamese to media serving the minority community. At each hearing, a Spanish-language translator was available, and at the Houston hearing, a Vietnamese-language translator was also provided. At the house field hearings, large maps were on display of the benchmark plan and proposed Plan 1180C. Similar publicity was conducted before the senate field hearings, the locations of which were decided after consulting with Democratic and Republican committee members. The state added hearings in Corpus Christi and Waco to accommodate requests by individual lawmakers.

In our discussions with legislators concerning the process, some Republican members of the House committee complained that Democrats and their supporters intentionally tried to disrupt the house field hearings, busing in supporters, providing them with meals, and allowing them to shout down people who wanted to speak in favor of redistricting. The legislators noted that even with these disruptions, the committee generally continued to hear testimony until every person who wanted to speak was allowed the opportunity, sometimes requiring that hearings continue late into the night.

2. The state's submission

In addition to the census data, the state also provided voter registration information in support of its plan, including the data on Spanish-surname registered voters [SSRV].[3] This is

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[3] We have used this analytical tool extensively, both in our litigation and in the preclearance process. Courts have held it to be a valid measure of Hispanic voting strength. See, e.g., Garza v. County of Los (continued...)

a comparison of the names of the people registered to vote compared with a list of Spanish surnames, compiled by the Census Bureau. Because the SSRV reflects a measure of the presence of non-citizens in the Hispanic population, the state presented these data as a better proxy for measuring eligible voters than VAP. Using the SSRV data, the proposed plan contains six majority Hispanic districts.

Finally, for each statewide race between 1996 and 2002 involving a minority candidate and an Anglo candidate, the state provided election returns by precinct or voting tabulation district [VTD]. This creates the ability to reaggregate the vote totals for the statewide races into the configuration of the proposed districts. Thus, through an election simulation approach, one can estimate how the proposed districts would have voted in statewide races. At our request, it also provided the results of its regression analysis of elections in the benchmark districts.

In support of its submission, the state notes it may maintain minority voting strength by either protecting "safe" minority districts or increasing the number of minority districts that are less than "safe" in order to satisfy the requirements of Section 5.[1/] While the submission does not explicitly identify the state's choice in this regard, the legal analysis it provided with the submission notes that the proposed plan "has increased the number of opportunities for the minority communities to elect candidates of choice." Submission, Exh. D at 15. According to the state, the proposed plan exceeds the requirements set forth in Georgia v. Ashcroft, 123 S. Ct. 2498 (2003), because it adds three districts where minority voters can elect their candidates of choice, resulting in 11 such districts in the proposed plan.

[1/](...continued)
Angeles, 756 F.Supp. 1298 (C.D. Cal.) aff'd, 918 F. 2d 763 (9th Cir. 1990); Redistricting of the Texas House of Representatives (UDDOJ file no. 2001-2431)(Nov. 16, 2001).

[1/] As discussed below, the Supreme Court has identified three types of districts that merit consideration as part of the Section 5 analysis. Georgia v. Ashcroft, 123 S.Ct. 2498 (2003). They are: safe districts where "it is highly likely that minority voters will be able to elect the candidate of their choice;" coalitional districts where it is "likely - although perhaps not quite as likely as under the benchmark plan - that minority voters will be able to elect candidates of their choice;" and influence districts "where minority voters may not be able to elect a candidate of choice, but can play a substantial, if not decisive, role in the electoral process." Id. at 2511-12. The state does not discuss influence districts other than to note that they are not as important here in Texas as they were in Georgia. Submission, Exh. D at 14.

Central to the state's conclusion that the proposed plan meets Section 5 standards is its judgment Benchmark 24, 25, and 29 do not provide minority voters with the ability to elect candidates of choice. Through its attorney, the state argues that these districts do not perform for African American or Hispanic voters because they are unable to elect a candidate of their same race in those districts. Benchmark 24 is located in the Dallas-Forth Worth area and Benchmark 25 and 29 are in Harris County.[5]

Benchmark 24/Proposed 24: This district is comprised of portions of Tarrant and Dallas Counties. The district has a 25.7 percent black CVAP, and a 20.8 percent Hispanic CVAP. The SSRV rate is 16.0 percent. Martin Frost, an Anglo Democrat, has represented the district since 1978. The state asserted that under the benchmark configuration minority voters could not elect a minority candidate in the district.

Under the proposed plan, the district has been completely reconfigured and split into six different districts; the greatest part, approximately a quarter of the benchmark district, is located in Proposed 26. Proposed 24 occupies only a small portion of Benchmark 24 and now is comprised of relatively equal portions of Denton, Dallas, and Tarrant Counties. In the state's view neither Benchmark 24 or Proposed 24 provide minority voters with the ability to elect candidates of choice. If so, under Section 5, there is no change in the status quo. The redrawn district has no resident incumbent.[6]

Benchmark 25/Proposed 9: Benchmark 25 is comprised of portions of Fort Bend and Harris Counties. Under the benchmark plan, the district has a 26.1 percent black CVAP and an 18.6 percent Hispanic CVAP for a total minority citizen VAP of 44.3 percent. The SSRV rate is 13.6 percent. Since 2002, Chris Bell, an Anglo Democrat, has represented the district.

Under the proposed plan, the district continues to be comprised of portions of Fort Bend and Harris Counties, but has

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[5] The district numbers in the benchmark and proposed plans do not always correlate because the state did not maintain a geographic consistency in numbering some of the districts. As a result, when referring to a district, this memorandum will identify it by plan, whether benchmark or proposed, and then by its number.

[6] Rep. Frost has been placed in Proposed 6, along with two other incumbents, Rep. Jim Turner (Benchmark 2) (A), and Rep. Joe Barton (Benchmark 6) (A). This proposed district is made up of 66.4% of Benchmark 6, 21.6% of Benchmark 24, and 4.4% of Benchmark 2.

been renumbered as Proposed 9. It has a black CVAP of 46.9 percent and a Hispanic CVAP of 16.6 percent, for a total minority citizen VAP of 63.0 percent. The SSRV rate is decreased to 13.7 percent. By reconfiguring Benchmark 25 into Proposed 9, the state counts this as a new "ability to elect" seat for black voters, thereby increasing the total number of such districts from two to three. Rep. Bell was drawn out of Proposed 9, making it an open seat.

Benchmark 29/Proposed 29: Benchmark 29 is located wholly within Harris County. Under the benchmark plan, the district has a 20.4 percent black CVAP, and a 42.8 percent Hispanic CVAP. The SSRV rate is 39.8 percent. Since 1992, Gene Green, an Anglo Democrat has represented the district.

Under the proposed plan, the district remains in Harris County. Proposed 29 has a black CVAP of 13.8 percent, and a Hispanic CVAP of 46.7 percent. The SSRV rate is increased to 45.9 percent. Rep. Green was drawn out of the district. The state argues that it has enhanced minority voting strength in Proposed 29 even though it still does not have a majority Hispanic SSRV. Further, because it is an open seat, the state views it as one where Hispanic voters can elect a candidate of choice.

The explanation with regard to each of Benchmark 24, 25, and 29 is the same; namely, that "as a result of the polarized voting patterns between African Americans and Hispanics in the Democratic primary, Anglo candidates, when they have a high Anglo component in the district, can take advantage of this polarization to defeat a minority candidate of either minority community in the Democratic primary." Submission, Exh. D at 9. Because these incumbents have not recently faced a credible minority candidate in the Democratic primary,[2] the state does not believe that support for these candidates from the minority community indicates the incumbent is a candidate of choice. According to the state, these three districts were drawn in 1991 as one-third Anglo, one-third Hispanic and one-third African American, to allow Anglo incumbents to control each district.

In sum, the state argues the elimination of Benchmark 24 does not alter the Section 5 balance because minorities there did

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[2] According to the state, a credible minority candidate has only run once in any of the three districts. In 1992, Rep. Green faced a Hispanic candidate who received a majority of the Hispanic vote and was clearly the Hispanic community's candidate of choice. Despite this support, Green defeated him because of the polarized voting in the Democratic primary.

not have an ability to elect, Proposed 9 replaces Benchmark 25 as an ability to elect district for minority voters, and Proposed 29 offers minority voters electoral ability they did not have in Benchmark 29.

Benchmark 23/Proposed 23: Benchmark 23 is comprised of 22 whole counties and portions of two other counties in the southwest portion of Texas with most of the population coming from Bexar and Webb counties. The district has an Hispanic VAP of 63.0 percent, an Hispanic citizen VAP of 57.4 percent and an SSRV of 55.3 percent. Since 1992, Henry Bonilla, a Hispanic Republican, has represented the district.

The proposed plan splits Webb County, removing an Hispanic population of 95,835 persons, and adds Anglo population from Kendall, Kerr, and Banderas Counties. Under the proposed plan, the Hispanic VAP decreases to 50.9 percent, Hispanic citizen VAP decreases to 45.8 percent, and SSRV decreases to 44 percent. Rep. Bonilla remains in the district.

The state identifies Benchmark 23 as a majority Hispanic district where Hispanic voters can elect their candidate of choice, who is Rep. Bonilla. According to the state, he receives significant Hispanic support and greater Hispanic support than most Republican candidates in Texas. The state cites to Justice White's concurrence in Thornburg v. Gingles for the proposition that a minority candidate who receives significant, although not majority minority support, should be considered a candidate of choice. Exh. D at 9.

The state also argues, alternatively, that Hispanics do not vote cohesively in Benchmark 23. Claiming that Rep. Bonilla has received "up to" 40 percent of the Hispanic vote, the state concludes that Hispanics are not able to elect their choice of candidates because they split their vote. Exh. D at 10-11.

Although the submission never identifies Proposed 23 as an "ability to elect" district for Hispanics, several of the state's statements indicate this is the state's position. First, the state notes "Plan 1374c will provide 11 districts in which the minority community can and should elect candidates of choice. In addition to the eight district described above. . . ." Exh. D at 9. District 23 is one of those eight districts "described above." The submission further notes that Proposed 23 will continue to perform in the same manner in which the district has performed under the benchmark. Id. at 14, n.31.

Benchmark 15/Proposed 15: Benchmark 15 contains eight counties, encompassing an area of approximately 180 miles, running north from Hidalgo County, in the lower Rio Grande Valley, to Goliad County. Benchmark 15 is anchored in Hidalgo County, with the district containing approximately 84 percent of the county.

Under the benchmark plan, the district has a total Hispanic population of 78.3 percent; an Hispanic VAP of 74.3 percent; a Hispanic citizen VAP of 69.3 percent; and an SSR of 68.2. Since 1996, Ruben Hinojosa (H) has represented the district. Rep. Hinojosa has not faced opposition in the general election since 1998. In its submission, the state identifies Benchmark 15 as one of the eight districts where minority voters can elect a candidate of choice.

The proposed plan increases the geographic size of the district, expanding it to 13 counties and extending it over 320 miles from Hidalgo and Cameron Counties, in the lower Rio Grande Valley, to Bastrop County, which is adjacent to Travis County and the City of Austin. Approximately 26 percent of Cameron County, including the City of Harlingen and the town of Indio, is added to Proposed 15 while 57 percent of Hidalgo County remains in Proposed 15. The proposed district splits the City of McAllen, assigning 78,412 of its residents to Proposed 25 and leaving 28,002 residents in Proposed 15. Rep. Hinojosa remains in the proposed district. In its submission, the State contends that Proposed 15 remains an ability to elect district.

Proposed 25: The state presents Proposed 25 as one of the "new" minority districts it created. The district has majority Hispanic CVAP and SSRV of 55.0 percent and 55.6 percent respectively. From 2000 to 2002, the SSRV in the proposed district increased by 2.2 percentage points from 53.4 percent to 55.6 percent. The state notes that Proposed 25 is "safely Democratic," with a weighted Democratic Index of 62.2 percent, and a weighted Republican Index of 37.8 percent.

The district includes Hidalgo and Starr Counties near the Mexican border and moves in a northerly direction to the southeastern part of Travis County, encompassing a distance of approximately 300 miles. Although a total of nine counties comprise Proposed 25, the counties that provide over 500,000 of the district's total population of 651,619 are Hidalgo and Travis. Proposed 25 draws approximately 25 percent of its population from Benchmark 15, approximately 25 percent from Benchmark 28, and approximately 40 percent from Benchmark 10. The southeastern part of the City of Austin, in Travis County,

and most of the City of McAllen, in Hidalgo County, are placed in Proposed 25. The state notes that in "[n]o other congressional district in Texas [that has had] a Spanish-surname registration as high," have minorities failed to elect their candidate of choice. Exh. D at 13.

B. Information from other sources

We have received a significant number of comments regarding this submission. Tab 6 contains a compilation of these comments.

Of the 55 African American and Hispanic legislators in the legislature, 53 voted against the redistricting plan. We have either met with or spoken to 22 state house representatives and 13 state senators, of whom 14 are Hispanic, 11 are African American, and nine are Anglo. Of the minority legislators to whom we talked, all but two opposed the redistricting plan. We have either met with, or spoken to, 13 county or city officials from Texas, of whom seven are Hispanic, five are African American, and one is Anglo. Of the local minority elected officials to whom we spoke, all but one opposed the redistricting plan.

The Section has met with fifteen members of the United States House of Representatives, of whom two are African American, four are Hispanic, and nine are Anglo. They all oppose the proposed plan. They also submitted a comment letter, which can be found at Tab 6.

We have met with attorneys and advisors for the League of United Latin American Citizens [LULAC], the Mexican American Legal Defense and Education Fund [MALDEF], the Texas branches of the National Association for the Advancement of Colored People [NAACP], and its Dallas County, Travis County, Webb County, and Hidalgo County branches. LULAC, MALDEF, and the NAACP also provided multiple comment letters, which are contained at Tab 6.

We also have received comment letters from six other state legislators who did not attend any meetings or speak on the telephone with any staff. Of these legislators, four are Hispanic and two are Anglo. Thirty-six (36) locally-elected officials from around the state sent comment letters. In total, the Section received 335 comments against the proposed plan, none in favor of it.

1. Comments regarding the redistricting process

The redistricting process was harshly criticized by some opponents of the plan as unreceptive to the views of minorities. We also met with two of the chief legislative architects of the plan who explained how criticism of the process was unwarranted, and opponents unfairly attempted to disrupt the process.

a. Comments from opponents

When the house first took up the issue of redistricting in 2003, the House committee had not planned to hold field hearings and, when asked about conducting hearings in Laredo or other heavily Hispanic areas of the state, Chairman Crabb allegedly denied the request, telling Rep. Richard Raymond (H)(D) that "there are only two people that I know of on the Committee who speak Spanish. The rest of us would have a very difficult time if we were out in an area other than Austin or other English-speaking areas to be able to have Committee hearings to be able to converse with the people that did not speak English." This comment prompted Rep. Raymond to file a complaint with this Department, which was later withdrawn when he filed suit in federal district court. Subsequently, the House committee agreed to conduct statewide field hearings.

The Redistricting Committee was separated into subcommittees to hold hearings, meaning that the entire committee would not hear all testimony. No Spanish translations of the hearing transcripts were available. None of the hearings were chaired by any of the six minority members of the Committee, including vice-chair Rep. Mike Villareal, an Hispanic.[8]

Democratic members of the house and senate and their supporters did not deny claims that some people had attempted to inflate opposition to redistricting by busing in persons to testify at the hearings. They claimed, however, that Republicans attempted, but failed, to produce an equal number of supporters at the hearings. In addition, we received information alleging that the Harris County Republican Party distributed a flier with a photo of Rep. Sheila Jackson-Lee (B), the local congressional representative, accompanied only by the caption "She will be

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[8] There was also one allegation of a more serious nature. Lauren Kasprzak, a staff member on the House Redistricting Committee, upon leaving the committee expressed in a letter that "seemingly racist remarks" had been made, and Crabb laughed and nodded at remarks made about how the League of Women Voters is the "plague of Women Voters." A copy of the letter is contained at Tab 6.

there to express her views . . . will you be there to express yours?"

We also received comments concerning the senate's decision not to require consent of two-thirds of the senate before debating redistricting. The comments criticized this action as enabling the senate to ignore minority views of redistricting. The rationale of the blocker bill and/or the requirement for a vote to suspend the rules was to require the senate to enact legislation only when there was general consensus so that the majority would not ride rough-shod over the process. According to minority legislators, this device was a traditional practice for almost all legislative sessions and particularly with regard to redistricting. According to the information provided for the litigation challenging this decision, this tradition was broken for the first time to pass the proposed redistricting plan.

Opponents of the plan also called attention to the reversal by the Republican majority of alleged minority gains made in earlier drafts of the redistricting plan. After criticisms by the minority community of any decrease in their voting strength, and concerns for retrogression apparently voiced by at least one person advising the house, both bodies repaired what minorities felt were the most egregious flaws in their plans by restoring benchmark voting strength to several areas of the state. Both plans passed by the house and senate before the final plan had maintained majority minority or influence districts in the Dallas/Fort Worth, San Antonio, and Austin areas.

The final plan drawn by the conference committee, however, reinstated the most criticized changes to the plans. In the eyes of these commentators, this is clear evidence that the state had one map it intended to pass from the beginning, and the process was a sham. Opponents also suggest that the legislators who passed the final plan understood its adverse effects and understood it would disadvantage minorities, even after the house and senate had agreed to more ameliorative plans. Commonly heard among opponents of the plan was criticism of the role played by Rep. Tom DeLay (A) and the director of his political action committee, Jim Ellis. Included in these comments were allegations that the house plan, which provoked the greatest concern for minorities, was brought into a committee hearing room by Jim Ellis and that Rep. DeLay prodded conference committee members to return to these more drastic changes after their respective chambers had eliminated many of them.

The only Hispanic on the conference committee, Sen. Juan Hinojosa (H) (D), reported to us that he had "zero" participation

in the work of the committee and was not even asked to sign off on the conference report. In addition, he said that none of the minority members of the House committee were named to the conference committee. Opponents of the plan also noted that proposed maps were sometimes not disclosed until after any opportunity for comment had passed or that maps were provided with insufficient time before hearings to discover what changes were proposed. The letter from Ms. Kasprzak, a staff member on the House committee, stated that "[t]he public was excluded in any real decision calculus of the committee . . . . we held public hearings . . . on a plan that we never intended to go to the floor. And then we introduced a new plan . . . while someone was writing the other map that we actually intended to be voted out of committee in a back room. . . . With no idea what is to come of their districts, there is no way for the citizens of Texas to truly be heard."

b. Comments from supporters

Rep. Phil King (A), a member of both the redistricting committee and the conference committee, defended the redistricting process as open and fair. The house followed the format of public hearings it had used when considering past redistricting bills. One significant obstacle to receiving public comment was the behavior of opponents of the plan who attempted to disrupt the public comment process and, in the case of the hearing in Brownsville, succeeded in shutting down a public hearing. Complaints that the conference committee had not solicited public comments were based on a misunderstanding of the legislative process. The conference committee is not open to the public, and a special rule would have been needed in order to allow testimony on the conference committee's plan. It is rare that a bill leaving conference committee looks the same as the legislative proposals coming from the two houses of the legislature. It was the conference committee, and not outsiders, which drew the final map, according to Rep. King.

Sen. Todd Staples (A), a member of both the Senate committee and the conference committee, noted that the legislature provided a greater opportunity for public participation in the redistricting process than it does for other legislation. Sen. Staples took exception to allegations of racial animus or racist comments on the part of any legislator. Members of the Senate committee sought and encouraged the input of Spanish-speakers and listened carefully to all comments before drafting any maps. Once the first maps were drawn, additional hearings received more comments and later maps addressed concerns raised. Almost every change made by the conference committee reflected a feature of

some prior map that the committee wished to incorporate into the final plan. The abandonment of the 2/3 rule in the senate was in keeping with the process used to pass prior redistricting bills, according to Sen. Staples.

Rep. Kenny Marchant (A), a member of the House committee, commented that he had never seen a more rigorous process of public hearings for any piece of legislation. The process employed was more comprehensive than that followed in the 1991 and 2001 redistricting cycles. Minority voters had equal access to the process, which was well publicized in minority communities. Opponents of redistricting did not tolerate anyone testifying in favor of redistricting, booing them and not letting them speak at the hearings. Democrats bused supporters to the public hearings for the purpose of disrupting them. The views of more people could have been heard if the hearings had not been disrupted, according to Rep. Marchant. Rep. Ken Grusendorf (A), another member of the House committee, added that the process they followed was more open than that used by the Democrats in passing the 1991 redistricting plan.

2. **Comments regarding specific districts**

Benchmark 24/Proposed 24: Minority legislators have told us that Benchmark 24 provides African American voters with the ability to elect their candidate of choice and that Martin Frost is the candidate of choice in Benchmark 24, even though he is an Anglo, because he is very responsive to the minority community. If Benchmark 24 were an open seat, minority legislators believe that it is highly likely that a black candidate would prevail.

On October 29, 2003, we met with several Democratic members of the Texas congressional delegation to discuss the proposed redistricting plan. Rep. Frost told us that African American voters controlled elections in Benchmark 24 because they control the vote in the primary. Frost believes that, if he were to retire tomorrow, the district would elect an African American candidate as his successor. Black voters continue to vote for him because he has been responsive to their issues and needs in the communities, according to Frost.

Some Anglo Republican legislators also appear to view Benchmark 24 as a district where African American voters have an ability to elect. State Rep. Phil King (A), a member of both the House Redistricting Committee and the conference committee, expressed concern for decreasing minority electoral strength in Benchmark 24. In his recent deposition, he characterized the district as a "minority district" which legal counsel had advised

him to approach "with caution" due to concerns for Voting Rights Act compliance. King Dep.at 79, 112-17. In a statement to the redistricting committee, he commented on why he had withdrawn his original plan: "[I]n the hopes of trying to respond to the concerns that [Rep. Raymond (H)] and others voiced and in the hope of trying to expedite the DOJ preclearance process, I moved [District] 24 back into its original district."[9] In addition, in the press a few days before the final plan came out of conference committee, King said that attorneys were concerned that there would be a violation of the Voting Rights Act because the Proposed 9 would not "offset the loss of Martin Frost's district."[10] Republican Sen. William Ratliff (A) also stated, "I do recall conversation about creating the long skinny districts in order to - to o[ver]come the loss of the district in the Dallas/Fort Worth area." Ratliff Dep. at 16.[11]

The NAACP and other groups have told us that Rep. Frost is the candidate of choice of minority voters in Benchmark 24. According to the "scorecards" of minority groups, he has been exceptionally responsive to the needs of the minority community.

Minority and Anglo legislators agree that the proposed plan creates no new district in the Dallas-Forth Worth area offering minorities the ability to elect. According to the persons to whom we have talked and comment letters we have received, the minority population there has been fragmented. Rep. Frost has been drawn out of Proposed 24, which has become an open seat where Anglo Republican voters will dominate. State Rep. Kenny Marchant (A) has announced he will run for the open seat. Comments from minority contacts indicate that Rep. Marchant is not considered a minority candidate of choice, having voted against a hate crimes bill strongly favored by the minority community, and having a score of "F" on the most recent NAACP scorecard for Texas state legislators.

Benchmark 25/Proposed 9: Most of the people who have commented believe that Benchmark 25 is a district that provides

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[9] Redistricting Committee Hearing, July 3, 2003. Contemporaneous news accounts reported similar comments by Rep. King.

[10] During our meeting with Rep. King, he admitted making such comments after staying up all night and not reviewing a press release before it went out. He sought to assure us that he did not believe, contrary to anything he may have said earlier, that Proposed 9 was retrogressive. In correcting the record, however, he made no remarks concerning Proposed 24.

[11] R.G. Ratcliffe, New map targets Anglo Democrats, Houston Chronicle, October 5, 2003 at 1

black voters with the ability to elect their candidates of choice. Everyone agrees that the black community is generally cohesive, and that in primaries, black voters are a majority of the voters in the election. The one exception is the 2002 Democratic congressional primary. In that election, black voters were not cohesive and split their votes between Carroll Robinson (B) and Chris Bell (A).

Rep. Bell, the Democratic incumbent in Benchmark 25, told us that there really is no substantial difference in electoral behavior between Benchmark 25 and Proposed 9. He argued that while black voters have been added to Proposed 9, Benchmark 25 already provides black voters with the ability to elect a candidate of choice. He further stated that African Americans usually vote cohesively, but that his race with Robinson was an anomaly. Both he and Robinson served in at-large positions on the Houston City Council, and faced each other in the 2002 Democratic primary. Had black voters followed their usual pattern of cohesive voting, Robinson would have won.

The Texas NAACP, minority legislators, and local elected officials from the Houston area believe that the minority vote was not cohesive because Carroll Robinson was not a strong enough candidate. The consensus is Robinson failed to achieve the usual level of black voter cohesion because of conflicts he had with Houston's Mayor Lee Brown (B). As a result, the mayor and other high-ranking black elected officials joined in a public endorsement of Bell, leading to the unusual splintering of the black vote.

As an open seat, most commentators said Proposed 9 is not substantially more likely to elect a black-preferred candidate than Benchmark 25. The core three areas of Benchmark 25, Sunny Side, Missouri City, and Hiram Clark, have been retained, and that is where the strength of black voters in the district lies. These areas have very high turnout rates and are politically active. New black voters drawn into the proposed district live in apartment complexes and have very low turnout.

Commentators note that Rep. Bell is very responsive to the black community as has received high scores on the NAACP report card. Further, Kent Bentsen (A), who previously represented Benchmark 25, was also mentioned repeatedly as a candidate of choice for black voters.

We have spoken with two black elected officials who disagree with the statements described above. They are State Rep. Ron Wilson, the only black legislator to vote in favor of the

proposed redistricting plan, and candidate Carroll Robinson. Each has told us that Benchmark 25 has historically elected an Anglo representative, and that this person has not been a candidate of choice for black voters. They believe that Proposed 9 will have the capability of electing a black representative, noting that the black voters added to Proposed 9 from Rep. DeLay's district have high turnout rates. Robinson said that while there might not be a big difference between Benchmark 25 and Proposed 9, it will be easier for a black person to win the Democratic nomination. Rep. Wilson stated to us his belief that a white person, regardless of party affiliation, can not represent black persons as effectively as someone who is black. Kyle Janek, an Anglo state senator from the Houston area, agreed with this assessment.

Benchmark 23/Proposed 23: All the minority legislators with whom we spoke told us that the proposed plan eliminates the ability of Hispanic voters to elect their candidate of choice in District 23. Both minority and Anglo legislators view Benchmark 23 as a district where Hispanic voters have an ability to elect. Their view is that it is unlikely an Anglo candidate would be able to win in Benchmark 23, demonstrated by the fact that an Anglo has not been able to win a primary since 1990. Minority legislators believe that if incumbent Henry Bonilla did not run in the next election, the voters would elect a Democratic Hispanic candidate.

According to these commentators, Rep. Bonilla is not the candidate of choice of Hispanic voters in Benchmark 23. LULAC gave him an 18 percent rating on issues concerning Hispanic voters, and the NAACP gave him an F. Rep. Bonilla has been steadily losing Hispanic support in the district because he has been nonresponsive to the Hispanic community and currently is able to retain his seat only through force of incumbency.

Extreme polarization of the vote could be seen in the 2002 election, which Rep. Bonilla nearly lost. Some commentators believe that Rep. Bonilla used to receive as much as 25 percent crossover vote in Webb County, but a unified Democratic party supported Bonilla's challenger Cuellar in 2002. Anglo voters in northwest San Antonio turned out in record numbers to vote for Rep. Bonilla. Others have argued that Cuellar, despite being Governor Perry's former Secretary of State, ran a race that appealed to the Hispanic voter base at the expense of Anglo voters.

With a drop in the Hispanic citizen VAP in Proposed 23 of 12 percentage points to 47 percent, both minority and Anglo

legislators agree that Hispanic voters would no longer decide who is elected in the district. Minority legislators also cite the splitting of Webb County as evidence of retrogression. Webb County has a greater percentage of Hispanic residents than any other county, and it is the fastest growing county in Texas.

MALDEF, LULAC, NAACP, and officials from Webb and Hidalgo Counties agree that Hispanic voters have lost the ability to elect a candidate of choice in Proposed 23. Their comment letters and presentations at our meetings explain that Anglo Republicans were added to the district to ensure that Rep. Bonilla would be able to get re-elected in the future. The proposed plan does this by fracturing Hispanic communities of interest, particularly in Webb County, and placing them in other districts. They note that maps have been drawn which would have preserved the district at the same Hispanic CVAP.

Although we extended an invitation to Rep. Bonilla to speak with us, he declined to respond.

Benchmark 15/Proposed 15: Elected officials and community organizations unanimously characterize Benchmark 15 as a safe district where Hispanic voters are able to elect their candidate of choice. Most, but not all, commentators believe that the district moves from a safe seat to a toss-up seat, where it is unclear whether Hispanic voters will continue to elect their candidate of choice.

According to the district's incumbent, Rep. Hinojosa, Proposed 15 does not provide Hispanic voters with the ability to elect candidates of choice to office. Hinojosa notes that the proposed redistricting plan takes traditional areas of high turnout Hispanic voting strength, such as the Cities of McAllen, Pharr, and Mission, out of the district and places them in Proposed 25, thus splitting Hidalgo County in two. He points out that a high turnout Anglo population, which is overwhelmingly Republican, is added to Proposed 15. This would cause future elections to be a "toss-up." As Rep. Hinojosa argues, in order for a Democrat to win in this part of Texas, the statewide election index must be at least 56 to 57 percent Democratic. The rating in Proposed 15 has been dropped to 55 percent in 2002 and 50.2 percent in 2000. Rep. Hinojosa notes that Vice-President Gore easily won Benchmark 15 with 68 percent of the vote but would have lost with 48 percent of the vote in Proposed 15. Various state and local officials have submitted comments echoing Congressman Hinojosa's sentiments with respect to Proposed 15.

State Rep. Lionel Pena, who represents a legislative district in south Texas, shares Rep. Hinojosa's concern about Proposed 15. In his recent deposition in the Sessions v. Perry litigation, Pena stated that in a race for an open seat in Proposed 15, an Hispanic-preferred candidate would "more than likely" lose. Pena's opinion was based on the inclusion in Proposed 15 of Anglo areas in the south like Harlingen and counties in the north such as Bastrop, combined with low Hispanic turnout compared to that of the added Anglo population. Pena Dep. at 10-11, 16-19. Other elected officials have expressed similar concerns.

Several Hispanic advocacy organizations, such as LULAC, MALDEF, and MALC, have submitted comments pertaining to Proposed 15. LULAC and MALC submit that the proposed district is not a safe district for Hispanic voters. During a meeting with LULAC officials, State Rep. Jim Solis (H), who represents areas of Cameron County, referred to McAllen as the "anchor for Hispanic power in the Valley," and to Harlingen as the "anchor for Anglo power and wealth in the Valley." Benchmark 15 keeps McAllen together and excludes Harlingen; Proposed 15 retains less than a third of McAllen and includes all of Harlingen.

In contrast, MALDEF contends that Proposed 15 will continue to perform for Hispanic voters. At a meeting with us, Nina Perales, MALDEF's representative, expressed the view that Proposed 15 remains a seat where Hispanics can still elect their candidate of choice. Several weeks later Perales called us to offer further comment on Proposed 15. In this conversation, Perales had a different emphasis, saying that MALDEF still maintained that, as proposed, the district provided an opportunity for Hispanic voters to elect, but MALDEF was not weighing in on whether this remained a "safe" seat. Perales noted that citizenship, registration, and turnout levels are crucial in order to adequately assess Hispanic voting strength; she emphasized that Hidalgo and Cameron Counties have always had lower turnout than other Texas counties.

Most commentators agree that Hispanic voters will not comprise the majority of Proposed 15's electorate, despite the fact that it has an SSVR level of 57.5 percent. Several persons have submitted information discussing the relevance of turnout and registration to the ability of Hispanic voters in the valley to elect their candidate of choice.[H]

[H] We have received expert reports from Dr. Henry Flores, Dr. Andres Tijerina, and Dr. Jorge Chapa which discuss the present day and historical (continued...)

Proposed 25: A majority of the comments, including those from elected officials, advocacy groups, including MALDEF and LULAC, and most experts consider Proposed 25 a safe district where Hispanic voters have an ability to elect their candidates of choice. At the same time, some have questioned whether Proposed 25 would be "highly likely to elect" a minority-preferred candidate.

These concerns focus mainly on the geographic configuration of Proposed 25. Given the sheer size of the district, some contend that the district pits two very different Hispanic communities against each other: one in South Texas and one in Austin with a resulting decrease in the potential for Hispanic electoral ability. One elected official noted the proposed configuration was like "putting Washington and New York City into one Congressional District."

Rep. Lloyd Doggett (A), the Democratic representative from Benchmark 10 in Austin, describes Proposed 25 as "a dumbbell district" where half of the population is located in Travis County and the other half is located "down in the Valley" in Hidalgo County. Rep. Doggett and State Senator Gonzalo Barrientos (H), who also represents the Austin area, fear that the proposed district will create significant geographic tension between Hispanic voters in the Valley and Hispanic and other voters in Austin.

Hispanic commentators have noted that the concerns of the residents of the Valley are very different from those of residents of central Texas. There are significant differences between the socio-economic levels of Hispanic voters in the two areas. State Rep. Eddie Rodriguez (H) stated that he finds Proposed 25 "offensive" because two Hispanic communities like those are paired, simply to create a new majority Hispanic district, without regard for the interests of those who live there.

These individuals and groups have also raised concerns with respect to how the proposed district's tremendous size will affect the ability of Hispanic-preferred candidates to wage a competitive campaign against any well-funded Anglo opponent.

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[22] (...continued)
impediments that affect the turnout and voter registration rates of Hispanic voters in South Texas. In addition, congressional and state representatives from south Texas, as well as Hispanic advocacy groups, including LULAC and MALDEF, have emphasized the role that turnout and voter registration play with respect to the viability of Hispanic opportunity districts there.

Commentators have pointed out that the candidates who run in Proposed 25 will have five different media markets with which to contend, including two of the most expensive markets in Texas: Austin and San Antonio. A district this size will have the effect of preventing Hispanic candidates from mounting an effective campaign, because Hispanic candidates are generally not well-funded, and often experience difficulty raising funds. The one previously announced Hispanic candidate from the Valley, Kino Flores (H), recently dropped out of the race for Proposed 25 on December 4, 2003, saying that he would be unable to raise sufficient funds to compete with Congressman Doggett.

Benchmark 29/Proposed 29: Several sources have commented that Benchmark 29 is a district in which Hispanic voters can elect a candidate of choice and that its incumbent, Rep. Gene Green, is the minority candidate of choice. None of the comments indicated that the district needed to have its Hispanic population increased in order to elect Hispanic-preferred candidates.

Rep. Green claims he is currently the Hispanic candidate of choice and pointed to his scorecards from minority organizations. LULAC gave him a grade of 72 percent and the NAACP rates him at 86 percent. He noted that he has lost the Anglo vote in his district, so his re-election has only been possible due to Hispanic support.

We also have received a large number of comments concerning those districts in which voters believe that the minority community exerts a significant, if not decisive, influence in congressional elections.

Benchmark 9/Proposed 2: Minority elected officials and advocacy groups consider Benchmark 9 to be an influence district. Benchmark 9 is comprised of the following whole counties: Chambers, Galveston and Jefferson. About four percent of Harris County is also in the district. The district's black CVAP is 21.3 percent, and the Hispanic CVAP is 9.7 percent. The combined minority CVAP is 31.0 percent. The SSRV for the district is 8.5 percent. Since 1996, the district has been represented by Anglo Democrat Nick Lampson.

Under the proposed plan, the majority of Benchmark 9, 47.7 percent, is placed into Proposed 2 with the remainder in Proposed 14 and 22. Proposed 2 is made up of all of Jefferson County, approximately 72 percent of Liberty County, and ten percent of Harris County. Galveston and Chambers Counties have been completely removed. The district's black CVAP is 19.2 percent,

and the Hispanic CVAP is 8.1 percent. The combined minority CVAP is 27.3 percent. The SSRV for the district is 6.7 percent. While Rep. Lampson has remained in the district, he has been paired with fellow Anglo Democrat, Rep Gene Green, the incumbent in Benchmark 29. It is assumed that Rep. Green will move back into his district, and Rep. Lampson will face a Republican challenger.

Rep. Lampson expressed his objection to the proposed redistricting plan. He said that he is elected to office in large part because of the support of black voters. He stated that the new map deprives minority voters of responsive representation, and over 100,000 minorities in Jefferson County have been placed into Proposed 2, where they will have no influence due to that district's heavily Anglo Republican character.

Minority and Anglo legislators and local officials have noted that black voters in the Cities of Beaumont, Galveston, and Port Arthur are placed in districts where their needs and concerns will not be met. Under the proposed plan, black voters from Galveston County have been removed, and in their place are black voters from Liberty County. According to residents of Benchmark 9, African Americans in Jefferson and Galveston Counties have formed a long-standing community of interest. They share similar needs, industries, and lifestyles while black residents of the largely rural Liberty County have nothing more in common with the black residents of Jefferson County than skin color. They told us that black voters are now placed into districts where their voices will go unheard, and their influence will be lost. Many black voters have been placed into Proposed 14 and 22, which are represented by Anglo Republican Reps. Ron Paul and Tom DeLay, both of whom repeatedly receive an F on the NAACP score card, while Rep. Lampson routinely receives a B.

Benchmark 10: Benchmark 10 is comprised of Travis County. The district has a 11.7 percent black CVAP, and a 21.9 percent Hispanic CVAP. The SSRV rate is 17.9 percent. Lloyd Doggett, an Anglo Democrat, has represented Benchmark 10 since 1994. Under the proposed plan, District 10 is split into several adjacent districts, dividing up Travis County for the first time and in essence eliminating the district as it has existed.

Rep. Doggett has stated to us that the electorate in Benchmark 10 is a coalition of black, Hispanic, and liberal Anglo voters, who unite to elect their candidate of choice. This coalition has supported him in each election. In the 1994 general election, he had opposition from an African American

candidate. Rep. Doggett was unopposed in the 1996 primary, but ran against another African American candidate in the general. He believes that both elections show that he is the candidate of choice of minority voters. He has had nominal opposition from 1998-2002.

State and local elected officials tell us that Rep. Doggett is the candidate of choice of both black and Hispanic voters. It is their view that if he did not have the support of black and Hispanic voters, he would not win the general election. In the 1994 general election, Teresa Doggett (B) opposed Lloyd Doggett. In that election, African American voters overwhelmingly supported Lloyd Doggett. In Benchmark 10, minority and Anglo voters come together on "issues," as opposed to race. There is an unofficial slating process whereby Anglo, black and Hispanic leaders coalesce their support behind a particular candidate. This explains in part the long history of electoral successes that black and Hispanic candidates have enjoyed. Senate District 14, which includes Benchmark 10, is presently electing an Hispanic, and black officials are also elected countywide.

The advocacy groups also weighed in with respect to the categorization of Benchmark 10. MALDEF refers to benchmark 10 as an influence district for Hispanic voters. LULAC's comment letter mirrors the views of their expert, Dr. Polinard, that Benchmark 10 is a safe "minority" district. The LULAC letter adds that African American, Hispanic, and progressive Anglos have "established a tri-ethnic coalition," which selects candidates and votes together as a bloc. They usually elect minority candidates of their choice in "central Austin."

Benchmark 1, 2, 4, 11, and 17: The consistent theme found in the comments concerning these districts is that the minority vote in these districts, overwhelmingly in support of each of the white Democratic incumbents there, in every instance put the Democratic incumbent "over the top" in his election in 2002. This is so because the white vote in these districts was split fairly evenly between the Democratic incumbent and the Republican challenger. Thus, they claim that the minority vote plays a "substantial if not decisive" role in electing these individuals to Congress. These comments also claim that all the Anglo representatives from these districts are responsive to the needs of their minority constituents as reflected in their votes in

Congress, thus satisfying another Ashcroft factor for determining minority influence.[13]

We have received written comments with regard to some or all of these alleged influence districts from, among others, the Texas State NAACP, MALDEF, Reps. Turner and Edwards, and several minority state legislators. We have also heard these comments in meetings with several Democratic representatives, including Reps. Sandlin, Turner, Edwards, and Stenholm, representatives of the state NAACP and several minority state legislators. In addition, we have received reports of Drs. Allan Lichtman and Richard Engstrom, prepared for pending litigation involving the proposed plan, alleging that some or all of these benchmark districts are minority influence districts.[14]

C. Factual analysis

1. Analytical standard

Section 5 inquires into the effect of proposed voting changes on the "ability of minority groups to participate in the political process and to elect their choices to office." Beer v. United States, 425 U.S. 130, 141 (1976) (internal quotation marks omitted).

In the past, the United States District Court for the District of Columbia and the Attorney General both understood that when reviewing redistricting plans, the level of minority voting strength protected under Section 5 consisted only of those

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[13] This information has been relayed to us in written comments as well as in meetings. Both the NAACP and Hispanic organizations have given to us their "report cards" for Texas congressional representatives, which grade Members of Congress based on their votes on issues of importance to the respective minority communities. Reps. Sandlin (Dist. 1), Turner (Dist. 2) and Edwards (Dist. 11) all receive very high grades. Rep. Stenholm (Dist. 17) receives moderate, but passing grades. Congressman Hall (Dist. 4), however, consistently receives very low grades from both the NAACP and Hispanic organizations that are only slightly better than the lowest-scored Texas Republican representative. Thus, claims as to minority influence in this district would appear to be weaker than those for the other four districts.

[14] Dr. Lichtman's report points to Benchmark 1, 2, 4, 11, and 17 as minority influence districts, while Dr. Engstrom's report appears to make this claim only for Benchmark 11 and 17 and only as to Hispanic voters. MALDEF's position on influence districts is consistent with and relies on Engstrom's report. Both of these reports, as well as other information we have gathered, lend credence to the claims that minority support for the Anglo incumbents in these districts is overwhelming and important to their reelection in 2002. However, none of the experts has done a similar analysis for elections prior to 2002.

districts in which minority voters could reasonably be expected to elect their candidates of choice.[15] Minorities' ability to elect their preferred candidates has been judged primarily by whether historically they have been able to control election outcomes. If so, that ability is protected by Section 5 from "backsliding." Georgia v. Ashcroft, 123 S. Ct. at 2510.

Georgia has substantially expanded the factors that must be assessed in the Section 5 inquiry in order to determine whether or not there has been "backsliding" of minority voting strength. The Court defines this expanded inquiry as a "totality of circumstances" test, a test that requires a three-prong assessment involving an "examination of all the relevant circumstances" which are described as (1) the "ability of minority voters to elect their candidate of choice;" (2) "the extent of the minority group's opportunity to participate in the political process;" and (3) "the feasibility of creating a non-retrogressive plan." Id. at 2511.

We believe that the type of analysis that prong one requires with regard to "safe" or "ability to elect" districts - districts in which "it is highly likely that minority voters will be able to elect the candidate of their choice" - is the same type of analysis we have traditionally done in our Section 5 analyses. How this has been done and will continue to be done in examining the first category of districts described in Georgia is set forth below.

a. Ability to elect or "safe" districts

To control election outcomes, (1) minority voters need generally to unite behind a preferred candidate; and (2) the chosen candidates must usually prevail. If both are true, the voters possess the electoral ability protected by Section 5 from retrogression. If either element is missing, minority population can be reduced without violating Section 5, even in the case of a district in which members of a minority group(s) constitute a majority of the population. Both elements depend upon the past behavior of voters.[16]

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[15] Guidance Concerning Redistricting and Retrogression Under Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, [Guidance] 66 Fed. Reg. 5412, 5413 (Jan. 18, 2001).

[16] Cf. 28 C.F.R. 51.28 (using election returns and voter registration data in Section 5 determinations); Guidance, 66 Fed. Reg. at 5413 ("election history and voting patterns within the jurisdiction, voter registration and turnout information, and other similar information are very important to an (continued...)

The first, and more difficult, question is whether minority voters in a particular district usually unite behind a single candidate. While the candidate's race is irrelevant to the question of whether the individual is the minority communities' candidate of choice, most experts examine contests featuring candidates of different races or ethnicities because it is in those elections that the behavior of voters is most easily ascertained. If minorities normally splinter their vote among different candidates, they usually will not be able to control the outcome of an election. A unified minority vote is often referred to as "cohesive."[17] Courts have not found it necessary to establish a threshold level for legally significant cohesion.

Because of the secrecy of the ballot, whether minority voters are cohesive and at what level cannot be determined by election results alone and must be estimated statistically. There are several accepted methodologies. The appropriateness of each depends in large part upon the data that are available and the jurisdiction's demographics. The most preferable and most widely-used is ecological regression, either bi-variate or multi-variate, again depending upon the particular circumstances presented.[18] By plotting the relationship between the actual vote for a particular candidate in a precinct and the precincts's demographics, the regression estimates the level of support, by race or ethnicity, that the identified candidate received within the district. Regression analysis cannot predict the behavior of the non-voting population because results are based exclusively upon the behavior of actual voters. When selecting the relevant

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[16] (...continued)
assessment of the actual effect of a redistricting plan").

[17] Despite differences between Sections 2 and 5 of the Voting Rights Act, minority cohesion under Section 5 is similar to that required by the first precondition for Section 2 claims that minorities are "politically cohesive." Thornburg v. Gingles, 478 U.S. 30, 50-51 (1986). See also Georgia 123 S. Ct. at 2514 ("[I]t is of course true that evidence of racial polarization is one of many factors relevant to assessing whether a minority group is able to elect a candidate of choice or to exert a significant influence in a particular district.").

[18] In most areas of social science, regression analysis deals with data based on individuals. In the ecological regression of election results, analysis is based upon the data of aggregate behavior, namely election results. The methodological assumption underlying both is the same. The Supreme Court has noted that regression analysis is one of the standard methodologies identified in the literature to assess the cohesiveness of the minority vote. Thornburg, 478 U.S. at 52-3, n.20. Other statistical methods of analyzing group behavior that have been used in voting cases include homogenous precinct or extreme case analysis, probit or logit analysis, or ecological inference.

precinct demographics against which to plot the vote total in that precinct, the more accurate portrait one can get of the actual electorate, the more accurate the estimate of voter behavior.[18] For that reason, experts seek to utilize voter turnout data by race and/or ethnicity. When such data are not available, the judicially-accepted practice is to estimate the turnout rate as part of the regression analysis.

The second question is whether minority-preferred candidates usually prevail in the district in question. For endogenous elections - in this case congressional elections - this is easy: success is measured by whether the minority-preferred candidate won. For exogenous elections - in this case elections other than congressional races[19] - "winners" are candidates who capture the majority of the vote within the voting precincts contained in a particular congressional district. For example, by totaling the votes in statewide contests for those precincts that constitute a benchmark congressional district, we can estimate, based upon past performance, how the electorate in that district has behaved.

We then turn to the proposed plan, reaggregating the precincts into the new configuration to determine whether the minority-preferred candidates identified by regression analysis would prevail in the proposed districts. Congressional election results are confined to the voting precincts that remain from the old district. Where there has been a significant change in the configuration of a district in the proposed plan, the past congressional elections would not be useful for predicting future results. For the exogenous elections, results are available for all, or in the case of local elections, a significant portion of, the voting precincts included in the new districts. As with benchmark districts, future electoral success is predicted on the basis of the behavior of voters in past elections. The focus is also on behavior of voters in the district as a whole and not

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[18] Registration by race is the most accurate base. The next most reliable are estimates of racially identifiable registration figures, such as in Texas, Spanish-surnamed registration, followed by voting age population, and then total population. But, the further one gets away from the actual composition of the electorate on election day, the less confidence there will be in the estimates.

[19] Exogenous elections can include contests for United States Senator, governor, etc., for which voters in every voting precinct across the state cast their ballots and results can be isolated for any current or proposed district. Exogenous elections also include local contests for city, county, or state senate/house where the jurisdiction (e.g. Houston) encompasses all or a majority of the current and/or proposed congressional district.

whether the past electoral performance of an incumbent indicates probable re-election.

With all of this data in place, a picture emerges of how changes in redistricting will affect the ability of minority voters to elect their candidates of choice by comparing past performance of minority-preferred candidates in the benchmark district with the anticipated behavior of minority voters in the proposed district. These assessments are tempered by an understanding of the unique circumstances that may accompany some elections and can skew some results. The opinion of the minority community can also play a significant role in judging whether a candidate is preferred by the minority community, particularly when election results are ambiguous.

b. The expanded analysis required by Georgia

The totality of circumstances inquiry established by the Court in Georgia has considerably broadened the traditional Section 5 inquiry. First, in prong one, the Court adds a new category of districts that are somewhat different from "safe" or "ability to elect" districts discussed above. The Court describes this kind of district as "a district in which it is likely - although perhaps not quite as likely as under the benchmark plan - that minority voters will be able to elect candidates of their choice." Id. at 2511. This definition includes districts where the ability to elect candidates of choice is maintained, and thus is similar, if not exactly the same, as districts that we have considered as "safe" or ability to elect" districts in that minority voters will be able to elect candidates of choice, albeit with more risk. By this definition, many of the districts we have examined in our traditional analysis fit this description.

The Court also includes in this category districts in which minorities coalesce around certain candidates but with uneven results, winning but also losing.[21] By this definition, such

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[21] These districts are described as having the promise of increasing "substantive representation" because they will create "coalitions of voters who together will help to achieve the electoral aspirations of the minority group." The Court went on to note that in such districts there is a "risk that the minority group's preferred candidate may lose," but that despite this risk, such districts may be advantageous:

> [T]here are communities in which minority citizens are able to form coalitions with voters from other racial and ethnic groups, having no need to be a majority within a single district in order

(continued...)

districts are somewhat different from what we have considered as safe or ability to elect districts. Nonetheless, we believe they should be assessed in a manner similar to the way we analyze districts which are highly likely to elect minority voters' candidate of choice, although they are not entitled to the same weight as "safe" districts.

Prong 2 requires examination of yet another category of districts in which "minority voters may not be able to elect a candidate of choice but can play a substantial, if not decisive, role in the electoral process." Georgia, 123 S. Ct. at 2512. Although such minority "influence" districts are not further explained by the Court, the addition of an unspecified number of these districts can provide an offset for the loss of a safe seat. Id. at 2513. Therefore, we address whether Texas has added any districts in this category which could offset any loss in the "safe," ability to elect, or coalition districts.

The inquiry required under prong 2 also requires consideration of two other factors: changes in legislative positions of power held by minority voters' representatives of choice and whether representatives elected from districts protected by Section 5 support the proposed plan. We also address these considerations.

Finally, prong 3 requires examination of the "feasibility of creating a non-retrogressive plan." We have considered this factor as part of our retrogression analysis in the past,.[22] By specifically noting this as a separate prong in the totality of circumstances analysis, we believe the Georgia decision increases the importance of this factor. Thus, we also specifically consider this factor.

2. Analysis

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[21] (...continued)
to elect candidates of their choice. Those candidates may not represent perfection to every minority voter, but minority voters are not immune from the obligation to pull, haul, and trade to find common political ground, the virtue of which is not to be slighted in applying a statute meant to hasten the waning racism in American politics.

123 S. Ct. at 2512 (quoting Johnson v. De Grandy, 512 U.S. 997, 1020 (1994).

[22] See Guidance, 66 Fed. Reg. 5413. ("If a retrogressive redistricting plan is submitted, the jurisdiction seeking preclearance of such a plan bears the burden of demonstrating that a less-retrogressive plan cannot be reasonably drawn."

Our examination of the proposed plan indicates that it will lead to an impermissible retrogression in the position of minorities with respect to their effective exercise of the electoral franchise. The primary focus of our analysis has been on the safe and coalitional districts to be considered under prong one of the Georgia decision. In the proposed plan, the number of districts in which minority voters are a majority of the VAP remains the same, and there is an increase of one district where minority voters are a majority of the citizen VAP. However, with regard to minority voters' ability to elect the candidate of their choice - the so-called "safe" seats -- there is a net reduction of two seats. There is an increase in one coalitional district, but we do not consider this increase as effectively offsetting the loss of one safe seat and certainly not two safe seats, as here.

With regard to majority Hispanic districts, there is an increase of one majority VAP district, but no change in the number of majority citizen VAP districts. However, as compared to the benchmark plan, the net result of the proposed plan reduces by one the number of districts in which the Hispanic minority community can "safely" elect candidates of their choice to office. In the benchmark plan, Hispanic voters have the ability to elect the candidates of their choice in the following districts: 15, 16, 20, 23, 27, 28, and 29. In the proposed plan, Hispanic voters can no longer elect their candidate of choice in Proposed 23, and it is no longer "highly likely" that they will be able to elect their candidate of choice in Proposed 15. The state offsets the loss of one district in the proposed plan by creating a new majority Hispanic district in Proposed 25, which appears to allow Hispanic voters the ability to elect their candidate of choice. Moreover, while Proposed 15 is no longer a "safe" district, it is not a total loss; it moves from the "safe" category to the "coalitional" category. The state, however, has not created any additional coalitional seats besides Proposed 15 to offset the net loss of one safe district.

With regard to majority black districts, there are no majority VAP districts in either the benchmark or proposed, but there is one majority black citizen VAP district in the proposed. However, as compared to the benchmark plan, the net result of the proposed plan reduces by one the number of districts in which the black minority community can "safely" elect candidates of their choice to office. In the benchmark plan, black voters have the ability to elect the candidates of their choice in 18, 24, 25, and 30. In the proposed plan, black voters can no longer elect their candidate of choice in Proposed 24. The loss of Benchmark 24 has not been offset. There has been an enhancement of the

black population in Proposed 9 when compared to Benchmark 25, which makes it "safer;" but this enhancement has not changed the fundamental ability of black voters to elect their candidate of choice in benchmark 25.[23]

Below in part (a), we examine in detail the districts pertinent to the first prong of the Georgia decision. These include both the Benchmark and Proposed 15, 23, 24, and 29; Benchmark 25/Proposed 9, which are in the same area of Houston; and the new majority Hispanic district, Proposed 25.[24]

We have also carefully considered the second and third prongs of the Georgia decision. In part (b) below, we address the factors making up the second prong of the Georgia totality of circumstances analysis. We first consider the proposed plan's impact on influence districts. Our review shows that there has been a net reduction of two influence districts in the proposed plan. We view Benchmark 9 and 10 as influence districts, which have been eliminated in the proposed plan, and no new influence districts are created. We next consider the view of minority lawmakers, and then the gain or loss of seniority and power in Congress of legislators who are representatives of choice for

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[23] We note here - and as is evident in our detailed discussion of the individual districts below -- that the districts that were most difficult to analyze and categorize were Benchmark 25 and Proposed 15. As discussed, our final conclusion, after very careful analysis of all pertinent factors, is that Benchmark 25 is a safe district and Proposed 15 is a coalitional district. When categorized in this way, we find the retrogression described above. However, there is a similarity in one aspect of the election results analyzed in Benchmark 25 and Proposed 15 - in both districts the minority voters' candidate of choice in statewide elections is receiving a similar margin of victory. This factor would argue that both districts should be categorized the same - either as safe districts or as coalitional.

Viewed in this manner, the proposed plan nonetheless would still be retrogressive under prong one of the Georgia decision. If both Benchmark 25 and Proposed 15 are viewed as safe districts, there would be a reduction of safe black districts from four (18, 30, 24, and 25) to three (18, 30 and 9). The number of Hispanic safe districts would remain the same (creation of Proposed 25 would offset the loss of Benchmark 23). There would be no loss or gain of coalitional districts for either group. If both districts are viewed as coalitional, there would be a net loss of a safe Hispanic seat (loss of Benchmark 23 and 15, offset only by Proposed 25) and the addition of only one coalitional district (Proposed 15). For blacks there would be no net loss of safe black seats (18, 30 and 24 under the benchmark as opposed to 18, 30 and 9 under the proposed plan); but there would be a loss of a coalitional seat (Benchmark 25 would not be replaced).

[24] Our review of the evidence presented by the state with respect to other "safe" districts leads us to believe that districts 16, 18, 20, 27, 28, and 30 elect candidates of choice in both the benchmark and proposed plans.

minority voters. In sum, it appears each of the prong 2 factors weighs against the proposed plan and supports the conclusion that the proposed plan is retrogressive.

Finally in part (c), we examine prong 3 of the totality of circumstances analysis -- the feasibility of non-retrogressive alternative plans. This factor also supports a conclusion that the plan is retrogressive.

a. The First Prong: Safe and coalitional districts

Benchmark 24/Proposed 24: Benchmark 24 in the Dallas-Fort Worth metropolitan area is a "safe" minority ability district. The combined black and Hispanic VAP is 54.6 percent; combined black and Hispanic citizen VAP is 46.3 percent. Proposed 24 is fractured into six districts, none of which provide minority voters with the ability to elect their candidate of choice. Proposed 26 has the highest minority population of these six districts, with black and Hispanic VAP of 27.4 percent and black and Hispanic citizen VAP of 23.5 percent.

We begin with the Balderas litigation, which created the benchmark plan. In examining Rep. Frost's district, as it existed in 2000, the court determined it was not one of the eight required to be protected under the Voting Rights Act. However, the court did determine that Rep. Frost was the dean of the Texas delegation and, given the powerful positions he held in Washington, believed it was important to provide him with a district in which he could reasonably get re-elected. Therefore, the court altered the 1996 plan, increased both the black and Hispanic voting populations in the district, and took out Anglo population that tended to vote Republican.

The state claims that no minority group is large enough to control the Democratic primary in Benchmark 24. Exh. D at 8. However, the state concedes in its submission that "a district with a Black plurality and a Democratic Party majority will typically be winnable for a serious Black candidate." Ibid. (citing Dr. John Alford). The status of Benchmark 24 rests, then, on whether blacks constitute at least a plurality of the electorate in the Democratic primary.

Evidence from all sources indicates that blacks currently constitute a majority of the electorate in the Democratic primary in Benchmark 24. Black voters generally vote cohesively and therefore, can elect the candidate of their choice in the primary. Anglo crossover voting allows black candidates of choice to win consistently in the general election. All experts,

including one retained by the state, agree that black voters control the Democratic primary and can elect their candidate of choice.[25]

The state's evidence does not support its claim that blacks do not constitute at least a plurality of voters in the Democratic primary. Indeed, the election data it provided us suggest a contrary result, with minority-preferred candidates winning exogenous elections in Benchmark 24 voting precincts and losing the same elections under Proposed 24. These data also show that the only time Rep. Frost faced a minority challenger in the general election, he was the overwhelming choice of the minority community. The relevant regressions provided by the state indicate that in the 2002 general election, 52.6 percent of the vote for the winning incumbent Frost came from black voters.

Our regression analysis shows, contrary to the state's claim, that black voters do constitute a majority of the electorate in the Democratic primary.[26] Because the state admits that voting is racially polarized and that Anglos crossover to vote with minorities in the general election to allow the Democratic nominees to prevail, minority electoral ability in District 24 depends upon whether black voters control the Democratic primary. The available information uniformly demonstrates that they do. All other experts addressing the issue agree that black voters currently control the primary election in Benchmark 24 and, therefore, determine the winner of the general election.

Our estimates showed that black voters likely constitute at least 66 percent of the voters in the Democratic primary elections analyzed, and currently can control the Democratic primary and elect their candidate of choice. Regression estimates for the 2002 primary elections show minority voters

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[25] "Blacks do control the primary in [benchmark] District 24 and the candidate of choice usually prevails." Testimony of Dr. Keith Gaddie to the Senate Committee on Jurisprudence, (July 22, 2003) In recent deposition testimony, Dr. Gaddie reaffirmed that "District 24 was a district where minority voters were in control of the Democratic party primary." Deposition of Dr. Keith Gaddie, (Nov. 22, 2003) [Gaddie dep.] at 16. Gaddie also admits that there is no occasion where black voters' candidate of choice has lost in the general election in Benchmark 24 Id. at 39.

[26] Due to low Anglo voter turnout in primaries, low Hispanic turnout in general elections, and a limited range of percentages of Hispanic population across precincts, our regressions combined black and Hispanic populations. Within the minority vote in the Democratic primaries, population and turnout levels clearly showed that blacks constituted a majority of voters.

clearly in control of election outcomes. Black voters are cohesive in each election.

We also analyzed primary elections from earlier years such as the 1996 Democratic primary and runoff for Texas House of Representatives District 90, and the 1998 Democratic primary for Texas Attorney General. Where black voters are cohesive, they control the primary.[27] In general, we find that black voters are cohesive in the primary, and they can control the election results. In endogenous general elections between 1992 and 2002, our regression analysis showed that virtually all minorities who cast ballots in those elections voted for Rep. Frost. Likewise, in exogenous general elections, the estimate of minority support for minority-preferred candidates within Benchmark 24 is 100 percent.

In addition to the election data, all other available evidence indicates that Rep. Frost is the minority communities' candidate of choice in Benchmark 24. Minority leaders state that he is their preferred candidate and that, if some day he were to fall into disfavor, blacks have the power to elect someone else. The "scorecards" of minority groups give him exceptionally high marks, providing some indication of his responsiveness to minority concerns. Two influential Republican legislators, Rep. Phil King (A), a member of both the House redistricting committee and the conference committee, and Sen. Bill Ratliff (A), recall concerns expressed during the redistricting process for the preservation of the ability that Benchmark 24 provided to minority voters to elect a candidate of choice.

Both the final house and senate-passed plans were non-retrogressive alternatives.[28]

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[27] The 1998 Democratic primary for attorney general was between Kelly (A), Mattox (A), and Overstreet (B). The black candidate did not enjoy the overwhelming support of the black community, failing to win a majority of the black vote in neighboring majority-minority District 30. The 1996 Democratic primary in District 90 was between Brooks (B), Burnam (A), Deleon (H), Hernandez (H), Hernandez (H), Ramirez (H), and Zapata (H).

[28] The plans passed by the house and senate and sent to the conference committee restored black voting age population to benchmark levels; the final plan lowered black population to the level criticized in earlier plans:

Benchmark (24 (1151C)	21.4%
Plan 1268C (House passed plan):	21.9%
Plan 1362C (Senate passed plan):	21.7%
Plan 1180C (early House Comm. plan):	10.4%
Proposed 24 (1374C):	9.3%

Benchmark 25/Proposed 9: The state has redrawn Benchmark 25, in the southern portion of the City of Houston, renumbered it as Proposed 9, and presents it as an additional safe seat for black voters. However, Benchmark 25 appears to be a safe minority district where minority voters have the ability to elect candidates of choice. The black VAP in Proposed 9 increases that in Benchmark 25 from 22 percent to 36.5 percent, the black citizen VAP increases from 26.1 percent to 46.9 percent, and combined black and Hispanic citizen VAP increases from 44.3 percent to 63 percent. But, because our analysis leads to a conclusion that Benchmark 25 already is a district where it is highly likely for black voters to elect their candidate of choice, Proposed 9 merely enhances that ability and there is no gain. If one assumes that black voters are not "highly likely," but only "likely," to elect a candidate of choice in Benchmark 25, then there is a gain from a coalitional seat to a safe seat in the Houston area.

Evidence from all sources indicates that blacks currently constitute a majority of the electorate in the Democratic primary for Benchmark 25. The black voters usually vote cohesively and therefore, can elect the candidate of their choice in the primary. Anglo crossover voting allows for the black candidate of choice to win consistently in the 2002 general election and in prior elections. Experts for both sides in the pending litigation against proposed redistricting plan in court, agree that blacks have the ability to control the Democratic primary, but they did not do so in the 2002 primary race for Congress.

As before, our review starts from creation of Benchmark 25 in the Balderas litigation. The court, in devising the district, made it safer for Democrats and for the black candidates of choice when it redrew it in 2001. Although the court did not find the existing district a "safe" district, it did find that minority voters basically could elect their candidates of choice in the primary. The court held that "in the practical world, this percentage [52.3 combined Hispanic and African American] will dominate the Democratic primary in a district that has consistently elected a Democratic congressman. This is, then, in a real sense, a minority district produced by our process that enhances the elective prospects of a minority, albeit not wholly the district sought." Balderas, at 14.

The state makes the same argument that it made with regard to Benchmark 24 to support its claim that Benchmark 25 does not perform. It says that in 1991, the district was drawn to ensure that the black and Hispanic voters would split their vote in the primary and an Anglo would be elected. The state claims that the

factors of no single minority community being capable of dominating the Democratic primary and the lack of cohesiveness of black and Hispanic voters in the primary continue to exist in Benchmark 25. As a result, black and Hispanic candidates of choice cannot win.

The state's evidence does not support this claim. To the contrary, its regressions show that during the 2002 Democratic primary, black voters accounted for 58 percent of those who voted and 67 percent of the runoff electorate.[23] Thus, black voters in Benchmark 25 are already able to control the primary, largely because the Anglo and Asian voters are overwhelmingly Republican. During that 2002 Democratic primary election, Anglos accounted for 42 percent of the voters. From 1996-2002, black voters comprised a majority of the Democratic primary with a mean of 55 percent. Dr. Gaddie found that in the 2002 Democratic primary for the congressional seat, black voters accounted for a majority of voters. Hispanic voters, moreover, constitute no more than five percent of the Democratic primary or runoff, rendering any alleged split between black and Hispanic voters irrelevant.

Moreover, in most instances, the black majority electorate exhibits a high level of cohesiveness. Dr. Gaddie states that black voters are generally cohesive. Gaddie dep. at 35. The state's regressions also demonstrate that black voters are cohesive in their voting patterns. It appears that black voters often vote together at a rate that is nearly 100 percent. The anecdotal information that we received from both black and Anglo contacts supports the claim that black voters are highly cohesive in their voting patterns in Benchmark 25.

We analyzed nine statewide primary and general election contests in 2002 in which we reviewed the results for precincts in Benchmark 25/Proposed 9. Our analysis determined that black voters are "often very cohesive" in Benchmark 25 and can elect most candidates of choice. Minority voters are able to impact election outcomes despite racial polarization.

While agreeing that black voters are cohesive, the state appropriately notes that black voters did not elect their candidate of choice in the 2002 Democratic Primary. Thus, the state questions whether black voters can elect their candidate of choice in Benchmark 25.

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[23] The state's regressions show that in the 2002 Democratic Primary race between Bell and Robinson, Anglos accounted for 42% of the voters and black voters were 58% of the electorate.

In 2002, Benchmark 28 was an open seat. Chris Bell (A) faced Carroll Robinson (B), and Robinson won a majority of the black vote in the primary.[10] Unlike most other elections we examined in connection with this and other submissions, the analyses conducted by various experts present somewhat differing views of voter behavior in this election. The range of estimates of black voter support for Bell is from 32.5 to 37 percent while the range is greater for Robinson, 51 to 62.4 percent.[11]

There are two inherent problems with the state's regressions. The state does a uni-variate regression rather than a multi-variate regression, which erroneously separates multiple variables, i.e., Anglos, Hispanics and African Americans. By not setting estimates of under zero percent or over one-hundred percent at the bounds, the state's regressions also greatly overestimate votes for candidates.

In this case, using the state's regression estimates, Bell received 31.4 percent of the vote, but in actuality he received 33.0. Likewise, the state's regression estimated the vote of Robinson at 31.2 percent, while in actuality he received 26.5 percent of the vote. If you correct the state's error by using a simple mathematical equation, Bell's black support would now be 36.8 percent, and Robinson's support would be 53 percent.

Our review of both analyses is that, based on the percentages of actual vote, Dr. Lichtman's statistics are probably the closest to being accurate. There are, however, some notes of concern about the reliability of the regression. There is an "other" category of VAP with 30,000 voters. Lichtman ignores this group, believing them to be Asian and more likely to

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[10] Rep. Bell's deposition testimony regarding the 2002 Democratic primary is consistent with the views that he expressed to us at the meeting. He considers himself to be the candidate of choice of the African American community because he received a "significant percentage" of the black vote. Bell Dep., December 6, 2003 at 13-18.

[11] The table below shows the percentage breakdown of the black vote:

	State	Lichtman	Justice
Bell	33%	37%	32.5%
Robinson	62.4%	51%	58%

vote Republican and not in the Democratic primary.[32] While this could make a difference of a few percentage points, it would not change the result. The outcome is roughly the same.

There was a run-off in 2002 between Bell and Robinson. Inexplicably, the state does not run this regression. Black voters provided Bell with 31 percent of the vote and Robinson with 69 percent of the vote.[33]

The anecdotal information that we obtained as part our investigation provides some context. The most significant backdrop to the election was a feud between Robinson, who like Bell was an at-large member of the Houston City Council, and Houston Mayor Lee Brown (B). A consequence of this dispute was that Mayor Brown and several other black elected officials supported and campaigned for Bell over Robinson. This resulted in what most persons familiar with politics in the Houston area called an uncharacteristic split in the black community. Bell obtained the support of the mayor, a black state senator, a black state representative, and a black county commissioner. He used this support to win enough of the black vote to carry the election. State Senator John Lindsay (W) said that it has been his electoral experience that black voters in the Houston area are at least 95 percent cohesive. State Senators Tommy Williams (W) and Kyle Janek (W), also of the general Houston area and both of whom support the redistricting in the legislature, confirmed that black voters are typically very cohesive.

Also noteworthy in Proposed 25's electoral history is Rep. Kent Bentsen (W), who represented the benchmark district prior to Rep. Bell. He received overwhelming black support when he ran as shown in the results of the 1998 congressional race. This same evidence of black support is evident in the 2002 senatorial Democratic primary, where Bentsen had higher black support than Ron Kirk (B), the popular former Dallas Mayor. Bentsen's support

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[32] According to the Chair of the Vietnamese Advisory Committee of Harris County, Michael Nguyen, while Asian voters do not tend to have strong political party preferences, most vote Republican. They overwhelmingly support white candidates over Hispanic or African American candidates. Thus, it seems appropriate to discount the Other/Asian populations from regressions done on Democratic primaries, as Dr. Lichtman did.

[33] More than likely our estimate of more than 75 percent support for Robinson is inflated because if Robinson did receive that level of support, he should have received a bigger share of the actual votes. It is likely that the black voters were more split than the regression data suggests and black support for him may be less than indicated.

was estimated at 53 percent, where Kirk received 43 percent of the vote.

We found that a black candidate in the 1994 congressional race was initially the preference of black voters over Bentsen. The estimate for white turnout rate for the 1994 election, however, is significantly higher than for the other primary contests the Department reviewed in Benchmark 25. The results from 1994 in general appeared to raise a question about whether black voters back in 1994 could elect their candidates of choice. We determined that this could be attributed to the possibility that the racial composition of the precincts in the district were different from today and that there likely were many more black voters in later contests.

The 2002 election cycle is the most probative to examine in Benchmark 25, not only because it is the most recent, but also because it is the only one using the benchmark configuration. Equally as important to our analysis is that the 2002 general elections have four black-Anglo races whereas the earlier general elections had none. Because the analysis of Benchmark 25 seeks to examine the differences in black voter performance, elections with a significant number of black and Anglo candidates prove the most relevant.[h]

The state also suggests that Benchmark 25 is not a protected district because it has an Anglo representative. This is contrary to the views of Dr. Gaddie, who has testified that the loss of Benchmark 25 must be offset in the proposed plan. Gaddie at 19-20; 34-36. State Representative and redistricting bill sponsor Phil King (A) also stated during his deposition that even if an Anglo is elected, a district can still be considered a majority minority district. Deposition of Phil King (Nov. 23, 2003) [King dep.] at 53-54. In fact, he counted Benchmark 25 as a minority district. Id. at 16, 97. State Senator John Lindsay, a Republican who voted in favor of the plan, told us that Anglo elected officials such as Bell are fully capable of representing minority communities. Since he has been in office, Congressman Bell has had the support of the black community. The Texas NAACP gives him a high score, and minority-elected federal and local officials contend that the Congressman is doing an excellent job of responding to the needs of the black community.

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[h] In 1998, the black voters' candidates of choice lost some close contests. The state analyzed Anglo-Hispanic races, which are not as probative in the instance of Benchmark 25/Proposed 9 as are Anglo-black races.

With the black CVAP increasing 20.8 percent in Proposed 9, it would appear that it is a more effective district. According to the state's expert report, Proposed 9 will be controlled by African American voters, and will elect their candidate of choice. Expert Report of Ronald Keith Gaddie (Nov. 21, 2003) at 13. His figures show that when the Democratic primary in 2002 was rerun using the demographics for Proposed 9, black voters made up 97 percent of the turnout. Dr. Gaddie admits that the state's reaggregated results show the same black-preferred candidates win in Benchmark 25 and Proposed 9, with one exception from 1998. He cites the increase in black voter turnout as the reason that Proposed 9 will be a "certain" performer for black voters' candidates of choice. When asked what would happen if we disregarded voter turnout, Dr. Gaddie told the Department that the turnout factor cannot be disregarded. He explained his results are predicated on turnout.

Our analysis also concluded that proposed 9 is a stronger district. Whereas Benchmark 25 is a Democratic district with minority cohesion and sufficient white support to elect minority-preferred candidates, Proposed 9 would be a very safe, majority minority district where minority-preferred candidates of choice are likely to win by very wide margins. In the configuration of precincts comprising Proposed 9, the minority-preferred Democrats all win, and, usually, by a very wide margin, up to 15 points. There is no doubt that the proposed district is a very safe majority minority district.

We also determined that Proposed 9 is comprised of a black population that appears to turn out at higher rates than the black population in Benchmark 25. In Proposed 9, there are no homogeneous white precincts, and the white voters appear to turnout at a lower rate than do white voters in Benchmark 25 and at a lower rate than black voters in Proposed 9. The consequence of this is that black voters clearly are in control.

In sum, Benchmark 25 is a district where minority voters have an ability to elect; it is simply weaker than the very safe Proposed 9. The difference is one of degree of ability to elect rather than of kind or character. In fact, it appears that Proposed 9 is much stronger than it needs to be to provide minority voters with the ability to elect.

Benchmark 23/Proposed 23: Hispanic voters in Benchmark 23, located in 25 counties mostly located along the border from El Paso to Webb County and including a portion of San Antonio, will lose the ability to elect their candidates of choice in the proposed plan. The Hispanic citizen VAP decreases from 57.4

percent to 45.8 percent, and the SSRV decreases from 55.3 percent to 44.0 percent. The extreme polarized voting that occurs in Benchmark 23, when combined with the fact that Anglo voters comprise a majority of the electorate in the new district, will mean that Hispanic voters will not be able to elect their candidate of choice.

Benchmark 23 currently affords Hispanic voters the ability to elect a candidate of choice. The court in Balderas determined that the precursor to the benchmark district here was one of eight majority minority districts from the 1990s plan that was protected under the Voting Rights Act. Moreover, the state in its original submission, all of the experts, and every person or group who provided comments, agree that Benchmark 23 is a district where Hispanic voters can elect their candidate of choice.

The state contends that Rep. Bonilla is the Hispanic voters' candidate of choice, and because he will be able to be elected in the proposed district, there is no loss of a Hispanic district. For support, it cites one expert's conclusion in the Balderas trial that in one election in the 1990s, Bonilla received "up to" 40 percent of the Hispanic support.

However, our review of the state's evidence does not support this claim. For example, in the 2002 election, which is the only election for which the state did a regression analysis, it estimates that Rep. Bonilla won 6.6 percent of the Hispanic vote and 90.5 percent of the Anglo vote. Further, Dr. Gaddie is of the view that Rep. Bonilla is not the Hispanic voter candidate of choice. Gaddie Dep. at 43.

As a part of our analysis, we conducted regressions for every congressional race since 1994, finding that Rep. Bonilla has never been the choice of the Hispanic community. Further, the level of electoral support that he receives from the Hispanic community has declined from 24.9 percent in 1996 to 18.8 percent in 2000 and then dropped to 3.5 percent in 2002.[25]

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[25] Rep. Bonilla won the 2002 election by only a few thousand votes, and that voting was extremely polarized. Our analysis of voter turnout in the 2002 races showed that Hispanic voter turnout by itself was not sufficient to elect candidates of choice in any general election. The state's regressions show that Hispanic voters accounted for 41.3 to 44% of the electorate (depending on the election reviewed), Anglo voters accounted for 51.1 to 54% of the electorate, and black voters ranged from 4.4 to 4.8% of the total voters. In contrast, Hispanic voters account for more than 90% of the electorate in the Democratic primary.

(continued...)

We found that in almost every election in 2002, black voters are cohesive with Hispanic voters, and Anglo voters provided enough crossover voting to elect the Hispanic candidate of choice in the general election; the exception being the congressional contest. Similarly, the state analyzed 15 statewide races for 2002 in their regressions under both the benchmark and proposed districts. Under Benchmark 23, candidates who are Hispanic voters' candidates of choice win 13 of 15 races. Gaddie Dep. at 128-129. The state's expert admits that Hispanic voters can elect their candidate of choice in Benchmark 23. Gaddie dep. at 129-131. Likewise, our analysis along with that of Dr. Lichtman and Dr. Engstrom all conclude that Benchmark 23 provides Hispanic voters the ability to elect their candidates of choice.

We discussed Benchmark 23 with Dr. Gaddie, who repeated his previous statements that Hispanic voters can elect a candidate of choice in the district. He says that, with the exception of the congressional race, the results in 2002 show the district really does perform for Hispanic voters. He believes, however, that Benchmark 23 is a weaker performer than the Proposed 25.

Dr. Lichtman asserts that only Rep. Bonilla's incumbency is allowing him to win in Benchmark 23 and even that will not be able to keep him in the seat in 2004. He points to the trend showing that an increasing number of Hispanics are registering to vote and more Hispanic registrants are going to the polls and voting. On average there has been an increase in Spanish-surname registrants of one percent per year in the district, which, in his view, means that Rep. Bonilla will be even more vulnerable in 2004.[36]

The state has provided updated Spanish-surname registration information for this year. This confirms that as of the end of September 2003, Spanish-surname registration increased from 55.3 percent to 56.2 percent in the district.[37]

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[35] (...continued)

[36] Our review of election behavior in Benchmark 23 also shows a continuing rise in Hispanic voter turnout. In the 1998 general election, Hispanic voter turnout ranged between 33.7 and 36.3% in the races we reviewed.

[37] There also is an increase in Spanish-surname registered voters in the precincts comprised by Proposed 23 from 44.0 to 44.6%. The increase is not as high as in Benchmark 23 because a large portion of Webb County has been split out of it.

As previously noted, all persons and groups who commented believe that Benchmark 23 provides Hispanic voters with the ability to elect a candidate of choice. Minority and Anglo legislators alike say that, in Benchmark 23, Hispanic voters control who wins the race, and one must be a Hispanic candidate in order to win the district. No Anglo candidate has won when running in a primary since 1990. Elections for municipal, county, and state offices show that Hispanic-preferred candidates dominate most of the populous areas with the exception of the northwest portion of San Antonio. Moreover, comments from both minority and Anglo legislators suggest that if this were an open seat, it is reasonably certain that a Hispanic Democrat would be elected.

Anecdotal evidence also suggests that Cuellar, the Hispanic Democrat who ran against Bonilla in 2002, ran a polarizing race, exacerbating the racial polarization in voting behavior. Both Anglo and Hispanic commentators expressed no surprise that the election results showed that Cuellar did not do as well as the average Hispanic Democrat in attracting crossover Anglo votes. If Cuellar had attracted the average crossover vote, he would have been elected in Benchmark 23.

MALDEF and LULAC agree that Benchmark 23 is a majority Hispanic district, which provides Hispanic voters with the ability to elect their candidate of choice. Nina Perales for MALDEF stated that Benchmark 23 only recently has allowed Hispanic voters to control who can be elected. She explained that the former incumbent, Rep. Bustamante, stated that he did not need as many Hispanic voters in his district because he felt he would be able to win. Thus, in 1991, the legislature decreased the number of Hispanic voters in the district. Following the redistricting, Rep. Bustamante was indicted and later sent to jail. These factors facilitated Henry Bonilla's successful challenge. Anglo voters have been happy with Rep. Bonilla's record, and he receives a strong incumbency boost from them. In the last several years, there has been significant growth in the Hispanic population, particularly in Webb County, which has allowed the district to become dominated by Hispanic voters again.

The state contends that Proposed 23 will allow Hispanic voters to elect their candidate of choice. The attorney for the state concedes that this position is based on the assumption that Rep. Bonilla is the candidate of choice, and the assumption that he can continue to be elected under the proposed plan means that Hispanic voters will be able to elect their candidate of choice. The state's regressions do not find that Hispanic voters can

otherwise elect their candidates of choice in the proposed district. Dr. Gaddie finds that under Proposed 23, candidates who are Hispanic voters' candidates of choice win zero of 15 races. Dr. Gaddie conceded at deposition that Hispanic voters will not be able to elect their candidate of choice in Proposed 23. Gaddie dep. at 129-131.

Rep. King has stated that because he believes Rep. Bonilla to be the Hispanic voters' choice, then Hispanics will be able to elect their candidate of choice in Proposed 23. In May, 2003, Dr. John Alford, in a memorandum and testimony before the Texas House, indicated that what the House was doing with a plan then under consideration and which did something similar to what the proposed plan does to south Texas, was "moving a Hispanic incumbent, who can presumably win in a non-Hispanic district, to allow a new Hispanic representative to be elected . . . . The focus in other words, is on the ethnicity of the Representative, not the ethnicity of the voters and their ability to elect candidates of choice - the test under the Voting Rights Act." Memorandum from John Alford to Senator Barrientos, (May 8, 2003) at 6-7.

LULAC notes that even if Rep. Bonilla could be considered the candidate of choice, he is likely to lose the Republican primary. Few Hispanic voters vote in the Republican primary and without the perception that the candidate in Proposed 23 needs to be Hispanic, Anglo candidates will feel comfortable in opposing Rep. Bonilla. LULAC also pointed to a popular Hispanic incumbent on the Texas Supreme Court, Xavier Rodriguez, who would have lost to an Anglo in the precincts comprising Proposed 23 despite the support of all of the elected Republican officials in the state. LULAC and Anglo leaders agree that once Rep. Bonilla retires or leaves, the Republican candidate will be an Anglo.

Our regressions show very few Hispanic voters casting ballots in the Republican primary. While it is possible that the power of incumbency may allow Bonilla to win, it seems relatively certain that polarized voting would prevent another Hispanic Republican from winning in the Republican primary in Proposed 23.

We have also considered whether Benchmark 23 should be classified as a coalitional district based on some close general election results in minority versus Anglo races in 2002. Election results for the precincts located in Benchmark 23 show that Kirk (B)(D) won with 53.2 percent of the vote, Sanchez (H)(D) won with 54.3 percent, Yanez (H)(D) won with 55.5 percent, and Mirabal (H)(D) won with 56.8 percent. These numbers are similar to the numbers in Proposed 15, thus leading to a

suggestion that District 23 should be classified as a coalitional district.

However, when considering all the information we have gathered, we do not believe that is a proper categorization of Benchmark 23. As explained above, there is a perception by all Hispanic and Anglo persons who commented or were contacted that Benchmark 23 is a majority Hispanic seat, and the candidates need to be Hispanic. Candidates in Benchmark 23 must appeal to and win some of the Hispanic vote to be elected. This perception has been true even back in the mid 1990s when the statewide races showed Anglo Republicans winning in Benchmark 23.

One reason for this perception is that Hispanic candidates have done very well in local races in Benchmark 23 as a whole, and in particular in the two areas that have most of Benchmark 23's population. In San Antonio, elections have been dominated by Hispanic candidates in large portions of the city (some in Benchmark 23) beginning in the 1990s. Seven of the ten council members now are Hispanic. Hispanic participation has increased significantly and has been increasing since the city instituted single member districts. All of the office holders in Webb are Hispanic. As the population in the county has exploded, there also has been an increase in the county's desire to use its clout to elect regional candidates.

The numbers in the election results in statewide races do not take into account the reality that Benchmark 23 has been viewed as a majority Hispanic district, and changing the demographics so significantly will alter that view. Benchmark 23 should be classified as a safe seat.

Benchmark 15/Proposed 15: This district, whose population is anchored in Hidalgo county and the Valley, changes from a "safe" district under the benchmark plan, where Hispanic voters are "highly likely" to elect their candidate of choice, to a coalitional seat where Hispanic voters are "likely, although perhaps not quite as likely," to elect their candidate of choice. The proposed district runs over 300 miles to central Texas. In Proposed 15, the Hispanic citizen VAP drops from 69.3 percent to 58.5 percent under the proposed plan and the SSRV level drops from 65.5 percent to 56.7 percent. When combined with the high levels of racially polarized voting occurring in the district, this reduction is apt to result in Hispanic voters being less likely to elect a candidate of choice even though the district remains over 50 percent SSRV.

The Balderas court identified the 1996 district as one in which Hispanic voters had the ability to elect candidates of choice and drew what is now Benchmark 15 to preserve that ability. The state agrees with this assessment. Likewise, every expert who has reviewed Benchmark 15 agrees that Hispanic voters are electing their candidates of choice.

Proposed 15 is a dramatic change in the district's character. Forty percent of its former population is moved out of the district, and the district no longer appears centered in the Valley. The population moved into Proposed 15 is from five predominantly Anglo counties to the north in central Texas - Bastrop, Lavaca, Fayette, Colorado, and De Witt. These counties consist largely of Anglos who turn out to vote at higher rates than the rest of the population of the proposed district. The state's analysis shows that turnout in these counties ranges from 50.5 percent to 56 percent for the 2002 election. Moreover, high turnout Hispanic portions of Benchmark 15 have been selectively gerrymandered out of the district by splitting the City of McAllen and taking portions of Hidalgo County, with odd configurations that pick up higher turnout Hispanic areas. These precincts are placed in Proposed 25.

Some lower turnout Hispanic areas also appear to be deliberately gerrymandered into Proposed 15. For example, the plan uses an elongated finger to add the Town of Indio to Proposed 15. Indio is an unincorporated town with a substantial Hispanic population, which according to elected officials from the Valley, is extremely poor and has very low voter turnout. Proposed 15 includes the City of Harlingen, which has a much lower Hispanic population. Several sources describe Harlingen as "the Anchor of Anglo wealth and power" in Cameron County and in the Valley. Alternative plans are available where the decreases in Hispanic citizen VAP and SSR in proposed 15 are unnecessary. For example, neither the final house or senate plans caused this type of a decrease.

These changes will exacerbate the difference in turnout rates between Hispanic and Anglo voters in the new district in the general election. According to the state's regressions in the 2002 general election, Hispanic voters comprised between 52.5 percent to 56.8 percent of the actual voters in Benchmark 15 for the statewide elections (Hinojosa had no opposition in the election). Hispanic voters composition of the electorate drops to between 37.5 percent to 39.1 percent for these same elections in the Proposed 15.

The contrast is just as stark when you look at the 1998 elections. Hispanic voters comprised between 44.9 percent to 47.5 percent of the actual voters in Benchmark 15 for the statewide elections. In Proposed 15, Hispanic composition drops to between 28.0 percent to 30.7 percent. Our analysis found similar numbers for 1996-2002.

The experts' regressions also show significant polarized voting in the statewide elections in Anglo versus Hispanic races. In Proposed 15, the state's regressions estimate that between 75 percent and 79 percent of Anglo voters supported the Anglo candidate. Our analysis showed similar levels of polarization.

Overall, the state's expert concludes that there is just enough Anglo crossover vote to elect Hispanic candidates of choice. Dr. Gaddie notes that Hispanic voters are able to elect candidates of choice in five of six general elections between Hispanic and Anglo candidates in Proposed 15.[18]

During his deposition, Dr. Gaddie acknowledged that Proposed 15 could be characterized as a district that has "changed" from "one in which Hispanics have unilateral control in the general elections (sic) to one in which they have to count on coalitions of others in order to have their candidate of choice elected." Gaddie dep. at 47 Dr. Gaddie also acknowledged that the percentage of the Hispanic electorate in Proposed 15 drops by more than ten percentage points; consequently, he asserts, Hispanic voters now constitute less than 50 percent of the persons actually voting in Proposed 15.[19]

After analyzing 15 races, including statewide races, in Benchmark 15 as well as Proposed 15, we have concluded that Hispanic candidates of choice probably would have been elected in most races for both districts. However, given the drop in Hispanic voters, margins are much lower and electing Hispanic candidates of choice is less likely in Proposed 15. The levels of racial polarization, coupled with the differences in participation rates between Hispanic and Anglo voters in the proposed district, shift the balance more than the simple reduction in Hispanic registration would indicate. As a result of the changes, Hispanic voters will no longer have the advantage of being the majority of the actual voter turnout, and are likely to be only 40 percent or less of the turn out. As additonal evidence of the changed electoral dynamics of the district,

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[18] Gaddie rep. at 8.

[19] Id. at 119-120.

Hidalgo County Republican Chairman Hollis Rutledge has stated that the GOP has a "fighting chance" of winning Proposed 15.

This concern regarding the change in the character of Proposed 15 is noted both by Dr. Lichtman and Dr. Polinard, LULAC's expert. Dr. Polinard concludes that Proposed 15 does not operate as a secure district for Hispanic voters. Deposition of Dr. Polinard at 119-20.

The state has highlighted the position of MALDEF and its expert, Dr. Engstrom, who maintain that Proposed 15 remains a safe seat. In her meeting with us, Nina Perales stated that MALDEF believes that the district provides an opportunity for Hispanic voters to elect the candidate of their choice. MALDEF's expert also finds that Proposed 15 elects Hispanic candidates of choice in seven out of the seven races he reviews, and at his deposition, he says the district allows Hispanic voters an ability to elect candidates of choice. In a subsequent telephone call, Perales said that she stood by everything she told us, but she said she wanted to make sure that we knew that MALDEF was not weighing in on whether Proposed 15 was a safe district, only that it appeared to be a district where Hispanic voters had an equal opportunity to elect candidates of choice.

The shift in the composition of the electorate in Proposed 15 also has an effect on the district's political index. The state's submission shows that Proposed 15 has a Republican Index of 44.3 in 2002 and 49.8 in 2000. By comparison, Benchmark 15's Republican Index is 38.3 in 2002 and 46.0 in 2000.

The loss of significant numbers of Hispanic registered voters in what have been relatively high Hispanic turnout areas in Benchmark 15 raises issues similar to those that led to our decision to interpose an objection to District 38 in the proposed redistricting plan for the Texas House in 2001. There, we found that a decrease in the SSRV from 70.8 to 60.7 percent, where much of the reduction was in areas of high Hispanic turnout, violated Section 5 standards. Past election history in this area had shown that the same configuration had been used in the previous decade and Anglo candidates continuously defeated Hispanic candidates because of the low Hispanic turnout. District 38, represented by Jim Solis, is part of Proposed 15. What happens to District 15 here is similar to what led to our objection to House District 38. High performing Hispanic areas are removed from the benchmark district, and even though the proposed district remains significantly above 50% Hispanic CVAP, the ability of Hispanic voters to elect their candidate of choice is

put in question because those Hispanic voters remaining turn out in lower numbers.[40]

As a result of the reduction of the SSRV, the high levels of racially polarized voting, and the significant differences in turnout and political party preferences between Hispanic and Anglo voters, Hispanic voters are less likely to control the general election in Proposed 15. The district decreases from safe to coalitional.

As discussed above with respect to District 23, we have considered the view that Proposed 15 should be considered a safe district because the exogenous statewide elections show a margin of victory that is the same or slightly higher than those in Benchmark 23.[41] Our concerns about the changes in the district's composition, polarized voting, and turnout differentials have caused us to reject this view.

Proposed 15 has geographic tension where the voters from the north will be pitted against those in the Valley. While Anglo voters in the north may be willing to cross over to vote for Hispanic candidates in statewide elections, we have our concerns that this will happen in the context of this district. The voters are in a different region with different interests. Voters will want a congressman from their area, not from an area 300 miles away. Of course, the small number of Anglo voters in Hidalgo also may feel the same way and be more likely to crossover to elect a candidate from their area.

There is a large turnout differential between those voters in the north and those in the Valley. Sixty percent of benchmark 15 remains in Proposed 15, and these Hispanic voters turned out at a rate of only 34.5 percent in 2002. Newly added Hispanic and Anglo voters in Cameron County appear to have a little higher turnout at 38 percent. The predominantly Anglo counties turn out

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[40] As we have indicated in previous memoranda on this subject, we believe that the level of participation within an electorate is a mandatory component of any analysis of that electorate's voting behavior. In addition, in the pending litigation involving this plan, there is evidence concerning the causes of the depressed turnout in the Valley. Experts have testified and submitted reports regarding the significant economic and educational differences between Anglos and Hispanics, and a two-hundred year history of discrimination against Hispanics in Texas and its negative impact on the ability of Hispanics to participate effectively in the electoral process.

[41] We have also considered whether Proposed 15 should be considered a safe district because the margin of victory in the 2002 general election results in District 25 are similar to those in Proposed 15. As noted above, we consider District 25 to be a safe district.

at a rate of about 52 percent. Overall, Hispanic voters' turnout rate ranged from 37 to 39 percent of the electorate in the Proposed 15. While it is possible that turnout rates in Hidalgo could dramatically increase, nothing in past election behavior would suggest a dramatic jump up.

The Hispanic voters in this district must depend on Anglo crossover voting with the low Hispanic turnout. Our analysis of Proposed 15 has revealed that the rate of general election Anglo crossover voting would be higher in the northern counties than in the Valley. A number of these predominantly Anglo counties do not appear to have any Hispanic elected officials even though Hispanic population in the counties ranges from 19 to 27 percent[12]. Similarly, Anglo voters may be less likely to vote for a Hispanic congressman in an open seat where geographic proximity of the candidate matters. Traditional Anglo Democratic voters in the north also could be more likely to vote for the "northern candidate", and this is critical where the Republican and Democratic indices have split 50/50 in presidential election years. Even so, the number of actual voters (Hispanic and Anglo) is greater in the Valley than in these northern areas, which is why we believe the Hispanic candidate from the Valley will be more likely to be elected. Therefore, in Proposed 15 it appears "likely", although not "highly likely," that the Hispanic voters' candidate of choice will be elected in Proposed 15.

Proposed 25: Proposed 25, a newly created, 320 mile long, district that goes from Austin to the Mexican border, is probably a safe district in which it is "highly likely" that Hispanics will be able to elect a candidate of their choice. Proposed 25 has a Hispanic citizen VAP of 64.6 percent, and SSR of 55.6 percent. There are two population centers in the district - the Austin area and Hidalgo County in the Valley. Proposed 25's political performance index is highly Democratic, meaning that the Democratic primary will control who is elected in the district.

In its submission, the state notes that in no other cngressional district in Texas that has had a Spanish-surname registration rate as high, have minorities failed to elect their candidate of choice. As further support, the state includes regressions that show that in the 2002 statewide Democratic primaries and statewide general election, Hispanic candidates of choice prevailed in five of six primaries, and all fifteen

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[12] A review of county officials in Bastrop, Fayette, De Witt, and Colorado counties showed no Hispanic elected officials. In Lavaca County, there is one Hispanic constable and one Hispanic official in a JP district.

general elections.[42] Moreover, the state's regressions show that between 70 and 75 percent of the voters in the primary elections are Hispanic.

Whether the statistical evidence means anything is unclear. Anecdotal information suggests that traditional statistical methods will have difficulty taking into account the geographic tension that will arise when Austin is pitted against the Valley. The overriding influence in the election may be that voters want a representative from their area and not one based 300 miles away. The geographic tension could sublimate racial preferences.[43]

There is a scenario in which an Hispanic candidate of choice will not win in the Democratic primary. The proposed district's geographic configuration may be such that either 1) Hispanic voters from the Valley and Austin areas end up pitted against each other, splitting their votes for multiple Hispanic candidates in the Democratic Primary and allowing Anglo voters to decide the primary winner; or 2) a well-financed Anglo candidate will overwhelm a severely underfunded Hispanic candidate to win the Democratic primary.

The reality of the situation here may be the second scenario. Lloyd Doggett, the incumbent in Benchmark 10 from Austin, has announced he is running in Proposed 25. Kino Flores, a representative from the Valley, had also announced he was going to run in this district. On December 3, Flores announced that he decided not to run in Proposed 25 because he could not raise sufficient funds to compete in the five media markets that cover the district.

Even though Proposed 25 is an open seat, it is difficult to conceive of a scenario where Rep. Doggett (with $2.5 million allegedly in his reelection account) would not defeat an Hispanic-preferred candidate in the Valley. Rep. Doggett currently attracts a sizeable Hispanic vote from the Austin area as well as virtually all of the non-Hispanic vote in the Austin portion of the proposed district.

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[42] The only primary race in which the Hispanic candidate of choice lost was for the office of Railroad Commissioner, in which the Hispanic vote was almost evenly split among two candidates (race unknown), 53% to 46%.

[43] Dr. Lichtman and Dr. Polinard make this argument and believe there is a good possibility that in Proposed 25, Hispanic voters will not have the ability to elect their candidate of choice.

It is also possible that a well-known Hispanic incumbent can and will run in that area and gain the support of the majority Hispanic voting population in the Democratic primary. For example, State Senator Barrientos, also from Austin, has not said whether he will run in the new congressional district.

Ultimately, our goal is to determine whether the seat itself presents an ability for Hispanic voters to elect their candidate of choice. Rep. Doggett is an incumbent, even though he is the current representative for only 38 percent of the district.[45] If Doggett were to choose not to run tomorrow for whatever reason, this race likely would be considered wide open, and a Hispanic candidate like Senator Barrientos would be favored to win.

Even though the most likely scenario is that Rep. Doggett, the Anglo candidate, will win, we think that presents a unique circumstance. We do not have sufficient evidence to show that Hispanic candidates do not have adequate funds to run for proposed 25. Recent electoral history shows that there are Hispanic candidates that can raise significant sums of money.[46]

The initial scenario raised above, that voters in the northern parts (the Austin area) of Proposed 25 will have higher turnout than the Hispanic voters in the Valley, seems unlikely. We conducted regression analyses to determine whether in Democratic primaries the voters in the urban area of Travis County included in Proposed 25 would submerge the voting preferences of voters in Hidalgo County, which is about 75

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[45] Of course, the possibility exists that Lloyd Doggett could be the Hispanic candidate of choice in the Proposed 25 primary election if he runs. State Senator Hinojosa has admitted as much. Moreover, as set forth in our discussion of Benchmark 10, both MALDEF and LULAC view Rep. Doggett as the Hispanic candidate of choice in that district. LULAC states in its comment letter that Rep. Doggett has been "extremely responsive to the interests and concerns of minority voters." Indeed, Hispanic organization and NAACP "report cards" give him high marks for his votes on issues important to their constituencies. On the other hand, we have heard anecdotal testimony that while Doggett is the candidate of choice in Austin, he likely would not be the candidate of choice 300 miles away in Hidalgo County.

[46] For example, in the 2000 election for Congressional District 5, Hispanic Democrat Regina Montoya Coggins was able to raise enough money to almost equal the amount spent by incumbent Pete Sessions (Montoya - $1.64 million; Sessions - $1.83 million). Similarly, incumbent Henry Bonilla in 2000 and 2002 was able to raise millions in outspending his opponents by an almost 3 to 1 margin. In his race against Henry Cuellar in 2002, Rep. Bonilla spent over $2.4 million to defeat Cuellar, who spent the not so paltry amount of $875,000. Even running unopposed in 2002, incumbent Hispanic Congressmen Reyes in District 16 and Gonzalez from District 20 were able to raise enough money to spend, respectively, $413,000 and $633,000.

percent Hispanic. We examined results from eight Democratic primaries for the Travis, Hidalgo, and Starr County[47] precincts in Proposed 25. First, we determined that, in general, voting in those areas tends to be polarized along racial lines. Second, our analysis showed that, in three of the elections, the candidate who would have won in Travis was different from the winning candidate in the other two counties. However, totaling over all three counties, the prevailing candidate was the same candidate who won in Hidalgo. Of significance, in each contest, there were more votes cast in Hidalgo than in Travis county, even though the total population is higher in Travis. The data indicates that while rolloff may be higher in Hidalgo County, voters in Hidalgo County turn out for the primaries at a higher rate than those in Travis so that the resulting number of voters is greater. Our analysis shows that ten Starr precincts are nearly 95 percent Hispanic and their voting behavior parallels that of precincts in Hidalgo County.[48]

Given these findings from past elections, we concluded that Austin voter preferences would not overshadow Hidalgo voter preferences if patterns of turnout and voter support retain the same characteristics. It is possible that voter turnout in Austin has been lower given the unofficial slating process that may occur with black, Hispanic, and Anglo leaders, and this could change when there is something at stake in the primary. It would appear, however, that the Austin Anglo vote simply will not be numerous enough to outvote the Valley because it appears that Hispanic voters in the Austin area just do not turn out in sufficient numbers.[49]

Thus, while Proposed 25 does give us some concern, it appears that the best category for this district is a safe seat. Dr. Gaddie argues that Proposed 25 more than offsets the loss of benchmark 23 because Proposed 25 is a certain performer whereas

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[47] In addition to Travis and Hidalgo Counties, Starr County comprises a large part of Proposed 15 along with small parts of other counties. In the case of large differences in voting patterns between Travis and Hidalgo precincts, Starr precincts could serve to tip the balance in one direction or the other. Thus, we included Starr in this examination of election results.

[48] Our analysis indicates that the percent of total primary votes from Hidalgo and Starr counties for the eight elections examined was, with one slight 1996 exception, over 61%.

[49] It is possible that Anglo turnout in Austin could increase in the Democratic primary in order to assure the election of an Anglo candidate from the Austin area more responsive to that area's needs than a candidate from the Valley. But such speculation does not override what current data indicates about the voting performance of Proposed 25.

Benchmark 23 not only is not a certain performer, but it currently does not elect the Hispanic candidate of choice. Gaddie dep. at 113-14. But, it appears Proposed 25 is no more safe than Benchmark 23, because it is likely Doggett, the Anglo incumbent, will win Proposed 25. As the anecdotal evidence has pointed out, Doggett is the Hispanic candidate of choice in Austin, but there is a good chance he would not be in the Valley. If both seats were open, they both appear to be highly likely to elect the Hispanic voters' candidate of choice. Proposed 25 is an offset for Benchmark 23, but there is no corresponding offset for the loss of the safe seat in Benchmark 15.

Benchmark 29/Proposed 29: Benchmark 29, in the City of Houston, is a safe Hispanic district and will remain so under the proposed plan. The Hispanic citizen VAP increases under the proposed plan from 42.8 percent to 46.7 percent while the SSR increases from 39.8 percent to 45.9 percent. The black and Hispanic citizen VAP decreases from 63 percent to 60.3 percent. Under the benchmark plan, Hispanic voters control the electoral outcomes of the district's races, and elect their candidates of choice. The proposed plan does not enhance this already existing ability.

The state's claim that Benchmark 29 does not perform for Hispanic voters as it is currently configured is in direct opposition to its own regression figures, statements of a plan sponsor, and expert reports. According to Dr. John Alford, another one of the state's experts, Benchmark 29 is already one of the seven Hispanic districts under the benchmark plan. State's submission, Exhibit 7, Report of Dr. John Alford at 3. State Rep. Phil King (A), who sponsored the redistricting bill in the Texas House and led the House team in conference committee, said during his deposition that Benchmark 29 is already a majority minority district. King dep. at 16, 97. Dr. Gaddie said that Benchmark 29 performs for Hispanic voters and is thereby protected under the Voting Rights Act. Gaddie dep. at 17.

With regard to Benchmark 29, the state claims that 1) no one minority community would be capable of dominating the Democratic primary; and 2) Anglo candidates take advantage of polarized voting patterns to defeat a minority candidate of choice in the Democratic primary. These claims are refuted by the election data.

In Benchmark 29, Hispanic voters comprised 76 percent of the voters in the 2002 Democratic primary for the United States Senate race, and 88 percent of the voters for the governor's

race.[21] For the 2002 Democratic runoff for the U.S. Senate race, Hispanic voters accounted for 62 percent of the voters. For the 2002 Congressional Democratic primary, also under the benchmark plan, Hispanic voters were 89.1 percent of the voters, and voted 100 percent for Rep. Green. Hispanic voters control the Democratic primary as the district currently exists.

The anecdotal evidence we received from federal and local elected officials in the Houston area is consistent with this information. John Lindsay, an Anglo Republican state senator, has pointed to Rep. Green as an example of an Anglo able to represent minority communities. This view was echoed by other elected officials. Houston City council member Gabriel Vasquez [illegible] noted that Green grew up in Hispanic neighborhoods, went to a Hispanic high school, knows the Hispanic culture, and is "basically Hispanic himself". His congressional website is one of few with a link to an all-Spanish version.

With the recrafting of Proposed 29, the state claims to have "enhanced" electoral opportunities for Hispanic voters. Such is not the case. Benchmark 29 actually performs better than Proposed 29. From 1996 to 2002, in five of six Hispanic versus Anglo Democratic primary or runoff elections, and in six of six general elections pitting a Hispanic Democrat against an Anglo Republican, the Hispanic candidate received a higher percentage of the vote in Benchmark 29.[22] Thus, while the state claims to have "enhanced" the Hispanic ability of the district, it has indeed done the opposite. Rep. Green also believes this to be the case because, while Hispanics are added to the plan, Proposed 29 also receives a high income Anglo area that has high turnout rates.

The state's intentional removal of the Anglo incumbent to increase the likelihood of a Hispanic representative is moot, as Rep. Green has announced that if the plan is approved, he will move back into Proposed 29. It is highly likely that as the Hispanic candidate of choice, and as a strong incumbent, he will run and win in the new seat. Even the state's expert witness, Dr. Gaddie, conceded during his deposition that Rep. Green would probably win in Proposed 29. Gaddie dep. at 68.

Thus, the information gathered from other sources, coupled with the State's own election analyses, shows that Benchmark 29

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[21] Ecological Regression Results, submitted by the state. (Nov. 24, 2003) . Analysis of Statistical Findings Submitted to the United States Department of Justice by the State of Texas. Dr. Allan Lichtman, p. 3.

[22] Lichtman rep. at Table 27, p. 66.

is a Hispanic-controlled district, and will remain so under the new plan. The new plan will maintain, but not enhance, this safe Hispanic district.

b. The Second Prong: Equal opportunity to participate

i. Influence districts

Benchmark 10: The state's submission does not acknowledge Benchmark 10 as a district - either a safe, coalitional or influence district - which should play any role in the determination of minority voting strength. Dr. Gaddie indicates that the state does not view this district as falling within any of the categories set forth by the Supreme Court in Georgia as deserving of Section 5 protection.

According to Dr. Gaddie, Benchmark 10 is a Democratic district in which the overwhelming Anglo voting participation in both the Democratic primary and the general election dominates any substantial effect minority voting power might have on elections. The statistical analyses submitted by the state seems to bear this out, indicating that Anglo participation in the Democratic primary is around 70 percent since 1996 and that Anglo participation in the general elections since 1996 has been between 85 and 92 percent.

Our analysis of Benchmark 10 indicates that the state's submission presented an accurate picture of the voting patterns in the district. It is clear that the winners in the general election contests in the district are Democratic and that the majority of the support for these candidates is from white voters. Because minority voters in Benchmark 10 are predominantly Democrats and vote Democratic in general elections, minority-preferred candidates are being elected in general elections.

To get a better picture of minority voting strength in Benchmark 10, we analyzed several Democratic primary elections between 1996 and 2002. Comparing primarily Hispanic voter registration numbers against all other voters, we found that, while Hispanic voters provide overwhelming support to Hispanic candidates, they cannot control the primary. Hispanics in general did not vote for black candidates and a combined minority population in the district could not elect a candidate of choice against an Anglo candidate. In sum, Hispanic-preferred candidates won only when they were the preferred candidates of non-Hispanics, most of whom were white. Thus, although Benchmark 10 is a strong Democratic district, minority voters appeared to

have little impact on who is selected to run as Democratic candidate.

On the other side of the statistical analysis is the extensive anecdotal information we have gathered which paints Benchmark 10 as a district where minority voters can form a coalition with each other and with Anglo voters to elect a candidate of choice. As indicated above, the clear and consistent message from persons we have talked to is that Benchmark 10 is a unique district where coalitions have been formed and minority voters play an important part in the voting calculus for the district. Incumbent Rep. Lloyd Doggett is universally viewed as a candidate of choice of the minority community and statistical analysis bears this out. As has been commented on time and again, Rep. Doggett is more than willing to take the interests of his minority constituents into account. His responsiveness to such interests is and has been very high. In addition to receiving high marks from minority groups on his votes in Congress, comments we have received have been uniform that Rep. Doggett pays close attention to the needs of the minority communities in his district and acts accordingly.

In Georgia, the Supreme Court stated that, in making a Section 5 retrogression determination, "a court must examine whether a new plan adds or subtracts 'influence districts' - where minority voters may not be able to elect a candidate of choice, but can play a substantial, if not decisive, role in the electoral process." Georgia, 123 S. Ct. at 2512. The Court goes on to say that "[i]n assessing the comparative weight of these influence districts, it is important to consider 'the likelihood that candidates elected without decisive minority support would be willing to take the minority's interests into account." Idid. (internal citation omitted).

Benchmark 10 appears to be the very type of district envisioned by the Court as an "influence" district. As our analysis demonstrates, the minority population in the district is not capable in and of itself of electing a candidate of choice. The black and Hispanic populations there, although totaling 39.2 percent VAP and 33.3 percent CVAP in the benchmark district, do not control the primary election separately or combined. Nevertheless, these populations vote almost unanimously for the incumbent white Democrat. With the combined Benchmark 10 minority population as high as it is, this vote contributes substantially to Doggett's ability to be elected. Minority influence appears to be reflected in Doggett's responsiveness to minority concerns. Moreover, unlike in the other alleged influence districts analyzed elsewhere, the Democratic

performance numbers for Benchmark 10 are and have been very high. This is one of the factors viewed as important by the Ashcroft Court in determining the influence of minority groups in a district.

In sum, although the minority population in Benchmark 10 does not appear able to alone elect candidates of choice or to control the primary elections, their substantial population numbers, coupled with the ability to form coalitions with other groups in the district, render them an influence in the district. Under the Georgia rubric, we would label this district as an influence district, albeit a weak one. As indicated above, the proposed plan effectively dismantles Benchmark 10 from a minority population and Democratic performance point of view, thus removing any minority influence Benchmark 10 possessed.

Benchmark 9: Benchmark District 9 appears to be a weak influence district. While it has been the contention of both the expert for the Congressional Democratic Interveners and numerous elected officials from federal to local levels that Benchmark 9 is a district in which African American voters exert a considerable amount of influence, the electoral analyses show only minimal support for this conclusion.

Although the state's submission is largely silent on Benchmark 9, it conducted electoral analyses on many congressional districts for 2002. The state's reports provide that black voters exert some varying form of electoral influence in Benchmark 9.[52]

In our electoral analyses, we determined that black voters have minimal influence on elections in the district. They tend to turn out at rates higher than Anglos in Democratic primaries, and almost as high in general elections. However, many of the general elections were won by Republican candidates who clearly were not the preference of black voters. The state's estimate that black voters make up about 40 percent of the total voters in

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[52] The state's regressions show that during the 2002 Democratic primary, Rep. Lampson received 100 percent of the black vote. He was elected with 59.3 percent of the vote. Black voters accounted for 41.0 percent of the votes during that congressional primary election, and 32.6 percent of the votes during that general election. Further regressions conducted by the state show that black voters accounted for 38.2 percent of the vote in the 2002 Democratic primary for United States Senate, and 38.3 percent of the votes cast for that election's gubernatorial races. Black voters cast 20.4 percent of the votes in that senate race, and 52.5 percent of that gubernatorial race.

most contests is reasonable.[53] Nevertheless, both approaches suggest higher black than white turnout, but unless that turnout were substantially higher, minority voters would remain the minority.

With regard to primary elections, although estimates suggest few Hispanic voters actually vote, as the state indicates in its tables, and as our analyses show, there is indication across contests that Hispanic voters support Hispanic candidates. Black voters, however, do not consistently support them. White voters were not cohesive behind any one candidate.

A quick look at outcomes for the general election contests in 2002 indicates that Republican candidates were the winners. Minority voters had little effect on the outcomes of those contests even though they overwhelmingly supported the Democratic candidates.

The incumbent in Benchmark 9, Nick Lampson, has had little minority opposition in recent years. In 1996, Sam (B) ran against him in a field of five. The analysis of the election indicates that Sam was not a preferred candidate. Black voters supported Lampson in that race.

Overall, the analysis of voting in Benchmark 9 suggests that in some elections, voting is polarized between black and Anglo voters when there are candidates of different races. Anglo voters appear to be in control of the Democratic primary and the general election. In only one contest, in which white voters were not cohesive, did minority voters seem to influence the election outcome. Thus, when minority-preferred candidates are elected, it is only because they are also the Anglo-preferred candidates.

When looking at the totality of circumstances in Benchmark 9, there are several important factors which cannot be ignored. First, the district's general characteristic is altered under the proposed plan. It changes from an 47.8 percent Democratic district to a 39.4 percent Democratic district using 2002 elections. Second, Anglo Democrats, who have formed coalitions with black voters, have been removed, and replaced with high performing Anglo Republicans. Therefore, the responsiveness of the district's incumbent to minority voters will change. Under the benchmark plan, the incumbent is very popular with black

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[53] We were was able to replicate these estimates using the state's turnout estimates. However, our estimates varied somewhat, yielding somewhat higher Anglo turnout rates.

voters, has consistently received their electoral support, and has received high marks from minority organizations. In fact, Rep. Lampson gets 100 percent black voter support. Under the proposed plan, it is highly likely that a Republican will be elected, and Republicans have not generally scored well in terms of being responsive to minority issues or concerns.

Benchmark 1, 2, 4, 11, and 17: These districts, located in rural east Texas and along the border with Louisiana, Arkansas, and Oklahoma, are represented by, respectively, Anglo Democrats Max Sandlin, Jim Turner, and Ralph Hall. Benchmark 11 is located in central to north central Texas and is represented by Chet Edwards, also an Anglo Democrat. Finally, Benchmark 17 is located in west to northwest Texas and is represented by white Democrat Charles Stenholm. The demographics indicate that in none of the benchmark districts are minority voters a significant presence. Under the proposed plan, each undergoes substantial changes both in its geography and in its voting population.

Analysis of election data dating back to 1992 indicates that the individual and combined minority group populations in these districts do not control the Democratic primary election. The election statistics over the past decade indicate a consistent theme - each of the districts has changed from majority or heavily Democratic to majority and increasingly heavily Republican. Weighted averages for statewide elections show this dramatic change away from a Democratic electorate. During that same time, the number and proportion of general election contests for statewide offices in each district won by Democrats has decreased significantly.

Analyses of these districts in light of Georgia and the above claims of minority voting influence all lead to the same result - each district is not a minority influence district. The information available to us does indicate that minority support for each of the white Democratic incumbents is overwhelming. However, while minorities may play a substantial role in electing these particular Democrats, it does not appear that the minority vote plays or can play a substantial role in electing any other candidate besides these popular incumbents. In other words, minorities have little influence on the overall electoral process in the districts, and incumbency, not the minority vote, is the decisive factor which puts minority preferred candidates "over the top." In fact, given the unmistakable trend in voting behavior change in each of these Districts over the past decade or so from Democratic to Republican, it is very possible that several of the incumbents, in particular Edwards and Stenholm, would not be reelected in their benchmark districts in 2004.

With regard to the standard imposed by Georgia, the purpose of our Section 5 analysis here is to judge the ability of minorities to influence election to an office as opposed to election of the current office holder. It appears highly likely that an election for an open seat in each of these districts would result in victory for the Republican candidate and not for the candidate of choice of the respective minority population. Thus, our conclusion must be that Benchmark 1, 2, 4, 11 and 17 are not influence districts and that any changes to these districts cannot have a retrogressive effect.

ii. Positions of leadership and influence of minority candidates of choice

To determine the extent of minority group opportunity to participate in the political process under Georgia v Ashcroft, in addition to looking at influence districts, the Court instructs us "to examine the comparative position of legislative leadership, influence, and power for representatives of the benchmark majority-minority districts." Georgia at 2513. "The ability to exert more control over th[e legislative] process is at the core of exercising political power... Maintaining or increasing legislative positions of power for minority voters' representatives of choice, while not dispositive by itself, can show the lack of retrogressive effect under Section 5." Id.

In light of our analysis above, the submitted congressional plan would have a negative impact on positions of legislative leadership and influence of minority candidates of choice. Four of the five minority-preferred candidates who would lose their seat under the proposed plan have substantial seniority and experience in the House and serve on influential House Committees. Rep. Martin Frost (Dist. 24) is the senior Member of Congress from Texas, currently serving in his 13th term. He is the Ranking member of the influential House Rules Committee. Rep. Gene Green (Dist. 29) has served in the House since his election in 1992. He is a member of the Committee on Energy and Commerce, the Subcommittee on Health, the Subcommittee on Environment and Hazardous Materials, and the Subcommittee on Commerce, Trade and Consumer Protection. Rep. Lloyd Doggett (Dist. 10), was first elected to the House in 1994 and has served continuously since then. He is a member of the Committee on Ways and Means, the Health Subcommittee and the Select Revenue Measures Subcommittee. He is also a member of the Committee on Standards of Official Conduct. Rep. Nick Lampson (Dist. 9) is a four-term Member of Congress who serves on the Committee on Transportation and Infrastructure and the Committee on Science.

Anecdotal evidence shows that constituents in these districts believe there would be a significant loss because these members of Congress likely would lose their seats. Moreover, minority commentators have said that these members of Congress use their positions to support issues that are important to the minority community.

iii. Whether minority legislators from majority minority districts support the plan

In Georgia v. Ashcroft, the Court said it was significant but not dispositive whether the representatives elected from the districts protected by the Voting Rights Act support the new redistricting plan. "The representatives of districts created to ensure continued minority participation in the political process have some knowledge about how voters will probably act and, whether the proposed change will decrease minority voters effective exercise of the electoral franchise." Id.

Given that this is a congressional redistricting, the exact circumstances that existed in Georgia do not exist here. Members of Congress do not vote on their own redistricting. However, of the Members of Congress that we talked to who currently represent a minority district, all ten opposed the proposed redistricting plan. We were unable to speak with Rep. Bonilla about Proposed 23.

The minority legislators that voted on this plan and reside in these same protected Congressional districts overwhelmingly opposed the redistricting plan. Of the 55 minority legislators in the state legislature, 53 voted against the plan. We talked to, met with or received comments from 30 of the 55 legislators, and 28 of 30 opposed the plan.

c. Prong 3: Non-retrogressive alternative plans

The third prong in the "totality of circumstances" retrogression test established in Georgia is the feasibility of creating a nonretrogressive plan. During the course of the redistricting process in 2003, there were several plans considered by both the house and senate that did not appear to retrogress from the level of minority voting strength in the benchmark plan. Indeed, the final plans passed by each body that went into conference committee - 1268C (House plan) and 1362C (Senate plan) - both maintained, in our view, the benchmark level of minority voting power, or were at the least considerably less retrogressive. The chart below demonstrates that the

retrogression caused by the loss of Districts 23 and 24 in the proposed plan do not occur in the House or Senate plans:

Comparison of Districts 9 (proposed), 10, 15, 23, 24, 25 (benchmark) in Final Senate Plan (1362), Final House Plan (1268), and the Proposed Plan 1374. Figures below are VAP and SSRV percentages.

	Senate 1362				House 1268				Proposed 1374			
	B	H	B+H	SSR	B	H	B+H	SSR	B	H	B+H	SSR
PD9									8.0	63.4	71.1	55.6
10	10.5	28.9	39.2	18.7	10.6	29.3	39.5	19.1	9.0	16.8	25.7	9.1
15	1.8	74.3	75.9	67.0	1.6	77.3	78.8	71.2	3.3	64.0	67.1	56.7
23	3.1	61.4	64.3	55.0	1.8	63.0	64.6	55.3	1.9	50.9	52.7	44.0
24	21.7	33.5	54.9	18.0	21.9	35.5	57.1	19.9	9.3	15.8	24.9	8.8
SDB P9	22.7	32.5	54.7	16.0	36.0	30.7	66.1	13.9	36.5	30.3	66.2	13.7

The state's expert did a ranking of the alternative plans on the basis of which plans would be at the greatest and lowest risk of being rejected for violating the Voting Right Act. He concluded that the proposed plan was among the worst in risk for its potential to be rejected for a violation of the Voting Rights Act. Gaddie dep. at 102-104.

Jim Ellis, Executive Director of Americans for Republican Majority, produced memoranda and a chart at his deposition which states that the proposed plan carries some risk of meeting Section 5 standards. The three other plan options that were considered, including the house and senate configurations, ranged from "most certain to preclear" to "very minimal risk." Ellis' Memorandum on October 5, 2003, adds, "we need our map, which has been researched and vetted for months. The pre-clearance and political risks are the delegation's and we are willing to assume those risks, but only with our map."

Alternative plans that addressed all of the state's other criteria show that it was not necessary to reduce Hispanic citizen VAP or SSRV in Benchmark 15 or 23 as significantly as was done in the proposed plan. The plan passed by the house maintained the Hispanic citizen VAP and did not split Webb County. Contrary to the assertion that splitting Webb County was unavoidable in order to create Proposed 23, a new majority Hispanic district, we have drawn a plan that keeps Webb County

whole and keeps the same Hispanic citizen VAP as in Benchmark 23 while preserving Proposed 25.

It does not appear possible to add an extra majority Hispanic district and to also maintain the Hispanic citizen VAP in Proposed 15. The most that can be done is to maintain Proposed 25, while restoring Hispanic CVAP to the benchmark level in Proposed 23. It is not also possible to raise the Hispanic CVAP in Proposed 15 to its benchmark level.

Likewise, alternative plans that addressed all of the state's other criteria demonstrate that it was not necessary to eliminate the electoral ability in Benchmark 24. Both the final house and senate-passed plans maintained that district. In addition, our illustrative plan, a least-change plan based on the proposed plan which makes changes to a minimum number of districts, restores the district to a "safe" level of minority voting opportunity and results in a level of minority voting strength under the proposed approximately equal to the benchmark. See Tab 8.

III. DISCUSSION

Section 5 requires the Attorney General to determine that the submitted change affecting voting does not have the purpose or effect of denying or abridging the right to vote on account of race. 42 U.S.C. 1973c. A voting change has a discriminatory effect under Section 5 if it will lead to "a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." Beer v. United States, 425 U.S. 130, 141 (1976).

A. Retrogressive effect

An assessment of retrogressive effect must consider the "totality of the circumstances." Georgia v. Ashcroft, 123 S. Ct. 2498, 2511 (2003). These include "the ability of minority voters to elect their candidate of choice, the extent of the minority group's opportunity to participate in the political process, and the feasibility of creating a nonretrogressive plan." Ibid. The analysis progresses sequentially. First, it calculates whether there has been any change in the number of districts in which minority voters can elect candidates of their choice. Id. at 2511-2512. Two types of districts count toward the total: (1) "'safe' districts, in which it is highly likely that minority voters will be able to elect the candidate of their choice," and (2) "districts in which it is likely -- although perhaps not quite as likely as under the benchmark plan -- that minority voters will be able to elect candidates of their choice." Id. at

2511. Section 5 permits jurisdictions to create a greater number of the "less-likely" districts to offset the loss of a "safe" district. Ibid.

The inquiry then moves to determine whether there has been any alteration in "the minority group's opportunity to participate in the political process." The relevant factors here are (1) changes in the number of "'influence districts'-- where minority voters may not be able to elect a candidate of choice but can play a substantial, if not decisive, role in the electoral process[;]" (2) differences in "the comparative position of legislative leadership, influence, and power for representatives of the benchmark majority-minority districts[;]" and (3) "whether the representatives elected from the very districts created and protected by the Voting Rights Act support the new districting plan." Ibid.

The burden is on the jurisdiction to show the changes are not discriminatory. Reno v. Bossier Parish School Board, 528 U.S. 320, 329 (2000). The State of Texas has not met its burden in showing that the proposed congressional redistricting plan does not have a discriminatory effect.

The state notes that under Georgia v. Ashcroft, it may choose to either protect "safe" districts or increase influence and coalitional districts. The state says it has increased "safe" or ability to elect districts by either two or three when comparing the proposed plan to the benchmark, although its submission does not explicitly choose one method or the other outlined by Georgia.

With regard to the first step in the analysis, the state argues, in part, that the proposed plan adds three safe seats when it reconfigured Benchmark 24, 25, and 29, replacing them with proposed 9 and 29. It claims the Anglo incumbents in these district have not "faced a credible minority candidate in the Democratic primary, results which indicate support from the minority community are not indicative of whether any of these incumbents are candidate of choice of any of the minority communities." Exh. D at 9. The submission does not elaborate on this point, citing only to Collins v. City of Norfolk, 816 F.2d 932 (4th Cir. 1987), without a page reference. That case discusses a different scenario whereby ballots were marked for multiple candidates in at-large elections and the minority vote for certain white candidates did not necessarily indicate a

minority preference.[34] That case is inapposite to the situation here. The evidence for Benchmark 24 and 25 show black voters control the primary and in Benchmark 29, there is Hispanic voter control of the primary. In all three districts, the minority candidates of choice prevail in the general election. Under these facts, an unopposed incumbent would more likely be evidence of minority support rather than minority helplessness.

The state has failed to meet its burden of demonstrating that it will maintain the level of voting strength for black voters and continue to provide them with the same ability to elect the candidates of their choice as they enjoyed under the benchmark plan. There are either four safe or ability to elect districts in the benchmark or three safe seats and one coalitional seat. In the proposed there are only three safe seats.

In Benchmark 24, black voters currently have the ability to elect their candidate of choice, and both anecdotal and statistical evidence suggest that Rep. Frost is the black candidate of choice. The state admits that the minority community in Benchmark 24 is splintered and submerged into majority Anglo districts in the Dallas-Fort Worth area in the proposed plan. This is a loss of a "safe" or ability to elect seat.

The state has failed to make up for this loss elsewhere in the proposed plan. While Proposed 9 increases the level of black population when compared to Benchmark 25, this only has made a safe seat for black voters safer. Even if one finds that Benchmark 25 was only "likely" to elect black candidates of choice and the enhancement in Proposed 9 makes it "highly likely" that black voters will elect a candidate of choice, the state still has not met its burden because if Proposed 9 acts as an offset to the loss of Benchmark 24 as the replacement of a highly likely district, then it has failed to offset the loss of

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[34] The court noted that

> [t]he mere election of a candidate who appears to have received votes from more than fifty percent of minority ballots does not count as a minority electoral success, when each ballot may contain votes for more than one candidate. In such a situation, if there were other candidates, preferred by a significantly higher percentage of the minority community, who were defeated in the same election, then it cannot fairly be said that the minority community has successfully elected representatives of its choice.

Id. at 937.

a Benchmark 25, a district that is "likely" to elect black candidates of choice.

The state's expert attempts to resolve this problem by suggesting that the loss in Benchmark 24 and 25 can be offset solely by the creation of the safe seat in proposed District 9. The expert views Proposed 9 as "certain" to elect while Benchmark 24 is "less than certain" to elect and Benchmark 25 is less likely to elect than Benchmark 24.

This approach finds no support in the case law. Georgia v. Ashcroft does not create a category for "certain." The court only creates categories of "highly likely" and "likely." 123 S. Ct. at 2311. The Court suggests only that a state may create a greater number of "likely" districts to offset the loss in "highly likely" districts. Ibid. The Court does not suggest that the creation of one district that is "highly likely" to elect a minority candidate of choice will offset the loss of two benchmark districts that are highly likely to elect minority candidates of choice. Similarly, the creation of one "highly likely" district would not offset the loss of one "highly likely" district and another "likely" district.

We also find that the state has failed to sustain its burden to show that it will maintain districts where Hispanic voters previously elected their candidates of choice. There are seven safe or ability to elect seats in the benchmark. There are six safe seats and one coalitional seat in the proposed.

There is classic retrogression in the benchmark District 23. The district loses 12 percentage points to go from majority Hispanic to a majority Anglo district. With the extreme level of polarization in the district, Hispanic voters simply no longer have any ability to elect their candidate of choice.

It has been suggested that the recent elections should not be used here because the Hispanic turnout skews higher in this election with Sanchez running for Governor in 2002. First, recent elections are more probative of racial voting patterns. See, e.g., Uno v. City of Holyoke, 72 F.3d 973, 990 (1st Cir. 1995) ("elections that provide insights into past history are less probative than those that mirror the current political reality"); LULAC v. Clements, 999 F.2d 831, 891 (5th Cir. 1993) (requiring "practical and searching appraisal" of current voting situation). Second, given the trend showing an increase in voter turnout here, there is no basis to claim that the people who are voting here will fail to vote in the future. The trend shows

that there has been a greater participation for Hispanic voters in recent elections.

We also find a loss of a Hispanic safe seat in Proposed 15. While it is still "likely" that Hispanic voters can elect their candidate of choice, it does not appear "highly likely."

The proposed plan offsets one of the losses with the addition of a safe district in Proposed 25. The geographic tension in this district between Austin and the Valley likely will split Hispanic voters where they will have a candidate of choice in Austin and a different one in the Valley. Even so, it appears that a Hispanic-preferred candidate would prevail in an open seat. The reality of this seat is that it likely will elect the current Anglo incumbent in Benchmark 10, who likely would be the Hispanic candidate of choice in the Austin area but not in the Valley.

In sum, the proposed plan reduces the level of minority voting strength because it eliminates the ability that minority voters have in Benchmark 15, 23, and 24 to elect candidates of choice. In each of these districts, the state failed to follow its traditional redistricting principles preserving communities of interest and forbidding fragmentation or packing of minority voters. The proposed plan offsets only one of these losses with a creation of a new safe seat in Proposed 25 and adds an enhanced, but not a different, ability in Proposed 9 than was available in Benchmark 25. As a result, the level of minority strength has been retrogressed. Even if one assumes that Proposed 9 results in a change in kind or character rather than only of degree, the proposed plan still drops minority voting strength by two districts.

Finally, alternative plans passed by the senate and House maintained the current levels of minority voting strength and did not pack any majority minority district or split it into multiple Anglo majority districts. United Jewish Organizations of Williamsburg v. Carey, 430 U.S. 144, 158-59 (1977). These non-retrogressive alternatives comply with the state's redistricting principles . As such, the plan does not pass scrutiny under Section 5 because it has a retrogressive effect. Beer v. United States, supra.

B. Intent

The principle evidence of retrogressive intent alleged by opponents of the plan is (1) the awareness of legislators, particularly in the conference committee, that the proposed plan

would have a retrogressive effect; (2) the denial of minority access to the legislative process; (3) the availability of less retrogressive alternatives; and (4) remarks considered racist.

Under normal circumstances, these facts, if true, would constitute strong evidence of retrogressive purpose. On each, the state has presented contrary evidence to refute these claims. As discussed above, the State claims that the proposed plan provides more, not fewer, minority ability districts, that the legislative process permitted extraordinary opportunities for minorities and others to comment and participate, and that alleged racist remarks were never made or harmless when viewed in context.

The greater obstacle to proving retrogressive intent, however, is that both proponents and opponents of the plan appear to agree that the main objective in redistricting was to increase substantially the number of Texas congressional seats held by Republicans. Even minority leaders opposed to the redistricting plan recognize that partisan gain drove the redistricting process and its result, at times consciously overriding other considerations.

Accordingly, the most opponents could prove by their intent evidence was that the state sacrificed compliance with Section 5 in its attempt to advance partisan goals. Though many alternative plans were available, which would have benefitted minorities more than the proposed plan, we have found no alternative plan which would have secured the exact same partisan advantage as the proposed plan while giving more benefit to minorities. Under these circumstances, we do not believe there is sufficient evidence to preclude the state from meeting its burden that its intent was not retrogressive.

IV. RELATED FILE

House Bill 1 provides for changes in candidate qualifying for congressional races, changes to the primary dates, procedures for canvassing the ballot, and the late counting of certain ballots. We will issue a no determination to the two changes that depend on the redistricting - 1) temporary changes to candidate qualifying for congressional seats; and 2) temporary change to the primary election date. The remainder of the changes have been analyzed in File No. 2003-3917, and those changes will be precleared.

V. RECOMMENDATION

For the reasons set forth above, we recommend that you interpose an objection to H.B. 3, which provides for the redistricting of the congressional districts in Texas and make a no determination on House Bill 1 for those matters that depend on the redistricting.

AGREE:

DISAGREE:

COMMENTS:

I concur in the recommendation to object.

This is the Division's first review which has required careful consideration of the new Section 5 standard set by Georgia v. Ashcroft and application of the standard to a statewide redistricting plan. The decision now requires us to apply a three-prong "totality of circumstances" test, a test that raises several issues of first impression. Our review indicates that the factors identified as relevant to each prong of the totality of circumstances test demonstrates that the plan is retrogressive.

As discussed in the memo, the first prong of the test to a large extent incorporates the traditional principles of retrogression that we have applied for many years and are set forth in Department regulations and a guidance memorandum, i.e. whether on a statewide basis the plan maintains or decreases districts in which minority voters have the ability to elect their candidates of choice. This inquiry into comparative ability to elect candidates of choice is no longer "dispositive or exclusive," but remains very important to the inquiry. The Georgia decision's discussion of the first prong adds a new element to this aspect of the analysis by creating two types of districts to be considered - "safe" districts which are "highly likely" to elect minority voters' candidates of choice and what we have termed as "coalitional" districts where "it is likely - although perhaps not quite as likely as under the benchmark plan - that minority voters will be able to elect candidates of their choice." The Court speaks of giving states a choice between these two approaches, but in the end a comparison of both categories of districts in the benchmark and proposed plans is required under the first prong of the totality test, and a determination then must be made as to whether the net result of this comparison is a maintenance (or increase) in minority voting strength, or in a reduction of such strength.

Our analysis has focused on this prong and has been intense and careful. Some districts raised especially difficult categorization issues - particularly benchmark 25 and proposed 15. But, in the end we concluded there was a net reduction of one "safe" Hispanic seat and one "safe" black seat, offset only by a net increase in one "coalitional" Hispanic seat. This result quite plainly indicates a reduction in minority voting strength. Even if we consider the difficult districts as falling into different categories, we still see a net reduction in minority voting strength, albeit not as great as in our final analytical conclusion. The state's argument that it has increased minority voting strength by three simply does not stand up under careful analysis and is based on an analytical approach different than what the Georgia decision identifies as the pertinent inquiry - identifying and comparing districts under the respective plans according to whether minority voters maintain their ability to elect their candidates of choice. Indeed, the state expert's discussion of the plan appears to be inconsistent with the state's analytical approach in the submission. In sum, the first prong of the new standard indicates the plan is retrogressive.

The second prong of the totality of circumstances test requires a review of three factors: (1) "whether a new plan adds or subtracts 'influence districts' - where minority voters may not be able to elect a candidate of choice, but can play a substantial, if not decisive, role in the electoral process;" (2) "the comparative position of legislative leadership, influence, and power for representatives of the benchmark majority-minority districts;" and (3) whether the representatives elected from the districts protected by the Voting Rights Act support the new redistricting plan. All three factors indicate the plan is retrogressive. First, although we disagree with arguments of opponents of the plan that it reduces the number of influence districts by seven, we do conclude that there is a loss of two influence districts. The fracturing and elimination of District 10 - the district we conclude is most akin to the Georgia decision's definition of an influence district - is particularly noteworthy. The state made no arguments whatsoever concerning the existence, or lack of influence districts. Thus, it essentially ignored this factor. Second, the loss of several safe, coalitional, or influence minority districts will reduce the legislative influence for representatives of the benchmark majority-minority districts. This is especially evident in the fracturing and elimination of District 24, thus ensuring that the senior member of the Texas congressional delegation and ranking member of the House Rules Committee, and a candidate of choice of minority voters, will not be re-elected. Third, the overwhelming

opposition of the minority legislators who voted on the plan - 53 of 55 of such members - is especially stark. This opposition is almost the flipside of the situation the court examined in Georgia, where the overwhelming support of minority legislators for the plan should be considered an important factor weighing against a determination of retrogression. As with influence districts, the state made no contentions with respect to either of these factors.

Finally, the third prong of the totality of circumstances test presents compelling evidence that the plan is retrogressive. Not only are non-retrogressive alternatives to the proposed plan feasible, but two of these alternatives were the very plans that were passed by the House and Senate. These plans were essentially scrapped in the conference committee that produced the plan eventually adopted. The plan adopted in committee made substantial changes to the House and Senate plans, changes that resulted in a significant part of the retrogression that we have found. For instance, the House and Senate plans left Districts 24 and 10 essentially unchanged when compared to the benchmark plan; but the committee plan completely fractures and eliminates each of them. Similarly, Districts 23 and 15 remain essentially the same under the House and Senate plans as under the benchmark plan. Offsetting this is only new District 25 which was not included in either the House or Senate plans. The evidence shows an awareness of the possibility and risk of creating a retrogressive plan in abandoning the House and Senate plans and adopting the committee plan. One of the important participants in the conference committee negotiations which led to the final plan, as well as the state's expert, have testified that the final plan ran a far higher risk of being retrogressive than either the House or Senate plan. Yet, even in face of these concerns it was adopted.

APPROVE:

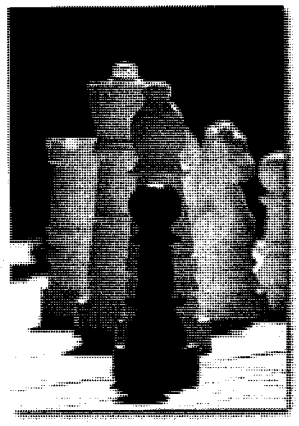
DISAPPROVE:

COMMENTS:

Dismantling Voting Rights Enforcement

A collaborative effort by ePluribus Staff Writers: Publius Revolts, Cho, Standingup, Aaron Barlow & Roxy

11 May 2007



As ePluribus Media **recently reported**, since the replacement of long-time Voting Rights Section Chief Joseph D. Rich by John K. Tanner (promoted by former Assistant Attorney General for Civil Rights R. Alexander Acosta) there has been an exodus of unprecedented proportions of experienced voting rights personnel from DoJ's Civil Rights Division. **TPM Muckraker**'s Paul Kiel has referred to this exodus as a *purge*, and it has stretched from the top to the bottom of the Voting Section's ranks. Acosta has been **implicated** in the plummeting number of voting rights cases filed to protect the rights of African-Americans. Since then, he has received three interim appointments from Attorney General Alberto Gonzales as U.S. Attorney for the Southern District of Florida prior to being confirmed by the Senate. Tanner, however, remains Voting Section chief.

Former Section Chief Rich noted, in **testimony** before a House Judiciary subcommittee in March of this year, that:

> [...] of the five persons in section leadership at the beginning of 2005 (the chief and four deputy chiefs), only one deputy chief remains in the section today.

The most striking feature of the exodus has been the hue of the professional staff members who have left and the hue and political affiliations of the individuals who have replaced them. Since mid-2004, when political appointees began the purge by forcing career staff **to downgrade the performance appraisals** of employees who did not toe the Bush line, knowledgeable sources tell **ePluribus Media**, nine of 13 African-American professional staff members (attorneys and analysts) have left — eight of them on Tanner's watch — while only one African-American professional staff member has been hired. The Section, which has **already come under fire** for filing only two lawsuits on behalf of African-American voters during the Bush years (one of which was prepared under the Clinton administration) and filing the first reverse discrimination suit against African-Americans ever filed by the Federal Government under the Voting Rights Act, which had been **passed specifically to protect African-American voting rights**, does not seem to be any more attuned to the needs of its own African-American staff members than it is to the rights of African-American voters.

Sources have reported that two Equal Employment Opportunity claims are currently

pending in the Voting Section alleging racially discriminatory treatment and/or hiring practices against African-Americans by Tanner and Acting Section 5 Deputy Chief Yvette Rivera. Rivera was Tanner's choice to succeed 28-year veteran voting rights lawyer Robert Berman as deputy chief of the Voting Section's Section 5 unit after Berman was involuntarily transferred from the Voting Section to what **Senator Ted Kennedy (D-MA)** has called a "dead-end job" in a training section after Berman's recommendation to **stop implementation** of a Georgia photo ID law under Section 5 of the Voting Rights Act was overruled by Tanner. Indeed, four highly experienced African-American Section 5 analysts, including the Section 5 supervisor, representing approximately 100 years of Section 5 enforcement experience, have left since Rivera became acting deputy chief, one **accusing the Section of having become a "plantation"** in an email sent to the entire Voting Section upon her departure, former employees report. These same sources report that the Section 5 supervisor departed rather than comply with Rivera's directive to downgrade the performance appraisals of other African-American analysts as well as the lone analyst who opposed preclearance of the Georgia photo ID law (this analyst, as well as Berman, another attorney, and **Geographer Toby Moore**, who also opposed preclearance of the Georgia law, were subsequently forced from the Section). Not one of the four analysts hired since Rivera's arrival has been African-American. Black staff report receiving disparate treatment on routine issues, and a former non-black minority staffer stated that Rivera has "problems with color."

Perhaps the problem of lack of diversity is not unique to the Voting Section. As Roberta Baskin of Washington's WJLA-TV **reported last week**, it extends throughout the Civil Rights Division:

> The Justice Department is missing a key component in its mission to protect civil rights — diversity. [...] The criminal section within the Civil Rights Division has not hired a single black attorney to replace those who have left. Not one. [...] Out of fifty attorneys in the Criminal Section - only two are black, the same number the criminal section had in 1978, even though the size of the staff has more than doubled.

Richard Ugelow, formerly of the Division's Employment Litigation Section and now a law professor at American University, told Baskin that when he was with the Justice Department, "we would sue employers for having numbers like that." House Judiciary Committee Chairman John Conyers (D-MI) has promised an investigation into the lack of diversity in the Civil Rights Division.

The lack of diversity may be startling, but it is only one aspect of the problem. The Section 5 unit, responsible for reviewing changes in states with the worst histories of racial discrimination in voting, has been completely gutted. Former Voting Section Chief Joseph D. Rich, who was forced out of the Section in 2005, when Tanner assumed the position, **noted in testimony** before a subcommittee of the House Judiciary Committee in March that:

> [...] by 2001 — the year that the new round of redistricting submissions began — approximately 40% of Section staff was assigned to this work, including a Deputy Section Chief, Robert Berman, who oversaw the Section 5 work; 26 civil rights analysts (including 8 supervisory or senior analysts) responsible for reviewing, gathering facts, and making recommendations on over 4,000 Section 5 submissions received every year; and over six attorneys who spent their full-time reviewing the work of the analysts. Since then, and especially since the transfer of Deputy Chief Berman from the Section in late 2005 [after Tanner's arrival], this staff dropped by almost two-thirds. There are now only ten civil rights analysts (none of whom hold supervisory jobs and only three of whom are senior) and two full-time attorney reviewers.

These analyst positions, formerly held by staffers with over 30 years of experience enforcing Section 5, are now routinely filled through a federal career internship program by twenty-somethings straight out of college who have no civil rights experience — when they are filled at all, former employees report. As Rich noted in his testimony, "It is difficult to understand how this Administration expects to fulfill its Section 5 responsibilities — especially the coming redistricting cycle — with such a reduced staff."

Toby Moore told ePluribus Media, "The quality of the work being done has really suffered because of the poor managers that the Bush Administration put in place and then tolerated because they tell the political appointees what they want to hear."

The attorney staff has been similarly dismantled. At least 17 attorneys, nearly half the staff, have departed just since Tanner's elevation to the section chief position in April of 2005, representing over 150 years of civil rights experience, employees who left the Section report. Many of their replacements have been **members** of the **Republican National Lawyers Association** or the ultra-conservative Federalist Society. This turnaround in the composition of the Section's staff has coincided with a shift, **noted by McClatchy**, from traditional voting rights enforcement to litigation aimed at suppressing the minority vote.

Recent news coverage of the Justice Department has focused on the firing of nine U.S. Attorneys, some apparently for **refusing to push doubtful allegations of "voter fraud."** Those who have witnessed the administration's **efforts to utilize the Justice Department to favor Republican candidates** firsthand feel that the bigger picture of politicization and internal management problems deserves equal attention. As Toby Moore told us when asked about the purge of career Voting Section staff:

> The politicization of the civil rights division and especially the Voting Section has really damaged day-to-day management. Even if you remove the politicization of the decision making you still have internal problems that need to be addressed by [Assistant Attorney General for Civil Rights] Wan Kim and others in the Justice Department. Someone needs to take responsibility, hopefully it will be Wan Kim, and investigate the problems and make the management accountable for the mistakes they have made. The people are still suffering and a lot of analysts are working under difficult circumstances.

About the Authors: ePluribus Media staff writers Publius Revolts, Cho, Aaron Barlow, Standingup, and roxy contributed to this story

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Staff Opinions Banned In Voting Rights Cases

Criticism of Justice Dept.'s Rights Division Grows

By Dan Eggen
Washington Post Staff Writer
Saturday, December 10, 2005; A03

The Justice Department has barred staff attorneys from offering recommendations in major Voting Rights Act cases, marking a significant change in the procedures meant to insulate such decisions from politics, congressional aides and current and former employees familiar with the issue said.

Disclosure of the change comes amid growing public criticism of Justice Department decisions to approve Republican-engineered plans in Texas and Georgia that were found to hurt minority voters by career staff attorneys who analyzed the plans. Political appointees overruled staff findings in both cases.

The policy was implemented in the Georgia case, said a Justice employee who, like others interviewed, spoke on condition of anonymity because of fears of retaliation. A staff memo urged rejecting the state's plan to require photo identification at the polls because it would harm black voters.

But under the new policy, the recommendation was stripped out of that document and was not forwarded to higher officials in the Civil Rights Division, several sources familiar with the incident said.

The policy helps explain why the Justice Department has portrayed an Aug. 25 staff memo obtained by The Washington Post as an "early draft," even though it was dated one day before the department gave "preclearance," or approval, to the Georgia plan. The state's plan has since been halted on constitutional grounds by a federal judge who likened it to a Jim Crow-era poll tax.

The policy shift's outlines were first reported by the Dallas Morning News. Sources familiar with the change said it was implemented by John K. Tanner, the voting section chief, who is a career employee.

In response to a request to comment yesterday, Justice Department spokesman Eric Holland wrote in an e-mail: "The opinions and expertise of the career lawyers are valued and respected and continue to be an integral part of the internal deliberation process upon which the department heavily relies when making litigation decisions." He declined to elaborate.

Tensions within the voting section have been rising dramatically, culminating in an emotionally charged meeting last week in which Tanner criticized the quality of work done by staff members analyzing voting rights cases, numerous sources inside and outside the section said. Many employees were so angered that they boycotted the staff holiday party later in the week, the sources said.

Under Section 5 of the Voting Rights Act of 1965, Georgia, Texas and other states with a history of discriminatory election practices are required to receive approval from the Justice Department or a federal court for any changes to their voting systems. Section 5 prohibits changes that would be "retrogressive," or bring harm to, minority voters.

For decades, staff attorneys have made recommendations in Section 5 cases that have carried great weight within the department and that have been passed along to senior officials who make a final determination, former and current employees say.

Preventing staff members from making such recommendations is a significant departure and runs the risk of making the process appear more political, experts said.

"It's an attempt by the political hierarchy to insulate themselves from any accountability by essentially leaving it up to a chief, who's there at their whim," said Jon Greenbaum, who worked in the voting section from 1997 to 2003, and who is now director of the Voting Rights Project at the Lawyers' Committee for Civil Rights Under Law. "To me, it shows a fear of dealing with the legal issues in these cases."

Many congressional Democrats have sharply criticized the Civil Rights Division's performance, and Senate Judiciary Committee Chairman Arlen Specter (R-Pa.) said this week that he is considering holding hearings on the Texas redistricting case. Sen. Edward M. Kennedy (D-Mass.) said in a statement yesterday: "America deserves better than a Civil Rights Division that puts the political agenda of those in power over the interests of the people its serves."

Attorney General Alberto R. Gonzales and other Justice officials have disputed such criticism, saying that politics play no role in civil rights decisions. In a letter to Specter this week, Assistant Attorney General William E. Moschella criticized The Post's coverage and said the department is aggressively enforcing a range of civil rights laws.

"From fair housing opportunities, equal access to the ballot box and criminal civil rights prosecutions to desegregation in America's schools and protection of the rights of the disabled, the division continues its noble mission with vigor," Moschella wrote.

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Politics Alleged In Voting Cases

Justice Officials Are Accused of Influence

By Dan Eggen
Washington Post Staff Writer
Monday, January 23, 2006; A01

The Justice Department's voting section, a small and usually obscure unit that enforces the Voting Rights Act and other federal election laws, has been thrust into the center of a growing debate over recent departures and controversial decisions in the Civil Rights Division as a whole.

Many current and former lawyers in the section charge that senior officials have exerted undue political influence in many of the sensitive voting-rights cases the unit handles. Most of the department's major voting-related actions over the past five years have been beneficial to the GOP, they say, including two in Georgia, one in Mississippi and a Texas redistricting plan orchestrated by Rep. Tom DeLay (R) in 2003.

The section also has lost about a third of its three dozen lawyers over the past nine months. Those who remain have been barred from offering recommendations in major voting-rights cases and have little input in the section's decisions on hiring and policy.

"If the Department of Justice and the Civil Rights Division is viewed as political, there is no doubt that credibility is lost," former voting-section chief Joe Rich said at a recent panel discussion in Washington. He added: "The voting section is always subject to political pressure and tension. But I never thought it would come to this."

Attorney General Alberto R. Gonzales and his aides dispute such criticism and defend the department's actions in voting cases. "We're not going to politicize decisions within the department," he told reporters last month after The Washington Post had disclosed staff memoranda recommending objections to a Georgia voter-identification plan and to the Texas redistricting.

The 2005 Georgia case has been particularly controversial within the section. Staff members complain that higher-ranking Justice officials ignored serious problems with data supplied by the state in approving the plan, which would have required voters to carry photo identification.

Georgia provided Justice with information on Aug. 26 suggesting that tens of thousands of voters may not have driver's licenses or other identification required to vote, according to officials and records. That added to the concerns of a team of voting-section employees who had concluded that the Georgia plan would hurt black voters.

But higher-ranking officials disagreed, and approved the plan later that day. They said that as many as 200,000 of those without ID cards were felons and illegal immigrants and that they would not be eligible to vote anyway.

One of the officials involved in the decision was Hans von Spakovsky, a former head of the Fulton County

GOP in Atlanta, who had long advocated a voter-identification law for the state and oversaw many voting issues at Justice. Justice spokesman Eric W. Holland said von Spakovsky's previous activities did not require a recusal and had no impact on his actions in the Georgia case.

Holland denied a request to interview von Spakovsky, saying that department policy "does not authorize the media to conduct interviews with staff attorneys." Von Spakovsky has since been named to the Federal Election Commission in a recess appointment by President Bush.

In written answers to questions from The Post, Holland called allegations of partisanship in the voting section "categorically untrue." He said the Bush administration has approved the vast majority of the approximately 3,000 redistricting plans it has reviewed, including many drawn up by Democrats.

Holland and other Justice officials also emphasize the Bush administration's aggressive enforcement of laws requiring foreign-language ballot information in districts where minorities make up a significant portion of the population. Since 2001, the division has filed 14 lawsuits to provide comprehensive language programs for minorities, including the first aimed at Filipino and Vietnamese voters, he said.

"We have undertaken the most vigorous enforcement of the language minority provisions of the Voting Rights Act in its history," Holland said.

Some lawyers who have recently left the Civil Rights Division, such as Rich at the Lawyers' Committee for Civil Rights Under Law and William Yeomans at the American Constitution Society, have taken the unusual step of publicly criticizing the way voting matters have been handled. Other former and current employees have discussed the controversy on the condition of anonymity for fear of retribution.

These critics say that the total number of redistricting cases approved under Bush means little because the section has always cleared the vast majority of the hundreds of plans it reviews every year.

The Bush administration has also initiated relatively few cases under Section 2, the main anti-discrimination provision of the Voting Rights Act, filing seven lawsuits over the past five years -- including the department's first reverse-discrimination complaint on behalf of white voters. The only case involving black voters was begun under the previous administration and formally filed by transitional leadership in early 2001.

By comparison, department records show, 14 Section 2 lawsuits were filed during the last two years of Bill Clinton's presidency alone.

Conflicts in the voting-rights arena at Justice are not new, particularly during Republican administrations, when liberal-leaning career lawyers often clash with more conservative political appointees, experts say. The conflicts have been further exacerbated by recent court rulings that have made it more difficult for Justice to challenge redistricting plans.

William Bradford Reynolds, the civil rights chief during the Reagan administration, opposed affirmative-action remedies and court-ordered busing -- and regularly battled with career lawyers in the division as a result. During the administration of George H.W. Bush, the division aggressively pushed for the creation of districts that were more than 60 percent black in a strategy designed to produce more solidly white and Republican districts in the South.

These districts were widely credited with boosting the GOP in the region during the 1994 elections.

Rich, who worked in the Civil Rights Division for 37 years, said the conflicts in the current administration are more severe than in earlier years. "I was there in the Reagan years, and this is worse," he said.

But Michael A. Carvin, a civil rights deputy under Reagan, said such allegations amount to "revisionist history." He contended that the voting section has long tilted to the left politically.

Carvin and other conservatives also say the opinions of career lawyers in the section frequently have been at odds with the courts, including a special panel in Texas that rejected challenges to the Republican-sponsored redistricting plan there. The Supreme Court has since agreed to hear the case.

"The notion that they are somehow neutral or somehow ideologically impartial is simply not supported by the evidence," Carvin said. "It hasn't been the politicos that were departing from the law or normal practice, but the voting-rights section."

In Mississippi in 2002, Justice political appointees rejected a recommendation from career lawyers to approve a redistricting plan favorable to Democrats. While Justice delayed issuing a final decision, a panel of three GOP federal judges approved a plan favorable to a Republican congressman.

The division has also issued unusually detailed legal opinions favoring Republicans in at least two states, contrary to what former staff members describe as a dictum to avoid unnecessary involvement in partisan disputes. The practice ended up embarrassing the department in Arizona in 2005, when Justice officials had to rescind a letter that wrongly endorsed the legality of a GOP bill limiting provisional ballots.

In Georgia, a federal judge eventually ruled against the voter identification plan on constitutional grounds, likening it to a poll tax from the Jim Crow era. The measure would have required voters to pay $20 for a special card if they did not have photo identification; Georgia Republicans are pushing ahead this year with a bill that does not charge a fee for the card.

Holland called the data in the case "very straightforward," and said it showed statistically that 100 percent of Georgians had identification and that no racial disparities were evident.

But an Aug. 25 staff memo that recommended opposing the plan disparaged the quality of the state's information and said that only limited conclusions could be drawn from it.

"They took all that data and willfully misread it," one source familiar with the case said. "They were only looking for statistics that would back up their view."

Mark Posner, a former longtime Civil Rights Division lawyer who teaches election law at American University, noted that Justice could have taken as many as 60 more days -- rather than seven hours -- to issue an opinion because of the new data.

Staff writer Thomas B. Edsall and researcher Julie Tate contributed to this report.

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During his signing of the landmark Civil Rights Act of 1964, President Lyndon B. Johnson shook hands with the Rev. Martin Luther King Jr. (United Press International/ File 1964)

Civil rights hiring shifted in Bush era

The Boston Globe

Conservative leanings stressed

By Charlie Savage, Globe Staff | July 23, 2006

WASHINGTON -- The Bush administration is quietly remaking the Justice Department's Civil Rights Division, filling the permanent ranks with lawyers who have strong conservative credentials but little experience in civil rights, according to job application materials obtained by the Globe.

The documents show that only 42 percent of the lawyers hired since 2003, after the administration changed the rules to give political appointees more influence in the hiring process, have civil rights experience. In the two years before the change, 77 percent of those who were hired had civil rights backgrounds.

In an acknowledgment of the department's special need to be politically neutral, hiring for career jobs in the Civil Rights Division under all recent administrations, Democratic and Republican, had been handled by civil servants -- not political appointees.

But in the fall of 2002, then-attorney general John Ashcroft changed the procedures. The Civil Rights Division disbanded the hiring committees made up of veteran career lawyers.

For decades, such committees had screened thousands of resumes, interviewed candidates, and made recommendations that were only rarely rejected.

Now, hiring is closely overseen by Bush administration political appointees to Justice, effectively turning hundreds of career jobs into politically appointed positions.

The profile of the lawyers being hired has since changed dramatically, according to the resumes of successful applicants to the voting rights, employment litigation, and appellate sections. Under the Freedom of Information Act, the Globe obtained the resumes among hundreds of pages of hiring data from 2001 to 2006.

Hires with traditional civil rights backgrounds -- either civil rights litigators or members of civil rights groups -- have plunged. Only 19 of the 45 lawyers hired since 2003 in those three sections were experienced in civil rights law, and of those, nine gained their experience either by defending employers against discrimination lawsuits or by fighting against race-conscious policies.

Meanwhile, conservative credentials have risen sharply. Since 2003 the three sections have hired 11 lawyers who said

they were members of the conservative Federalist Society. Seven hires in the three sections are listed as members of the Republican National Lawyers Association, including two who volunteered for Bush-Cheney campaigns.

Several new hires worked for prominent conservatives, including former Whitewater prosecutor Kenneth Starr, former attorney general Edwin Meese, Mississippi Senator Trent Lott, and Judge Charles Pickering. And six listed Christian organizations that promote socially conservative views.

The changes in those three sections are echoed to varying degrees throughout the Civil Rights Division, according to current and former staffers.

At the same time, the kinds of cases the Civil Rights Division is bringing have undergone a shift. The division is bringing fewer voting rights and employment cases involving systematic discrimination against African-Americans, and more alleging reverse discrimination against whites and religious discrimination against Christians.

"There has been a sea change in the types of cases brought by the division, and that is not likely to change in a new administration because they are hiring people who don't have an expressed interest in traditional civil rights enforcement," said Richard Ugelow, a 29-year career veteran who left the division in 2002.

No 'litmus test' claimed

The Bush administration is not the first to seek greater control over the Civil Rights Division. Presidents Richard Nixon and Ronald Reagan tried to limit the division's efforts to enforce school-desegregation busing and affirmative action. But neither Nixon nor Reagan pushed political loyalists deep in the permanent bureaucracy, longtime employees say.

The Bush administration denies that its changes to the hiring procedures have political overtones. Cynthia Magnuson , a Justice Department spokeswoman, said the division had no "litmus test" for hiring. She insisted that the department hired only "qualified attorneys."

Magnuson also objected to measuring civil rights experience by participation in organizations devoted to advancing traditional civil rights causes. She noted that many of the division's lawyers had been clerks for federal judges, where they "worked on litigation involving constitutional law, which is obviously relevant to a certain degree."

Other defenders of the Bush administration say there is nothing improper about the winner of a presidential election staffing government positions with like-minded officials. And, they say, the old career staff at the division was partisan in its own way -- an entrenched bureaucracy of liberals who did not support the president's view of civil rights policy.

Robert Driscoll , a deputy assistant attorney general over the division from 2001 to 2003, said many of the longtime career civil rights attorneys wanted to bring big cases on behalf of racial groups based on statistical disparities in hiring, even without evidence of intentional discrimination. Conservatives, he said, prefer to focus on cases that protect individuals from government abuses of power.

Hiring only lawyers from civil rights groups would "set the table for a permanent left-wing career class," Driscoll said.

But Jim Turner , who worked for the division from 1965 to 1994 and was the top-ranked professional in the division for the last 25 years of his career, said that hiring people who are interested in enforcing civil rights laws is not the same thing as trying to achieve a political result through hiring.

Most people interested in working to enforce civil rights laws happen to be liberals, Turner said, but Congress put the laws on the books so that they would be enforced. "To say that the Civil Rights Division had a special penchant for hiring liberal lawyers is twisting things," he said.

Jon Greenbaum , who was a career attorney in the voting rights section from 1997 to 2003, said that since the hiring change, candidates with conservative ties have had an advantage.

"The clear emphasis has been to hire individuals with conservative credentials," he said. "If anything, a civil rights background is considered a liability."

But Roger Clegg , who was a deputy assistant attorney general for civil rights during the Reagan administration, said that the change in career hiring is appropriate to bring some "balance" to what he described as an overly liberal agency.

"I don't think there is anything sinister about any of this. . . . You are not morally required to support racial preferences just because you are working for the Civil Rights Division," Clegg said.

Many lawyers in the division, who spoke on condition of anonymity, describe a clear shift in agenda accompanying the

new hires. As The Washington Post reported last year, division supervisors overruled the recommendations of longtime career voting-rights attorneys in several high-profile cases, including whether to approve a Texas redistricting plan and whether to approve a Georgia law requiring voters to show photographic identification.

In addition, many experienced civil rights lawyers have been assigned to spend much of their time defending deportation orders rather than pursuing discrimination claims. Justice officials defend that practice, saying that attorneys throughout the department are sharing the burden of a deportation case backlog.

As a result, staffers say, morale has plunged and experienced lawyers are leaving the division. Last year, the administration offered longtime civil rights attorneys a buyout. Department figures show that 63 division attorneys left in 2005 -- nearly twice the average annual number of departures since the late 1990s.

At a recent NAACP hearing on the state of the Civil Rights Division, David Becker , who was a voting-rights section attorney for seven years before accepting the buyout offer, warned that the personnel changes threatened to permanently damage the nation's most important civil rights watchdog.

"Even during other administrations that were perceived as being hostile to civil rights enforcement, career staff did not leave in numbers approaching this level," Becker said. "In the place of these experienced litigators and investigators, this administration has, all too often, hired inexperienced ideologues, virtually none of which have any civil rights or voting rights experiences."

Dates from '57 law
Established in 1957 as part of the first civil rights bill since Reconstruction, the Civil Rights Division enforces the nation's antidiscrimination laws.

The 1957 law and subsequent civil rights acts directed the division to file lawsuits against state and local governments, submit "friend-of-the-court" briefs in other discrimination cases, and review changes to election laws and redistricting to make sure they will not keep minorities from voting.

The division is managed by a president's appointees -- the assistant attorney general for civil rights and his deputies -- who are replaced when a new president takes office.

Beneath the political appointees, most of the work is carried out by a permanent staff of about 350 lawyers. They take complaints, investigate problems, propose lawsuits, litigate cases, and negotiate settlements.

Until recently, career attorneys also played an important role in deciding whom to hire when vacancies opened up in their ranks.

"We were looking for a strong academic record, for clerkships, and for evidence of an interest in civil rights enforcement," said William Yeomans , who worked for the division for 24 years, leaving in 2005.

Civil Rights Division supervisors of both parties almost always accepted the career attorneys' hiring recommendations, longtime staffers say. Charles Cooper , a former deputy assistant attorney general for civil rights in the Reagan administration, said the system of hiring through committees of career professionals worked well.

"There was obviously oversight from the front office, but I don't remember a time when an individual went through that process and was not accepted," Cooper said. "I just don't think there was any quarrel with the quality of individuals who were being hired. And we certainly weren't placing any kind of political litmus test on . . . the individuals who were ultimately determined to be best qualified."

But during the fall 2002 hiring cycle, the Bush administration changed the rules. Longtime career attorneys say there was never an official announcement. The hiring committee simply was not convened, and eventually its members learned that it had been disbanded.

Driscoll, the former Bush administration appointee, said then-Attorney General John Ashcroft changed hiring rules for the entire Justice Department, not just the Civil Rights Division. But career officials say that the change had a particularly strong impact in the Civil Rights Division, where the potential for political interference is greater than in divisions that enforce less controversial laws.

Joe Rich , who joined the division in 1968 and who was chief of the voting rights section until he left last year, said that the change reduced career attorneys' input on hiring decisions to virtually nothing. Once the political appointees screened resumes and decided on a finalist for a job in his section, Rich said, they would invite him to sit in on the applicant's final interview but they wouldn't tell him who else had applied, nor did they ask his opinion about whether to hire the attorney.

The changes extended to the hiring of summer interns.

Danielle Leonard , who was one of the last lawyers to be hired into the voting rights section under the old system, said she volunteered to look through internship applications in 2002.

Leonard said she went through the resumes, putting Post-It Notes on them with comments, until her supervisor told her that career staff would no longer be allowed to review the intern resumes. Leonard removed her Post-Its from the resumes and a political aide took them away.

Leonard said she quit a few months later, having stayed in what she had thought would be her "dream job" for less than a year, because she was frustrated and demoralized by the direction the division was taking.

The academic credentials of the lawyers hired into the division also underwent a shift at this time, the documents show. Attorneys hired by the career hiring committees largely came from Eastern law schools with elite reputations, while a greater proportion of the political appointees' hires instead attended Southern and Midwestern law schools with conservative reputations.

The average US News & World Report ranking for the law school attended by successful applicants hired in 2001 and 2002 was 34, while the average law school rank dropped to 44 for those hired after 2003.

Driscoll, the former division chief-of-staff, insisted that everyone he personally had hired was well qualified. And, he said, the old hiring committees' prejudice in favor of highly ranked law schools had unfairly blocked many qualified applicants.

"They would have tossed someone who was first in their class at the University of Kentucky Law School, whereas we'd say, hey, he's number one in his class, let's interview him," Driscoll said.

Learning from others

The Bush administration's effort to assert greater control over the Civil Rights Division is the latest chapter in a long-running drama between the agency and conservative presidents.

Nixon tried unsuccessfully to delay implementation of school desegregation plans. Reagan reversed the division's position on the tax-exempt status of racially discriminatory private schools and set a policy of opposing school busing and racial quotas.

Still, neither Nixon nor Reagan changed the division's procedures for hiring career staff, meaning that career attorneys who were dedicated to enforcing traditional civil rights continued to fill the ranks.

Yeomans said he believes the current administration learned a lesson from Nixon's and Reagan's experiences: To make changes permanent, it is necessary to reshape the civil rights bureaucracy.

"Reagan had tried to bring about big changes in civil rights enforcement and to pursue a much more conservative approach, but it didn't stick," Yeomans said. "That was the goal here -- to leave behind a bureaucracy that approached civil rights the same way the political appointees did."*

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Former DoJ Official: I Left Due to "Institutional Sabotage"

By Paul Kiel - April 30, 2007, 12:44PM

In a story on Brad Schlozman last week, I quoted Bob Kengle, formerly the deputy chief of the voting section of the Civil Rights Division and a Justice Department veteran, as saying that he'd left because he'd reached his "personal breaking point."

Well, that's true. But it's also, of course, more complicated than that. And Kengle thought that readers would benefit from a more in-depth view of what life was like in the division and why he "lost faith in the institution as it had become."

The Civil Rights Division, and specifically the voting section there, as I've said before, is probably the worst case of politicization at the department. Kengle's is an invaluable account of how political appointees like Schlozman seized control -- and the damage that seizure has done to the department's integrity and credibility.

The full text is below, but we've also posted Kengle's statement as our document attachment if you prefer to read it there.

Why I Left the Civil Rights Division
Bob Kengle

During our interview I told you that I left my position as a Deputy Chief in the Voting Section of the Civil Rights Division in April 2005 after I reached my "personal breaking point". No doubt many of your readers envisioned a deranged federal office worker running amok in some dark corridor, but I'm afraid the reality was far less colorful, though more distressing. I spent over twenty years in the Civil Rights Division because it is a unique institution with which I identified not because it was perfect, but because it sought to advance a genuine public good, above the political fray. I reached my "breaking point" when I concluded that I no longer could make that happen. I have not previously elaborated on my reasons for leaving the Civil Rights Division, but it seems now to be the right time to do so.

In short, I lost faith in the institution as it had become. This was not the result of just one individual, such as Brad Schlozman, although he certainly did his share and then some. Rather, it was the result of an institutional sabotage after which I concluded that as a supervisor I no longer could protect line attorneys from political appointees, keep the litigation I supervised focused on the law and the facts, ensure that attorneys place civil rights enforcement ahead of partisanship, or pursue cases based solely on merit.

1) I no longer could insulate the line attorneys I supervised from the political appointees.

From 2001 on there were repeated occasions on which I discovered after the fact that front office personnel (that is, the political appointees) had directly contacted attorneys I was supervising without first advising me or the section chief. Before this Administration such contacts were extremely rare and generally only occurred under exigent circumstances. This was a serious problem for several reasons. First, the front office personnel lacked the specialized litigation experience needed to successfully litigate voting rights cases at the highest level. Even if such direct contacts were well-intentioned, the political appointees' judgment often was poorly informed. By first discussing a matter with me or the section chief we could ensure that the appointees were aware of the relevant legal, factual, policy and tactical considerations before any directions were given to the line attorneys. What may appear to be a good argument in a particular case may be inconsistent with longstanding positions that in fairness should be adhered to absent a convincing reason to change. States, political subdivisions and public officials (who are the parties against whom the Voting Section generally litigates) have every right to expect the Department to be consistent. Ad hoc arguments are de rigeur for private litigants but the Department must be judged by a higher standard. Direct contacts with the line attorneys undermine these policy considerations.

Worse, such contacts could be less than well-intentioned, often coming to occur after the front office had obtained some piece of information, or received a question or "helpful suggestion" from Republican officials or attorneys. This was a particular problem in a highprofile redistricting case involving the State of Georgia that we litigated from 2001-2003. I felt that it took every bit of my abilities to prevent the Voting Section from being hijacked in that case by pressure from the Georgia Republican Party. While I believe that with the unwavering support of my section chief Joe Rich I was successful in doing so, by late 2004 I became convinced that we no longer would be able to intervene in the same way.

I also was very concerned that increased interaction between line attorneys and political appointees would result in retaliation against line attorneys who did not toe the line. The Civil Rights Division historically had been structured so that part of my role as a supervisor was to be a buffer against such conflict between political appointees and line attorneys, who could then be evaluated by the quality of their work rather than the extent to which they were "team players" with the Administration. If there was a price for disagreeing with the front office, it was mine to pay – not the attorneys I supervised. In bypassing the section chief and deputy chiefs the front office seriously (and in my view quite deliberately) undermined the institutional safeguards protecting the Section's career staff.

2) I lost confidence that any litigation I supervised would be resolved based upon the merits rather than partisan factors.

Happily, many matters involving the Voting Section do not implicate partisan concerns, and the career staff have managed to bring and win several very good cases in the past two years that appear to have been unaffected by partisanship. My docket, however, tended to include high-profile cases in which such partisan pressures were a repeated diversion, and my personal conclusion by late 2004 was that my judgment and recommendation no longer would be sufficient to keep partisan influences at bay in my cases.

The Voting Section tends to attract attorneys with a strong interest in politics. However, I can say with no hesitation that I never in more than 20 years in the Voting Section made a recommendation based upon the likely partisan outcome, and I expected any attorney I supervised to check such considerations at the door. For example, in the Georgia case to which I referred above the Voting Section was aligned in part with intervenors represented by the top Republican lawyers in the State of Georgia, against the State of Georgia and a state senate redistricting plan passed by its Democrats. The Voting Section argued that the senate plan unnecessarily jeopardized black voters' ability to elect candidates in three districts. At the same time, the Voting Section did not join those intervenors in opposing Democratic Congressional and state house redistricting plans that also were at issue. The difference in those positions was a principled one, as shown by the district court's decision adopting the Department's position (the Supreme Court vacated the district court's decision after deciding to invent a new legal standard, later overturned by Congress when it renewed portions of the Voting Rights Act in 2006). The team that litigated the case included line attorneys who were Democrats and at least one Republican, and while the case was positively swimming in partisan cross-currents, our recommendations were based completely on the law and the facts, not the partisan outcome -- and I never had to say a word to the line attorneys to make that happen; it simply was ingrained (I admit to some pride in attending a hearing in 2006 at which Cong. John Lewis and other colleagues of his stated that the Voting Section's position had been the correct one, so far as black voters' interests were concerned, notwithstanding some statements he previously made that had been used to support the State's position).

But by late 2004, I did not believe that I could ensure that following the law and facts would remain a higher priority than partisan favoritism. This was based partly upon my expectation that the Administration, if returned to office, would feel less constraint against heavy-handed management and biased enforcement than had been the case in the aftermath of the controversial 2000 election. To put it bluntly, before 2004 the desire to politicize the Voting Section's work was evident, but it was tempered by a recognition that there were limits to doing so. That such constraints diminished over time is evidenced by the well-known and ham-fisted handling of decisions involving Texas' congressional redistricting plan in late 2003 and Georgia's voter ID law in 2005. My concerns also were greatly magnified by the evident intentions of the political appointees to replace Joe Rich after the 2004 election with a new section chief who would be a willing "team player".

3) I lost confidence that the hiring process would bring in attorneys who placed civil rights enforcement over partisan considerations.

The takeover of hiring by political appointees has been documented elsewhere, so I don't feel that I need to repeat it. As someone hired during the Reagan Administration under the tenure of William Bradford Reynolds -- a controversial

period for reasons of ideology – I am reluctant to conclude that new hires should be judged simply by the people who fired them (as an aside, more than a few old hands in the Civil Rights Division now look back on the battles of the Reynolds era as hard-fought but highly professional by comparison to this administration, a real through-the-looking-glass experience).

Recent news, however, suggests that the culture of the Civil Rights Division has changed to one in which partisan advocacy was openly tolerated, if not encouraged, among new hires, at least until it was exposed. Thus, my concerns unfortunately appear to have been realized. It is a menace to the bottom credibility of the Civil Rights Division (which I am tell you was a real thing and part of what made being a Division lawyer different), and especially the Voting Section, if its line attorneys come to be viewed by federal courts, by state and local governments and by the general public as just a bunch of Administration flunkies. It is an even greater danger if that is true. I am hopeful that with responsible leadership at the Division level the Section's staff will one day regain its reputation for impartiality. And I am pained by the thought that the reputation of former colleagues who still remain in the Voting Section may suffer in the meantime.

4) Policy decisions to pursue or avoid pursuing certain cases or types of cases.

In a chapter that I co-authored with Joe Rich and former colleague Mark Posner in *The Erosion of Rights*, released earlier this year and available from the Center for American Progress, we discuss in detail the (public) voting rights enforcement patterns of this Administration. As we discuss, in addition to the notorious Texas and Georgia Section 5 decisions, there are also great concerns about the lack of cases involving discrimination against African-American and American Indian voters, the use of the NVRA (Motor Voter Act) to pursue chimerical suspicions of vote fraud and the use of the Department's imprimatur to serve as an amicus curiae cheerleader for Republican litigants. I won't discuss recommendations that never made the public record but I will say that these also heavily influenced my decision to leave OCR.

Furthermore, I was outraged by the Administration's very deliberate decision to do nothing to prepare for the reauthorization of Section 5 of the Voting Rights Act, a critical federal protection for minority voters in states with a history of voting discrimination. The Voting Section far and away is the key player in Section 5 enforcement and has unique institutional knowledge. As a private citizen I was able to play a role in the renewal hearings in 2006, but had I remained in the Voting Section I would have been prohibited from developing a record to help Congress make its decisions. By 2004 the political appointees who had become increasingly antagonistic toward many of the professional Section 5 analysts and Section 5 attorney staff in the Voting Section, a campaign that appears to be continuing to worsen as a result of attrition and transfers.

In fairness I have the impression that the general climate in the Civil Rights Division under Assistant Attorney General Wan Kim and other new front office personnel has improved somewhat over its predecessor. But with the bar having been lowered so near the ground I cannot say if that is meaningful.

I am encouraged by the recent resumption of genuine Congressional oversight, and I am grateful for the attention that has been paid to the problems in the Civil Rights Division and the Department generally in recent weeks by you and other journalists. Joe Rich in particular has done a public service in his testimony, something that for such a long-time veteran of the Division is a hard thing to do. I hope that your readers find this informative, and will understand and support a return to a Justice Department that aspires to the impartial administration of our country's laws.

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Kim McCall wrote on April 30, 2007 1:13 PM:

This guy (?) should be tasked with ripping to shreds the flimsy non-denial denial that "The Justice Department does not, nor has it ever, solicited any information from applicants . . . about their political affiliation or orientation."

They DID solicit such information FROM OTHERS, and searched for it on the Web

Attorney General Alberto Gonzales
(Lauren Victoria/WDCPIX.com)

Inside The Bush DoJ's Purge of The Civil Rights Division

By Paul Kiel - April 17, 2007, 3:41PM

Over the past six years, the Bush administration has aggressively reshaped the Justice Department's Civil Rights Division. Many career analysts and attorneys have either been transferred or driven out; their replacements are long on conservative credentials and short on civil rights experience.

Here's an inside account of what it's like inside from Toby Moore, a redistricting expert with the division's voting section until the spring of 2006. Like many of his colleagues, he left due to the hostile atmosphere in the section, where he says there was a pattern of selective intimidation towards career staff.

According to Moore, his supervisor and the political appointees in the section consistently criticized his work because it didn't jibe with their pre-drawn conclusions. That was bad enough, he said, but the real trouble came after he and three colleagues recommended opposing a Georgia voter I.D. law pushed by Republicans. After the recommendation, which clashed with the views of Moore's superiors, they reprimanded him for not adequately analyzing the evidence and accused him of mistreating his Republican colleague, with whom he'd had frequent disagreements. But it got worse. Moore said that his Republican superiors even monitored his emails, eventually filing a complaint against him with the Justice Department's Office of Professional Responsibility for allegedly disclosing privileged information in one email (he was cleared of wrongdoing). Fed up, and worried that it was too dangerous to his professional future to remain there, he left.

Moore said that his experience was similar to others in the section who'd disagreed with conservative attorneys working at the Justice Department. Over the following year, all three of Moore's colleagues who'd joined him in opposing the law either left or were transferred out of the section. The senior member of the team, Robert Berman, the deputy chief of the section and a 28-year veteran of the Civil Rights Division, was transferred to the Office of Professional Development— what Sen. Ted Kennedy (D-MA) has called "a dead-end job."

The Justice Department's Office of Professional Responsibility opened and conducted an investigation into the section's handling of the Georgia I.D. law. Joe Rich, the former chief of the voting section, told me that he was interviewed by investigators in 2006. It's not clear, however, what the outcome of the investigation was.

"Mr. Moore's allegations about political interference in the Civil Rights Division surrounding the Georgia memo, are very much in line with what we are learning daily about the Justice Department," Rep. Jerrold Nadler (D-NY) told TPMmuckraker. Nadler is the chairman of a House Judiciary subcommittee that held a hearing on the voting section last month. "A clear pattern is developing of a department culture that seems to encourage politically-motivated, improper and lawless activity."

The voting section is tasked under the Voting Rights Act with reviewing new legislation in certain regions in order to prevent regulations that might lead to discrimination against minority voters. When Moore and his colleagues examined the Georgia voter-identification law, they found a lot to worry about. Their bosses weren't interested.

"They weren't really interested in investigating Georgia's submission," Moore, who has a Ph.D. in geography and had been with the section since 2000, told me. "They were mainly interested in assembling evidence to support pre-clearance. Any attempt to bring up counter-evidence to suggest a discriminatory impact was ignored or critiqued. We were told it was our own bias.... Any evidence in support

was embraced uncritically."

The problems with Georgia's new law were legion, as outlined in the "Recommendation Memorandum" that Moore and his colleagues compiled.

To start with, jurisdictions covered by the Voting Rights Act (mostly in southern states) are required to show that law changes will not have a discriminatory impact on minority voters. In the case of Georgia, the law change would have revised an earlier voter-ID law that allowed a variety of forms of identification (such as a utility bill); the new law restricted acceptable forms to photo ID. But the law's advocates could provide no evidence that African Americans would not be disproportionately affected by the bill. In fact, the law had been pushed largely on the basis of assertions contained in Stealing Elections, a book by conservative journalist John Fund and what was called "anecdotal evidence."

Other evidence pointed even more strongly to nefarious motives behind the legislation. According to the Recommendation Memorandum, Georgia state Rep. Sue Burmeister, the sponsor of the bill, told section staff that "if there are fewer black voters because of this bill, it will only be because there is less opportunity for fraud," and that "when black voters in her black precincts are not paid to vote, they do not go to the polls."

For that and a host of other reasons, Moore and three of his colleagues recommended against clearing the bill. A single member on their review team, a young Republican lawyer, supported clearance. Yet Moore's team was nevertheless overruled and the bill was cleared. In a telling sequel to these events at the Justice Department, a federal appeals court judge later barred implementation of the law, comparing it to a Jim Crow-era poll tax.

Things went downhill from there.

A few weeks later, Moore said, he and all three of his colleagues were called in one by one to speak with voting section chief John Tanner. All four were criticized for their performance on the Georgia I.D. memo.

In the private meeting, Moore said that Tanner criticized him for his performance – for not adequately analyzing the evidence – and for his behavior. "I was accused of mistreating the Republican-hired attorney, because I criticized some of the things he said and did," Moore told me, adding that there had been frequent disagreements between the lawyer, Joshua Rogers, and the others on the team. "He was just out of law school and had only been in the section a few months. He was saying things and writing things in his memos that we believed were incorrect... We had some very sharp disagreements with him."

Moore said that instead of meeting with Tanner like the others, Rogers was "called over to main Justice and commended for his work on the case." Rogers, a member of the Republican National Lawyers Association, is still with the section.

But it didn't stop there. Moore said that there was persistent gossip in the section that the political appointees who supervised the division had been monitoring staff's emails.

Bradley Schlozman

This suspicion was confirmed, he said, when Bradley J. Schlozman, the Principal Deputy Assistant Attorney General for the Civil Rights Division (now an unconfirmed U.S. Attorney installed after the revision to the Patriot Act) and Hans von Spakovsky, Counsel to the Assistant Attorney General for Civil Rights (now a commissioner with the Federal Election Commission), filed a complaint against him with the Office of Professional Responsibility (OPR).

The charge, Moore said, was that he had violated department rules by discussing one of the section's cases in an email to a friend who used to work in the Civil Rights Division. He was interviewed by investigators. According to an April, 2006 letter from OPR reviewed by TPMmuckraker, Moore was cleared of any wrongdoing.

Hans Von Spakovsky

But Moore had had enough. Worried about the likelihood of receiving a poor performance review from his superiors, he left in April of last year. "I felt very much retaliated against," he said. "It happened to a lot of us who disagreed."

Moore currently works as the project manager for the Commission on Federal Election Reform at American University.

In response to this piece, Justice Department spokeswoman Cynthia Magnuson said that the Privacy Act prevented the department from discussing personnel issues. But she did say that the decision to clear the Georgia voter identification law "followed a careful analysis that lasted several months and considered all of the relevant factors."

Moore took issue with that. "Did we [examine all of the relevant factors]? Yes. Did they consider them? No."

In a comment to TPMmuckraker, Sen. Ted Kennedy said that the administration's politicization of the Civil Rights Division goes hand-in-hand with its emphasis on voter fraud preventions:

> "The Department of Justice's protection of the fundamental right to vote should be above politics. Unfortunately, that hasn't been the case in this Administration. The scandal over the dismissal of United States attorneys who had refused to bring meritless voter fraud charges is just the latest example of a problem that has far deeper roots. The facts suggest that for years, the Bush Administration has viewed voting rights enforcement as a partisan tool."

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Anonymous wrote on April 17, 2007 4:04 PM:

So the political appointees monitor the e-mail of the career staff...

And Karl Rove and others use private e-mails to escape monitoring...

Are the political appointees over at the NSA sifting through all those emails?

litigatorman wrote on April 17, 2007 4:05 PM:

So, is Joshua Rogers, the young Republican lawyer whose views about the Georgia voting statute prevailed, a graduate of Regent University Law School?

Mike Caswell wrote on April 17, 2007 4:10 PM:

Let's not forget the DOJ's senior staff over rode findings by staff lawyers that Tom Delay's unprecedented Congressional redistricting in Texas violated the Voting Rights Act.

Washington Post article with links to DOJ memos and documents:

http://www.washingtonpost.com/wp-dyn/content/article/2005/12/01/AR2005120101927.html

Not Surprised wrote on April 17, 2007 4:12 PM:

Above the Law has long been covering the craziness at the Special Litigation

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Voter Purging: A Legal Way for Republicans to Swing Elections?

By Steven Rosenfeld, AlterNet. Posted September 11, 2007.

Now the Department of Justice, like the Republican Party, wants fewer registered voters in 2008.

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The Department of Justice's Voting Section is pressuring 10 states to purge voter rolls before the 2008 election based on statistics that former Voting Section attorneys and other experts say are flawed and do not confirm that those states have more voter registrations than eligible voters, as the department alleges.

Voting Section Chief John Tanner called for the purges in letters sent this spring under an arcane provision in the National Voter Registration Act, better known as the Motor Voter law, whose purpose is to expand voter registration. The identical letters notify states that 10 percent or more of their election jurisdictions have problematic voter rolls. It tells states to report "the subsequent removal from rolls of persons no longer eligible to vote."

"That data does not say what they purport it says," said David Becker, People for the American Way Foundation's senior voting rights counsel and a former Voting Section senior trial attorney, after reviewing the letters and statistics used to call for the purges. "They are saying the data shows the 10 worst voter rolls. They have a lot of explaining to do."

"You are basically seeing them grasping at whatever straws are possible to make their point," said Kim Brace, a consultant who helped the U.S. Election Assistance Commission prepare its 2004 National Voter Registration Act report, which contains the data tables cited by the Voting Section letter to identify the errant states.

The Justice Department would not comment for this report, despite repeated requests.

The 10 states receiving Voting Section purge letters are Iowa, Massachusetts, Mississippi, Nebraska, North Carolina, Rhode Island, South Dakota, Texas, Utah and Vermont. Since 2005, the Section has also sued six other states or cities -- Indiana, Maine, New Jersey, Philadelphia and Pulaski County, Arkansas -- where purging voter rolls was part of the resulting settlement. Only Missouri fought a Voting Section suit, winning in federal court, although that decision has been appealed.

Democratic Party officials in Washington and state capitals were not fully aware of the latest Voting Section effort to winnow voter rolls, but Democratic National Committee officials said it would be studied in a 50-state review of election practices before 2008.

The voter roll purges are part of an unprecedented effort at the Justice Department to eliminate "voter fraud," which, as defined by Republican activists, is an assumption that Democratic political operatives or sympathetic political organizations have filed fake

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voter registrations or encouraged supporters to vote more than once to win elections. These claims have been investigated by the U.S. Election Assistance Commission (EAC) and academics and found to be without merit. However, the Bush administration's Justice Department, starting under former Attorney General John Ashcroft, has devoted considerable resources to prosecuting "voter fraud." The effort to pressure states to additionally purge voter rolls is a trickle-down effect of these policies.

Voter roll purges, if incorrectly done, can be a factor in determining election outcomes -- particularly in tight races. Unlike most of the "voter fraud" cases cited by GOP activists, where a handful of registrations -- usually in the single digits -- from big voter registration drives are found to be erroneous, purges can affect thousands of voters. In Florida and Missouri in 2000, a total of 100,000 legal voters were incorrectly removed, according to academics and local election officials. In Cleveland in 2004, voter purges were a factor behind long lines and people leaving without voting as poll workers dealt with people who did not know they had been removed from voter lists, various media reported.

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AlterNet obtained and analyzed the EAC data used by the Voting Section to identify states with allegedly swollen voter rolls that need purging. Using the methodology cited in Tanner's letters, it found 18 states where more than 10 percent of the jurisdictions -- a total of 2,000 counties, cities and townships -- allegedly had more registered voters than eligible voting-age citizens. It shared those findings with several dozen experts -- from consultants like Brace, who compiled the numbers, to former Voting Section lawyers, to state election officials, to political operatives -- to assess if those states' voter rolls needed purging and whether the Voting Sections actions were partisan.

AlterNet found many of the states targeted by the Voting Section have outdated voter rolls, especially in rural counties, where the registrations of people who have moved, died or been convicted of felonies need to be removed. That is the standard practice of local election officials and required under federal election laws. However, AlterNet found that some states facing Justice Department pressure to purge voters have long been targeted by GOP "vote fraud" activists, especially where concentrations of minority voters have historically elected Democrats -- such as St. Louis, Philadelphia and South Dakota's Indian reservations. One of those Republican activists who is now a Federal Election Commission member, Hans Von Spakovsky, started the department's purge effort in January 2005 when he was a political appointee overseeing the Voting Section's legal agenda, according to former Voting Section attorneys who worked with him then.

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Steven Rosenfeld is a senior fellow at Alternet.org and co-author of What Happened in Ohio: A Documentary Record of Theft and Fraud in the 2004 Election, *with Bob Fitrakis and Harvey Wasserman (The New Press, 2006).*

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NC DEPT OF JUSTICE

U.S. Department of Justice
Civil Rights Division

Voting Section - NWB
950 Pennsylvania Avenue, NW
Washington, DC 20530

April 18, 2007

The Honorable Gary Bartlett
Executive Director
State Board of Elections
P.O. Box 27255
Raleigh, North Carolina 27611-7255

Dear Director Bartlett:

We write to you as the chief State elections official for the State of North Carolina to request information concerning the State's compliance with certain requirements of the federal National Voter Registration Act of 1993, 42 U.S.C. §1973gg *et seq.* ("NVRA") and the Help America Vote Act of 2002, 42 U.S.C. § 15301 *et seq.* ("HAVA").

Section 8 of the NVRA sets forth requirements with respect to the administration of voter registration. As part of a nationwide effort to assess compliance with the Section 8 of the NVRA, we conducted an analysis of each state's total voter registration numbers as a percentage of citizen voting age population based on reports following the 2004 general election submitted to the Election Assistance Commission. According to that report, voter registration actually exceeded the total citizen voting age population in 10 percent or more of the jurisdictions within your State. It is contemplated that the effective implementation of a statewide voter registration database pursuant to HAVA would help address that issue and provide an opportunity for State action.

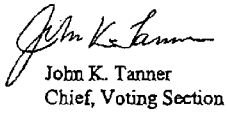
We write to you to request a copy of your State's current voter registration list in electronic format. Please include, at a minimum, voters' full names, dates of birth, addresses, dates of registration, voter history, and social security number (if available), on a compact disc in a comma-delimited file format or as a Microsoft Access database file. We are requesting this information under the statutory authority found in 42 U.S.C. §1974b. As you are aware, we made a similar request to you in August 2006, and we thank you for complying with that request. We write now to assess the changes in your voter registration list since that time, and in particular since the adoption of a statewide voter registration database and since the intervening federal election and the subsequent removal from the rolls of persons no longer eligible to vote.

Please provide the information requested above no later than two weeks from the date of this letter. We will be happy to provide you with our Federal Express account number. The

APR 23 2007

materials may be sent to Robert Popper of the Civil Rights Division Voting Section to the following address: Voting Section, Civil Rights Division, 1800 G Street N.W., Washington, D.C. 20006. If you have any questions regarding our request, please contact Mr. Popper at 202-305-0046. We very much appreciate your cooperation in our efforts to monitor the progress nationwide of NVRA and HAVA compliance.

Sincerely,



John K. Tanner
Chief, Voting Section

National Voter Registration Implementation Project

October 1, 2004

Hans A. von Spakovsky, Counsel to the Assistant Attorney General
Joseph D. Rich, Chief, Voting Section
Chris Herren, Trial Attorney, Voting Section
Civil Rights Division
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dear Messrs. von Spakovsky, Rich, and Herren:

Thank you again for meeting with representatives of the National Voter Registration Act Implementation Project on September 10, 2004 regarding implementation of the National Voter Registration Act (NVRA) in public assistance offices. We hope that the conversation that day can be part of an ongoing collaborative effort to ensure that the Act's public assistance provisions are effectively implemented in all states where they apply.

In this spirit, we would like to express our disappointment that the Department of Justice has decided not to take a particular step discussed during the meeting. By choosing not to write to governors, election officials, and public assistance commissioners to emphasize the importance of immediately bringing their states into compliance with NVRA Section 7, the Department is missing a critical opportunity to prompt all states to correct serious ongoing violations of the rights of public assistance recipients to participate in the electoral process on the same terms as other citizens.

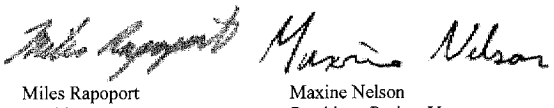
We understand that the Department's reluctance to communicate with states about the need to improve compliance with Section 7 is based in part on the fact that the Department already sent a letter on August 31st to election officials regarding compliance with federal voting laws. However, while the August 31st letter was constructive as far as it went—reminding election officials in a general way of their obligations to comply with the Voting Rights Act of 1965, the NVRA, the Help America Vote Act of 2002, and other laws—it was inadequate in at least two respects. First, by broadly focusing on nondscriminatory administration of a large body of federal voting laws, it failed to emphasize the systematic failure of most states to register voters through public assistance agencies as required by Section 7. Second, the fact that the August 31st letter was addressed only to election officials means that it did not reach the key officials who are required to implement NVRA Section 7, the governors and public assistance commissioners with management responsibility over public assistance agencies.

We appreciate the Department's offer to look into specific violations in individual states, and we will follow up with you shortly with examples of such violations. However, as is manifest from the dramatic decline in voter registrations through public assistance agencies in nearly every state and from even a cursory look at the activities of public assistance agencies across the country, what we are seeing is a

wholesale failure of states to comply with Section 7, a singular failure that affects the rights of millions, perhaps tens of millions, of citizens. While an investigatory approach focusing on the deficiencies of individual states will likely be necessary in states that refuse to respond to firm reminders of their obligations under the law, we feel that given the nationwide scope of the problem, the Department must find ways to spur improved compliance throughout the country, rather than responding only in instances where specific violations are brought to the Department's attention.

Should you have any questions, please contact Lucy Mayo at Dēmos at 212-419-8772 or Doug Hess at Project Vote at 202-955-5869. Thank you again for your attention to this important matter.

Sincerely,



Miles Rapoport
President, Dēmos

Maxine Nelson
President, Project Vote

The National Voter Registration Act's Public Assistance Requirements: A Promise Unfulfilled

A Report to the U.S. Department of Justice

Demos: A Network for Ideas & Action
Project Vote
January 2005

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Introduction

The following report reflects the findings of a joint project by Demos and Project Vote, two nonpartisan, nonprofit organizations that aim to increase voter registration and strengthen participatory democracy.

During the late spring, summer and fall of 2004, Demos and Project Vote worked with states across the nation to improve compliance with the National Voter Registration Act of 1993 (NVRA, P.L. 103-31). Specifically, the goal was to strengthen compliance with Section 7 of the law, which mandates that states offer voter registration services at public assistance offices.

In researching state compliance with the NVRA and doing work in the field, Demos and Project Vote found that, to a disturbing degree, states are disregarding their obligations under the law. This report describes these findings and offers potential policy remedies available to the Department of Justice, the only federal agency with the both the power and the mandate to compel compliance. Specifically, this report:

- ***Provides a brief history of the NVRA,*** focusing on the Act's public assistance requirements;
- ***Offers an analysis of FEC data*** showing the decline in voter registration at public assistance agencies in nearly all states;
- ***Summarizes observations from the field*** of defects in state implementation responsible for this dramatic drop in registrations;
- ***Describes systems in place in states that have been more successful than other states in implementing the NVRA requirements*** for voter registration at public assistance agencies; and
- ***Offers policy recommendations*** on steps that the Department of Justice and allied agencies can take to improve compliance with Section 7 of the NVRA.

Poor state implementation of the public assistance provisions of the NVRA is neither inevitable nor irreversible. In working with states earlier this year, Demos and Project Vote found important exceptions to the negative trends—a handful of states that have been able implement key provisions of Section 7 with ease. These states demonstrate that, with good faith efforts, states can improve and enhance their compliance with the public assistance requirements of the NVRA.

A Brief History of the NVRA

When Congress passed the National Voter Registration Act of 1993 (NVRA, P.L. 103-31), its goals were to "increase the number of eligible citizens who register to vote in elections for Federal office" and "protect the integrity of the electoral process."[1]

The NVRA created a variety of mechanisms to make it easier for American citizens to obtain and complete voter registration applications. These included requirements for states to establish and disseminate mail-in voter registration forms; offer voter registration services at motor vehicle departments; and offer voter registration services at public assistance offices.

[1]National Voter Registration Act of 1993, Public Law 103-31, May 20, 1993, 103rd Congress, Section 2 (b).

Citizens and public officials tend to be most familiar with the mail-in registration forms and the "motor voter" section of the law, which created simple mechanisms for voter registration at motor vehicle departments.

Section 7 of the Act, less widely known, requires states to designate all offices that provide public assistance—such as Food Stamps, Medicaid, Temporary Assistance for Needy Families (TANF), and Women, Infants and Children (WIC) benefits—as voter registration agencies. With each application for assistance, application for recertification or change of address notification, states must provide a form that includes the question, "If you are not registered to vote where you live now, would you like to apply to register to vote here today?" States are required to provide to each applicant who decides to register "the same degree of assistance with regard to the completion of the registration application form as is provided by the office with regard to completion of its own forms."[2]

Congress included these requirements because low-income individuals are less likely to have driver's licenses, and would therefore be underrepresented in a system that focused exclusively on motor vehicle departments. Minority, female, urban, and low-income citizens are among those least likely to own cars and most likely to frequently change addresses. Indeed, Census Bureau data from 2000 shows that African Americans were 14 percent less likely to have registered at a department of motor vehicles than whites; Latinos were 25 percent less likely, and Asian and Pacific Islander Americans 37 percent less likely.[3]

Lawmakers believed that establishing voter registration at public assistance agencies would rectify this imbalance.

A number of states initially resisted implementing a variety of the NVRA mandates, challenging the federal government's authority to impose such registration requirements. The courts struck down these state challenges, citing the constitutional authority of Congress to regulate elections and voter registration.[4]

With the courts rejecting state challenges, many states appear to have made some initial, good faith efforts to implement the agency registration provisions. But such efforts soon dropped off. The NVRA required the Federal Election Commission (FEC) to report biennially to Congress on the impact of the act, and these reports show a striking trend.[5] As the next section will document,

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[2] *Ibid.*, Section 7 (a).

[3] "Voting and Registration in the Election of November 2000," U.S. Census Bureau Current Population Report P20-542. This report and other detailed data on Americans' voting behavior are available online at: http://www.census.gov/population/www/socdemo/voting.html

[4] In Acorn v. Miller, 129 F.3d 833 (6th Cir. 1997) (Michigan), Voting Rights Coalition v. Wilson, 60 F.3d 1411 (9th Cir. 1995) (California), and Acorn v. Edgar, 56 F.3d 791 (7th Cir. 1995) (Illinois), appellate courts interpreted Congressional authority over voter registration as paramount, citing the Constitution's Elections Clause—Article I, Section 4, Clause 1—as the source of such authority. For a clear, concise explication of these and related decisions, see "Elections: The Scope of Congressional Authority in Election Administration," GAO Report to the Congress (March 2001).

[5] Under the Help America Vote Act (HAVA), this reporting responsibility shifted to the Election Assistance Commission.

FEC data show that registrations at public assistance agencies dropped *61.8%* between 1995-96 and 2001-02.[6]

Analysis of Federal Election Commission Data

The NVRA required the Federal Election Commission (and now the Election Assistance Commission) to report biennially to Congress on the impact of the NVRA. The first such report, issued in 1997, presented results of the states' initial efforts to implement the NVRA from 1995-1996. Given that some states experienced difficulties implementing the new requirements and others did so only after unsuccessful court challenges, there is no reason to believe that states' results for 1995-1996 reflect the NVRA's full potential to facilitate voter registration. Nevertheless, data from 1995-1996 offer a baseline against which states' results in subsequent years can be measured. The data show that 1995-1996 represented a high-water mark for voter registration at public assistance offices, even with state missteps in the initial implementation of NVRA Section 7.

While the state-reported data presented by the FEC is flawed in some significant respects,[7] they are sufficiently complete to demonstrate serious problems with state implementation of the NVRA at public assistance offices over the past decade.

Overall compliance with the NVRA has been far more successful than adherence to the public assistance provisions in Section 7. As Table 1 (on the following page) indicates, total applications reported by the states from all sources were down 9.6% in 2001-2002, as compared with 1995-1996. However, this modest decline reflects the fact that there was no presidential election in 2001-2002. Changes in the number of applications from each source are better understood by comparison between the presidential election years (1999-2000 versus 1995-1996) on the one hand and the non-presidential election years (2001-2002 versus 1997-1998) on the other.

Such comparisons show an upward trend in total applications from all sources. Total applications were up 10.1% in 1999-2000, as compared with 1995-1996, and up 5.5% in 2001-2002, as compared with 1997-1998. Moreover, similar comparisons show increases or only modest declines in applications from individual sources other than public assistance offices. For example, applications from motor vehicle offices were up 26.8% in 1999-2000, as compared with 1995-

[6] Impact of the National Voter Registration Act of 1993 on the Administration of Elections for Federal Office, 1995-1996, 1997-1998, 1999-2000, 2001-2002 (Federal Election Commission Reports to the 105th, 106th, 107th and 108th Congresses).

[7] The flaws in state-reported data presented by the FEC are noted in this report's Appendix A and also detailed in appendices to the FEC reports themselves. In addition, our review of the data presented in the FEC reports revealed several arithmetic errors, which seem to have caused the FEC to report substantially inaccurate national totals of voter registration applications from public assistance offices in some years as well as several other erroneous figures. The numbers in this report have been corrected. For additional details, see the notes to Appendix A. Notwithstanding the problems with the state-reported data, there are several reasons to believe that the national trends discussed in this section are valid. First, our analysis indicates that aggregate trends in states that indicated that their data were complete are not substantially different from trends in states that indicated problems with their data. Second, in some cases, the problems with data reported by a given state are the same from one report to the next. For example, some states report perennial problems obtaining data from certain jurisdictions; in these instances, statewide totals should be comparable from one reporting period to the next. Finally, information obtained by Demos and Project Vote in our conversations with state staff around the country bear out the trends discussed in this section.

1996, and up 5.6% in 2001-2002, as compared with 1997-1998. Applications by mail were up 14.8% in 1999-2000, as compared with 1995-1996, and up 17.8% in 2001-2002, as compared with 1997-1998.

Figures from public assistance offices offer a sharp contrast to these upward trends. Applications from public assistance offices fell 56.8% in 1999-2000, as compared with 1995-1996, and fell 23.1% in 2001-2002, as compared with 1997-1998.[8] In fact, public assistance offices are the only source of applications that declined in each biennial period. In the 1999-2000 presidential election period, applications from public assistance offices were down even compared to the preceding non-presidential election year. Such applications fell 13.4% in 1999-2000, as compared with 1997-1998, while applications from other sources rose 30.8% during the same period of time. *The net result of this steady decline is that applications from public assistance offices had fallen 61.8% by 2001-2002 as compared with 1995-1996 far more than the 6.1% decline in applications from all other sources.* In short, states' poor results at public assistance offices do not reflect a broader decline. Rather, the drop in voter registration applications at public assistance offices exceeds the overall decrease in registration by a more than ten-to-one ratio.[9]

Table 1: Voter Registration Applications By Source 1995-2002[10]

Source	VR Apps 1995-1996	Change 1995-96 to 1997-98	VR Apps 1997-1998	Change 1997-98 to 1999-00	VR Apps 1999-2000	Change 1999-00 to 2001-02	VR Apps 2001-02	Four-Year Changes		Six-Year Change
								1995-96 to 1999-00	1997-98 to 2001-02	1995-96 to 2001-02
Motor Vehicle Offices	13,722,233	10.6%	15,175,653	14.6%	17,393,814	-7.9%	16,026,407	26.8%	5.6%	16.8%
By Mail	12,330,015	-28.7%	8,792,200	61.0%	14,150,732	-26.8%	10,357,284	14.8%	17.8%	-16.0%
Public Assistance Offices	2,602,748	-50.1%	1,298,907	-13.4%	1,124,491	-11.2%	999,042	-56.8%	-23.1%	-61.6%
Disability Services	178,015	26.5%	225,156	-48.5%	115,971	-20.4%	92,317	-34.9%	-59.0%	-48.1%

[8] Though our focus is on applications at public assistance offices, it's worth noting that drops in applications from disability services were only slightly less severe: down 34.9% in 1999-2000 as compared with 1995-1996 (presidential years) and 59.0% in 2001-2002 compared with 1997-1998 (non-presidential years).

[9] While caseloads in some public assistance programs have declined overall since the NVRA went into effect, these declines are not sufficient to explain the declines in voter registration applications through public assistance agencies. For example, in the Food Stamp Program, one of the largest and most inclusive public assistance programs, average monthly participation was about 7.8 million households in 2001-2002 compared with 10.7 million in 1995-1996, for a decline of about 27.0%. (Source: USDA-National Agricultural Statistics Service, Agricultural Statistics 2004, Table 13.7.) As we have seen, the decline in voter registration applications from public assistance offices during the same period was 61.6%. Moreover, there is evidence that declines in public assistance caseloads do not mean that fewer people are applying for benefits. See, for example, FIP Caseload Trends Overstate Good News for Michigan's Poor Families, Michigan League of Human Services, Sept. 2001, available at www.mllhs.org/Media/EDocs/FipTrends.pdf (application levels of Michigan's main public assistance program continued at the levels recorded in the early and mid-1990s, even though caseloads were down); Memorandum Regarding Public Assistance Caseloads vs. Applications, Center for Public Policy Priorities, Mar. 29, 1999, available at www.cppp.org/products/policyanalysis/memcaseloads.html.

[10] See footnote 7.

Armed Forces Offices	76,008	-70.3%	22,608	227.5%	74,038	-27.0%	54,024	-2.6%	139.0%	-28.9%
State Designated Sites	1,732,475	-36.9%	1,092,526	72.3%	1,881,984	-44.8%	1,038,269	8.6%	-5.0%	-40.1%
Other Sources	10,810,934	-18.9%	8,765,163	24.9%	10,943,962	-18.6%	8,906,351	1.2%	1.6%	-17.6%
TOTAL	**41,452,428**	**-14.7%**	**35,372,213**	**29.3%**	**45,684,992**	**-17.9%**	**37,473,694**	**10.1%**	**5.9%**	**-9.6%**
Total Less Public Assistance Offices	38,849,680	-12.3%	34,073,306	30.8%	44,560,501	-18.1%	36,474,652	14.6%	7.1%	-6.1%

The previous analysis reflects aggregate national data. The results of individual states vary significantly, with many showing declines considerably worse than the national average. A handful of states bucked the national trend and showed an increase rather than a drop in applications from public assistance offices.

The chart in Appendix A presents state data for voter registration applications from public assistance offices as well as state totals from all sources. The chart is sorted according to the net declines between 1995-1996 and 2001-2002. *Most states posted declines steeper than the national figure: 25 of 43 states reported decreases exceeding 61.6%.* Only 6 states reported increases in applications from public assistance offices, while 15 reported increases in total applications from all sources in the same period.

Comparing presidential election periods, 24 states reported declines in applications from public assistance offices from 1995-1996 to 1999-2000 that were steeper than the national figure of 58.6%; only 4 states reported increases in applications from public assistance offices while 25 reported increases in total applications from all sources. Figures from the non-presidential election periods show similar results. There were 34 states that showed declines in 2001-2002 compared with 1997-1998 that were worse than the national figure of 13.4%; only 10 states showed increases, while 23 showed increases in applications from all sources.

Field Observations

The disturbing drop in registration applications from public assistance offices reflects specific defects in state implementation of the NVRA. Observations from the field show that there are a number of causes for declining registration at public assistance agencies.

During the summer and fall of 2004, Demos and Project Vote conducted meetings in a number of states regarding implementation of the NVRA in their public assistance offices. These meetings often included discussions with top officials, site visits to welfare offices, conversations with caseworkers and office managers, and analyses of voter registration procedures.

In the states where Demos and Project Vote worked most intensively, we witnessed widespread violations of the NVRA in public assistance offices. Violations ranged from certain offices effectively offering no voter registration services whatsoever to voter registration not being offered to an array of clients who contact agencies by various means (e.g. phone or mail).[11]

[11] It should be noted that, in cases where states worked with Demos or Project Vote, most problems were remedied fairly quickly and easily. For example, initial plans for a new "change center" in Philadelphia, Pennsylvania—where clients can phone in any changes to their status (e.g. address or employment) in lieu

It has also come to our attention that many voters were disenfranchised in the recent presidential election by apparently widespread violations of the NVRA. A hotline established in 2004 by the Election Protection Coalition, a national, nonpartisan collaborative of over one hundred organizations, received numerous calls from would-be voters who claimed to have completed timely voter registration applications at a PAO, only to find themselves omitted from the voter rolls on Election Day. These reports are recorded in the web-based Election Incidence Reporting System (EIRS), available for viewing at www.verifiedvoting.com. See Appendix B for logs of some of these calls. Due to a phenomenal call volume experienced on the hotline (tens of thousands of calls were made on November 2nd), many callers were not able to get through to an Election Protection volunteer. Thus, the PAO registration problems recorded in the EIRS almost certainly under-report the actual number of citizens who were unable to vote on November 2, 2004 because of poor NVRA implementation.

It is worth noting that voters who registered at motor vehicle departments also faced problems on Election Day. While a search of the EIRS will certainly reveal some of these problems, news reports from multiple states indicate that voters who registered to vote and motor vehicle departments found themselves unlisted on voter rolls when they went to the polls.[12] (See Appendix C for full reports.)

Below are details on the Section 7 violations we witnessed in various states. These violations were witnessed between June and October 2004. A violation that was remedied as a result of our work is indicated parenthetically; otherwise, violations are presumed to remain unresolved.

Arizona

- The Department of Employment and Rehabilitation Services (DERS), which administers programs serving individuals receiving TANF and Food Stamps, did not offer any voter registration services. (This problem has been addressed; as a result of our work in the state, DERS has now adopted a voter registration system.)
- Lack of procedures for registering individuals who change their addresses at Department of Economic Security (DES) offices.
- DES offices without bilingual voter registration applications as required by federal law.
- Voter registration not offered to those who receive services from DES offices via phone or mail. No procedures are in place to offer voter registration during phone transactions, and packets subsequently mailed out with application materials lack the required declination and voter registration forms.

California (Los Angeles County)

- The Los Angeles County Department of Public Social Services' declination form language did not comply with the NVRA. The form read: "Would you like to register to

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of face-to-face contact at a public assistance office—made no provision for voter registration. Voter registration was added to a checklist of options for clients reporting a change of address after Demos and Project Vote brought this NVRA violation to the attention of agency administrators.

[12] "Some Motor-Voter Registration Problems Noted," Mike Hasten, The Advertiser, Nov. 4, 2004, Baton Rouge, Louisiana; "Voters Registered At BMV Not On Registration Rolls" by David Slone, Times-Union, Nov. 4, 2004 Warsaw Indiana; "Minor Problems Reported at Some Polls," Staff reports, The Patriot-News, Nov. 3, 2004, Pennsylvania; "Broken Vote Counting Machines, MoveOn Draw Complaints in Iowa," Lynn Campbell, The Register, Nov. 3, 2004, Des Moines, Iowa.

vote here today?"[13] (As a result of our work with the County, they are now fixing this error.)

- Voter registration training is not offered to staff on any level. (The County is now setting up training for staff.)

Connecticut

- In July of 2004, the Department of Social Services (DSS) acknowledged that entire offices administering TANF, Food Stamps and Medicaid were not complying with the NVRA. (Through our work with the state, DSS has taken steps to rectify this situation.)
- Lack of procedures for registering individuals who change their addresses.
- Voter registration not offered to those who receive services from offices via phone or mail. No procedures in place to offer voter registration during phone transactions, and packets subsequently mailed out with application materials lack the required declination and voter registration forms. (DSS is now addressing this issue.)
- Agency and office staff not trained in NVRA procedures. We have encountered regional directors who were entirely unaware of their duties under the NVRA. (DSS is now increasing trainings on NVRA compliance.)

Florida

- The voter registration question that is integrated into public assistance applications does not comply with the NVRA. The question on the Application Packet for Food Stamps, Temporary Cash Assistance and Medicaid reads: "Check YES if you would like to apply to register to vote or update your voter registration information…"
- Lack of procedures for registering individuals who change their addresses.

Iowa

- Several problems in NVRA implementation were noted during meetings with state staff, including the use of incorrect forms and inconsistent implementation. (These problems were remedied; Iowa has become a model state in implementation of Section 7.)

Massachusetts

- Lack of procedures for registering individuals who change their addresses.
- No opportunity to register if application or recertification is sought by phone or mail (with the exception of Food Stamp program).
- Offices without bilingual voter registration applications, as required by federal law.
- Wrong voter registration question used in some offices: "Is there anyone in your household not registered to vote?" If a person answers "no" to this question, they are never presented with the declination form or a voter registration application – even though that individual may need to re-register due to change of address.
- Agency and office staff not trained in NVRA procedures. We encountered office supervisors entirely unaware of certain basic NVRA requirements.

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[13] The NVRA mandates that the question read precisely as follows: *"If you are not registered to vote where you live now, would you like to apply to register to vote here today?"* States' incorrect wording results in failure to inform clients that, if they have changed address since last registering, they must re-register to be eligible to vote.

Michigan

- In meetings with state officials, budget cuts were blamed for significant problems with implementation of the NVRA in public assistance offices. Implementation problems included no tracking of registrations or monitoring of performance.
- Public assistance offices were providing clients with outdated voter registration applications. (As a result of our work, this has been remedied.)

Missouri

- Not offering voter registration to those who inform the office of a change of address, whether in person or by phone.

Montana

- Clients are not offered voter registration when they contact the office via phone or mail to change their address or apply for benefits. (See Appendix D for letter from Montana Department of Health and Human Services acknowledging this.)
- Some public assistance offices have registered no voters whatsoever during long periods of time – a clear indicator of compliance problems.

New Jersey

- In Camden County, no voter registration opportunity is offered to clients who inform the office of a change of address by phone.

Pennsylvania (Allegheny, Delaware and Philadelphia Counties)

- The voter registration question integrated into public assistance applications does not comply with the NVRA. On the combined application the question reads: "Are you or any other adult(s) in your household interested in registering to vote?" On the Food Stamps application the question reads: "Are you or any adults in your household interested in registering to vote?" As with California and Florida, Pennsylvania's incorrect wording fails to inform clients that, if they have changed address since last registering, they must re-register to be eligible to vote.
- No declination question or voter registration form included in statewide online assistance application system [the "Compass system"].
- Lack of procedures for voter registration when individuals change their addresses.
- Voter registration not offered to those who receive services from offices via phone or mail. Packets subsequently mailed out with application materials lack the required declination and voter registration forms.

Tennessee

- Office failing to send completed voter registration applications to elections officials. This failure has been documented by the press (see Appendix E).

Successful States – Best Practices

Though many states have clearly failed to properly implement the NVRA in public assistance agencies, a few seem to have been more successful following the law. In fact, the experience of the states that have paid greater attention to the NVRA federal mandates indicates that, with straightforward steps, every state could easily comply with voter registration requirements for public assistance agencies.

Nevada and South Dakota illustrate this point well. Discussions with officials from these two states responsible for NVRA compliance in public assistance agencies indicate that, though they differ in size and demography, they have pursued similar strategies in achieving these successes.

Nevada's Successful Strategies

- NVRA voter registration requirements are part of the core mission of welfare offices. As the Field Operations Manager of the Nevada Welfare Division puts it, compliance is "automatic—part of what we do every day"—like all other federal requirements.[14]
- There are strong training systems for supervisors and for caseworkers. Instruction in NVRA voter registration is an integral part of the four-month training curriculum that Nevada State Welfare staff undergoes at the state's two training academies.
- Nevada utilizes integrated forms—which fold the NVRA declination question and voter registration applications into standard state forms—that make it easier to maintain compliance with the law. Applications for public assistance include the exact language prescribed by the NVRA in the sections posing the declination question and offering applicants an opportunity to register to vote.[15]
- Nevada ensures that all public assistance offices post a sign in the reception area that reads, "Voter Registration is Available Here." This posting is visible to all who pass through the office.
- The state ensures timely transmission of registration forms to elections officials. Designated personnel in each office are responsible for ensuring transmittal of registration forms within five days of their submission – with an even shorter timeframe as Election Day approaches.

South Dakota's Successful Strategies

- Key requirements of the NVRA – such as sending voter registration forms to every person who changes address or seeks recertification of benefits – are part of the welfare department's core mission, and are carried out automatically.
- The state maintains strong training systems for supervisors and for caseworkers. The Department of Social Services (DSS) has designated the Manager of the Food Stamp Program as the lead manager for NVRA voter registration requirements. She oversees the training of all District Offices and District Supervisors with respect to NVRA voter registration requirements. District Supervisors train all subordinate supervisors, who ensure that the opportunity to register is a mandatory component of each application for public assistance.
- Monitoring of voter registration results is also critically important to South Dakota's success. Districts submit periodic updates on voter registration activities to the Food Stamp Program Manager. In addition, review of voter registration activities is included in random monthly audits of applicant files, and in the overall management evaluations of offices conducted every two to three years.

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[14] While fulfilling the requirements of the law seems self-evidently necessary, it appears not to be the norm in state welfare offices. Caseworkers burdened with large caseloads often assume that voter registration is *not* included in their core responsibilities, which helps explain why the NVRA requirements have not fared well in so many states.

[15] In this regard, too, the surprise is how many states have failed to use the language specifically required under federal law. In many instances, the wording used by states is not only different from the required text, but fails to ascertain whether the individual may have changed address since last registering.

- The state employs applications for public assistance that include the declination question with the exact language prescribed by the NVRA.
- The state ensures timely transmission of registration forms to elections officials.

A number of other states have shown that, having previously allowed voter registration results at public assistance agencies to drop off, it is possible to improve results quickly and significantly. Several states chose to work with Demos and Project Vote to improve their systems for implementation of the NVRA at public assistance agencies. Arizona, Connecticut, Iowa and Pennsylvania, four of the states that worked with us, illustrate the rapid improvements that are possible.

Arizona

The Department of Economic Security (DES) implemented new voter registration procedures in the summer of 2004. The new procedures included:

- A reminder to staff to offer registration to clients during application, recertification and change of address procedures;
- Caseworkers encouraging clients to complete voter registration applications while in the office;
- Provision of a declination form to all clients at the front desk in waiting rooms upon submission of an application or change of address report;
- Designation of voter registration coordinators for each office;
- Voter registration applications being sent in every day;
- More frequent and detailed tracking of voter registration data, to be reported to a single person in DES;
- Commencement of required registration processes in the Employment and Rehabilitation Services Program and the Child Support Enforcement program;
- Posting of signs promoting voter registration in every DES waiting room.

Connecticut

The Commissioner of Social Services issued a memo in early September to every Department of Social Services (DSS) employee underscoring that voter registration is a "core feature in our notion of self-sufficiency for the people we serve." To improve agency voter registration, the Connecticut DSS implemented the following policies:

- Assigning waiting-room voter registration responsibilities to a caseworker or receptionist in every DSS office;
- Including enhanced voter registration training in the curriculum for every agency training program for new and current employees;
- Distributing posters, videos and buttons encouraging voter registration to every agency office;
- Ensuring that voter registration materials are included with all mailings DSS sends to those who reapply for benefits or change their addresses.

Iowa

The Director of the Department of Human Services (DHS) initiated NVRA improvement efforts with an action memo sent this summer to office mangers in the department underscoring the priority of improving voter registration processes. Pursuant to this memo, DHS offices undertook the following steps:

- Designation of a voter registration supervisor in every local office;
- Voter registration in waiting rooms and office reception areas;
- Inclusion of registration forms in materials sent to every client changing his or her address;

- Reporting on voter registration activity more frequently (weekly);
- Use of an automated web-based reporting system to improve tracking of all agency voter registration activities;
- Posters, videos and buttons used in offices to promote voter registration services.

Pennsylvania
Allegheny, Delaware, and Philadelphia Counties all undertook efforts to improve voter registration efforts in public assistance offices. Steps taken by these three counties include:

- Voter registration coordinators were designated for each office—a supervisor or manager who oversees all voter registration efforts;
- Receptionists provide all clients with declination and voter registration forms in office waiting rooms in Philadelphia and Delaware Counties;
- Allegheny County provides a voter-registration script to staff, to make voter registration easier and more standardized;
- Staff encourage clients to complete registration forms before leaving the office;
- Caseworkers ask clients about voter registration at the very outset of client interviews; previously, the question was buried in the middle of the interview;
- Voter registration opportunity offered to those who change addresses;
- Offices in Philadelphia and Delaware Counties report on registration results every two weeks;
- Promotional posters and videos are on display in office waiting rooms; staff wear buttons encouraging voter registration.

It's clear that, while there may be local variations, the strategies pursued in these successful states share key elements that make them effective:

- **Inclusion of voter registration in core mission of the public assistance agency;**
- **Strong leadership by top policy makers;**
- **Clear designation of responsibilities;**
- **Training of all relevant personnel;**
- **Inclusion of voter registration question and materials—using federally mandated language—in integrated forms;**
- **Commitment to ensuring that every client receives voter registration materials;**
- **Tracking and reporting that is frequent and detailed;**
- **Energetic outreach to applicants beginning in agency waiting rooms, and including clearly displayed promotional materials;**
- **Timely transmission of completed voter registration applications.**

As noted previously, a few states have embraced these elements ever since the NVRA was first enacted, while others have come to emphasize them more recently. In both cases, however, these priorities have produced clear results. It seems clear, then, that states like Arizona, Connecticut, Nevada and South Dakota offer paths toward greater compliance that other states can and should follow.

Policy Recommendations

Given the findings above, several policy responses appear to be both necessary and appropriate.

Investigation

Demos and Project Vote worked with a sampling of states in 2004, but not the majority. The sample that Demos and Project Vote worked with was fairly representative (encompassing all regions of the country, and states of different sizes and demographics), and suggests that there are widespread problems with state implementation of the NVRA public assistance provisions.

To date, no federal agency has investigated the degree to which each state is, in fact, complying with the National Voter Registration Act. Given widespread evidence of noncompliance uncovered by Demos and Project Vote, we suggest that the DOJ commence an investigation to ascertain whether:

- State public assistance offices are actually presenting clients with required declination and voter registration forms;
- Offices are providing these forms to those who change address or reapply for benefits, as also required under the NVRA;
- Offices are offering voter registration services at all points of contact with clients, including mail, phone and internet interactions;
- All relevant programs are offering voter registration services to clients;
- Caseworkers are receiving the training needed to properly carry out federal voter registration mandates;
- There has been any discrimination by state agencies regarding who is or is not offered the opportunity to register;
- State employees are complying with the NVRA requirement to assist clients with voter registration forms;
- Forms are being completed correctly, so that those who believe they have registered have actually done so;
- Public assistance agencies are properly transmitting registration forms to election authorities;
- States are collecting and transmitting complete and accurate data to the Election Assistance Commission (formerly to the Federal Election Commission).

Demos and Project Vote recommend use of randomized surveys and site visits to public assistance offices in order to answer these questions.

Reminder to States of NVRA Requirements

Whatever the explanatory variables, the FEC's biennial reports show that states' efforts to comply with the NVRA's public assistance requirements have been declining.

Demos and Project Vote therefore recommend that the Department of Justice send written reminders to the Chief Election Officers of each state and to those responsible for administering public assistance offices. These letters should emphasize the important, non-optional aspects of Section 7 of the NVRA, including:

- Provision of declination forms, registration forms, and a clear opportunity to register to every person who applies for public assistance, changes address or reapplies;
- Compliance with federal mandates for translating declination forms;
- Assistance to clients who request help in completing declination and/or registration forms;
- Proper completion and transmission of forms;
- Proper tracking of registration results and maintenance of registration records for two years as required under the law.

Dissemination of Best Practices

As indicated earlier, Demos and Project Vote promote a series of best practices that make compliance with NVRA requirements both automatic and effective. Given the demonstrated efficacy of this approach in improving state compliance, Demos and Project Vote advocate that the Justice Department disseminate information on best practices to all low-performing states. We also recommend providing states with comparative data showing recipients how their results compare to those of states that follow such best practices.

Improved Reporting

The NVRA requires biennial reports to Congress from the Elections Assistance Commission (EAC).[16] Congress intended these reports to assess the impact of the NVRA on administration of elections for the preceding two years, and to include "recommendations for improvements in federal and state procedures, forms or other matters affected by this subchapter."[17]

To date, these reports to Congress have lacked the data necessary for a full assessment of the impact of the various sections of the NVRA. The lack of accurate and complete information reflects shortcomings on the part of the state governments providing the data as well as the federal agency responsible for reporting to Congress.

Demos and Project Vote are hoping to work with the EAC to help that agency improve its reporting on the impact of the NVRA.

We must note, however, that the Department of Justice is uniquely positioned to help EAC improve the completeness and accuracy of future reports on the impact of the NVRA. DOJ has the authority to audit data provided by states, to investigate states that appear to be failing to comply with federal law, and to compel changes necessary to achieve full compliance. It is our hope that DOJ will use these powers to improve state reporting, and, ultimately, state compliance.

Previous reports presented by the FEC to Congress have noted major defects in state data; only 22 states provided all required data in the most recent report, covering 2001-2002. We suggest that the DOJ collaborate with the EAC in pressing states to provide complete data for the upcoming 2005 report to Congress. We also suggest that the Department of Justice audit the state-reported data for accuracy, given that *accurate data is critical to assessing state compliance with federal voter registration requirements.*

Demos and Project Vote further recommend that the Department of Justice, along with the EAC, seek to expand the range of data that states submit. Data categories are currently too limited to permit full analysis of states' performance. By amending the rules currently included in the Code of Federal Regulations, the federal government might require states to report such items as how many voting-eligible citizens receive public assistance, how many people had contact with public assistance offices, how many declined to register, etc. It would also be worthwhile to ask states to provide subtotals for periods shorter than the current two-year reporting period and to explain how the data are gathered.

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[16] The law originally required reports to be made by the Federal Election Commission; the Help America Vote Act transferred responsibility to the EAC.
[17] National Voter Registration Act, Title 42, Sec. 1973gg-7 (a) (3).

The DOJ could assist the EAC in assessing what the data indicate about states' performance over time in implementing the NVRA. Previous reports to Congress have placed scant emphasis on comparisons between current and previous reporting periods, instead presenting only the current data and some anecdotes about state-reported improvements, with little analysis. Oklahoma, for example, is among the four states praised for improvement in the public assistance section of the 2001-2002 report—even though voter registration at Oklahoma's public assistance agencies decreased by 84% in six years, among the steepest drops in the country.[18]

Finally, DOJ and EAC could greatly improve compliance with the NVRA by informing low-performing states how they can improve their procedures and their results – and by pressing for necessary changes. The NVRA specifies that the biennial reports should include "recommendations for improvements in Federal and State procedures, forms, and other matters affected by" the NVRA, but the 2001-2002 report presented only two recommendations, both of which were overly broad and unrelated to states' poor implementation of Section 7.[19] Given the widespread failure of states to implement portions of the NVRA – as reflected in the FEC data and confirmed in our work – the DOJ and EAC should make multiple recommendations for improvements. Tailoring such recommendations to the needs of specific states is both feasible and necessary for the intent of Congress to be carried out.

Absent action by the DOJ, states will almost certainly continue to fall short of fulfilling the public assistance requirements of the NVRA.

On the contrary, there is every reason to believe that NVRA compliance would greatly improve if the DOJ were to increase auditing of state performance. Given the importance of the goals that underlie the NVRA – to "increase the number of eligible citizens who register to vote in elections for Federal office" and "protect the integrity of the electoral process" – Demos and Project Vote strongly urge the Department of Justice to undertake a proactive role.

Conclusion

Demos and Project Vote greatly appreciate the interest that the Department of Justice has shown in our work and findings. We believe that there are great possibilities for a continuing partnership, and will be glad to provide further information or assistance to the Department.

To date, our efforts to improve state implementation of the NVRA at public assistance agencies have demonstrated some simple truths:

- In most instances, state noncompliance reflects a basic lack of information regarding federal requirements;
- Clear communication with states regarding mandates is often sufficient to rectify a problem;
- For more complex problems, there are simple steps states can take to achieve remedies;

[18] While one might expect a modest decrease in 2001-2002 because there was not a presidential election in this period, nearly all of Oklahoma's decrease occurred between 1995-1996 and 1999-2000, years when the data should be comparable.

[19] The recommendations were for the Postal Service to provide cheaper rates for official election materials and for the states to provide better training for personnel at motor vehicle offices and other voter registration agencies.

- When provided with templates for such steps, states can quickly improve implementation.

As FEC data and field reports demonstrate, widespread noncompliance with the NVRA at public assistance offices remains a serious problem today. At present, it appears that a majority of states are not complying with the basic mandate to provide the opportunity to register to vote to citizens who apply for public assistance, or reapply or change address.

While this is a troubling situation, it also represents an excellent opportunity. As we have shown, it is not difficult for a state to move from noncompliance to full compliance. With simple steps, states can achieve this change quickly. We hope that the Department of Justice will join us in efforts to ensure that noncompliant states take such steps. Given that the voting rights of millions of low-income citizens are at stake, we believe that this is a critically important effort, and are optimistic that the Department of Justice can work with the EAC and Demos and Project Vote to help solve the problems we have identified.

Appendix A

As Reported by States to the Federal Election Commission

	Voter Registration Applications from Public Assistance Offices							Voter Registration Applications, All Sources						
					Four Year Changes		Six-Year Change					Four Year Changes		Six-Year Change
State (a)	1995-1996	1997-1998	1999-2000	2001-2002	1995-96 to 1999-00	1997-98 to 2001-02	1995-96 to 2001-02	1995-1996	1997-1998	1999-2000	2001-2002	1995-96 to 1999-00	1997-98 to 2001-02	1995-96 to 2001-02
Louisiana (b,c)	74,636	21,958	15,869	10,522	-78.74%	-52.08%	-85.90%	1,345,799	342,769	389,311	315,709	-71.07%	-7.89%	-76.54%
Indiana (b,c)	83,853	25,741	18,594	13,281	-77.83%	-48.41%	-84.16%	1,059,666	761,947	791,086	495,964	-25.35%	-34.91%	-53.20%
New Jersey	54,579	31,902	27,771	11,611	-49.12%	-63.60%	-78.73%	1,425,826	1,450,193	2,058,025	688,121	44.34%	-52.55%	-51.74%
Mississippi (b)	33,203	8,250	13,241	21,242	-60.12%	157.48%	-36.02%	268,459	122,478	159,785	130,046	-40.48%	6.18%	-51.56%
Alabama (c)	80,096	25,932	16,362	13,621	-79.57%	-47.47%	-82.99%	560,500	319,307	403,018	280,485	-28.10%	-12.16%	-49.96%
North Carolina	74,882	21,152	42,125	23,781	-43.74%	12.43%	-68.24%	1,449,659	1,277,258	1,699,062	727,231	17.20%	-43.06%	-49.83%
Montana (b)	473	1,489	3,286	3,207	594.71%	115.38%	578.01%	90,017	66,353	105,201	46,124	16.87%	-30.49%	-48.76%
Washington	22,859	24,416	22,167	13,067	-3.03%	-46.48%	-42.84%	883,722	765,476	796,590	480,833	-9.86%	-37.19%	-45.59%
Pennsylvania (c)	59,462	31,993	45,967	16,207	-22.70%	-49.34%	-72.74%	1,846,786	1,479,817	1,861,536	1,151,346	0.80%	-22.20%	-37.66%
Nevada (b)	13,200	NA	2,883	39,444	-78.16%	NA	198.82%	289,345	NA	142,149	204,638	-50.87%	NA	-29.28%
Maryland	982	22,095	32,250	1,151	3184.11%	-94.79%	17.21%	473,449	414,959	474,575	363,303	0.24%	-12.45%	-23.26%
Ohio	100,129	38,499	28,712	24,391	-71.32%	-36.65%	-75.64%	1,866,048	1,438,727	1,802,119	1,450,809	-3.43%	0.84%	-22.25%
Georgia	103,942	103,942	41,165	35,802	-60.40%	-65.56%	-65.56%	1,469,269	1,469,269	1,275,304	1,144,833	-13.20%	-22.08%	-22.08%
Tennessee	147,830	66,081	49,636	52,373	-66.42%	-20.74%	-64.57%	776,156	495,284	625,189	611,548	-19.45%	23.47%	-21.21%
New York	358,105	256,214	225,660	164,924	-36.98%	-35.63%	-53.95%	3,275,102	3,644,216	4,177,321	2,591,110	27.55%	-28.90%	-20.88%
Vermont (a,b)	NA	1,914	5,724	143	NA	-92.53%	NA	NA	18,640	26,624	15,565	NA	-16.50%	-16.50%
Maine (c)	16,849	10,883	10,419	7,839	-38.16%	-27.97%	-53.47%	269,673	249,497	310,418	226,081	15.11%	-9.39%	-16.16%
Nebraska	9,564	3,117	3,063	2,527	-67.97%	-18.93%	-73.58%	294,282	246,297	243,647	249,680	-17.21%	1.37%	-15.16%
California (b,c)					-51.82%	-39.41%	-64.43%					-8.97%	6.24%	-15.06%

	129,273	75,875	62,288	45,976				5,761,575	4,606,233	5,244,771	4,893,793			
Arkansas (c)	28,324	11,343	9,214	8,623	-67.47%	-23.98%	-69.56%	282,023	190,602	231,029	243,316	-18.08%	27.66%	-13.72%
Kentucky	63,477	23,271	24,993	27,269	-60.63%	17.18%	-57.04%	1,495,553	1,354,084	1,418,227	1,300,095	-5.17%	-3.99%	-13.07%
Missouri	143,135	68,475	51,951	34,923	-63.70%	-49.00%	-75.60%	937,209	1,084,178	1,154,165	818,644	23.15%	-24.49%	-12.65%
Kansas	8,419	12,500	7,585	4,661	-9.91%	-62.71%	-44.64%	377,279	381,754	472,083	341,234	25.13%	-10.61%	-9.55%
New Mexico	16,668	8,811	5,088	3,719	-69.47%	-57.79%	-77.69%	203,052	175,646	173,800	189,555	-14.41%	7.92%	-6.65%
Massachusetts (b)	10,895	18,921	26,984	13,521	147.67%	-28.54%	24.10%	619,966	1,180,552	1,284,799	586,126	107.24%	-50.35%	-5.46%
Oklahoma	58,811	22,703	11,777	9,633	-79.97%	-57.57%	-83.62%	554,679	411,542	645,341	525,252	16.34%	27.63%	-5.31%
Florida	158,836	47,990	31,619	59,460	-80.09%	23.90%	-62.57%	2,723,303	2,319,830	2,850,347	2,626,913	4.67%	13.24%	-3.54%
Michigan (b)	79,538	55,095	51,123	30,127	-35.73%	-45.32%	-62.12%	1,493,541	1,280,518	1,272,229	1,455,616	-14.82%	13.67%	-2.54%
Oregon (b)	38,446	37,368	51,714	53,538	34.51%	43.27%	39.26%	802,724	836,789	873,071	797,297	8.76%	-4.72%	-0.68%
Utah (b,c)	24,913	7,356	4,349	3,750	-82.54%	-49.02%	-84.95%	330,169	208,590	426,267	330,613	29.11%	58.50%	0.13%
Dist of Columbia (b)	14,268	3,444	2,586	4,454	-81.88%	29.33%	-68.78%	320,968	135,630	323,530	339,401	0.80%	150.24%	5.74%
Connecticut (b,c)	21,061	13,690	9,951	11,603	-52.75%	-15.24%	-44.91%	338,203	238,885	311,676	384,970	-7.84%	61.15%	13.83%
Arizona (b,c)	17,845	29,902	32,137	9,351	80.09%	-68.73%	-47.60%	524,042	469,826	919,676	619,734	75.50%	31.91%	18.26%
Alaska	3,673	604	211	102	-94.26%	-83.11%	-97.22%	170,669	171,198	268,800	210,242	57.50%	22.81%	23.19%
Texas (c)	353,550	19,726	19,108	97,644	-94.60%	395.00%	-72.38%	3,340,587	436,336	4,262,944	4,339,913	27.61%	894.63%	29.91%
Iowa (b)	26,345	12,246	8,259	9,655	-68.65%	-21.16%	-63.35%	731,514	684,091	691,217	954,498	-5.51%	39.53%	30.48%
South Dakota (b,c)	13,906	10,116	10,276	9,020	-26.10%	-10.83%	-35.14%	94,117	76,562	106,881	123,213	13.56%	60.93%	30.91%
Delaware	7,889	4,100	3,317	1,601	-57.95%	-60.95%	-79.71%	159,302	165,919	145,065	213,452	-8.94%	28.65%	33.99%
Hawaii (c)	1,040	3,443	738	277	-29.04%	-91.95%	-73.37%	139,399	133,810	231,271	200,075	65.91%	49.52%	43.53%
Virginia (b)	54,051	39,631	14,953	15,817	-72.34%	-60.09%	-70.74%	664,754	1,254,260	1,610,148	1,232,029	142.22%	-1.77%	85.34%
South Carolina	20,615	22,035	13,428	16,253	-34.86%	-26.24%	-21.16%	117,197	251,261	301,308	240,733	157.10%	-4.19%	105.41%
Colorado (b,c)	12,255	15,282	9,905	56,801	-19.18%	271.69%	363.49%	554,343	1,021,816	1,003,557	1,194,031	81.04%	16.85%	115.40%
Illinois (c)					-21.71%	-41.60%	-58.95%					119.60%	31.50%	129.51%

	33,837	23,785	26,490	13,891				887,874	1,549,601	1,949,777	2,037,793			
Rhode Island (b,c)	3,822	2,130	1,646	2,240	-56.93%	5.16%	-41.39%	41,131	84,473	110,278	101,730	168.11%	20.43%	147.33%
West Virginia (b,c)	23,212	13,487	27,907	NA	NA	NA	NA	143,497	105,740	61,775	NA	-56.95%	NA	NA
United States	2,602,748	1,298,907	1,124,491	999,042	-56.80%	-60.83%	-61.62%	41,452,428	35,372,213	45,684,992	37,473,694	10.21%	5.94%	-9.60%

(a) ID, MN, NH, ND, WI, WY are exempt from NVRA. NVRA was not implemented in VT in 1995-96; VT's ranking is based on 2001-02 versus 1997-98.

(b) Seventeen states reported deficiencies in data collection in one or more years that may have had a substantial effect on the data in this table. Such deficiencies and the relevant years are as follows: Louisiana (2001-02), Indiana (1997-98), Mississippi (1995-96, 1997-98, 2001-02), Montana (1995-96, 1997-98, 2001-02), Nevada (1995-96, 1997-98, 2001-02), Vermont (1997-98, 2001-02), California (1995-96, 1997-98), Massachusetts (1995-96), Michigan (1995-96, 1997-98, 2001-02), Oregon (2001-02), Utah (2001-02), Connecticut (1997-98), Arizona (1995-96), South Dakota (2001-02), Colorado (1995-96), Rhode Island (1995-96), West Virginia (2001-02).

(c) In addition to the substantial deficiencies mentioned in footnote (b), several states reported minor deficiencies in data collection that would seem to have had minimal or no effect on the data in this table. Following are the states and the relevant years: Louisiana (1997-98), Indiana (1995-96, 1999-00), Alabama (1999-00), Pennsylvania (1995-96, 1997-98), Maine (1995-96, 1997-98,1999-00), California (1999-00), Arkansas (1999-00), Utah (1995-96, 1997-98), Connecticut (1999-00), Arizona (1997-98), Texas (1995-96, 1997-98, 1999-00), South Dakota (1995-96, 1997-98), Hawaii (1995-96, 1997-98), Colorado (1997-98), Illinois (1997-98, 1999-00), Rhode Island (1999-00), West Virginia (1995-96, 1997-98).

Appendix B

(Source: Electronic Incidence Reporting System- www.verifiedvoting.com. Boxes contain notes taken by call operators of voter complaints.)

Daviess County, KY

https://voteprotect.org/index.php?display=EIRMapCounty&tab=ALL&cat=ALL&start_time=&start_date=&end_time=&end_date=&search=welfare&go=Apply+filter&state=Kentucky&county=Daviess

		Owensboro, Daviess County, Kentucky	Registered atlanta one year ago - then moved to Kentucky - reregistered at the State Building Welfare Office (Owensboro). Never received card - went to vote - they called courthouse - said she wasn't able to vote - turned away.

Wayne County, MI

https://voteprotect.org/index.php?display=EIRMapCounty&tab=ALL&cat=ALL&start_time=&start_date=&end_time=&end_date=&search=welfare&go=Apply+filter&state=Michigan&county=Wayne

016103	10/27/04, 1:01 PM PST	Registration-related problem	Detroit, Wayne County, Michigan	mother and son registered after moving at welfare office, have not received cards and don't know where to vote. on MI state verification site, she is still showing her old polling place and son shows new place.

Essex County, NJ

https://voteprotect.org/index.php?display=EIRMapCounty&tab=ALL&cat=ALL&start_time=&start_date=&end_time=&end_date=&search=welfare&go=Apply+filter&state=New+Jersey&county=Essex

043986	11/02/04, 2:28 PM PST	Registration-related problem	Essex County, New Jersey	Registered w/ Welfare Dept. in September. They told her today that people registered in Sept. with the Welfare Dept have not been processed yet, so she is still unable to vote.

Salem County, NJ

https://voteprotect.org/index.php?display=EIRMapCounty&tab=ALL&cat=ALL&start_time=&start_date=&end_time=&end_date=&search=social+service&go=Apply+filter&state=New+Jersey&county=Salem

048245	11/02/04, 4:59 PM PST	Registration-related problem	Firehouse etc. Broadway, Salem, Salem County County, New Jersey	Registered in Salem country in July 2004. Registered at social services bulding used new address. Went to vote, was not on the list. Received a voter registration card.

Berks County, PA

https://voteprotect.org/index.php?display=EIRMapCounty&tab=ALL&cat=ALL&start_time=&start_date=&end_time=&end_date=&search=welfare&go=Apply+filter&state=Pennsylvania&county=Berks

055297	11/10/04, 1:35 PM PST	Registration-related problem	815 Franklin St, Reading, Berks County, Pennsylvania	registered 6 months ago via Welfare Office - never received verification (registered at Welfare Office at 5:00)

Luzerne County, PA
https://voteprotect.org/index.php?display=EIRMapCounty&tab=ALL&cat=ALL&start_time=&start_date=&end_time=&end_date=&search=welfare&go=Apply+filter&state=Pennsylvania&county=Luzerne

042676	11/02/04, 1:45 PM PST	Registration-related problem	Luzerne County County, Pennsylvania	twice registered to vote through Dept of Welfare; not on rolls

Philadelphia County, PA
https://voteprotect.org/index.php?display=EIRMapCounty&tab=ALL&cat=ALL&start_time=&start_date=&end_time=&end_date=&search=welfare&go=Apply+filter&state=Pennsylvania&county=Philadelphia

016739	10/28/04, 12:29 PM PST	Registration-related problem	Philadelphia, Philadelphia County, Pennsylvania	Registered to vote at local welfare office (on 6th and Poplar streets), but has not received confirmation that she is registered. Referred to County election official.
016714	10/28/04, 11:46 AM PST	Registration-related problem	philadelphia County, Pennsylvania	registered at DMV and at welfare office two years ago --never got card- is she registered

York County, PA
https://voteprotect.org/index.php?display=EIRMapCounty&tab=ALL&cat=ALL&start_time=&start_date=&end_time=&end_date=&search=welfare&go=Apply+filter&state=Pennsylvania&county=York

038685	11/02/04, 11:09 AM PST	Registration-related problem	York, York County, Pennsylvania	Voter changed his name over 6 years ago, he registered prior to the name change but has never voted. Six months ago the welfare office told him that they were updating his voter registration to his new name. The polling place still has his old name, and tells him he cannot vote without ID that shows his old name - he doesn't have any.

Bedford County, PA
https://voteprotect.org/index.php?display=EIRMapCounty&tab=ALL&cat=ALL&start_time=&start_date=&end_time=&end_date=&search=Food+Stamps&go=Apply+filter&state=Pennsylvania&county=Bedford

043040	11/02/04, 2:10 PM PST	Registration-related problem	Bedford, Bedford County, Pennsylvania	Caller registered at to vote at county assistance office; filled out a form when signing up for food stamps..She went to the county registrar today to find out her polling location and they told her she wasn't registered to vote and couldn't vote. They said this particular county assistance office has had a great deal of trouble registering voters -- it's an ongoing problem Caller is voting for first time in PA -- moved from Ohio

York County, PA
https://voteprotect.org/index.php?display=EIRMapCounty&tab=ALL&cat=ALL&start_time=&start_date=&end_time=&end_date=&search=social+service&go=Apply+filter&state=Pennsylvania&county=York

017877	10/30/04, 10:06 AM PST	Registration-related problem	Glenrock, York County, Pennsylvania	moved from MD to PA; filled out registration form at York County, PA Social Services office; called York County Board of Elections and told no record of her registration; MD has closed out registration because was informed she moved

Oneida County, NY
https://voteprotect.org/index.php?display=EIRMapCounty&tab=ALL&cat=ALL&start_time=&start_date=&end_time=&end_date=&search=Food+Stamps&go=Apply+filter&state=New+York&county=Oneida

025384	11/01/04, 3:34 PM PST	Registration-related problem	Utica, Oneida County, New York	March 2004 he attempted to register to vote. Filled out food stamps certification and there's a portion that allows one to register to vote. The certification for food stamps went through and the voter registration did not go through. They believed they registered on the same form.
028735	11/02/04, 4:10 AM PST	Registration-related problem	Utica, Oneida County, New York	March, 2004 attempted to register. Filled out food stamps certification. Food stamps went through, voter registration did not. Believe registration is on same form.

Horry County, SC
https://voteprotect.org/index.php?display=EIRMapCounty&tab=ALL&cat=ALL&start_time=&start_date=&end_time=&end_date=&search=Food+Stamps&go=Apply+filter&state=South+Carolina&county=Horry

017065	10/28/04, 7:31 PM PST	Registration-related problem	Conway, Horry County, South Carolina	She registered when she got food stamps at DSS, but there is no record of her registration when I looked at the SC on-line database. Tried to get details of time/place of registration in a return call, but she didn't answer phone.

Tarrant County, TX
https://voteprotect.org/index.php?display=EIRMapCounty&tab=ALL&cat=ALL&start_time=&start_date=&end_time=&end_date=&search=Medicaid&go=Apply+filter&state=Texas&county=Denton

051391	11/03/04, 11:50 AM PST	Registration-related problem; Polling place inquiry	Fort Worth, Tarrant County, Texas	Registered year ago when signing up for medicaid

Harris County, TX
https://voteprotect.org/index.php?display=EIRMapCounty&tab=ALL&cat=ALL&start_time=&start_date=&end_time=&end_date=&search=Medicaid&go=Apply+filter&state=Texas&county=Harris

036578	11/02/04, 9:53 AM PST	Registration-related problem	Harris County, Texas	Didn't recieve registration card. Moved but did submit change of address form. Registered on Medicaid. She was registered on her D.L address, didn't have registration card.

Orange County, TX
https://voteprotect.org/index.php?display=EIRMapCounty&tab=ALL&cat=ALL&start_time=&start_date=&end_time=&end_date=&search=social+service&go=Apply+filter&state=Texas&county=Orange

050967	11/03/04, 7:56 AM PST	Registration-related problem	Orange, Orange County, Texas	Registered to vote about 2 months ago at Social Service agency. Went to vote today and told she couldn't vote because she wasn't registered- no information about her in the system.

Dallas County, TX
https://voteprotect.org/index.php?display=EIRMapCounty&tab=ALL&cat=ALL&start_time=&start_date=&end_time=&end_date=&search=human+service&go=Apply+filter&state=Texas&county=Collin

017170	10/29/04, 9:10 AM PST	Registration-related problem	Dallas, Dallas Co County, Texas	Registered at Department of Human Services and did not go through.

Tarrant County, TX
https://voteprotect.org/index.php?display=EIRMapCounty&tab=ALL&cat=ALL&start_time=&start_date=&end_time=&end_date=&search=human+service&go=Apply+filter&state=Texas&county=Tarrant

017648	10/29/04, 7:33 PM PST	Registration-related problem	tarrant County, Texas	voter applied for registration via dept of human services, but hasn't received card

Broward County, FL
https://voteprotect.org/index.php?display=EIRMapCounty&tab=ALL&cat=ALL&start_time=&start_date=&end_time=&end_date=&search=welfare&go=Apply+filter&state=Florida&county=Broward

Coral Springs, Broward County, Florida	Caller reports that woman registered to vote at a Welfare Office and checked with Election People and was told she was not registered. Caller asks whether the woman should try to vote provisionally.

Miami-Dade, FL
https://voteprotect.org/index.php?display=EIRMapCounty&tab=ALL&cat=ALL&start_time=&start_date=&end_time=&end_date=&search=social+service&go=Apply+filter&state=Florida&county=Miami-Dade

015731	10/26/04, 7:52 PM PST	Registration-related problem	Miami-Dade County, Florida	Moved from another state in July, has re-registered twice, once on the street, once in a social services office. Has not received anything yet, and wanted to make sure he was registered.

Prince Georges County, MD
https://voteprotect.org/index.php?display=EIRMapCounty&tab=ALL&cat=ALL&start_time=&start_date=&end_time=&end_date=&search=social+service&go=Apply+filter&state=Maryland&county=Prince+George%27s

034161	11/02/04, 8:26 AM PST	Absentee-ballot related problem	Riverdale, Prince Georges County, Maryland	Registered in early 2004 and never received voters registration. Registered Social Services

Gaston County, NC
https://voteprotect.org/index.php?display=EIRMapCounty&tab=ALL&cat=ALL&start_time=&start_date=&end_time=&end_date=&search=social+service&go=Apply+filter&state=North+Carolina&county=Gaston

053754	11/07/04, 11:33 AM PST	Registration-related problem	Gastonia, Gaston County, North Carolina	Gaston County Social Services told caller they had registered her, but she does not appear on the State BOE list of registered voters. Voter told to vote a provisional ballot

Shelby County, TN
https://voteprotect.org/index.php?display=EIRMapCounty&tab=ALL&cat=ALL&start_time=&start_date=&end_time=&end_date=&search=social+service&go=Apply+filter&state=Tennessee&county=Shelby

046197	11/02/04, 3:44 PM PST	Registration-related problem	Shelby County, Tennessee	Registered via social service agency but didn't receive card.

Appendix C

THE ADVERTISER
Some Motor-Voter Registration Problems Noted
Mike Hasten
November 4, 2004

BATON ROUGE — You've just gotten your driver's license and the clerk at the Office of Motor Vehicles asks you if you'd like to register to vote.

You say, "yes," and you're handed a form that you sign and then walk out, thinking you're now a registered voter — but you're not.

Unless the extensive form requiring personal information — like your mother's maiden name — is completely filled out, your registrar's office cannot process it and register you as a certified voter.

That's the primary cause of election day problems for a few voters who registered at driver's license offices across the state, registrars said, but the main responsibility of employees at those offices is dealing with licenses, not registering voters.

"We're looking now at complaint sheets and there were some problems," said Frances Simms, head of Secretary of State Fox McKeithen's elections division. "We've got many, many call sheets about many, many problems. I can't tell if it was a common problem statewide or only in some motor vehicle offices."

Ouachita Parish registrar Christa Medaries said her offices receives the same complaints every election. She said that since registrars keep every application, complete or not, she sometimes can show angry customers that they did not complete the forms.

"I stress to people that if they haven't received a voter registration card in a few weeks, they need to check on whether they're registered."

She said she had almost

50 complaints from people who thought they had registered at the motor vehicle office.

Joanelle Wilson, registrar in Rapides Parish, said there are "problems like that all the time," but she said her office has "a very good relationship with the OMV."

She said failure to complete all the information on the forms is the most common problem and "when people don't fill it out, it's not sent to us."

Since 1995 when the Motor Voter Law was enacted, "we've had problems and they've never been solved," said Ernie Roberson, Caddo Parish registrar of voters. He said he's

had hundreds of such complaints and "it's not that hard to solve the problem, but there's resistance."

Roberson said the problem is that registration through motor vehicle offices is done on paper, not electronically, and the forms are then mailed to registrars. The offices that serve the largest population areas have the most problems.

"We get swamped," he said, and it takes time to type all the information into computers – "just like the 1950s," he said. "We need to do it smarter," like having registration done electronically or having OMV offices scan the applications into their computers and transmit them to registrars.

Roberson said another problem is that the Caddo Parish OMV offices sometimes don't send the registration forms in promptly.

"Why would we hold them?" asks Michelle Rayburn of the state OMV. "We send them through the mail on a daily basis," and she said she's never been told of any problems.

Charlene Meaux, chief deputy registrar in Lafayette Parish, said the office never has had a problem, but that it does collect voter registration applications from the parish OMV bureaus.

©The Lafayette Daily Advertiser
November 4, 2004

Broken Vote-Counting Machines, MoveOn Draw Complaints in Iowa
The left-leaning group denies assertions that its members were 'electioneering' in Iowa and other states.
By LYNN CAMPBELL
REGISTER STAFF WRITER
November 3, 2004

Malfunctioning ballot-counting machines and uncounted provisional and absentee ballots left Iowa's election results in doubt early this morning.

The Iowa secretary of state's office reported at 1:30 a.m. that four counties - Lee, Montgomery, Greene and Harrison - had not yet finished counting votes. Two of those counties, Lee and Montgomery, were still in the process of counting thousands of absentee ballots.

Adding to the confusion were 4,200 supplemental ballots issued by Lee County in late September because of misprinted ballots that accidentally omitted a judge's name. Many of those won't be tallied until Monday.

"Attorneys from the Republican Party are going to come through our doors," said Lee County Auditor Anne Pedersen. "From what I'm told, Bush and Kerry's so close in Iowa. Apparently, this is where they think they've got room to challenge."

The other two counties, Greene and Harrison, reported malfunctions in their ballot-counting machines that delayed counting. Harrison County got its machine fixed shortly after midnight and resumed counting.

Earlier in the day, an automatic absentee ballot-counting machine in Scott County made by Election Systems & Software of Omaha also broke down. Election officials there resorted to backup machines, which required workers to manually feed in about 23,000 ballots one by one.

Yet another unknown factor is the provisional or "challenged" ballots cast across the state by voters whose qualifications were challenged. Those votes will be counted Thursday by special precinct boards.

"That's the wild card of this election," said Spencer Overton, who teaches election law at George Washington University. "The big question here is, how many provisional ballots will count?"

Problems reported Tuesday included:

Electioneering? Republicans in Iowa joined those in Minnesota, New Hampshire, Colorado and Michigan in complaining Tuesday that a left-leaning group, MoveOn, was illegally campaigning too close to polling sites.

"This is part of the Democrats' national plan to disrupt the election," said Gentry Collins, deputy chairman of the Republican Party of Iowa.

But Eli Pariser , executive director of MoveOn PAC, the grass-roots group backing Democrat John Kerry for president, said there was no evidence of his group's 70,000 volunteers doing anything wrong. "This is a smear campaign," he said. "These charges are simply fraudulent. We play by the rules."

In Iowa, campaigning within 300 feet of the entrance of a polling place is illegal. Those caught "electioneering" can be charged with a serious misdemeanor, punishable by up to a year in jail and a fine of up to $1,500.

Complaints came from Polk, Story, Linn, Johnson and Pottawattamie counties. Ames police and the Polk County artorney's office were among those called to help move people away from polling sites. No arrests were reported.

Absentee ballots: Johnson County Republicans challenged the legality of several hundred absentee ballots, forcing them into a pile of challenged votes that will be sorted out later. Challenges included different spellings of a person's name.

"There's no one particular group that is being targeted that we can tell, other than the fact that they're all Democrats," said Sarah Swisher, the county's Democratic Party chairwoman.

Some people were forced to vote by provisional ballot after they threw their absentee ballots away. "A lot of people requested ballots back in July, then they didn't realize what they were and threw them away," said Jasper County Auditor Ken Slothauber.

Identity theft? Deanna Trevillyan , 40, of West Des Moines went to vote at Stilwell Junior High School, only to find she was not on the list of registered voters. She said she's lived and voted in the same precinct for at least 14 years. Election officials told her that her Social Security number and birthday were listed as someone else's in Ankeny. Trevillyan cast a provisional ballot.

Motor voter: Election officials could not confirm that Tina Buffington of Des Moines had registered to vote when renewing her driver's license in May. Such problems, which began when Iowa started motor voter in 1996, did not appear to be widespread this year, said Phyllis Peters, spokeswoman for the secretary of state's office. She said in most cases, problems can be sorted out when election officials audit individual drivers' computer records.

Wrong precinct: Derek Schoppa, 27, said he didn't get his voter registration card in the mail, so he drove to three polling places in Urbandale before finding the right one, St. Pius X Parish Center.

Overvoting: Some Polk County residents voted for too many candidates, causing machines to reject their ballots. "They're just making mistakes," said Michael Mauro, the county auditor.

Address changes: A Republican poll watcher in Linn County challenged voters who reported new addresses when they cast their ballots, despite state law allowing the change if voters can prove residence in the precinct.

Iowa's voting problems paled in comparison with reports across the country. In Arkansas, some poll workers reportedly were asking only black voters for identification; tires were slashed on 20 Republican get-out-the-vote vans in Milwaukee; and New Mexico voters were allegedly misled to think they were at the wrong polling place.

"The corruption that you find in some states doesn't seem to be finding its way to Iowa," said Ben Stone, executive director of the Iowa Civil Liberties Union.

Iowa was one of 25 states visited Tuesday by teams from the U.S. Department of Justice's civil rights division. "I told them they looked like the Maytag repairmen," said Assistant U.S. Attorney Robert Dopf. "They were waiting for the call that never came."

Register staff writers Jeff Eckhoff, Bert Dalmer, Laurie Mansfield, J. Janeczko Jacobs and Clark Kauffman contributed to this report.

The Patriot-News

Minor Problems Reported at Some Polls
Wednesday, November 03, 2004
From staff reports

There were no allegations of hanging chads, but as one of the most vigorously contested presidential races came down to its final hours, some problems emerged at midstate polls.

Although most voters cast their ballots without incident, some complained they were turned away for lack of photo identification or were limited to three minutes in the voting booth because of long lines.

In Dauphin County Court, lawyers for the Bush-Cheney campaign threatened to file a lawsuit alleging Democratic poll watchers were not properly registered.

Attorneys and county elections officials reached an agreement to have any illegal poll watchers removed from Harrisburg polls.

Northern York County officials said provisional ballots were handed to a number of people who said they had registered through the "motor voter" process but found their names had not been added to registration lists.

Provisional ballots allow a citizen not listed on the voter rolls to cast a ballot, provided they can provide proper identification. The votes are set aside and only come into play if a very close race is contested.

One of the most common complaints of the day centered around long lines and a long wait.

Across Perry County, scores of voters stood out in the rain as polls closed at 8 p.m. Elections Director Bonnie Delancey said anyone standing in line at 8 p.m. was assigned a number and guaranteed an opportunity to vote.

Cumberland County Assistant Solicitor Jason Kutulakis estimated that the county handled between 7,000 and 10,000 calls, mostly from people asking where they were supposed to vote or if they were registered.

Kutulakis said county judges granted about six petitions on behalf of voters who could not get to polls. At least one was filed on behalf of a woman having a baby; others were filed on behalf of accident victims.

"I think today went very smooth, considering the amount of people voting," said Cumberland County Voter Registration and Elections Coordinator Toni Goril.

In Lebanon County, Elaine Ludwig, director of voter registration, said some people did not realize they had to register to vote even if they were using provisional ballots.

Ludwig had calls from two attorneys, one in Annville Twp. and one in Lebanon, who complained that the judges there were asking everybody for identification, not just first-time voters. She called and told them to stop that.

Secretary of State Pedro Cortes, during a media briefing last night at the state Capitol, reported a few problems affecting voting in a handful of counties.

In Huntingdon County, Ralph Nader's name appeared on ballots, despite a court ruling that Nader failed to meet the requirements to have his name appear. Votes for Nader will be counted as write-in votes, Cortes said.

Machine glitches and a shortage of provisional ballots prompted officials in Allegheny, Lackawanna and Luzerne counties to extended voting hours in some precincts.

Overall, Cortes said, "we are very pleased" with how the election went.

11-04-2004
Voters Registered At BMV Not On Registration Rolls
BY DAVID SLONE, Times-Union Staff Writer
http://www.timeswrsw.com/N1104042.HTM

The Kosciusko County clerk's office estimates they had 75-100 phone calls from people on Election Day who registered at the Bureau of Motor Vehicles and who were not shown on the registration rolls.

Sharon Christner, county clerk, today said, "There's nothing we can do now. There's no way the BMV can verify who registered and who didn't."

When a person registers at the BMV, the BMV sends their registration card to the county clerk's office. The BMV does not keep track of who registers to vote there.

The people who did not appear on the rolls could still have voted by provisional ballot, Christner said, but she could not say if they did or not. "We don't know how many (of them) voted."

If a person is concerned about their registration status, she said, she would encourage them to re-register.

Appendix D

DEPARTMENT OF
PUBLIC HEALTH AND HUMAN SERVICES

JUDY MARTZ
GOVERNOR

GAIL GRAY, Ph.D.
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STATE OF MONTANA

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September 14, 2004

Senator Mike Cooney
713 Pyrite Court
Helena, MT 59601

Dear Senator Cooney,

In response to your letter of August 30 asking about voter registration procedures in our Offices of Public Assistance, I am pleased to inform you that we are in compliance with the National Voter Registration Act (NVRA).

We include voter registration forms in the packets we give to all applicants for public assistance. The forms are available in most of our waiting areas as well. Our staff discuss voter registration with applicants and offer assistance with filling out the forms.

We ask each of our Offices of Public Assistance to keep records of the individuals who choose to register there. I have attached a compilation of those reports for the past eight months.

While the number of people registering to vote at our offices is relatively small, keep in mind that many people are already registered before they visit our offices. Others are focused exclusively on trying to meet their most basic needs and are not interested in registering at the time.

You asked if our workers update voter registrations when recipients change their address. Most of our recipients contact our offices by mail or phone to make address changes for purposes of receiving benefits. As a result, we do not get an opportunity to update their voter records as well. We do not have adequate staff to call or write people back.

We would welcome a review by the Senate State Administration Committee. We are confident that the NVRA and voter registration assistance has been fully implemented in our county Offices of Public Assistance. I will ask Hank Hudson

to remind his county offices to make sure posters encouraging voter registration are in plain view in our waiting areas.

Thank you for reminding us of the importance of helping people to register to vote.

Sincerely,

Gail Gray
Director

cc: Bob Brown, Secretary of State

Appendix E

13 of 39 DOCUMENTS

Copyright 2004 Chattanooga Publishing Company
Chattanooga Times Free Press (Tennessee)

July 28, 2004 Wednesday

SECTION: LOCAL NEWS; Pg. B1

LENGTH: 336 words

HEADLINE: No fraud in voter forms found in trash, TBI investigators declare

BYLINE: By Brian Lazenby; Staff Writer

BODY:

Officials with the Tennessee Bureau of Investigation determined that three voter registration forms found in the trash last month were thrown away by mistake, officials said.

Hamilton County District Attorney Bill Cox had asked the TBI to investigate whether the three forms, which were found June 7 in trash along Webb Road, were part of a voter fraud scheme.

"It looks like it was just a mistake," Mr. Cox said. "There was nothing criminal about it."

Election commission attorney Jerry Summers said he is satisfied with the investigation.

"They felt there was nothing to constitute voter fraud," he said. "I'll report it to the election commission, and that's all there is to it."

Mr. Cox said an employee with the Department of Human Services, where the forms were obtained, had taken some work home and thrown the forms away by mistake. TBI officials contacted two of the three people whose forms were found, and they acknowledged that they had filled out the forms. The third person has not been located, Mr. Cox said.

Fran Dzik, election commission administrator, said the commission does not control forms distributed through other state facilities. Those facilities get forms directly from state officials and turn them in to the election commission to be processed, she said.

Mr. Summers said he will make recommendations to the election commission in hopes of avoiding similar situations.

"I will recommend to the election commission to request to the different agencies to re-evaluate their procedures to try to make sure none of these forms are inadvertently misplaced," he said.

Brook Thompson, state election coordinator, said there should be strict rules regarding the handling of voter registration forms.

"I don't think there is any reason they should go anywhere but from the Department of Human Services to the election commission," he said. "I feel very confident that is the policy of the Department of Human Services."

E-mail Brian Lazenby at blazenby@timesfreepress.com

LOAD-DATE: July 28, 2004

Sunday, Oct 28, 2007

Posted on Thu, Oct. 04, 2007

Voting chief defends approval of Georgia's voter ID law

BY SHANNON MCCAFFREY

COLLEGE PARK, Ga.

The head of the Justice Department's voting rights division told members of the NAACP that when he cleared Georgia's voter ID law he didn't look at whether it violated the Constitution.

"All we can look at is racial discrimination, we can't look at anything else," John Tanner told the annual meeting of Georgia's NAACP.

"You can't look at whether it's a poll tax, you can't look at whether it violates the Equal Protection Clause (of the Constitution)."

Tanner said that Justice Department lawyers are very limited in what they can consider when they "pre-clear" state laws under the Voting Rights Act. The voting chief faced criticism after a memo revealed that he signed off on the Georgia law in 2005 over the objections of four of the five career employees who concluded it ran afoul of the voting rights law.

Tanner said Thursday that Georgia statistics examined by Justice Department lawyers showed that minorities are "slightly more likely" than non-minorities to have a photo ID.

He suggested that was due to the vestiges of racism that are still at work in the United States.

"You think you get asked for ID more than I do?" Tanner, who is white, asked the black audience members.

"I've never heard anyone talk about driving while white."

And Tanner said it is wrong to assume that the poor lack photo IDs.

"When someone goes to a check cashing business God help them if they don't have a photo ID," he continued.

"People who are poor are poor. They're not stupid. They're not helpless."

Georgia's law, which requires all voters to show a government-issued photo ID at the ballot box, was upheld by a federal judge last month. The same judge had struck down an earlier version of the law, saying it amounted to an unconstitutional poll tax. The state Legislature passed an amended law that made the IDs free to anyone who needs them

Photo IDs were required in special elections in 22 counties on Sept. 18. State elections officials said the elections went off without a hitch. Eight provision ballots were cast by voters who lacked the necessary photo identification.

Opponents claim the photo ID law will disenfranchise minorities, the poor and the elderly who don't have driver's licenses or other valid government-issued photo IDs. Supporters say it is needed to prevent voter fraud.

The U.S. Supreme Court has agreed to consider Indiana's photo ID law this term. Indiana's law is similar to Georgia's.

Tanner told The Associated Press on Thursday that he does not know whether the Justice Department will weigh in with a brief supporting or opposing the Indiana law.

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http://www.ledgerenquirer.com

John Tanner, DOJ Voting Rights Section Chief

DoJ Vote Chief Argues Voter ID Laws Discriminate against *Whites*

By Paul Kiel - October 9, 2007, 12:48PM

When Justice Department lawyers and analysts found in 2005 that a Georgia law requiring voters to have photo ID would disproportionately discriminate against African-Americans, they were overruled by John Tanner, the chief of the Civil Rights Divisions' voting rights section. The law was subsequently halted by a federal appeals judge, who compared it to a Jim Crow-era poll tax.

This past weekend, Tanner showcased his own analytical skills, telling an audience that voter ID requirements actually disproportionately affect whites.

Tanner explained that "primarily elderly persons" are the ones affected by such laws, but "minorities don't become elderly the way white people do. They die first." So anything that "disproportionately impacts the elderly, has the opposite impact on minorities," he added. "Just the math is such as that." Video of Tanner's remarks were posted yesterday by The Brad Blog. We've supplied a transcript below.

According to former Department employees, Tanner's comments were not only wrong, but way off, and typical of the type of decision making in the section. "In trying to defend his decision in the Georgia case, he's saying things that are frankly ludicrous," Joe Rich, a forty-year veteran of the Department and Tanner's predecessor in the voting rights section, told me.

"This is the kind of analysis that the voting section has been doing: seat of the pants generalizations and suppositions instead of hard numbers and analysis," said Toby Moore, a redistricting expert who worked as an analyst for the section until the spring of 2006. "It's false." Tanner's conclusions, he added, were "always in support of what his Republican appointee bosses wanted him to say, which is why he got to where he is."

Tanner made the remarks this past Friday during a panel on voter disenfranchisement held by the National Latino Congress in Los Angeles.

He'd recently made similar comments when addressing the Georgia NAACP about the 2005 Georgia law last week. There, Tanner told the group that minorities were actually "slightly more likely" than non-minorities to have a photo ID," according to the AP.

"As the person who analyzed the numbers for John," Moore told me, "I can tell you that he's cherry-picking the data that he wants to use."

To buffer that statement, Tanner seemed to rely on a similar brand of anecdotal evidence in the Georgia speech, according to the AP.

> He suggested that was due to the vestiges of racism that are still at work in the United States.
>
> "You think you get asked for ID more than I do?" Tanner, who is white, asked the black audience members.
>
> "I've never heard anyone talk about driving while white."
>
> And Tanner said it is wrong to assume that the poor lack photo IDs.
>
> "When someone goes to a check cashing business Grid help them

if they don't have a photo ID," he continued.

"People who are poor are poor. They're not stupid. They're not helpless."

The House Judiciary Committee is currently seeking to have Tanner appear at a Congressional hearing, but has so far been rebuffed by the Justice Department.

A transcript of Tanner's remark last Friday:

> Tanner: It's probably true that among those who don't have photo ID], it's primarily elderly persons. And that's a shame. You know, creating problems for elderly persons just is not good under any circumstance. Of course...that also ties in to the racial aspect, because our society is such that minorities don't become elderly. The way white people do. They die first.
>
> There are inequities in health care. There are a variety of inequities in this country. And so anything that disproportionately impacts the elderly, has the opposite impact on minorities -- just the math is such as that. And then Georgia, the fact was and the court found that it was not racially discriminatory. That was the finding of the initial court. And that was the clear information from our analysis in the office, my analysis, that was not affected by any other person. And I think that the memorandum which was leaked, which was a breach of legal ethics, was incomplete, was not the complete staff version and ultimately you come up against a hard fact, the minorities in Georgia statistically, slightly, even more likely to have ID, are today, and Georgia -- as far as ID and voter registration and voter participation go we've been straining at gnats and swallowing camels because there are a couple of million people in Georgia who have IDs, who went there and, repeatedly in many cases, to drivers license offices and other offices to get the ID and apparently either said they didn't want to register to vote, which is a very high number, or were not asked as the federal law requires. And as I say we are trying to work with the NAACP there to document a violation of federal law. Federal law does not do everything you want- Yes, sir?
>
> Off stream woman: We have a question.
>
> Question: The panels mentioned earlier -- you haven't spoken to what is the problem, why do we need voter ID? I've heard Duncan Hunter on the GOP debate say one thing, you know, and we always hear, oh all these people are illegally voting, but the government did its own study and they've never found -- there's, you know, minuscule cases of people voter fraud so why is it that we need this voter id requirements in the first place?
>
> And also on that, you mean all these cases that you brought, are all those cases about voter fraud, individual voter fraud, like people voting when they're not eligible because they're felons or whatever? Because I don't know anything about these cases that you're bringing, this multitude of cases.
>
> Tanner: Well I (camera shakes / muffled)... do policy. We do not, we cannot, use our policy judgment under section 5 of the Voting Rights Act to do what I think is right. If we did that the law would be struck down by the Supreme Court in a New York minute, and that's not gonna happen on my watch. We follow the law, we follow the facts, we've always done that and you know, there's not much else we can do without going into court and getting beaten up badly.
>
> The, on the ID, there have been a number of ID cases, there have been a number of efforts to prove disparities in it in court -- all have failed. And they largely, actually in Georgia most recently, and in Indiana, the effort to prove a disparate impact of the ID was based on the same list matching procedures that so accurately have been criticized, trying to match names on two lists, and as the court in Indiana says, garbage in, garbage out.

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House Judiciary Chairman John Conyers D-MI (Lauren V. Burke/WDCPIX.com)

Conyers Has More Questions For DOJ's Tanner

By David Kurtz • October 12, 2007, 5:54PM

House Judiciary Committee Chairman John Conyers has issued a statement in response to Paul Kiel's reporting earlier today on the unprecedented written public assurance that DOJ voting rights chief John Tanner gave to election officials in Ohio that the Justice Department had found no evidence of intentional African-American voter disenfranchisement in the 2004 election.

As Paul reported, Tanner wrote a June 2005 letter to election officials in Columbus, Ohio, offering a lengthy explanation for why the Department had not discovered sufficient evidence of discrimination, the effect of which was to "poison the well" for future litigation or investigation of the alleged election improprieties.

In his statement, Conyers says:

> "I am concerned about the extreme lengths Mr. Tanner went to in order to justify the reasons African-Americans were not treated equally in the 2004 Ohio election. The committee needs to consider this matter. I am aware of no precedent for the Department acting in this capacity in the past.

Tanner has been asked to testify before Conyers' committee, though no date for his testimony has been set.

The full text of Conyers' statement appears below the fold.

> Today, House Judiciary Committee Chairman John Conyers, Jr. (D-MI) released a statement in response to news reports that Department of Justice (DOJ) Voting Section Chief John Tanner's investigation of the 2004 election in Ohio concluded that long lines and late voting precincts were due to the fact that white voters tend to cast ballots in the morning (i.e., before work) and black voters cast ballots in the afternoon (i.e., after work). The news report appeared online at the popular blog, TPMmuckraker.com.
>
> "I am concerned about the extreme lengths Mr. Tanner went to in order to justify the reasons African-Americans were not treated equally in the 2004 Ohio election. The committee needs to consider this matter. I am aware of no precedent for the Department acting in this capacity in the past.
>
> "The Department of Justice – since the Voting Rights Act of 1965 – has a responsibility to thoroughly investigate allegations of voter suppression and discrimination, like those made in Ohio in 2004. I look forward to hearing more from Mr. Tanner in our committee later this month as he testifies about his work as chief of the Voting section. The 2004 election exposed serious deficiencies in this section's failure to adequately investigate and prosecute voter suppression efforts nationwide and I hope he is prepared to address this issue head on."
>
> Conyers issued a comprehensive report on voting discrepancies in Ohio in 2004, titled, What Went Wrong in Ohio, and found huge racial disparities in how voting machines were distributed in white

and black precincts, among other findings. Tanner, in contrast, in a 2005 letter detailing his findings, says he found no discrepancies in the number of voting machines and attributed the long lines to the tendency of African-American voters to vote after work, as opposed to in the morning hours.

The full story is available at: http://www.tpmmuckraker.com/archives/004458.php.

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DC Pol Sci wrote on October 12, 2007 6:14 PM:

I can't wait to see Tanner defend his remark that "minorities don't become elderly like white people do; they die first" in front of the 78-year-old African-American Conyers.

Ellen wrote on October 12, 2007 7:06 PM:

Right on. First Harper's, now Conyers. Kudos!

Rusty Austin wrote on October 12, 2007 7:38 PM:

What has happened at DOJ is beyond all sense of decency and integrity. It's turned itself into a Kangaroo court, with tragic consequences. Prosecutions have been brought with the goal of bringing the full power of the Federal government to bear against innocent Democrats. No doubt Seigelman is the tip of the iceberg, and the case against ACORN was so blatantly partisan it's beyond me how they got away with it, and continue to do so. Unless Conyers is prepared to pursue criminal charges against these people, up to and including the president, he might as well not even bother because they are all thumbing their noses at him now.

The Onion wrote on October 12, 2007 10:00 PM:

If Mr. Conyers and his staff don't already read TPM, they certainly need to. You guys could keep them busy for the next 5 years.

At some point back in time, TPM went from just a good blog to a great little news organization. I couldn't put my finger on when it happened exactly, but it's unmistakable today. You all deserve many kudos for the great work you do. Keep it up.

Kent Mueller wrote on October 12, 2007 10:38 PM:

Mighty White of him to say so, but where were the long lines of White voters in the morning, being made late for work, presumably, by the same lack of voting machines?

John Tanner, DOJ Voting Rights Section Chief

Bush's Legacy on Voting Rights: A Story from Ohio

By Paul Kiel - October 12, 2007, 10:32AM

In June of 2005, John Tanner, the chief of the voting rights section, wrote Columbus, Ohio's election officials to publicly assure them that the Justice Department had found no evidence of intentional African-American voter disenfranchisement in the 2004 election.

Not only was that an unprecedented move, former Department lawyers say, but the letter is another, and particularly galling, example of Tanner using the force of the Department to further Republican aims -- in this case, to hamper future lawsuits or investigations concerning the problems in Columbus.

"It really looked like the Civil Rights Division was used to run interference for Republican election officials in Ohio," former voting rights section deputy chief Bob Kengle told me.

At issue was the experience of thousands of voters in Franklin County, Ohio, in the 2004 election. Voters in mostly African-American precincts were forced to wait hours in long lines to vote. An investigation by Rep. John Conyers (D-MI) found that voters often waited as many as four to five hours, some as many as seven, deep into the night. *The Washington Post* reported that "bipartisan estimates say that 5,000 to 15,000 frustrated voters turned away without casting ballots." The culprit, of course, was a scarcity of voting machines in those districts, one that seemed to follow a suspicious trend: "27 of the 30 wards with the most machines per registered voter showed majorities for Bush" and "six of the seven wards with the fewest machines delivered large margins for Kerry."

But Tanner, who's due to appear in a Congressional hearing, launched an investigation (more on that below) and found that "Franklin County assigned voting machines in a non-discriminatory manner," as he wrote in a detailed 4-page letter to a local official. But if the distribution of the machines was non-discriminatory, why then were polling places in predominantly African-American areas forced to remain open for hours after the normal 7:30 PM closing time in order to accommodate the long lines?

Tanner explained that African-Americans simply vote later in the day:

> ...the principal cause of the difference appears to be the tendency in Franklin County for white voters to cast ballots in the morning (i.e., before work), and for black voters to cast ballots in the afternoon (i.e., after work). We have established this tendency through local contacts and through both political parties, and it accords with our considerable experience in other parts of the United States. Morning voters may wait in line several hours, as happened in white precincts, without keeping the polls open after 7:30 pm; this is not the case, however, at sites where voters arrive after 5:30 p.m.

The letter is remarkable for a number of reasons, not least of which Tanner's increasingly-evident *generalizing* style. This is the same man who explained that voter ID laws don't discriminate against minorities, because minorities don't grow old, and that African-Americans tend to get photo IDs more than whites because of racial profiling by police.

Needless to say, veterans of the voting rights section say that they're not familiar with a tendency for African-Americans to vote later in the day. "I've never seen that before," Joe Rich, a former chief of the section and 40-year veteran of the Civil Rights Division told me. Toby Moore, formerly a redistricting expert with

the section who worked on the Ohio investigation with Tanner, called that a "convenient" explanation seized on by Tanner. "I never saw any indication that he was really investigating that," Moore said.

Suspiciously, Tanner, the chief of the section, seems to have been the only section attorney investigating the matter. Moore, who traveled with Tanner to Ohio, said that no other lawyer came along on the trip and that he dealt with no one else on the investigation except for Tanner. "This was not handled the way other investigations were handled," Bob Kengle, who spent more than 20 years in the Civil Rights Division, said that he couldn't think of another type of investigation where no line attorney was assigned.

But that wasn't the only first for the investigation. Kengle and Kidd both said that the very composition of such a detailed letter was unprecedented. On occasion, both said, the Department had sent letters informing officials that the voting rights section had decided not to continue the investigation. But such letters were very short and revealed nothing about the results of the investigation to date. The reason for that was clear: offering a lengthy explanation for why the Department had not discovered sufficient evidence of discrimination would "poison the well," Kengle told me, for outside groups attempting litigation on the issue, or even for the Justice Department to return later to investigate.

But Tanner seemed eager to poison the well. "It reads like a defense brief," Kengle told me.

"Tanner bent over backwards to rule that black voters did not have a right to the same number of machines as white registered voters, and then went out of his way to make that ruling public," said David Becker, a former attorney with the section, currently with People for the American Way. "It's one of the most remarkably disconcerting things to come out of the voting section in a long time."

For his part, Moore said that he doesn't think that the evidence shows that Franklin County officials conspired to disenfranchise African-American voters. "Election officials are almost always more likely to be incompetent than venal," he told me. "On the other hand, was it all because of different voting patterns? Or did black precincts get neglected? I know we didn't try very hard to find out."

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Comments (50)

Citizen92 wrote on October 12, 2007 11:04 AM:

Ohio?

Don't overlook anti-swindlers Tom and Bernadette Noe in this scenario.

White House Political Director Ken Mehlman met with Tom Noe in 2003 in a political strategy session.
(http://toledoblade.com/apps/pbcs.dll/article?AID=/20050707/SRRAREC0INS/507070079)
Also in that meeting was Coddy Johnson, a Mehlman deputy who later went on to run national voter turnout efforts for Bush-Cheney 04. Coddy's job was to know the numbers -- read this article to see how deep he'd go:
(http://www.msnbc.msn.com/id/6420969/site/newsweek/) Coddy is also the son of Bush's Yale roommate.

When push came to shove, would you have any doubts that Mehlman or Coddy would have hesitated to call on Bernadette Noe, then the Chair of the Lucas County (Toledo) Board of Elections - and maybe ask her to move some machines

Sen. Barack Obama (D-IL) (WDCbio.com)

Obama: Fire Voting Rights Chief

By Paul Kiel - October 19, 2007, 10:45AM

In a letter today, Sen. Barack Obama (D-IL) urged the acting attorney general to fire voting rights section chief John Tanner. Citing Tanner's remarks earlier this month that "minorities don't become elderly the way white people do: They die first," Obama wrote that "Through his incessable comments, Mr. Tanner has clearly demonstrated that he possesses neither the character nor the judgment to be heading the Voting Rights Section." He concluded: "For that reason, I respectfully request that you remove him from his position."

Tanner made the comments as justification for his decision to overrule Justice Department staff attorneys and approve a Georgia voter ID law that was subsequently halted by a federal appeals court. Tanner made the novel argument that such laws actually discriminate against whites.

John Tanner, DOJ Voting Rights Section Chief

Things are only getting worse for Tanner. In a couple weeks, he'll appear before the House Judiciary Committee, where he'll get to explain personally to the 78 year-old African-American chairman that minorities don't "become elderly." He'll also have to explain why he took the unprecedented step of publicly assuring officials in Columbus, Ohio that there had been no discrimination against African-Americans in the allocation of voting machines for the 2004 election. The fact that African-Americans had to wait in long lines deep into the night, he said, was due to "the tendency" for "white voters to cast ballots in the morning" and "for black voters to cast ballots in the afternoon."

This is second time this month that Obama has come out hard against a controversial figure from the Civil Rights Division. Earlier, he joined with Sen. Russ Feingold (D-WI) in blocking the nomination of Hans von Spakovsky to the Federal Election Commission.

Obama's letter is below:

October 19, 2007

The Honorable Peter D. Keisler
Acting Attorney General
Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Dear Mr. Keisler:

On October 5, 2007, at the National Latino Congress in Los Angeles, John Tanner, the chief of the voting rights section of the Civil Rights Division, spoke on a panel regarding minority voters. During the course of that discussion, which focused on recent state laws requiring photo identification for voting, Mr. Tanner said that such photo ID requirements disadvantage the elderly. "[a]nd that's a shame." He explained: "You know, creating problems for elderly persons just is not good under any circumstance."

However, according to Mr. Tanner, such requirements do not disenfranchise minorities, and in fact, they actually benefit minorities. He said: "Our society is such that minorities don't become elderly the way white people do; they die first. There are inequities in health care. There are a variety of inequities in this country. And so anything that disproportionately impacts the elderly has the opposite impact on minorities; just the math is such as that."

Such comments are patently erroneous, offensive, and dangerous, and they are especially troubling coming from the federal official charged with protecting voting rights in this country. Mr. Tanner has already demonstrated questionable judgment in overruling the decision of Justice Department lawyers that the Georgia photo ID requirement would disproportionately discriminate against African Americans. For Mr. Tanner to now suggest, in an effort to defend his erroneous decision, that photo identification are not necessary for minority voters because "they die first" shows just how far the Justice Department has fallen. This is a disgrace and yet another reason why the next Attorney General must demonstrate a strong commitment to civil rights.

But, until the next Attorney General is confirmed, you are in charge of the Department, and you are in charge of ensuring that our laws are enforced and that the civil rights of all Americans are protected. Through his inexcusable comments, Mr. Tanner has clearly demonstrated that he possesses neither the character nor the judgment to be heading the Voting Rights Section. For that reason, I respectfully request that you remove him from his position.

Sincerely,

Barack Obama
United States Senator

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Anonymous wrote on October 19, 2007 10:51 AM:

In other word, blacks are lazy? These guys are unbelievable!

Telus wrote on October 19, 2007 10:51 AM:

In other word, blacks are lazy? These guys are unbelievable!

drift wrote on October 19, 2007 11:09 AM:

How about the balls on these guys. Not just that he says these things, but that he does so at a Latino Voters Conference and an NAACP convention.

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In the Loop

Al Kamen, Columnist

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That's Latin for 'Daily,' Not 'Occasionally'

By Al Kamen
Wednesday, October 24, 2007; Page A17

Hard to keep up with the voting rights section of the Justice Department's civil rights division. Division chief *John Tanner* recently made some news with a fascinating analysis of how photo IDs for voters actually help minorities.

Now there's word that the acting deputy director of the section, *Susana Lorenzo-Giguere*, has been accused of collecting a $64 per diem, including on weekends and the Fourth of July, while spending half of June and most of July and August with her husband and kids at their beach house on Cape Cod.

The allegation, made to the department inspector general apparently by someone linked to the Boston regional office, was that Lorenzo-Giguere made "multiple" government-paid trips to the Cape and that she improperly said that "her presence on Cape Cod was necessary pending litigation in Boston," which was in the courts over the summer.

Asked for a comment from Lorenzo-Giguere or the department, spokesman *Peter Carr* said in an e-mail: "The Department's Office of Professional Responsibility is investigating the allegations, and upon conclusion of the investigation the Department will take appropriate action."

The complaint also alleged that Lorenzo-Giguere "spent little time in Boston" this summer and did little work on the case. Also, what supervision and oversight she provided was done by phone to Boston while she "remained on the beach," and she would have been able to do this from her office in Washington.

Maybe, but we've always believed that it's easier to think more clearly on the beach, breathing the salt air, looking at the waves . . .

Yesterday's News

Timing is indeed everything. And when you're writing for Foreign Affairs -- the house organ of the foreign policy establishment, which has a lead time of about a month from submission to publication -- things can change.

Just ask *R. Nicholas Burns*, the undersecretary of state for political affairs, who wrote an upbeat article in the November-December issue hailing "America's Strategic Opportunity

Former FEMA chief Michael Brown is ready to advise. (Manuel Balce Ceneta - Associated Press)

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With India " In a section labeled "Nuclear Spring," Burns wrote that India's unmonitored nuclear program had been for years "the elephant in the room," blocking improved relations.

But then came the breakthrough U.S.-India nuclear deal in 2005. Although it hasn't been officially approved in treaty form, Burns wrote glowingly, "it has already become the symbolic centerpiece of the new U.S.-India friendship and is wildly popular among millions of Indians who see it as a mark of U.S. respect for India."

On the other hand, even Brussels sprouts or *George Steinbrenner* could be "wildly popular among millions" in a country with more than 1 billion people.

"Despite the objections voiced by the Communist Party of India in August of this year," he wrote, "the Indian government has stood firm and is meeting its commitments under the agreement." Three months ago, he called it "perhaps the single most important initiative" that the two countries "have agreed to."

Alas, the deal took a bad turn last week because of opposition by India's leftist parties. Not dead, but on life support. The Indian government may be standing, but not all that firmly, and outside experts put the odds of the agreement being revived at one in three. Maybe lower.

The online version of the article now includes an intro saying: "The nuclear deal between Washington and New Delhi may have run into trouble, but the future of bilateral relations between the two countries should still be bright." Millions would agree.

When It Rains, It Pours

Administration transportation officials have bellyfloored a new $15 billion satellite-based air traffic control system as a major step in alleviating those horrific flight delays. They recently announced a $1.8 billion contract to ITT to get things going.

But the Georgia congressional delegation seems to be focusing these days on local concerns -- namely mold, asbestos and a leaking roof at the air traffic control center in Atlanta, the world's busiest.

In a recent letter to Transportation Secretary *Mary Peters*, the group, an unlikely coalition including Sen. *Saxby Chambliss* (R) and Rep. *John Linder* (R) and Democratic Reps. *John Lewis* and *Sanford Bishop*, said meetings with administration officials about this problem have yielded precious little progress.

The lawmakers said they are troubled by photos of "air traffic controllers working traffic while [holding] umbrellas to keep their equipment dry, something which has occurred at least three times in the last year."

We're sure everyone is working hard to resolve this. In the meantime, the folks at the Federal Aviation Administration, in the usual end-of-fiscal-year spending season, managed to buy a new $3,500 poker table for the Atlanta center, according to a tally compiled by the National Air Traffic Controllers Association. Now they can put the equipment under the table so they don't have to use umbrellas.

Speaking of the FAA, *President Bush* yesterday nominated former pilot *Robert A. Sturgell*, who's now acting administrator, to a five-year term as head of the agency.

Disaster, Indeed

This just in from New York PR type *Rita Larchar*, who notes that 10,000 of the hundreds of thousands of people uprooted by California's wildfires "have taken shelter at the local NFL stadium," something "vaguely reminiscent of circumstances of Hurricane Katrina evacuees two years ago."

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So who better to advise us than former FEMA director and Katrina veteran *Michael "Heck of a Job, Brownie" Brown*? "The agency has learned some hard lessons regarding the handling of mass evacuations," Larchar's e-mail quotes him as saying, "especially in regard to the bureaucratic red tape ... involved."

Brown, Larchar says, "can offer advice to residents and businesses on proper relief and recovery efforts and advice for future disaster preparedness."

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Both Parties Now Ignoring McCain

The presidential campaign strategies these days are clear. For the Democrats, it's time to stop the clobbering and rally round Barack Obama, who dominates the Democratic National Committee's Web site.

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Obama: DOJ Official Must Be Fired

Sen. Barack Obama (D-Ill.) today called on the Justice Department to fire a top official over controversial comments the official made about minorities.

John K. Tanner, chief of the voting rights section in the Justice Department's civil rights division, recently told a Latino group in Los Angeles that "minorities don't become elderly the way white people do. They die first."

Tanner's comments came during a discussion of voter-identification laws, which minority rights groups have objected to as an obstruction to their voting rights. [The video portion of Tanner's statement was first reported on and posted in Brad Blog.] Appearing before the National Latino Congress, Tanner said elderly people are the most likely voters to not have driver's licenses and other forms of photo identification. This led to his assertion that minority deaths come earlier in life and, therefore, they would not be impacted by voter-ID laws.

"Anything that disproportionately impacts the elderly has the opposite impact on minorities -- just the math is such that," Tanner told the group.

Obama today wrote to acting Attorney General **Peter D. Keisler** saying Tanner "possesses neither the character nor the judgment" to hold his job.

"Such comments are patently erroneous, offensive, and dangerous, and they are especially troubling coming from the federal official charged with protecting voting rights in this country," Obama wrote.

Tanner already came under fire for his decision to overrule career Justice Department lawyers who considered a similar ID requirement in Georgia to be discriminatory toward black voters.

"For Mr. Tanner to now suggest, in an effort to defend his erroneous decision, that photo identification are not necessary for minority voters because 'they die first' shows just how far the Justice Department has fallen. This is a disgrace," Obama wrote to Keisler.

The Justice Department dismissed Obama's request in a full-throated defense of Tanner and the entire civil rights division, but noted the effects of voting rights laws on the elderly are not something that can be considered under the Voting Rights Act.

Here is the rest of Justice's defense of Tanner from **Brian Roehrkasse**, spokesman for the department:

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"John Tanner ... is a dedicated career civil servant who has worked for decades to protect the voting rights of all Americans. Under Mr. Tanner's leadership, the Voting Rights Section has doubled its production in lawsuits, from an average of 8 new cases a year to 16 new cases. It has brought over twice as many lawsuits under the minority language provisions of the Voting Rights Act in five years as in the previous 32 years combined. It has in five years brought a majority of all cases under the substantive provisions of the Voting Rights Act on behalf of Hispanic and Asian voters in the 42-year history of the Act, including the first cases in history on behalf of Filipino, Vietnamese and Korean voters. Recently the Section won a lawsuit under Section 2 of the Voting Rights Act on behalf of African Americans. Mr. Tanner has been honored by more African American citizen groups than any other attorney in the history of the Civil Rights Division, including awards from local voters' leagues and an NAACP group. Under the Voting Rights Act, the age of a voter or group of voters is irrelevant to the Department's review of a proposed change to voting practices or procedures. As the Voting Rights Act requires, the Department's consideration is limited to possible discrimination on the bases of race, color, or membership in a language minority group. Under those criteria, the Department was compelled to preclear the Georgia voter identification law. This was because the data showed that, in Georgia, the number of people who already possessed a valid photo identification greatly exceeded the total number of registered voters, and that there was no racial disparity in access to the identification cards."

By Paul Kane | October 19, 2007; 1:38 PM ET Bloomfield vs. Reinoff , Senate
Previous: McKinney, Lantos Hold 'Meet Locker' Hearing | Next: Spencer Responds Rep. Stark Over Comments During SCHIP Debate

Comments Please email us to report offensive comments.

obama, the man made an observation and you have to keep your ignorance in check. should you be fired for any statement you have made, should we label you a traitor for siding with the enemy, stop screwing with peoples lives for the sake of your own politics.

Posted by: Dwight | October 19, 2007 4:15 PM

I agree with Obama. If not fired, Tanner should suffer some consequences of this statement. It was not an observation, but a blatantly racist statement.

Oh, and by the way, voting against attacking another country does not mean that Obama sided with the enemy. In fact his opinion is currently supported by the majority, so it's hard to say who is the enemy at this point.

Posted by: Alex | October 19, 2007 5:26 PM

Let me get this straight: Tanner thinks blacks don't get old and they always vote late because of that hidden reason bigots use all the time! Laziness.
This better become a huge story.
And I can't wait til when Tanner testifies in 2 weeks to the House Judiciary Comm., whose chairman is a 78 year old African American, John Conyers.
The MSM does love squirming; maybe they'll cover this.

Posted by: SPENCER | October 19, 2007 5:39 PM

Right On, Obama!

John Tanner may have held his civil service job at the Justice Department for a few days too long. Had there been any real leadership in the Justice Department, Mr. Tanner would never have had the temerity to make such remarks in the first place.

Perhaps we should turn the tables and deny white voters enfranchisement,

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Sen. Edward Kennedy (D-MA) (WUCYB.com)

Kennedy Asks Mukasey for Review of Voting Rights Chief

By Paul Kiel - October 26, 2007, 11:57AM

Last week Sen. Barack Obama (D-IL) called for the Justice Department's voting rights chief John Tanner to be fired. And in written questions to attorney general nominee Michael Mukasey this week, Sen. Edward Kennedy (D-MA) asked Mukasey to review Tanner's record and consider whether he ought to be canned.

In the question, Kennedy noted Tanner's reasoning that voter ID laws actually discriminate against whites because "'minorities don't become elderly the way white people do.'" The "remarks display a shameful lack of understanding and sensitivity that is unacceptable in the person charged with enforcing the nation's laws against voting discrimination," he wrote.

Tanner will appear before a House judiciary subcommittee on Tuesday, where he's sure to be questioned about those remarks, others where he said that African-Americans tend to carry picture ID because of racial profiling, and his role in whitewashing a Justice Department review of Columbus, Ohio voting problems in the 2004 election and forcing through approval of a controversial voter ID law in Georgia -- among other things. It's not going to be a fun hearing for Tanner. The chairman of that subcommittee, Rep. Jerrold Nadler (D-NY), called on Tanner to resign yesterday.

John Tanner, DOJ Voting Rights Section Chief

"The Voting Section of the Civil Rights Division has failed miserably in its responsibility to enforce the Voting Rights Act during this Administration," Sen. Kennedy said in a statement. "The latest shameful revelations from the Section drive home the urgent need for the next Attorney General to install strong leadership to allow the Voting Section to return to its historic role in ensuring access to the ballot."

Kennedy's question to Mukasey is below:

> During your hearing, Senator Cardin asked you about the Civil Rights Division's approval of a 2005 Georgia photo ID law over strong objections by career professionals that the law would have a discriminatory impact on minority voters. That 2005 law was enjoined by a federal court as having the effect of a Jim-Crow era poll tax, and the injunction was upheld by the Eleventh Circuit. The Georgia legislature abandoned the 2005 law, and passed a new version the following year. The Washington Post reported that Mr. Tanner dismissed concerns over the racially discriminatory impact of photo ID laws in recent public remarks to the National Latino Congreso, suggesting that such laws affect the elderly, but not minorities because "minorities don't become elderly the way white people do. They die first." Those remarks display a shameful lack of understanding and sensitivity that is unacceptable in the person charged with enforcing the nation's laws against voting discrimination. Those comments only

undertaken the Voting Section's troubling record under Mr. Tanner. If you are confirmed, will you review Mr. Tanner's record and consider whether he should be replaced as head of the Voting Section?

PERMALINK | **TOPICS:** Civil Rights Division, Michael Mukasey PRINT SHARE

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[redacted]

Comments (13)

Praise the Day wrote on October 26, 2007 12:13 PM:

My only criticism of this piece is that I really don't think that the term "reasoning" can accurately be use to relate to anything produced by the one and only John Tanner.

ieJustice wrote on October 26, 2007 12:56 PM:

Tanner must also be called to account for his hiring and retention of Yvette Rivera. Rivera is the acting deputy section chief of the Section 5 Unit in the Voting Section. She is Sandra Lorenzo-Giguere's counterpart.

There are currently nine individuals performing the duties of Section 5 analysts, down from 23. Since Rivera took over from 28-year veteran Bob Berman, whom Tanner forcibly transferred to a dead-end training job, over 100 years of Section 5 analyst experience has been forced out. Almost all of these analysts were black. One, on her departure, as has been reported by NPR, referred to the Section as a plantation. Of the nine remaining individuals, two are black.

Yesterday was the Civil Rights Division awards ceremony. Rivera decides which analysts get awards. Seven of the nine get awards of one form or another.

Guess who didn't get an award? The two black analysts. They also happen to be the two most experienced analysts.

The Voting Section, and more specifically Section 5 of the Voting Rights Act stopped Jim Crow. Under Tanner and Rivera, the Voting Section has BECOME Jim Crow.

Algoion wrote on October 26, 2007 12:59 PM:

Following the same "reasoning", one could argue that minority voters will soon become extinct, victims of natural selection since, according to Tanner, they tend to die first...
Would this be a case in which we can blame Darwinian selection for favoring the Republican agenda by extending the lifespan of whites?
All creationists out there: Anybody care to explain?

ieJustice wrote on October 26, 2007 1:18 PM:

Almost forgot. For her outstanding racism in forcing out over 100 years of experienced black analysts, in not giving her own black analysts awards, and for perverting the enforcement of Section 5, Yvette Rivera herself received an award.

John Tanner, DOJ Voting Rights Section Chief

In Voting Section, Charges of Discrimination Persist

By Paul Kiel - October 29, 2007, 11:50AM

When John Tanner, the chief of the Justice Department's voting rights section, goes before Congress tomorrow, he'll have a lot to answer for.

One of the most uncomfortable topics, to be sure, will be continuing charges of discrimination in the section that is supposed to be the font of civil rights enforcement -- charges that point squarely at Tanner himself. Things became so bad that a 33-year veteran analyst sent out an email to colleagues on her last day last December: "I leave with fond memories of the Voting Section I once knew, and I am gladly escaping the 'Plantation' it has become. For my colleagues still under the 'whip', hold on - 'The Times They are A-Changing.'"

In an interview with NPR, that analyst, Teresa Lynn, made clear who was holding the whip in that metaphor. It was "aimed toward the leadership of the section," she said, "both the section chief [Tanner] and the deputy chief of section five [Vicente Rivera]." Lynn told NPR that she got "high fives" from her former colleagues for her parting shot.

We first reported on charges of discrimination in the section -- charges that resulted in at least two Equal Employment Opportunity complaints from African-American employees -- in May. But the same problems still persist today, Carl Goldman, executive director of AFSCME's Council 26, the union that represents non-attorney staff in the Justice Department's Civil Rights Division, told me:

> The employees feel that [Tanner] has decimated the voting rights program... and they're glad that he is being called to task by Congress.
>
> We're hopeful that lawmakers will ask him about the problems the employees face: about the many employees who felt they had to leave due to his poor leadership, the atmosphere of fear that he has created, and the severe damage he's done to the cause of voting rights.

In addition to the charges of discrimination against the non-attorney staff, Tanner will have to answer for the drain of African-American attorneys in the section. As of May, only two of the approximately thirty-five attorneys in the voting rights section were African-American.

PERMALINK | TOPICS: Civil Rights Division

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American-Arab Anti-Discrimination Committee

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In Memoriam
Hala Salaam Maksoud, PhD (1943-2002)
Alex Odeh (1944-1985)

October 26, 2007

The Honorable Jerrold Nadler, Chairman
Subcommittee on the Constitution, Civil Rights, and Civil Liberties
House Committee on the Judiciary
2334 Rayburn House Office Building
Washington, DC 20515

VIA FAX: (202) 225-6923

Dear Chairman Nadler:

On October 30, as the House Subcommittee on the Constitution, Civil Rights, and Civil Liberties convenes an oversight hearing on the Voting Section of the Civil Rights Division of the US Department of Justice (DOJ), the American-Arab Anti-Discrimination Committee (ADC), the nation's premier organization dedicated to ensuring the civil rights of Arab Americans, would like to express our support for Voting Rights Section Chief John Tanner.

Mr. Tanner has shown nothing but the most professional leadership and courtesy in his proactive outreach efforts on behalf of the Voting Section to the Arab-American community. He has gone above and beyond the normal call of a public servant to listen, work with and incorporate the input of a diversity of communities from across this nation. As one of ADC's many efforts to work with our government officials, we are proud to have a solid working relationship with Mr. Tanner and his team. He is someone in government who takes seriously the concerns of Arab Americans. He has worked with our team in Washington DC as well as ADC members in New Jersey, Texas and Michigan on proactively and constructively addressing challenges that our community may face in the voting process.

John Tanner is a career public servant who has dedicated 30 years of his life to fighting discrimination in voting and protecting civil rights. He is a man who served both in a political position in the White House during the Clinton administration and was elevated to a civil service leadership position during the current Bush administration, and, our work with him has proven to us that he does what he does because he cares deeply about voting rights.

Thank you for your consideration of this matter. Should you or your staff have any questions concerning ADC's work with Mr. Tanner, please do not hesitate to contact me at kshora@adc.org or (202) 244-2990.

Sincerely,

Kareem Shora, JD, LL.M.
National Executive Director

http://www.washingtontimes.com/article/20071011/NATION/110110070/1002/NATION

Bill would cut Justice aid to suspect groups

By Audrey Hudson
October 11, 2007

Mary F. Calvert/The Washington Times Sen. Tom Coburn is sponsoring legislation to block Justice Department support for groups designated as unindicted co-conspirators in court cases.

Legislation is moving through Congress to block the Justice Department from providing financial support to participate in conventions held by groups designated by the government as unindicted co-conspirators in federal court cases.

The measure sponsored by Sen. Tom Coburn, Oklahoma Republican, is in response to the department's recent participation in a convention held by the Islamic Society of North America (ISNA).

The Justice Department named ISNA as an unindicted co-conspirator in the Holy Land Foundation, which the government is prosecuting for raising $12 million for Hamas. As the trial proceeded last month, Justice officials sponsored a booth at ISNA's annual convention, angering some Republicans.

"Prohibiting the Justice Department from supporting conferences held by organizations linked to terrorism and capping the overall amount the department can spend on conferences will assist the department to better prioritize both its spending and mission," Mr. Coburn said.

Erik Ablin, Justice Department spokesman, said officials are concerned about the amendment and plan to share those concerns with Congress.

"The department's goal in these efforts was to educate the public about how the department works to protect religious freedom, voting rights, economic opportunity and many other rights," he said. "A variety of other federal agencies participated as well, including the United States military, the FBI, the Department of Homeland Security, the Department of State, the Department of Defense and USAID."

The legislation caps overall conference spending by the Justice Department to $15 million for the next year, an estimated $31 million in savings.

The Justice Department spent $312 million on conferences between 2000 and 2006, according to an inspector general investigation — nearly twice the amount of the State Department, which convenes meetings worldwide for diplomatic purposes.

Justice officials have declined to say how much money was spent to sponsor a booth and send several lawyers from Washington to Chicago for the Labor Day event.

"Clearly, in the post-September 11 world, the tens of millions of dollars spent every year by the Justice Department on conferences would be much better spent investigating and prosecuting terrorists," Mr. Coburn said.

In a letter to then-Attorney General Alberto R. Gonzales, Reps. Peter Hoekstra, Michigan Republican and ranking member of the House Permanent Select Committee on Intelligence, and Sue Myrick, North Carolina Republican, called the Justice Department's involvement a "grave mistake."

"In light of the threat that our nation ... is currently facing from radical jihadists, and because of the president's commitment to fighting the war on terror on all fronts, we believe it is a grave mistake to provide legitimacy to an organization with extremist origins, leadership and a radical agenda," the lawmakers said.

The amendment, which was approved by a voice vote to a spending measure, states that "no funds appropriated under this act may be used to support a conference sponsored by any organization named as an unindicted co-conspirator by the government in any criminal prosecution."

Connecting the dots

Frank J. Gaffney Jr.
August 28, 2007

What do the following recent news items have in common? c Sen. John Warner returns from a weeklong excursion to Iraq in the company of inveterate defeatist and Armed Services Committee Chairman Carl Levin to announce the United States must begin withdrawing 5,000 troops from Iraq by Christmas. The Virginia Republican says he wants to use this symbolic step — which he might or might not try to impose legislatively in coming weeks — to pressure the Iraqi government to make more progress on various fronts.

c Director of National Intelligence Michael McConnell revealed to the El Paso Times that the United States had caught Iraqi terrorists trying to get into the country across its still-unfenced southern border. According to a report subsequently published in WorldNetDaily, Adm. McConnell's office revealed that, "During fiscal 2006, there were 14 Iraqi nationals caught trying to enter the U.S. illegally, while so far in 2007, that number is 16." The online publication quoted the DNI as saying, "The goal is for terrorists to gain admittance to the United States, and then produce 'mass casualties.' "

c Outgoing Attorney General Alberto Gonzales' Justice Department is paying the Islamic Society of North America for the privilege of having government lawyers man a booth at ISNA's upcoming annual convention in Chicago. The Washington Times' indefatigable Audrey Hudson broke the story, noting that federal employees at Justice are concerned this "outreach" to the Muslim-American community will jeopardize an important terrorism trial now under way in Dallas. After all, ISNA is one of a large number of Islamist front organizations identified as an unindicted co-conspirator by federal prosecutors in the Holy Land Foundation terror-financing case.

These three developments actually have several things in common:

(1) They each shed light on the magnitude of the threats we face in what truly is a War for the Free World. Mr. Warner's trial balloon is a reminder of the greatest danger we face in waging that war — the prospect of being defeated politically on the home front. Adm. McConnell's revelations make it clear that our enemies overseas are not waiting for such a defeat, and the humiliating withdrawal from Iraq it will precipitate, to try to attack us here at home. And the hash-up by the Justice Department calls attention to the fact that, even if no more foreign-based terrorists get into our country, we already have in our midst organizations that are sympathetic with, if not actually serving the interests of, our Islamofascist foes.

(2) Each of these news items tends, if anything, to understate the problem. Mr. Warner's is not only the latest of congressional demands to begin the surrender of Iraq to those who wish us ill there. It is also perhaps the most modest. The more irresponsible seek the *immediate* removal of *all* U.S. forces — a logistical impossibility and strategic disaster.

Others envision changing the mission at once, quickly removing some of our troops and putting the rest on remote bases, effectively ceding much of Iraq to the terrorists and their enablers.

For his part, Adm. McConnell's admission raises the obvious question: If we caught more than a dozen Iraqi terrorists slipping into the U.S. during each of the last two years, how many were *not* intercepted? Typically, the ratio is something like for every one nabbed, 10 get through.

Indeed, WorldNetDaily reports that "the U.S. Customs and Border Protection intercepted 60 Iraqis crossing the nation's southwestern border in 2006 who were seeking asylum in the U.S., while that number so far in 2007 is 178." What is interesting is that the El Paso Times was told by a U.S. intelligence analyst, "There's been evidence that human smugglers, or coyotes, are telling Iraqis to ask for amnesty if they are caught." How many desiring to do us harm are among those seeking amnesty (caught and uncaught) — and whose wish might be realized if extraordinarily ill-advised legislation like H.R. 2265 recently introduced in Congress is adopted? (For a troubling analysis of this bill, see http://www.vigilantfreedom.org/910blog/2007/08/06/faq-on-hr-2265/).

The problem with the Islamic Society of North America is but the tip of the iceberg. There are dozens of such groups in this country. Most were established by, funded from or otherwise lashed up with Saudi Arabia. They typically are vehicles for promoting the intolerant Wahhabi strain of Islam, inculcating a sense of separateness and grievance among American Muslims and advancing the insidious, even seditious, agenda of the Muslim Brotherhood.

The three headlines also, regrettably, indicate a certain cluelessness in the U.S. government. Congressional figures, intelligence officials and bureaucrats in various governmental departments are neither fulfilling their sworn obligations to defend the Constitution of the United States nor serving the American people well by their failures to recognize — let alone deal effectively with — the great and growing dangers we face, abroad and at home.

It is past time for an honest rendering of the facts suggested by "connecting these dots": America will not be made more secure by surrendering in Iraq. Our porous borders pose an open invitation to terrorists. Our continuing failure to secure them will, in due course, make possible not just "mass casualties" but possibly national calamity. And Islamist organizations may declare themselves the self-appointed leaders of the Muslim-American community, but no good can come from our government associating with or otherwise legitimating them.

Frank J. Gaffney Jr. is president of the Center for Security Policy and a columnist for The Washington Times.

U.S. sponsors Islamic convention

By Audrey Hudson
August 27, 2007

The Justice Department is co-sponsoring a convention held by the Islamic Society of North America (ISNA) — an unindicted co-conspirator in an ongoing federal terrorist funding case — a move that is raising concerns among the Justice's rank and file.

Justice lawyers have objected to the affiliation with ISNA, fearing it will undermine the case against the Holy Land Foundation for Relief and Development in Dallas.

"There is outrage among lawyers that the Department of Justice is funding a group named as a co-conspirator in a terrorist financing case," said a Justice lawyer who spoke to The Washington Times on the condition of anonymity.

According to an e-mail from Susana Lorenzo-Giguere, acting deputy chief of the Voting Rights Division, the sponsorship will involve sending government lawyers to man a booth for the Labor Day weekend event in Illinois.

"This is an important outreach opportunity, and a chance to reach a community that is at once very much discriminated against, and very wary of the national government and its willingness to protect them," Mrs. Lorenzo-Giguere said in an e-mail obtained by The Washington Times.

"It would be a great step forward to break through those barriers. And Chicago is lovely this time of year," Mrs. Lorenzo-Giguere said.

ISNA is one of more than 300 unindicted co-conspirators in a case against the Holy Land Foundation, whose top officers are accused of raising money for Hamas.

Justice spokesman Erik Ablin said the agency participates in the annual convention to educate Muslims about their civil rights.

"The Civil Rights Division will have a table at the ISNA convention over Labor Day weekend to hand out literature and answer questions about the division's work. The ISNA convention attracts more than 30,000 American Muslims every year, and the division has had tables at the convention in previous years," Mr. Ablin said.

The Justice Department declined to say how much the sponsorship will cost.

"This is just staggering, it's outrageous," the lawyer said. "Lawyers from the Civil Rights Division traveling to Chicago on the federal dime. This will cost thousands of dollars."

A second lawyer responded to Mrs. Lorenzo-Giguere's e-mail questioning the participation and said it "seems like an odd time for one part of DOJ to lend credence and visible support to ISNA at the same time DOJ prosecutors will be called on to defend their decision to name ISNA as a conspirator."

"Presumably the prosecutors have determined that they might need that testimony admitted; I hope we don't undermine their position," the second lawyer said. "Needless to say, [the Holy Land Foundation trial] is a very significant case."

Mohamed Elsanousi, director of communications and community outreach for ISNA, says the annual convention is open to anyone who provides services or information of value to convention participants.

"For many years, we have welcomed representatives from U.S. government agencies who wish to share information about their services and have the opportunity to reach out to the Muslim American community," Mr. Elsanousi said.

The convention features book signings, musical entertainment and seminars on family, community service and political activism.

But the first lawyer also pointed to a morning session on "the threat and reality of U.S.-sponsored torture" as contrary to the department's mission. The Justice Department was responsible for signing off on the legality and constitutionality of interrogation techniques.

"The extensive news coverage by the U.S. and international media sources makes it all too clear that the grim abuses in Abu Ghraib, Guantanamo Bay, and the sending of detainees to secret prisons around the world that are known to torture during interrogations, are not isolated incidents, but rather constitute policy of the U.S. government," the schedule of events said.

"This session will describe the nature of U.S.-sponsored torture, the effects of torture on its victims, the efforts of the U.S. religious community, and what you can do to help end U.S.-sponsored torture," the schedule said.

Republicans slam Islamic Society convention

By Audrey Hudson
August 31, 2007

Republican lawmakers are urging the Justice Department not to participate in a convention held by the Islamic Society of North America — a group named as an unindicted co-conspirator in an ongoing terrorism-financing case.

In a letter to Attorney General Alberto R. Gonzales, Reps. Peter Hoekstra of Michigan, ranking member of the House Permanent Select Committee on Intelligence, and Sue Myrick of North Carolina called the Justice Department's involvement a "grave mistake."

"In light of the threat that our nation ... is currently facing from radical jihadists, and because of the president's commitment to fighting the war on terror on all fronts, we believe it is a grave mistake to provide legitimacy to an organization with extremist origins, leadership and a radical agenda," the lawmakers said.

Rep. Peter T. King, New York Republican and ranking member of the House Homeland Security Committee, said he agrees that Justice officials should not attend the conference.

"It is absolute insanity for the federal government, especially the Department of Justice, to be giving any credibility at all to a group like the ISNA, which has such strong links to Islamic extremism," Mr. King said.

Justice Department spokesman Erik Ablin said in an e-mail that the department has "received the letter, and we will respond to Reps. Hoekstra and Myrick." He went on to note that the Civil Rights Division and other government agencies — including military recruiters — frequently attend the convention "as part of its outreach and education efforts."

Rank-and file lawyers within the Justice Department object to participating at the ISNA convention, fearing it will undermine the case against the Holy Land Foundation for Relief and Development.

According to an e-mail from Susana Lorenzo-Giguere, acting deputy chief of the Voting Rights Division, the plan to "co-sponsor an exhibit booth" will involve sending government lawyers to man it for the Labor Day weekend event in Illinois.

This is an important outreach opportunity, and a chance to reach a community that is at once very much discriminated against, and very wary of the national government and its willingness to protect them," Mrs. Lorenzo-Giguere said in an e-mail obtained by The Washington Times.

Citing The Times, which broke the story on Monday, the lawmakers' letter said: "Establishing a partnership with ISNA is exactly the wrong approach at this critical juncture in history, setting a precedent that radical jihadists should be the conduit between the U.S. government and the American Muslim population, and we urge you to reconsider your decision to establish an official relationship with ISNA."

An ISNA spokesman is attending the conference and was not available yesterday for comment. Previously, he said the group welcomes any government agency that can provide information beneficial to the Muslim community.

According to the ISNA Web site, there are three levels of convention sponsorships that allow organizations to operate a booth in the convention hall: diamond, ruby and pearl. The Justice Department has declined to reveal how much money will be spent to obtain a booth.

Sen. Tom Coburn, Oklahoma Republican and a member of the Senate Homeland Security Committee, said his staff is investigating government spending on conference-related activities.

"There are few internal fiscal or policy checks on conference spending to ensure tax dollars are not being wasted or being spent to promote agendas that run contrary to our national interests, such as the Justice Department sponsored event by an unindicted co-conspirator in an ongoing federal terrorist case," Mr. Coburn said.

POST-HEARING QUESTIONS SUBMITTED TO JOHN K. TANNER, CHIEF, VOTING SECTION, CIVIL RIGHTS DIVISION, U.S. DEPARTMENT OF JUSTICE

ONE HUNDRED TENTH CONGRESS

Congress of the United States
House of Representatives
COMMITTEE ON THE JUDICIARY
2138 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6216
(202) 225-3951

January 18, 2008

Grace Chung Becker
Acting Assistant Attorney General
Civil Rights Division
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Re: Civil Rights Division Oversight Hearing

Dear Ms. Becker:

John Tanner, Chief of the Voting Section appeared before the Constitution, Civil Rights, and Civil Liberties Subcommittee for an oversight hearing on October 31, 2007, to testify about the work of the Civil Rights Division's Voting Section. During this hearing members had a number of follow-up questions for the record. Although Mr. Tanner is no longer Chief of the Voting Section, it is our understanding that he remains an employee of the Department of Justice in the Office of Special Counsel for Immigration-Related Unfair Employment Practices; therefore, we are requesting that you work in consultation with him to answer follow-up questions from the Voting Section oversight hearing.

Attached are questions from members of the Committee. All written responses should be submitted to David Lachmann, Chief of Staff for the Subcommittee on the Constitution, Civil Rights, and Civil Liberties, B353 Rayburn House Office Building. Thank you for your cooperation.

Sincerely,

John Conyers, Jr.
Chairman, Committee on the Judiciary

Jerrold Nadler
Chairman, Subcommittee on the Constitution, Civil Rights and Civil Liberties

cc: Hon. Lamar Smith
Hon. Trent Franks

Note: At the time this hearing was submitted for printing, January 27, 2009, the Subcommittee had not received responses to the questions submitted to Mr. Tanner.

VOTING SECTION OVERSIGHT HEARING
Tuesday, October 30, 2007
Follow-up Questions from Chairman Conyers and Chairman Nadler
to former Voting Section Chief John Tanner

DOJ PRE-CLEARANCE OF THE GEORGIA PHOTO ID LAW

In April 2005, while you were serving as the Voting Section Chief, Georgia passed a law requiring photo identification in order to vote. Georgia submitted this law for §5 pre-clearance. We now know that four out of five of the Department of Justice civil service employees objected to the law and forwarded a 51 page memorandum to you that included a factual investigation and a legal review of the Georgia plan. Most significantly, the memo included a detailed analysis and a recommendation that the Department object to the voting change because it was likely to discriminate against African American voters, but they were overruled the next day by higher-ranking officials at Justice. Only one day after receiving the staff analysis recommending an objection, the Department approved the Georgia plan.

Q1. Did you receive a copy of the Georgia review team's staff recommendation memo published in the *Washington Post* on Thursday, November 17, 2005? When did you receive it and from whom?

Q2. What was the staff's recommendation in the Georgia photo identification case? Was there a dissenting view? If so, who dissented?

Q3. Did you agree with the staff recommendation? Why or why not?

Q4. Please identify all the officials involved in overruling the staff's recommendation. Why was the staff recommendation overruled?

Brad Schlozman and Hans Von Spakovsky, both former senior level Department of Justice officials who served in the Civil Rights Division (CRT), testified before the Senate and stated that you played a key role in the Department's decision to approve the Georgia Photo Identification law.[1]

Q5. Did you have the authority as the Voting Section Chief to pre-clear a voting submission without sign-off from front office officials in the Justice Department? Did Mr. Schlozman and Mr. Von Spakovsky approve your recommendation to pre-clear the Georgia photo ID plan?

Problems With Information Submitted by Georgia

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[1] Transcript Senate Judiciary Committee Hearing on the U.S. Attorney Firings - June 5, 2007 - Testimony of Bradley Schlozman, Associate Counsel, Director of the Executive Office for U.S. Attorneys. Transcript Senate Rules Committee Hearing on Nominations to the Federal Election Commission - June 13, 2007.

According to Toby Moore, the Geographer/Social Science Analyst assigned to the Georgia photo identification submission review team, on August 26th Georgia officials informed the Department that the data it submitted earlier regarding the number of Georgia residents with photo identification was erroneous. The state overstated the number of people who had licenses or ID cards by some 600,000. In light of this, Georgia submitted additional information for review. At the time Georgia officials contacted the Department the plan had not been pre-cleared.

Q6. How many pages of additional information did the State submit? Briefly describe the content of the information.

Q7. Was this new information reviewed before the Georgia plan was precleared? By whom? Did anyone on the Georgia review team (Robert Berman, Amy Zubrensky, Heather Moss, Joshua Rogers, or Toby Moore) have an opportunity to review the additional information submitted by the State of Georgia before the photo identification law was precleared? If so who? If not, why not?

Q8. Is it true that the Georgia plan was pre-cleared on the same day the Department received additional information?

Q9. Was the new information included in the analysis of the recommendation memo that was forwarded to the front office. If not, why not?

Q10. Did you alter the Georgia review team's recommendation memorandum on the Georgia photo identification submission (the memo published in the Washington Post - November 17, 2005) before sending it to the front office? If so, what changes did you make and why?

Q11. Was the Georgia review team's recommendation to object to the Georgia Photo ID plan forwarded to the front office? If so, when? If not, why not? Was the staff memorandum as published in the Washington Post forwarded to the front office during the time the Department was considering whether to preclear the Georgia photo identification law?

Q12. Is it true that the Department has a longstanding Voting Section practice for a Section Chief who disagreed with a staff recommendation to submit a separate recommendation and leave the final decision concerning the split recommendation between staff and Section Chief to the Assistant Attorney General? Did you deviate from this practice? If so, please explain why?

Q13. Subsequent to the 2005 Georgia photo ID submission, the *Washington Post* reported that a new policy had been instituted which prohibited staff recommendations in Section 5 reviews. Is this true? If so, please explain the reasons for the change in policy. What is the current policy?

Q14. Is it true that neither the Texas nor the Georgia review team's memoranda published in the *Washington Post* have ever been entered into the Submission Tracking and Processing System?

Q15. In the remarks before the National Latino Congreso in Los Angeles, you defended the Department's preclearance of the Georgia's photo ID law by claiming in "Georgia, the fact was and the court found that it was not racially discriminatory. That was the finding of the initial court."[2] You repeated those comments when you testified before the Constitution Subcommittee on October 30, 2007. Please cite specifically where the court made that finding in its initial opinion.

Q16. Isn't it true that in issuing its initial opinion granting a preliminary injunction against enforcement of the photo ID law, the court found the law "is likely to prevent Georgia's elderly, poor, and African-American voters from voting"?[3] Did the court address the merits of the plaintiffs claim that the law violated the racial fairness provisions of Section 2 of the Voting Rights Act?

Similar Voting Section Submissions

In 1994, the Department of Justice reviewed a Voter Identification Submission from Louisiana. Provisions in the Louisiana statute required first time voters who had registered by mail to present a current driver's license or other picture identification card in order to vote.

Q17. Were you the staff attorney for the Louisiana identification case? The Department interposed an objection in that case because minorities were less likely to own a driver's license or picture ID card, and were therefore more likely to be denied the opportunity to vote as a result of the new requirement. Was the Department's decision based on your recommendation? How was the Louisiana photo identification law different from Georgia?

Q18. Please provide all the "weekly reports" produced by the CRT and the Voting Section from 2000 - 2008.

Section 5 Unit

In your written testimony you emphasize the Department's commitment to section 5 enforcement, yet in the last few years there has been a significant decline in personnel in the

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[2] TPMmuckeraker.com, "DOJ Vote Chief Argues Voter ID Laws Discriminate Against Whites," October 9, 2007.

[3] Common Cause v. Billups, 406 F.Supp.2d 1326, 1365, 1375 (N.D. Ga 2005).

Voting Section during your tenure. Prior to 2001, there were 26 civil rights analysts and six attorneys who reviewed submissions, gathered facts, and made recommendations on over 4,000 Section 5 submissions each year. The Judiciary Committee has received information indicating that there has been significantly fewer staff members processing Section 5 submissions and many of the staff now conducting the review were recently hired employees with no prior experience with Section 5.

TPM Muckraker has reported that Senior Trial Attorney Tim Mellett has replaced Yvette Rivera as Acting Deputy Chief of the Section 5 unit.

Q19. When was Ms. Rivera appointed as Acting Deputy Section 5 Chief? Please provide Ms. Rivera's current job title and describe her duties.

Q20. Was the Section 5 Unit restructured during Ms. Rivera's tenure? If so, how and why?

Q21. The Committee has received reports that the number of Section 5 analysts has decreased from 26 analysts to 8 in the past 6 years. Of the 8, only 2 of the remaining analysts are African-Americans. Is this correct?

Q22. How many full time analysts are currently employed in the Section 5 Unit?

Q23. Please provide the number of analysts who left the Section 5 Unit during Ms. Rivera's tenure as Acting Deputy Chief of the Section 5 Unit. Please indicate the years of experience, gender, ethnicity/race of each of the analysts who left the Section 5 Unit during Ms. Rivera's tenure as the Acting Deputy Chief.

Q24. Please also provide the number of new analysts for the Section 5 Unit hired during Ms. Rivera's tenure and indicate the gender, ethnicity/race. Were the newly filled positions competitively advertised? If so, where was it advertised?

Q25. How many full time equivalent (FTE) positions were allocated for attorney reviewers in the Section 5 Unit in January 1998 and in January 2008? How many FTE positions were allocated for analysts in the Section 5 Unit in January 1998, and each January of subsequent years through January 2008? How many vacant FTE attorney reviewer positions current exist in the Section 5 Unit? How many vacant FTE analyst positions current exist in the Section 5 Unit?

Q26. Under the Voting Rights Act, the Attorney General has 60 days to interpose an objection to a voting change. Has the Section 5 Unit missed any submission deadlines during Ms. Rivera's tenure. If so, how many and in what jurisdictions?

Q27. The Judiciary Committee has received reports that the caseload for each analyst has increased from 30 cases to 90 cases. It seems impossible for staff to conduct a thorough review of

Section 5 submissions when they are processes 90 cases. Does the Department plan to hire more analysts and when? What preparations has the Section 5 Unit made to handle the workload for the 2010 redistricting cycle?

Q28. At least two African-American employees have filed equal employment opportunity (EEO) complaints against you and Yvette Rivera, claiming that they have routinely been passed over for promotions given to white staff? Is this correct? What is the status of those complaints?

Q29. During the 2005-2006 rating cycle, did Acting Deputy Section 5 Chief Yvette Rivera instruct then Section 5 Supervisor Natalie Govan to downgrade the performance appraisals of any Section 5 staff? If so, would such action be consistent with DOJ policy?

On her last day, an African-American 33-year veteran of the Justice Department sent a message to the Voting Section that compared the deteriorating working environment of the section to a plantation.

Q30. The Judiciary Committee has received several complaints that the voting section has become a hostile work environment, particularly for women and racial minorities. What efforts have been taken to address these concerns?

DOJ held an awards ceremony a week prior to our October 30th oversight hearing. All of the civil rights analysts in the Section 5 Unit received some kind of award – cash or otherwise – at the Division's awards ceremony, even analysts who had worked in the Voting Section for less than 5 months with the exception of two analysts, both of whom are African American.

Q31. What were the criteria for the awards?

Purging

Q32. Has the Voting Section, at any time during your tenure as chief, drawn up a list of voters that it thought were ineligible to vote or ought to be removed from the rolls as part of its NVRA enforcement activity? If so, in what states? What methodology was used to create the list or lists? What is the statutory authority?

The Department sent letters to 10 different states (Iowa, Massachusetts, Mississippi, Nebraska, North Carolina, Rhode Island, South Dakota, Texas, Utah and Vermont) pressuring them to purge their voter rolls before the 2008 election. Please provide copies of these letters.

Q33. Is this correct? What specifically is the statutory authority for demanding the voting lists of states? How much staff time has been devoted to voter purge actions? Were you directed to do work on Section 8 enforcement of the NVRA by Brad Schlozman, Hans Von Spakovsky or any other person?

In 2005 the Justice Department filed lawsuit against the Missouri Secretary of State alleging that her office failed to make a "reasonable effort" to remove ineligible people from local voter-registration rolls. A federal judge dismissed the suit in April 2007 ruling that the government had provided no evidence of fraud.

Q34. Is this correct?

Q35. Is it true that the Department initiated this suit despite a 2002 court settlement in which St. Louis, Missouri election officials acknowledged that they improperly purged some 50,000 names from voter lists before the 2000 elections and had failed as required by federal law to notify those people properly that they had been placed on inactive status?

The National Voter Registration Act (NVRA), which Congress passed specifically to increase the number of eligible Americans registered for federal election, requires states to offer voter registration to client and applicants of public assistance programs. Registrations from these agencies have plummeted from 2.6 million in 1995-1996 to about 1 million in 2001-2002, and 1 million again in 2003-2004. They fell by almost 50 percent in 2005-2006 to 550,000.

Q36. Can you explain why, given the Voting Section's vigorous enforcement beginning in 2005 of the NVRA's voter list maintenance provisions, it took the Voting Section until August 30, 2007 to begin to inquire into states' compliance with provisions of the NVRA that would increase registration? The three states that did not appear to get letters were FL, TX and VA. Why didn't these states receive letters? Is the Voting Section considering further action with these states? If so, what actions are being consideration?

In September of 2005, in a letter to then Attorney General Gonzales, the Judiciary Committee shared with the Department of Justice specific NVRA violations that included: (1) states failing to offer any voter registration services in public assistance offices; (2) states failing to offer voter registration services when clients change addresses; and (3) states failing to train staff on NVRA requirements as required by Section 7 of the NVRA.

Q37. What specific actions has the Department taken to address the concerns the Judiciary Committee raised about section 7 enforcement? How many Section 7 cases have you filed? Is Section 7 enforcement a priority for Voting Section? How much staff time is devoted to Section 7 enforcement?

Q38. In October 2006, the Voting Section sued Philadelphia under the minority language provisions of Section 203. In April 2007, the Section amended that suit as part of a settlement to include a voter purge requirement under Section 8 of the NVRA. Why did the Voting Section expand the suit to include the voter purge? Did the Voting Section ever

receive or use a list of 10,000 names to be purged created by the Republican Party (either at the state or national level) or by any other outside entity in consideration of amending its complaint?

Ohio 2004

In 2005, you wrote to Ohio officials defending their decision to distribute voting machines disproportionately to predominantly white precincts because of "the tendency in Franklin County for white voters to cast ballots in the morning, (i.e., before work), and for black voters to cast ballots in the afternoon (i.e., after work)."

Q39. On what evidence did you base this conclusion? Was there an investigation? If so, please list Voting Section staff who conducted the Franklin County investigation?

Q40. Is there any precedent for sending such a detailed letter in any other case similar to Franklin county voting machine controversy? If so, in what other cases has the Department sent similar letters?

In 2005, Chairman Conyers issued a report entitled *Preserving Democracy: What Went Wrong in Ohio*. The report identified several massive and unprecedented election irregularities in the Ohio presidential election, including the mis-allocation of voting machines, widespread instances of intimidation, and improper purging of voter rolls.

The Third Circuit Court of Appeals found that the Ohio Republican Party's caging tactics in Ohio during the 2004 election, which selectively targeted 35,000 predominantly minority voters, were illegal and in direct violation of a consent degree.[4] Vote caging is an illegal voter suppression technique used to keep minorities (mostly blacks) from voting. "Vote caging" is when a political organization, typically a political party, compiles a "caging list" of voters whose mail came back undeliverable or who did not return the receipt, and uses that list to challenge those voters as not being validly registered. The challenges can occur prior to Election Day or at the polls.

Q41. What actions did the Voting Section take to address complaints of caging, intimidation, and other campaign tactics intended to suppress the minority vote during the Ohio 2004 election?

Q42. Given Ohio Secretary of State Kenneth Blackwell's failure to investigate a single one of the

[4] DNC v. RNC, No. 04-4186 (3d. Cir. 2004).

numerous complaints of intimidation during Ohio 2004, did the Voting Section intervene? If no, why not?

Travel

Please provide Susana Lorenzo-Giguere current job title and describe her duties.

Q43. Are you aware of a complaint that was filed with the Office of Inspector General on or about September 20, 2007 concerning the travel to Cape Cod during the summers of 2006 and 2007 by Ms. Lorenzo-Giguere? Did you approve that travel? What is the status of that complaint?

Q44. Have you imposed any restraints on travel by staff members because of budgetary or any other concerns? How often and how many persons were denied travel requests because of budgetary concerns during your tenure?

Questions for Chief John Tanner submitted by Congressman Steve King
Oversight Hearing in the Subcommittee on the Constitution, Civil Rights, and Civil Liberties, October 30, 2007

1. Based on a review of your section's work, one might conclude that there is a plan to target any jurisdiction that enacts an ordinance pertaining to illegal immigration by bringing unrelated voting rights actions. Is this correct? If not, why not?

2. How do anti-illegal immigration ordinances have anything to do with voting? Illegal aliens are not allowed to vote are they?

3. What gives you the authority under the Voting Rights Act to target jurisdictions based solely on their decision to pass ordinances relating to illegal aliens that are designed to guard the integrity of American elections by insuring that only Americans are voting in American elections?

4. Have any such above mentioned ordinances in place to counter illegal immigration or the voting of illegal immigrants been found unconstitutional in a court of law?

5. Your Division has taken action against Farmers Branch, TX, Pima County AZ, Carpentersville, IL, Kane County, IL, Dallas County, TX, and Prince William County, VA, Please explain the action you have taken against each of these jurisdictions (whether the action was the filing of a suit, the deployment of election monitors, or any other action taken pursuant to the mission of the Civil Rights Division or the Voting Rights Section, specifically).
   a) Please provide the basis of your decision to investigate these jurisdictions, and include documentation.
   b) Provide the dates that the actions were taken.
   c) Did each of these jurisdictions have an ordinance pertaining to illegal aliens, specifically illegal aliens participating in elections? If so, when were those ordinances enacted?
   d) Did you officially acknowledge that these ordinances existed in your documentation? Did you maintain a list of jurisdictions with such ordinances? If so, please provide the list.

7. Provide the nature and source of complaints received by the Voting Rights Section that led to the investigation of these jurisdictions. Please provide documentation to prove the existence of these complaints, the dates of the receipt of these documents by your office, and whether each document was possessed by your office prior to your questioning before the House Judiciary Committee on October 30, 2007. Please indicate whether your office requested the documentation or whether the documentation was brought to you at the behest of an individual, a government, or an organization. Specify the source of the documentation.

8. In these areas that have passed the above mentioned anti-illegal alien voting ordinances, did you have any evidence or complaints from legal, registered voters relating to voting to substantiate that action was warranted by the Voting Rights Section? If yes, please provide documentation to show the substance of these complaints.

9. Do you initiate suits or take action against jurisdictions based solely on requests to do so by organizations, such as MALDEF[1] and LULAC[2]? Have you or others in your Section ever discussed specific ordinances pertaining to illegal aliens with MALDEF or LULAC ? If yes, who were the parties to these conversations and when did they take place? Which jurisdictions were discussed specifically?

10. Following any conversation you or others in the Section had with MALDEF or LULAC regarding ordinances to combat illegal voting or illegal immigration, did your Section issue letters to the enacting jurisdictions pertaining to Section 203 compliance? If yes, with which jurisdictions? Did you take other action against these jurisdictions, whether sending election monitors, initiating investigations, etc.? If yes, with which jurisdictions? How long after your conversations with the organizations did your section take issue letters, launch an investigation, contact the jurisdiction, or take any other action against the jurisdiction?

11. Has there ever been a single instance in which you have learned of a law to prevent illegal aliens from voting where you did NOT then take some form or action within the jurisdiction under 203, whether suing, sending monitors, etc., even though 203 – a law requiring that certain covered jurisdictions provide language assistance to those of limited English proficiency - is unrelated to the voting of illegal aliens, a wholly UN Constitutional practice? If so, name the jurisdiction, the ordinance, and the date of the enactment of the ordinance.

12. Was there or can you point to or name a single U.S. citizen or legally registered voter in Carpentersville, IL or Kane County, IL who contacted your office about voting issues or concerns before you launched an investigation in Kane County or Carpentersville, Illinois? Did you rely solely on complaints from special interest groups? If yes, which groups? Who were the individuals within those groups that sought you out to communicate the groups' concerns? Or did your office seek them out to learn of violations? What individual(s) in your Section made contact with the outside group(s) and on what date(s)?

13. Can you point to a single voter who contacted your office from Farmers Branch, Texas **about voting issues** before you launched an investigation or deployed with election monitors? Did you rely solely on complaints from interest groups? If yes, which groups? Did you discuss Farmers Branch voting issues with LULAC? Other organizations? Who were the individuals within those groups that sought you out to communicate the groups' concerns? Did you seek out the individuals within the groups that supplied information to you, or did they seek out your office? Please provide documentation to substantiate your responses and indicate the date of this documentation and whether you obtained the documentation before or after October 30, 2007.

14. What activities of the Minutemen patrolling the border in Pima County Arizona do you believe justified opening an investigation of Section 203 or sending election monitors? How could the activities of the Minutemen possibly be relevant to Section 203, the translation of the English language on a ballot?

15. Can you point to a single legally registered voter who contacted your office about voting issues in Prince William County, Virginia? Did you rely solely on complaints from interest groups? If yes, which groups? Did you discuss the issues raised in Prince William County with with LULAC or other organizations? Who were the individuals within those groups that sought you out to communicate the groups' concerns? Did you seek out the individuals within the groups that supplied information to you, or did they seek out your office? Please provide documentation to substantiate your responses and indicate the date of this documentation and whether you obtained the documentation before or after October 30, 2007.

16. Did you inform your superiors in the Civil Rights Division that you were personally attending a convention of the Council of Mexican Federations of North America (COFEM),[3] and that you allowed large numbers of your staff to take June 11 off and attend the rally and convention of COFEM's, an organization is dedicated to thwarting US immigration laws?

17. Have you sent letters demanding information pertaining to Section 203 from the jurisdictions that passed ordinances dealing with illegal aliens? Can you name a jurisdiction with such an ordinance to which you have not sent a letter demanding information pertaining to Section 203?

18. Is the VRA colorblind? Does the VRA favor the litigant based on the color of their skin?