Testimony of

J. Christian Adams

House Judiciary Committee
Subcommittee on the Constitution

"Voting Wrongs: Oversight of the Justice Department's Voting Rights Enforcement"

April 18, 2012

J. Christian Adams
Attorney
Election Law Center, PLLC
300 N. Washington Street
Suite 405
Alexandria, Virginia 22314
703-740-1762
adams@electionlawcenter.com

Chairman Franks, Ranking Member Nadler, and members of the Committee:

Thank you for the opportunity to testify in this important matter. Free and fair elections are the cornerstone of our constitutional republic. I served for five years as a career attorney in the Voting Section at the United States Department of Justice from 2005 through 2010. There, I investigated and brought a range of cases to protect minority rights under the anti-discrimination and minority language provisions of the Voting Rights Act, and also cases to enforce obligations under National Voter Registration Act/ Help America Vote Act. I was involved in preclearance submissions under Section 5 of the Voting Rights Act.

The Department of Justice has a long and admirable role in securing the right to vote free from racial discrimination. The laws enforced by the Voting Section are essential to ensure that all citizens have an equal opportunity to participate in the political process. I was proud to enforce those laws without regard to racial or political bias when I served at DOJ. Since leaving the Justice Department, I have continued to pursue cases and matters enforced by DOJ but with private rights of action.

Ahead of the November 2012 elections, I can report on encouraging developments regarding enforcement of federal election laws, as well as several discouraging ones. Many of these developments directly implicate the actions of

the Voting Section at the Department of Justice and the conduct of the November election. Below I discuss areas where the Department of Justice deserves some praise, but also where this Committee should conduct vigorous investigation.

Redistricting

One positive development is that redistricting after the 2010 Census appears to have gone better than in previous redistricting cycles. Apart from an ongoing case arising from redistricting in Texas, most state and Congressional redistricting plans in the sixteen states covered by Section 5 of the Voting Rights Act have been put in place for the 2012 election. The Justice Department deserves some credit for a speedy and smooth redistricting process.

It is worth noting, however, that some of the speed and smoothness this cycle is attributable to states wisely submitting their plans to the United States District Court for preclearance approval while simultaneously submitting plans to the Voting Section. This was a deliberate, and in hindsight, successful strategy by the states to militate against some of the most abusive prior practices of the Department of Justice. In the 1990 redistricting cycle, for example, the Justice Department was forced to pay out nearly two million dollars in court imposed sanctions for misconduct in the Section 5 redistricting process. For example, Voting Section lawyers were sanctioned $1,147,228 in *Hays v. State of Louisiana*

(936 F. Supp. 360, 369 (W.D. La. 1996)). In that case, a federal court imposed sanctions after finding that "the Justice Department impermissibly encouraged—nay, mandated—racial gerrymandering." The court noted that, in drawing the redistricting plans, the Louisiana legislature "succumbed to the illegitimate preclearance demands" of the Voting Section.

In another redistricting case from the 1990's, *Johnson v. Miller* (864 F. Supp. 1354, 1364 (S.D. Ga. 1994)), the sanctions against the Justice Department were smaller, only $594,000, but the court outlined egregious misconduct by DOJ Voting Section lawyers. In *Johnson*, the Voting Section fought to impose an illegal, "max-black" legislative redistricting plan on the state of Georgia. A federal court found that the DOJ had acted inappropriately with ACLU lawyers, noting the ACLU was "in constant contact with the DOJ line attorneys." Pronouncing the communications between the DOJ and the ACLU "disturbing," the court declared, "It is obvious from a review of the materials that [the ACLU attorneys'] relationship with the DOJ Voting Section was informal and familiar; the dynamics were that of peers working together, not of an advocate submitting proposals to higher authorities." After a Voting Section lawyer professed that she could not remember details about the relationship, the court found her "professed amnesia" to be "less than credible."

This history provides some explanation why states have decided after the 2010 Census to pursue redistricting preclearance in federal court as compared with the more traditional route of only filing an administrative preclearance with the Department of Justice. No sanctions whatsoever were imposed on the Voting Section after 2000, and so far, it appears that the 2010 redistricting process is operating smoothly and fairly, for the most part.

Voting Rights Act Section 2

There is a false perception that the Obama administration Voting Section has more vigorously protected minority voting rights than the Bush administration Voting Section.

The current Justice Department Voting Section is woefully lacking in enforcement of Section 2 of the Voting Rights Act. Section 2 of the Voting Rights Act is the broad prohibition on discrimination in elections, and frequently manifests as lawsuits against at-large electoral systems. Typically, the remedy sought in a Section 2 lawsuit is a single member district legislative plan which gives racial minorities the opportunity to elect candidates of their own choosing. While the Bush administration vigorously enforced Section 2, enforcement under the Obama administration has been essentially dormant. In fact, the current

administration has failed to initiate a single Section 2 investigation which resulted in an enforcement action since January 20, 2009.

The failure of the Justice Department to investigate then bring even a single Section 2 claim since 2009 must be viewed in the political and historical context of a few years ago. Loud critics of the Bush administration claimed that enforcement of Section 2 was lacking, when in truth was it was vigorous. Indeed, I (and the other lawyers working on the case with me) personally brought more Section 2 cases than the entire Obama administration has.

Consider Wade Henderson of the Leadership Conference on Civil Rights. On March 22, 2007, he complained to the House Judiciary Committee about the purported lack of Section 2 cases brought by the Bush administration, complaining: "the [Civil Rights] Division must deal with and respond to growing distrust among minority communities who feel increasingly abandoned and marginalized by the Division's litigation choices and priorities." When Henderson made this complaint, the Bush administration was in the process of litigating two Section 2 cases: *United States v. Osceola County, FL* (M.D. Fla 2005) and *United States v. Village of Port Chester, NY* (S.D.N.Y. 2006). In preparing this testimony, I could find no complaints to the media from Mr. Henderson about the fact the Obama administration has not brought a single Section 2 case since I filed *United States v. Town of Lake Park, FL* (S.D. Fla. 2009), when I was a lawyer at the DOJ

in March of 2009. The investigation of the *Lake Park* case was approved by the Bush administration. Thus, the Obama administration has not initiated then brought a single Section 2 lawsuit.

Wade Henderson is not the only former critic to fall silent. Stanford Law Professor Pam Karlan, someone who has testified before committees of this Congress, is another. In a 2009 Duke law journal article, Karlan stated "for five of the eight years of the Bush Administration, [they] brought no Voting Rights Act cases of its own except for one case protecting white voters."[1] Karlan's claim is demonstrably false.

The Bush administration filed Section 2 cases against Crockett County, Tennessee, in 2001 to protect black voters; in Berks County, Pennsylvania, in 2003, to protect Hispanics; in Osceola County, Florida, in 2005 to protect Hispanics; and, then a flurry of cases including: *United States v. City of Euclid, et al* (N.D. Ohio 2006), *United States v. Village of Port Chester, NY* (S.D.N.Y. 2006), *United States v. Georgetown County School District, et. al.* (D.S.C. 2008). In fact, if you include all Section 2 cases to protect national racial minorities, the Bush administration filed fourteen cases. Again, the Obama administration has filed exactly one, (*Lake Park*) a matter launched during the Bush administration.

[1] Pamela S. Karlan, "Lessons Learned: Voting Rights and the Bush Administration," 4 Duke J. Const. L. & Pub. Pol'y 17 (2009).

The current lack of results in enforcing Section 2 is all the worse because of the caustic criticism the Bush administration was forced to endure, despite a much more vigorous enforcement record. Worse, the caustic criticism continues. In December 2009, Assistant Attorney General Thomas Perez criticized the Bush administration Voting Section before the American Constitution Society: "Those who had been entrusted with the keys to the division treated it like a buffet line at the cafeteria, cherry-picking which laws to enforce."[2] The enforcement record two years removed from Perez's 2009 bravado at ACS paints a very embarrassing portrait of the Justice Department Voting Section.

In response to criticism for failing to enforce Section 2, the Department of Justice has recently adopted a curious new public position – that it is conducting a record number of Section 2 investigations. Assistant Attorney General Perez recently told the National Secretaries of State that the DOJ has opened "almost 100" Section 2 investigations. This is a public relations strategy without substance.

Here is what is actually happening. Soon after I and others criticized the DOJ for a lack of Section enforcement, the Voting Section launched the "almost 100" Section 2 investigations. The demographer at the Voting Section identified

[2] Cited in Serwer, The Battle for Voting Rights, *The American Prospect*, January 8, 2010. http://prospect.org/article/battle-voting-rights-0.

scores of American jurisdictions – counties and towns – with substantial minority populations based primarily on census data. No voters have complained from these newfound targets. Names from this target list have been parceled out to various Voting Section attorneys to take a preliminary glance to see if the matter might be worth pursuing. These inquiries almost never go beyond looking at the current make-up of the legislative body, and may not even involve an analysis under *Gingles* One.[3] That is, the "investigation" doesn't even reach the preliminary point of whether it is even possible to draw a minority-majority district. In an effort to puff the "investigative" numbers, these sweeping glances are assigned a "DJ" number, and thus become "investigations" for public relations purposes.

Had the Bush administration used such flimsy standards for characterizing an inquiry a "Section 2 investigation," they probably could have boasted of hundreds of Section 2 investigations. Indeed, I personally conducted at least 100 such preliminary inquiries, except that in many instances I actually drew maps for *Gingles* One purposes. The reality is that the "almost 100" Section 2 investigations currently being "conducted" by the Justice Department constitute little more than a public relations exercise designed to keep critics quiet about the absence of Section 2 enforcement.

[3] See, *Gingles v. Thornburg*, 478 U.S. 30 (1986).

Section 4(e) and Section 203 – Minority Language Protections

During the Bush administration, the DOJ Voting Section brought a record number of cases to enforce Sections 4(e) and 203 of the Voting Rights Act. As with Section 2, enforcement of minority language protections has collapsed during the Obama administration. Sections 4(e) and 203 ensure that Americans who cannot speak English are still able to participate fully in the electoral process. Section 4(e) protects any Americans who were educated in Puerto Rico under the American flag, but now live in the United States. Section 203 is a jurisdiction-wide obligation - once the jurisdiction reaches a numeric threshold based on Census data, ballots must be available in a foreign language.

The Bush administration brought 28 cases under Sections 203 and 4(e), and the Obama administration has, thus far, brought six.

There are two issues meriting further attention from this Committee. The first issue pertains to Section 203. 42 U.S.C. 1973aa vests power in the Census to certify if a jurisdiction has met the numeric threshold to be covered by Section 203. If a jurisdiction has more than five percent, or, 10,000 citizens "limited English proficient," then the jurisdiction is covered by Section 203 and must provide foreign language election materials jurisdiction-wide. The statute defines "limited English proficient" as "unable to speak or understand English adequately enough to participate in the electoral process."

Yet the Census Bureau counts any Census response as counting against the 10,000 or 5% threshold unless the respondent chooses the option: speaks English "very well." If, for example, the Census respondent choses "speaks English 'well,'" they are counted toward the 10,000 or 5% percent threshold. This practice is absurd. The final Census Bureau certification for jurisdictions which reach either the 10,000 or 5% threshold is barred from being challenged in court. Only Congress can fix this absurd outcome where citizens who profess to speak English "well" are still counted toward reaching the statutory threshold for Section 203 coverage. The law should be amended to require Section 203 coverage only where there is actually a need by amending the statute so that only a Census response saying English is "not spoken" count s against the Section 203 triggers.

Unlike Section 203, Section 4(e) has no numeric triggers to require foreign language ballots. Section 4(e) provides Spanish ballots for citizens of Puerto Rican heritage. Section 4(e) is structured to protect individual citizens, not to impose jurisdiction-wide mandates.

Nevertheless, the Justice Department has adopted an interpretation of Section 4(e) arguably beyond the language of the statute and limited case law. DOJ has demanded that entire counties adopt Spanish ballots under Section 4(e), even if they are not covered by Section 203. One of the few cases to protect language minorities brought by the Obama administration arguably exceeds the

statute's remedial authority. The case of *United States v. Lorain County, OH* (N.D. Ohio 2011), was one such case. Lorain had pockets of Spanish speaking Puerto Ricans, but not a county-wide need. Nor was Lorain covered by the broad county-wide obligations of Section 203. Nevertheless, the Voting Section demanded that Spanish language ballots be used across the entire county under Section 4(e). Facing DOJ pressure, Lorain County settled and adopted countywide Spanish elections in 2011.

Amending the Voting Rights Act to include more rational Census determinations for Section 203 coverage and clarity about 4(e) obligations would ensure Federal power and resources are used where a genuine need exists.

National Voting Registration Act Section 8

One of the most unfortunate circumstances relating to the 2012 elections is the absence of DOJ enforcement of Section 8 of the National Voter Registration Act. Voter rolls nationwide are filled with ineligible and dead voters. Yet the Department of Justice is deliberately refusing to enforce Section 8 and require states to purge rolls because of philosophical disagreement with the purging statute. Failure to enforce Section 8 to require states and localities to clean up voter rolls presents a troubling circumstance prior to the November 2012 elections.

Some counties in the United States have outrageous and implausible percentages of voting age citizens registered to vote. Consider just a few. Noxubee County, where widespread voter fraud was proven in the case I litigated of *United States v. Ike Brown*, has 113% of voting age citizens eligible to vote.[4] In the case, the United States presented evidence of in-person voter impersonation. But Noxubee isn't even the worst county in Mississippi. Ten counties have higher percentages than 113%, including Tunica where 2011 saw multiple voter fraud convictions, and Claiborne County, Mississippi, where 162% of eligible voting age population is on the rolls. Mississippi Secretary of State Delbert Hosemann has begged these counties to clean up their corrupted rolls, but Mississippi law provides him no statutory weaponry, except begging. The Justice Department has the power to step in and sue states and counties to clean up their rolls, but it deliberately refuses to act.

Unfortunately, the Justice Department has not brought a single case under Section 8 of the National Voter Registration Act. Indeed, when I was at the Voting Section, political appointees expressed open and outright hostility to enforcing Section 8. Former Voting Section Chief Christopher Coates testified under oath that he recommended eight Section 8 investigations into various states, but that the political appointees overseeing the Voting Section simply said the Obama

[4] *United States v. Ike Brown*, 494 F.Supp.2d 440 (S.D. Miss. 2007).

administration would not enforce Section 8 to require the removal of ineligible voters.[5] Coates also testified that political appointees announced to the entire Voting Section in November 2009 that the Obama administration would never enforce Section 8 to require states to purge ineligible voters. Coates' testimony was given under oath, and I can corroborate his account because I was also an eyewitness. Dozens of other eyewitnesses to these instructions exist.

With over 150 counties across the nation with more voters on the rolls than could possibly be eligible to vote, the outright refusal to enforce Section 8, a provision that was part of a carefully crafted compromise by Congress in 1993, threatens the integrity of the elections in November 2012. Thankfully, I have partnered with Judicial Watch to try to do what the Justice Department refuses to do – enforce Section 8 through the private right of action provisions. Though we don't have the resources of the Voting Section, we will endeavor to do what they should be doing this year.

Election Integrity Laws and Section 5 of the Voting Rights Act

The final concern ahead of the November election is the Justice Department's aggressive use of Section 5 of the Voting Rights Act to block election integrity measures. The first example of this was in 2009 when a Section

[5] The transcript of the testimony is at http://www.usccr.gov/NBPH/09-24-2010_NBPPhearing.pdf . The relevant sections are page 33, lines 16-25 through to and including page 37.

5 objection was entered to stop Georgia's law that required proof of United States citizenship to register to vote.

The DOJ initially claimed that Georgia failed to prove the absence of any discriminatory intent in requiring proof of United States citizenship. Thereafter, Georgia sued for approval in the United States District Court in the District of Columbia, and DOJ capitulated and precleared the law.

The quick capitulation to Georgia was because the DOJ has adopted an analytical framework for election integrity measures under Section 5 that I do not believe would survive transparent court analysis. State photo identification requirements also fall into this category.

In short, DOJ has adopted a *de minimis* standard in Section 5 reviews of election integrity laws. This means that unless states can prove an absolute absence of the slightest trace of disparate impact, then DOJ will object. For example, in the South Carolina voter ID law (which DOJ has objected to), 90% of African-Americans were shown to have photo ID, and 91.6% of whites. This *de minimis* difference of 1.6% was found to be enough to object to the law.

Exacerbating the *de minimis* standard was the DOJ's refusal to consider determinative the practical safe harbors contained in the statutes. For example, in South Carolina, the state would provide free rides to state offices to obtain a free

voter ID. The South Carolina law also allows anyone without photo ID to cast a ballot if they fill out an affidavit saying they have a "reasonable impediment" from getting the free photo ID, and swearing to their identity. Under the statute, their ballot must be counted unless local election officials can prove "the affidavit is false." Simply put, anyone who could not get a photo ID in South Carolina, (even those who could not afford to obtain a birth certificate) would be allowed to cast a vote after filling out the "reasonable impediment" affidavit.

I believe it is unlikely that the courts will permit such an unreasonable enforcement of Section 5 of the Voting Rights Act, especially involving measures designed to protect election integrity. If the courts do, however, then Congress must step in and examine whether Section 5 should be amended so the Department of Justice cannot, under these circumstances, use Section 5 to block implementation of state election laws designed to ensure election integrity.

A final note. None of the shortcomings of the Voting Section relate to a lack of resources. In fact, the prior administration did more, with less, including the 2000 redistricting cycle. What is lacking is not money, but a willingness to enforce all voting laws in an evenhanded and efficient fashion. This unwillingness is all the more troubling in the context of the caustic and wicked political attacks on the good work of Voting Section employees and political appointees during the Bush administration. Thank you for your time and attention.

Date: April 18, 2012

Respectfully submitted,

J. Christian Adams