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PROTECTING THE RIGHT TO VOTE: OVERSIGHT OF THE DEPARTMENT OF JUSTICE'S PREPARATIONS FOR THE 2008 GENERAL ELECTION

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED TENTH CONGRESS

SECOND SESSION

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PROTECTING THE RIGHT TO VOTE: OVERSIGHT OF THE DEPARTMENT OF JUSTICE'S PREPARATIONS FOR THE 2008 GENERAL ELECTION

TUESDAY, SEPTEMBER 9, 2008

UNITED STATES SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The Committee met, pursuant to notice, at 2:21 p.m., in room SD–562, Dirksen Senate Office Building, Hon. Ben Cardin, presiding.

Present: Senators Cardin, Whitehouse, Cornyn, and Coburn.

OPENING STATEMENT OF HON. BEN CARDIN, A U.S. SENATOR FROM THE STATE OF MARYLAND

Senator CARDIN. The Senate Judiciary Committee will come to order. First, let me thank Chairman Leahy for allowing me to chair's today hearing. I also want to thank Senator Kennedy and Senator Kennedy's staff for the work they did in helping us prepare for today's hearing. We certainly wish him a speedy recovery and look forward to Senator Kennedy's return shortly to the United States Senate.

Today the Judiciary Committee will receive testimony on the subject of "Protecting the Right to Vote: Oversight of the Department of Justice's Preparations for the 2008 General Election."

During the 2008 Presidential primary season, many States have witnessed record-breaking new voter registrations and voter turnout at the elections. I have particularly been encouraged to see so many young people becoming energized about the candidates in this election, which will help shape our Nation's future for many years to come.

That is going to present a challenge for our election system. We are going to have a lot of new first-time voters who are going to show up in November to vote. We are going to see record numbers, and if prior elections are any indication, we know that there are likely to be some problems as far as the voting equipment is concerned, the ballots, et cetera. And one of the questions for today's hearing is whether the Department of Justice is prepared to help to make sure that every eligible voter who wants to vote has the opportunity to cast his or her ballot on November the 4th.

Today's hearing will focus on to what extent the Department of Justice is prepared, or unprepared, for the new challenges we ex-

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pect to face in the 2008 elections. I must tell you that I am concerned as to how well prepared we are.

Over the past 2 years, this Committee has undertaken extensive investigations into the inappropriate role that politics has played in the Department of Justice. When it comes to the Civil Rights Division specifically, I am gravely concerned that the Division has lost its way from its historical mission to protect the civil rights of all Americans, particularly the most vulnerable among us.

The Civil Rights Division, in particular, has suffered terrible stains on its reputation under the Bush Administration, in particular during the tenure of former Attorney General Alberto Gonzales. It has had a very poor record of filing disparate impact cases and pattern and practice cases, and it has not made it a priority to file cases to protect African-Americans from discrimination. The Civil Rights Division failed to authorize a single case alleging discrimination in voting on behalf of African-American voters between 2001 and 2006. In particular, I have been concerned that the Justice Department has been reluctant to file Section 2 Voting Rights Act cases alleging minority vote dilution.

I am disturbed that the Civil Rights Division has also let partisan politics influence its personnel and litigation decisions, including the preclearance of Georgia's restrictive voter identification law in 2005—which overruled and was contrary to the recommendations of career staff.

I look forward to hearing from today's witnesses from the Department of Justice as to what steps they are going to take before the elections to ensure that all eligible votes are counted and that voters are not disenfranchised.

I want to again ask the Justice Department if they have the tools necessary to combat deceptive practices in the upcoming election. One of the concerns is that we have laws on the books, we have tools available. Are they adequate? We have seen practices in the 2004 and 2006 elections in which misleading information was distributed. We have seen flyers that tell people that if they have outstanding parking tickets, they are in jeopardy of being arrested. We have seen the wrong election date handed out. We have seen information that has been deceptive as to endorsements, and they have been handed out in minority communities in an effort to try to diminish the importance of minority voters in a given election. That goes well beyond what is acceptable in American politics, and I know the elections are difficult circumstances, and we have got to be prepared to defend our records. But there are steps that you cannot go beyond, and I think in American politics we have seen in the last couple of election cycles that that has happened.

My question for the Department of Justice: Are they prepared to make sure that efforts to diminish minority voters in the 2008 election will not be tolerated? And do they have enough tools to deal with it? We have legislation that has been approved by this Committee, that has been approved by the House of Representatives, and I am disappointed that we have not been able to get that legislation enacted. I think the Department of Justice could help us a great deal by working out the last remaining details. If those tools are needed, let us get it done. Let us work together to give you all the tools you need so there is a clear message to the American pub-

lic that in 2008 we are going to do everything in our power to make sure that the intent of the Civil Rights Acts, that the intent of the action taken over the last hundred-and-some years to protect all voters in this country will be aggressively pursued by the Department of Justice.

I look forward to hearing from all the witnesses, including our second panel of witnesses, who I think will give us some additional information to make sure that we are properly prepared for the November elections.

And, with that, I would recognize my colleague, Senator Coburn.

Senator COBURN. I will defer an opening statement.

Senator CARDIN. With that, we will go immediately to our panel of witnesses. May I ask our first panel if they would please stand first to be sworn.

Do you affirm that the testimony you are about to give before the Committee will be the truth, the whole truth, and nothing but the truth, so help you God?

Ms. BECKER. I do.

Ms. SABIN. I do.

Senator CARDIN. Our first panel consists of Grace Chung Becker, who currently serves as the Acting Assistant Attorney General in the Civil Rights Division in the Department of Justice. She supervises approximately 650 to 700 employees and ten litigating sections. Ms. Becker previously served as the Deputy Assistant Attorney General in the Division from March 2006 through December 2007. She has also worked as counsel to the Senate Judiciary Committee for Senator Hatch.

Barry Sabin presently serves as the Deputy Assistant Attorney General in the Criminal Division of the Justice Department. Mr. Sabin started in that position in January of 2006 and is responsible for overseeing the Fraud Section, Criminal Appellate Section, Gang Squad, and Capital Case Unit. A Federal prosecutor since 1990, Mr. Sabin served as chief of the Criminal Division's Counter terrorism Section from 2002 until 2006.

We will be glad to hear from you. Your entire statements will be made part of our record, without objection.

STATEMENT OF GRACE CHUNG BECKER, ACTING ASSISTANT ATTORNEY GENERAL, CIVIL RIGHTS DIVISION, U.S. DEPARTMENT OF JUSTICE, WASHINGTON, D.C.

Ms. BECKER. Good afternoon, Chairman Cardin, Senator Coburn, members of the Judiciary Committee. It is an honor to appear today to talk to you about what the Civil Rights Division is doing to prepare for the 2008 election.

As Senator Cardin noted, this is an unprecedented election year. We know that record numbers of voters are registering across the Nation and record numbers are expected on November 4th.

These exciting developments present challenges to States—which have primary responsibility for administering elections—and the Justice Department is doing its part in actively training Federal personnel, reaching out to State and local governments and dozens of civil rights organizations and continuing its enforcement of Federal voting laws in this election season.

I am fortunate to have a tremendously talented and hard-working team of approximately 80 attorneys and non-attorneys in the Voting Section, and I am proud of their accomplishments.

Since 2006, we have filed seven cases under Section 2 of the Voting Rights Act involving vote dilution and voting discrimination. In addition, I have an approved an eighth case under Section 2 on behalf of African-American voters that has not yet been filed.

Our lawsuits have made a difference. In Euclid, Ohio, the first African-American was elected to the city council in March. In Osceola, Florida, the first Latino was elected to the school board just a couple of weeks ago. And in November, voters in Georgetown County, South Carolina, will have the opportunity to elect school board members based upon relief we obtained in creating three majority African-American districts. In addition, we continue our record-high number of lawsuits under the language minority provisions and voter assistance provisions of the Voting Rights Act and the Help America Vote Act.

The Division has also worked to ensure that States meet their obligations to provide voter registration opportunities at public assistance agencies, as required by Section 7 of the National Voter Registration Act. We filed lawsuits in Tennessee and New York, settled a case in Arizona; and based upon our investigations in Nebraska and Iowa, we were able to obtain voluntary compliance in the form of new State legislation.

The NVRA also ensures that new voters can vote on election day when an applicant submits a valid voter registration application that is received or postmarked by 30 days before a Federal election or by the State law deadline, whichever is less. It also prohibits States from removing ineligible voters from the voter list within 90 days of a Federal election. Five of the eight cases that we have filed under Section 8 include allegations that defendants either failed to add properly registered voters or improperly removed eligible voters.

As you know, the Supreme Court held that Indiana's voter identification law is constitutional on its face. It is important to emphasize that the Court also held that individuals are allowed to file suit if a voter ID law is applied to them in an unconstitutional manner.

In addition, the Civil Rights Division can take action if an ID law or any voting law is enforced in a discriminatory manner. For example, this summer, we filed and favorably resolved a Section 2 case in Penns Grove, New Jersey. The lawsuit included allegations that Hispanic voters were being required to show more identification than white voters, and this is in a State that does not have a voter ID law.

I emphasized these points during my recent discussion with State and local officials. And with so many of our men and women in uniform now overseas, the Voting Section is also working hard to protect the franchise for service members and their families. Last month, I joined the Department of Defense in sending letters to all 50 States emphasizing the need to provide at least 45 days for absentee ballots to be mailed and returned. We will continue to work with the States and, if necessary, file lawsuits to ensure that

soldiers, sailors, airmen, marines, and other overseas citizens are afforded a full opportunity to participate in Federal elections.

And, lastly, the Division's election monitoring program is among the most effective means of ensuring that Federal voting rights are respected on election day. So far during calendar year 2008 we have sent 364 Federal observers and 148 Department personnel to monitor 47 elections in 43 jurisdictions in 17 States.

On November 4th, we will coordinate the deployment of hundreds of Federal Government employees in counties, cities, and towns across this country. The Department will have a toll-free hotline with interpretations services, fax number, and Internet-based mechanisms for reporting problems.

Thank you very much, and I will turn it over to Mr. Barry Sabin.

[The prepared statement of Ms. Becker appears as a submission for the record.]

Senator CARDIN. Mr. Sabin.

STATEMENT OF BARRY SABIN, DEPUTY ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, U.S. DEPARTMENT OF JUSTICE, WASHINGTON, D.C.

Ms. SABIN. Good afternoon, Chairman Cardin, members of the Judiciary Committee. I appreciate the opportunity to appear before you today to discuss the Criminal Division's efforts to enforce Federal laws relating to the corruption of the franchise and attendant criminal violations.

As you are aware, the Justice Department has met on a number of occasions this year with members of this Committee's staff to discuss the Department's established policies regarding pre-election criminal investigative activities and other issues of interest to the Committee. Additionally, on June 6th of 2008, Criminal Division and Civil Rights Division representatives provided a briefing to the United States Commission on Civil Rights. In these forums, the Justice Department outlined the roles of the respective Divisions in the enforcement of Federal laws that are designed to make voting accessible and cheating more difficult. The Department remains committed, in both words and action, to ensuring that we effectively implement these responsibilities not only during this election year but for future elections as well.

Dating back to the creation of the Public Integrity Section in 1976, the Criminal Division has been responsible for supervising election crime investigations and prosecutions initiated in United States Attorneys' Offices throughout the country. In 1980, an Election Crimes Branch was created within the Public Integrity Section to oversee the handling of these cases.

While Public Integrity attorneys on occasion prosecute election crime cases, most of these cases are prosecuted by Assistant United States Attorneys in U.S. Attorneys' Offices across the Nation.

From an operational perspective, the Criminal Division's oversight of election crime matters is designed to ensure that the Department's nationwide effort to combat election fraud and campaign financing crimes is consistent, impartial, and effective. Although the Public Integrity Section does not have formal veto authority over the investigation and prosecution of Federal election crimes, U.S. Attorneys' Offices are required to consult with the

Public Integrity Section before taking certain actions. With respect to election fraud matters, such as vote buying and ballot box stuffing, a U.S. Attorney's Office must consult with the section before commencing a grand jury investigation, requesting that the FBI conduct a full-field FBI investigation, or bringing criminal charges. Such consultation is also required before subpoenaing election materials in the possession of State and local election officials and other actions prior to an election. Additionally, the Criminal Division has provided written guidance to U.S. Attorney's Offices on the applicable laws and investigative strategies governing this sort of crime.

On a frequent basis, these Criminal Division attorneys closely coordinate with their counterparts in the Civil Rights Division, particularly that Division's Voting and Criminal Sections. This inter-Division consultation assists in the effective enforcement of both election crime and voting rights matters.

In October of 2002, the Attorney General announced the establishment of a Department-wide Ballot Access and Voting Integrity Initiative to spearhead the Department's increased efforts to protect voting rights and to combat election fraud. The initiative expands on the Department's longstanding District Election Officer Program, which requires each United States Attorney's Office to designate at least one Assistant United States Attorney to handle the investigation and prosecution of election crimes and to serve as a liaison with the Civil Rights Division on ballot access issues within its District. In 2006, the FBI established a similar program, which requires that each of its 56 Field Divisions designate a special agent to serve as Election Crime Coordinator.

Another critical feature of this initiative requires that the Criminal Division, jointly with the Civil Rights Division, organize and present annually a Ballot Access and Voting Integrity Symposium, which is an intensive annual training event.

Since the initiative was announced, a total of seven such national training events have been held, the most recent of which took place on July 1st and 2nd of this year. The Attorney General personally addressed the prosecutors and agents and discussed the importance of both protecting the voting rights of all Americans and safeguarding the electoral process. In a March 5, 2008, memorandum to all Department employees, the Attorney General had emphasized that politics should play no role in the in the investigation or prosecution of election crimes.

A final critical feature of the initiative requires each United States Attorney's Office and each FBI Field Division to establish and maintain a close liaison with State law enforcement and election administrators concerning ballot access and election integrity complaints.

The Criminal Division and the Justice Department's criminal prosecutors in the United States Attorney's Offices complement the work of the Civil Rights Division in election matters. The Civil Rights Division is responsible for protecting the right to vote, while the Criminal Division's Public Integrity Section and other Department prosecutors throughout the country seek to protect the value of each person's vote by criminally prosecuting those who corrupt the elections.

I thank you for the opportunity to provide the Committee with information about the Criminal Division's role in combating election fraud. I welcome your questions.

[The prepared statement of Mr. Sabin appears as a submission for the record.]

Senator CARDIN. First, let me thank you both for your appearance and your testimony. It was certainly very strong testimony about the integrity of the election system and actions you plan to take, including criminal actions, and the steps you have taken before the elections to make clear your ability to help.

I want to talk specifically about some activities that took place in the last two election cycles which have been documented and then ask you questions as to whether you believe you have adequate laws to take action against those types of activities, what steps you have taken to preempt those activities in this election cycle, and whether you are prepared to take investigative actions if it occurs in 2008.

The type of activities I am referring to, is misleading and fraudulent information that was given out in an effort to diminish minority participation or voting in the 2004 and 2006 election cycles. There was literature that was targeted to minority communities that gave the wrong date of election. There was information distributed in both Pennsylvania and Ohio that said, because of large turnout, Republicans should vote on Tuesday and Democrats should vote on Wednesday.

There was information handed out in California to immigrant communities warning them—these are newly registered voters, targeted to the Latino population—warning them that voting in the Federal election is a crime that can result in incarceration and possible deportation for voting without the right to do so.

There was information handed out giving the wrong voter date in my own State of Maryland.

In Wisconsin, there was information targeted that states that you can only vote once a year. If you have been found guilty of anything, even a traffic ticket, you cannot vote in a Presidential election; if you do, violating these laws, you can get 10 years in prison and your children will be taken away from you—again, targeted to minority communities.

My question to you: Do you have adequate tools to combat that type of action aimed at diminishing the minority vote in our country? Do you believe that you have adequate tools? And have you taken steps to make it clear that such activity will be pursued to try to discourage candidates from using those types of tactics? And are you prepared to initiate investigations if, in fact, you see that type of activity in the 2008 elections?

Mr. SABIN. With respect to the criminal enforcement of the laws, the Department has provided a views letter on the Deceptive Practices Act, some of which you referred to in your question, specifically back in October of 2007. I believe we share common ground with the premise of your question with respect to the goal of the bill and the goal of those kinds of activities, that we would seek to address certain election-related deceptive conduct; and where Federal statutes do not presently exist, to address that, seek to

specifically support additional legislation in order to bridge any gaps.

Specifically, under the voter suppression types of activities, the Department of Justice has clearly articulated in the seventh edition of the guidance that has been provided to prosecutors throughout the country that it is a Department of Justice priority that we will aggressively prosecute these types of matters and that, where appropriate, cases will be brought. In terms of voter suppression, we have used Title 18, United States Code Section 241, to pursue that kind of activity, although in terms of the voter suppression and deceptive conduct, that is arguably not within the parameters—or at least critics have argued that, and therefore, the additional legislation as proposed and referenced in your question would seek to make that explicit by Congress rather than the Department's position and as articulated in our views letter.

Hopefully that is responsive to your question.

Senator CARDIN. I think I can interpret it. But September is going to be a long month around here. We could get a lot of work done if we could really get your help on this legislation. We are prepared to make reasonable compromises if you need strong laws. We think it is covered under existing laws, but as you know, Senator Obama has introduced a bill to strengthen that, and it passed our Committee. It has not been taken up on the floor yet. If there are changes that you need, let us sit down and talk about it. But what we are trying to do—and I am not trying to make this partisan in the least, because it could well be we are dealing with minority voters in Alaska where they tell the Democrats to vote on Tuesday and Republicans to vote on Wednesday. I think it is already illegal. If it is not illegal, let us make it illegal and let us make sure that you will investigate and prosecute any efforts to do that.

Mr. SABIN. To be clear, we share that common ground in terms of working together to address what needs to be addressed so that Congress provides the Justice Department with the ability to enforce violations of Federal criminal law.

Obviously, when you pursue matters that relate to campaign rhetoric and other kinds of campaign tactics, that goes into First Amendment territory.

Senator CARDIN. We are in agreement on that.

Mr. SABIN. Your point—and I think the Justice Department shares that view—is that we could work together to address whatever specifics need to be addressed.

Senator CARDIN. I think the examples I gave are all examples that are not protected under the First Amendment when you give the wrong date of election targeted to minority communities or try to intimidate people with telling them they do not have the right to vote when they do.

Let me cover one other circumstance, and that is, we have seen in States where in minority communities there has been an inadequate amount of ballots available, inadequately trained judges, which caused much longer lines in minority communities than in other voting places in the same State.

Do you need additional tools in order to deal with this? What can be done at the national level to make sure that all of our voters

have the ability, equal ability, to cast a ballot? I could show you that in minority communities in my own State in the last election, they had to wait three, four, five times as long to vote, and there was no reason for it other than they did not have the voting machines or ballots available, and it seemed to be only in the minority communities.

Ms. BECKER. Senator, that is a very important issue. That is obviously something that we are concerned about in the Civil Rights Division as well. I know that there is a witness on the second panel that will be describing one of these examples here for you today, and I want you to know that we share your concern, that we have an open investigation. And right now we are not seeking any additional tools. We believe we can take appropriate law enforcement action where necessary to combat this type of behavior. But I do very much appreciate that offer and reserve the opportunity to maybe take you up on it in the future, if necessary.

Senator CARDIN. Thank you.

Senator Cornyn.

Senator CORNYN. Thank you very much, Mr. Chairman. I would be glad to defer to Dr. Coburn, who actually was here before I was, so please go ahead.

Senator COBURN. No. Go ahead.

Senator CORNYN. Well, rather than get in a stand-off about who is going to go first, I will go ahead and go first.

Senator COBURN. Oklahomans usually defer to Texans—except on the football field.

Senator CORNYN. On behalf of Senator Specter, I would like to ask for unanimous consent to make a part of the record a number of letters in support of Grace Chung Becker for head of the Civil Rights Division.

Senator CARDIN. Without objection, they will be made part of the record.

Senator CORNYN. Thank you very much.

Mr. Chairman, I appreciate your convening this hearing today and Senator Leahy for scheduling it because we all recognize that the right to vote is one of our most cherished civil rights. That right to vote, like all rights, is safeguarded by our men and women in uniform, and I was glad to hear Ms. Becker allude to efforts they are making in that area, which I want to talk about a little bit more. But, obviously, far too often these very same men and women who wear the uniform of the United States of America and who are fighting and sacrificing in some cases everything to protect our civil rights are themselves unable to exercise their right to vote. Because they do much to protect our rights, I think that justice demands that we do everything in our power to protect theirs.

Through legislation such as the Uniformed and Overseas Citizens Absentee Voting Act and the Help America Vote Act, Congress has attempted to establish a framework through which the Department of Defense and the Department of Justice can safeguard the voting rights of our men and women in uniform. But let me be clear about this. That framework has failed. It is broken and it does not work.

Specifically, the Department of Defense has failed to adequately educate enlisted men and women about how to vote, and it has

failed to take adequate steps to ensure, when enlisted men and women do vote, that their votes are actually counted. The Department of Defense has a legal duty to educate and assist our service members in voting, and the evidence shows that the Department of Defense has failed in that duty.

The Department of Defense's current system of relying on voting assistance officers to educate enlisted men and women about how to vote has failed as well. The Department of Defense Inspector General report, 2006 Evaluation of the Federal Voting Assistance Program in the DOD, noted that only 59 percent of surveyed military service members knew where to obtain voting information on base, and only 40 percent had received voting information or assistance by a voting assistance officer.

DOD regulations require DOD voting assistance officers to hand-deliver Federal postcard applications to all eligible military service members by January 15 each year. But the IG report indicates that only 33 percent of service members are familiar—are even familiar much less having been handed the card—with the Federal postcard application. According to the United States Election Assistance Commission, only 16.5 percent-–16.5 percent—of 6 million eligible military and overseas voters requested an absentee ballot for the November 2006 election. Of the overseas troops who did ask for mail-in ballots, only 47.6 percent, less than half, had their completed ballot actually arrive at their local election office, and many of those arrived after the statutory deadline because of delays in transmission, resulting in them being rejected and, thus, not being counted at all.

I believe that in 2006 only 5.5 percent of the eligible military and civilian voters overseas had their vote count—5.5 percent. I hope the panel would agree with me that that is an outrage that cries out for a remedy, and I hope you will help us work to remedy that abominable statistic.

I have introduced a bill called the Military Voting Protection Act to expedite delivery and electronically track service members' ballots. This would improve the infrastructure for protecting our troops' right to vote. The legislative framework is only as effective, as you know, as the executive branch's will to enforce it.

That is why last month I sent a letter to the Attorney General, co-signed by 12 of my Senate colleagues and 22 of my House colleagues, requesting that the Department of Justice investigate whether the DOD's Voting Assistance Program was fulfilling its legal responsibilities to protect service members' right to vote or whether service members deployed around the world were being effectively disenfranchised.

I consider this to be a very important civil rights issue, and I am glad to have the acting head of the Division, Ms. Becker, here testifying today. And I am also looking forward to hearing the testimony on the second panel of Bryan O'Leary, a former voting assistance officer in the United States Marine Corps and hearing about his firsthand experiences with how the law is actually being implemented—or how it is not being implemented, apparently, to me.

I hope that today's hearing will demonstrate the need and certainly the universal conviction on the part of all Members of Congress to see that the laws it passes are actually enforced by the ex-

ecutive branch and properly administered by the appropriate agencies.

Mr. Chairman, I guess I have a minute and 24 seconds. Let me just ask Ms. Becker a question.

Ms. Becker, is this something that alarms you as much as it does me, these statistics?

Ms. BECKER. It does, Senator Cornyn. I share your concern as somebody who has worked at the Pentagon as a civilian for the United States Army in Manpower and Reserve Affairs and in the Department of Defense in the General Counsel's Office. I have seen firsthand the sacrifices that men and women and their families make in order to serve their country, to preserve our rights here at home. And certainly if there is anything that we can do in the Civil Rights Division to vigorously enforce UOCAVA in order to preserve their voting rights while they are abroad, we certainly are committed to doing so, Senator.

I did read the letter that you sent to the Attorney General, and I thought it raised some very, very important issues that are of concern to us. Many of the issues that you raise involving educating the military are assigned to the Department of Defense, as you know, for their—it is their responsibility. What we do in the Justice Department is to sue States to ensure they are giving adequate time to send absentee ballots and to have these absentee ballots returned. So that is the limited role that the Justice Department plays in this regard.

Senator CORNYN. Let me ask you this, Ms. Becker. Are you saying that the Justice Department has no responsibility to see that an agency of the United States Government—the Department of Defense—has a program in place to make sure that ballots are actually returned on a timely basis so that the votes actually count? Is that part of the Department of Justice's responsibility or not?

Ms. BECKER. Well, we do not have the authority to investigate and sue the Department of Defense, as you may imagine. But what I did do—because I think this is a very important issue, Senator Cornyn—is that I referred it to the Department of Defense Inspector General's Office, because I think this is an important issue that needs to be brought to their attention. They have looked at this issue in the past, as you have noted in your statement, and I think that the issues that you raise in your letter are things that are going to be of great interest to them.

Senator CORNYN. Well, Ms. Becker, my time is about up, but let me just make clear my commitment, and I guarantee that Congress on a bipartisan basis will pursue this. So I do not want any ping-pong played between the Department of Defense and the Department of Justice. And I also want to make sure that if you lack any authorities which Congress is able to confer upon you, that you tell us, and that you tell us what tools that the Department of Justice—who has the primary responsibility to make sure that civil rights laws are enforced—what you need in order to make sure that our service members' votes count. Will you do that for me?

Ms. BECKER. I will, and I appreciate that. Thank you very much, Senator.

Senator CORNYN. Thank you.

Senator CARDIN. Senator Whitehouse.

Senator WHITEHOUSE. Thank you, Mr. Chairman, and thank you for chairing this hearing. I know this is a subject that is near and dear to you after your experience in the last election, and I appreciate your constant attention to it during the time that we have served together.

Mr. Sabin, we have endured a very unfortunate experience within the Department of Justice in the last several years. The two examples of many that stand out are the former United States Attorney David Iglesias, under intense political pressure to bring pre-election voter fraud cases, took a look at those cases with the career folks in his office and the investigators that were assigned to it, and they decided those cases could not be made. And the response from the Department of Justice at the highest levels at that point was not to back this U.S. Attorney who had made that call but, rather, to yield to the political pressure and fire him. And he was, in fact, fired.

Not too much after that, another fired United States Attorney was replaced by a gentleman named Bradley Schlozman, whose name you are probably familiar with, who undertook to bring pre-election cases that his predecessor had found to be without merit in the days literally before an election.

This is an area of law that for many years was guided by manuals that gave the guidelines for these prosecutions, and my colleague from California, Dianne Feinstein, has done wonderful work in comparing the 1995 manual, which was in operation, with the 2000 manual that came out thereafter, and there were some very, very significant differences. And what it looks to an average person like me as is that the conduct of the Department at the time was in plain violation of its own manual, in addition to being wrong. When the conflict between the manual and the handling of those cases became apparent, to solve the problem they changed the manual. And the differences—do you want to hold them up?—are summarized in a variety of different ways.

In the 1995 edition, it says, "The Justice Department must refrain from any conduct which has the possibility of affecting the election itself." Obviously, Mr. Schlozman's purpose was exactly to affect the election itself. That was changed in the 2007 edition to the milder "Overt criminal investigation measures should not ordinarily be taken in matters involving alleged fraud." I do not think that really addresses the purpose at all.

The second difference in the 1995 edition, it says, "Federal prosecutors and investigators should be extremely careful to not conduct overt investigations during the pre-election period or while the election is underway." That provision was removed.

Another provision said, "Most, if not all, investigation of an alleged election crime must await the end of the election to which the allegation relates." Again, that provision was removed.

"It should also be kept in mind," said another provision of the manual, "that any investigation undertaken during the final stages of a political contest may cause the investigation itself to become a campaign issue." That was whittled down to "Starting a public criminal investigation before the election runs the risk of interjecting the investigation itself as an issue."

And, finally, the position of the Justice Department had been that the Justice Department generally does not favor prosecution of isolated fraudulent voting transactions based in part on constitutional issues that arise when Federal jurisdiction is asserted." That, too, was removed.

Do you know if there is any effort to restore any of those provisions to the manual or will those removals hold?

Mr. SABIN. I appreciate the question. Let me try and give you a candid answer with respect to the issues you raise.

First, the Department of Justice and Attorney General Mukasey on March 5th of 2008 issued a memorandum setting forth clearly and unequivocally that politics must play no role in the decisions of Federal investigators or prosecutors regarding any investigation or criminal charges. The memo goes on to further discuss and set that context whereby we are sensitive to and mindful of the power of criminal prosecutions and the impact it has upon or could have on November's elections.

I am not going to comment upon the two specific U.S. Attorney examples that you referred to, but let me talk to you regarding the changes or the demonstrative aid that you have regarding the sixth edition and the seventh edition of the guidance that was prepared by the Public Integrity Section on behalf of the Criminal Division and distributed throughout the Justice Department. It was prepared by career prosecutors: the head of the Election Crimes Branch, a 38-year veteran as director of that component, and another prosecutor with over three decades of experience. It was not meant or intended in any way to have a political or partisan purpose with respect to those modifications.

The Justice Department has articulated and responded to, as you referred to, Senator Feinstein's concerns regarding the language in the sixth edition versus the seventh edition of that guidance.

In a letter dated February 1st of this year, we walked through in exacting detail each of the concerns that are raised here today and were articulated previously by Senator Feinstein explaining the nature of the changes and the reason why the Justice Department made the changes.

Let it be clear that there has been no change in Department of Justice policy regarding the non-interference relating to election matters on election crime investigations or prosecutions, either in the 1995 edition or the 2007 edition. The Department of Justice policy has remained the same. The changes were made because 12 years had elapsed. There had been new case law. There had been additional lessons learned and experience derived from prosecutors, both in Washington and around the country. And as a result of those new laws and those additional experiences, this career-prepared document and guidance was distributed throughout the country.

So, at present, in direct answer to your question, there is no—

Senator WHITEHOUSE. You feel there is no need to restore the language from the 1995 manual that—

Mr. SABIN. Well, let us go through some of the different points—no, there is not.

Senator WHITEHOUSE [CONTINUING].—Requires, for instance, Federal prosecutors and investigations to be extremely careful to not conduct overt investigations during the pre-election period.

Mr. SABIN. And that remains our policy. Let's walk through specifically what that means in terms of the non-interference policy, so that regarding the votes that are cast or counted for a particular election fraud or election crime matter, there will be a heed and an adherence to those core principles, which I think we share common ground on, namely, that the concerns that an overt criminal enforcement action could have on chilling legitimate voting; that overt criminal activity could interfere with the administration of the elections by State and local officials; and that you could transform a criminal investigation into a campaign issue, for example, by appearing to legitimize unsubstantiated allegations.

So those core concerns I believe are present in the 1995 edition and are present in the 2007 edition.

Senator WHITEHOUSE. My time has expired, and I am not trespassing on my colleague's courtesy. So if you could follow up with a question for the record as to where those are in the 2007 manual, and I will end my questioning at this point because my time has expired.

Mr. SABIN. Again, we specifically addressed that in the February letter, but we would be happy to do it further in questions for the record that you or your staff provides to us.

Senator WHITEHOUSE. I would appreciate it.

Mr. SABIN. Yes, sir.

Senator CARDIN. Senator Coburn.

Senator COBURN. Well, let me, first of all, thank both of you for your service and your attendance here today, and I would apologize on behalf of myself for the tardiness with which you received your hearing and the tardiness with which we have failed to act on your nomination. So you have my apologies.

I want to follow up a little bit on the line that Senator Cornyn raised. If, in fact, the Department of Defense is denying a civil right to a soldier outside of this country by not delivering in a timely way either the cards for notification so they can seek a ballot or the delivery of a ballot when it is cast in a timely manner, why is it that you lack authority to file a case against the Department of Defense? You would not lack that authority against any other branch of the Federal Government. Why would you lack authority in filing that against the Department of Defense?

Ms. BECKER. Thank you, Senator Coburn, and I appreciate your comments in the introduction.

This is an issue that I believe would be primarily handled by the DOD Inspector General's Office. If it appears that there is a public integrity issue that is going on there, that may be something that may be referred to other components of the Department of Justice. But at the first instance, an allegation of this nature should be handled by the DOD Inspector General's Office. We have referred the matter to them in the first instance to take appropriate action. If there is additional action to be taken where they think that somebody has been—an employee of the Department of Defense has done some wrongdoing and they make additional referrals to

the Justice Department, that would be something we would have to take on a case-by-case basis, Senator Coburn.

I can tell you that situation has not arisen, so it would be one that I would want to give some further thought to if something like that were to arise.

Senator COBURN. Well, the problem I have with that is just by sheer incompetence, one in 20 people who chose to vote did not have their votes counted. And if that is not a denial of their civil rights, I do not know what is. You have 19 out of 20 military personnel who actually cast a ballot, and the ballot did not count because of the incompetence or malfeasance of the Defense Department.

Now, to me, that is a direct—no matter what your motivation is, the fact is that if you are denying a civil right to a soldier who is defending our rights, why is it that we do not have the right to hold the Defense Department accountable through the Justice Department for their own civil rights?

Ms. BECKER. I think the Department of Defense can be held accountable. There is an Inspector General at the Department of Defense that can hold their employees accountable. Again, if there is additional action to be taken, that will have to be handled on a case-by-case basis to determine if there is jurisdiction for whether it is the Civil Rights Division or another component of the Justice Department to take any appropriate action if there is malfeasance by DOD employees or something of that nature.

But, again, in the first instance, Senator, I share your concern on this very important issue. I think it is very important for all of us to be doing everything that we can to ensure that service members have the right to vote in this very important election. And if they are not getting the information that they need, that is something that is of concern to all of us.

Senator COBURN. Well, let me rephrase the question again. Let us say that only minority voters in the military voters, they had one in 20 ballots cast, but if you were a non-minority military outside of this country, you had 19 out of 20 cast. Would that then qualify as a civil rights violation of the minorities in the military?

Ms. BECKER. Again, this would be something that would be of concern to us in the Civil Rights Division. We would have to look at the totality of the facts and the circumstances to make an assessment of that. It would be difficult for me in a hypothetical setting to opine one way or the other.

Senator COBURN. Okay. Well, I am not going to get where I wanted to go. To me, I think it is an absolute embarrassment to us as a Nation to have 6 million military and civilian—combined military and civilian people throughout this country, spread around the world, spread around our country, who desire to vote, who actively, in spite of the lack of effort on the part of the Defense Department, got a card and got a ballot and their ballot did not count. I think we should be embarrassed. I think we as Congress should be embarrassed that we have not fixed that, that we have not held the Defense Department accountable. I think the Department of Defense should be embarrassed. But more importantly is—voting rights is for everyone, no matter where you serve, no matter what your color, no matter what your viewpoint, is the one thing that

makes us solid, keeps us solid is the right to have your vote counted. And I am extremely disappointed that we have not effectively solved this problem. And I do not have great hope that it is going to get solved this time. I have great trepidation that, in fact, 5 percent, again, are not-5 percent out of the ones that do finally cast a ballot will get their ballots delivered on time and actually be able to participate in our electoral process.

Ms. BECKER. Well, Senator, I can give you my commitment that if there is an appropriate role for the Civil Rights Division to play in this regard, you have my commitment that we will do everything we can to ensure that the men and women in uniform get their right to vote protected.

Senator COBURN. Thank you.

I yield back.

Senator CARDIN. I want to concur with Senator Coburn's comments and Senator Cornyn's comments. We want to make sure that everyone's votes are counted, and it is very difficult when you are in the military service, and we should make it a lot easier, not more difficult, for them to vote.

I had a chance to meet with Americans abroad during the last couple weeks, and a similar issue is involved there. We should be making it easier for people to be able to cast their ballots, and I think it should be of interest to the Department of Justice to work with the other agencies to make sure that we have the easiest system possible, because in many cases they have to comply with some State laws, and it becomes a complicated process. And 5 percent is certainly well, well below the interest levels of our military in participating in our political system. So there is a problem that has to be dealt with.

I want to ask you a couple more questions, and then if my colleagues have additional questions, they will be recognized.

I understand that the Department of Justice Criminal Division and the FBI recently had a conference. I also understand that you are contemplating the use of district election officials, which I would like to have a little more clarification as to who that person is, how they are being deployed.

It seems to me this could be extremely constructive in helping the election process, but I want to make sure that we have adequate protections in here so it does not become a chilling influence on voter participation because someone believes they are being watched.

Can either one of you help me as to what is being contemplated in using district election officials for the Federal Government around the country?

Ms. BECKER. Let me begin by saying first what a district election official is. In each of the 93 United States Attorneys' Offices, there is a point of contact on election day. This person is known as the district election official. This person is trained both in the laws that—the criminal laws for voter fraud as well as the Civil Rights Division voter access laws. They are the persons that can make the referral to the Civil Rights Division or to consult with the Criminal Division as necessary.

They also conduct outreach with State and local election officials prior to election day so that they can make referrals as appropriate

to State and local election officials, should questions arise on election day, and take appropriate action.

The question, I think, that you are referring to is the practice in both Democratic and Republican administrations of the very limited use of prosecutors from U.S. Attorneys' Offices out in the field as monitors on election day. These may or may not be the district election officers of the day. They have been used in very limited circumstances, very carefully, and without any complaint that there has ever been a problem with a prosecutor who is serving as a monitor on election day. That person is not there in their role as monitor, but as a volunteer.

They usually are selected because they are Civil Rights Division alumni, so they may have experience being a monitor in the past and they are willing to help us out on election day; or they may be an individual that has had specific language capabilities so that if we are monitoring elections and to make sure that they are meeting their obligation under language minority provisions, we have somebody who is familiar with the language who can be able to assess that and observe that.

They are trained to look for Federal civil rights violations. They are trained not to interfere in the election. If they see a problem, they are not to fix it, they are not to interfere. They are to report it to a supervisor. The supervisor is a Civil Rights Division attorney and can make the appropriate referral, whether it is to the district election officer or to State and local or to keep it within the Civil Rights Division.

These individuals are not identifiable in any way as prosecutors. They are casually dressed. They do not wear guns. They do not have badges. They are not outwardly identifiable as law enforcement officers. And so they have been used very carefully and without any complaints that we are aware of that anyone has been intimidated by our use, limited use, again, in Democratic and Republican administrations in this regard.

But this is a very important issue that we take very seriously at the Civil Rights Division. We certainly do not intend and do not want to intimidate voters. So we are very, very careful.

Senator CARDIN. Thank you for that answer.

I want to ask you about technology and how we have to stay ahead of it, and let me use as the example robo-calls. I am convinced that some campaign is going to put up robo-calls pretending to be the other candidate just to annoy the voters in an effort to discourage them from voting. These robo-calls have become a nuisance to a lot of voters. They are relatively inexpensive. The message is very difficult to trace as to who is using the message. They can be targeted to minority communities kind of easily.

I just really want to alert you and just urge you to take a very careful look as to how campaign tactics are using new technologies that could be used in a very sophisticated way to target minority voters to affect the impact a community has in the elections. And robo-calls is just one example. We know there was misleading information put out by robo-calls in the last election cycle. We know that for sure. And whether you are looking at how the challenges of new technologies can be used to thwart the Civil Rights Acts.

Ms. BECKER. Senator, new technology, of course, is always a challenge. This is something that we are concerned about. I urge members of this Committee and members of the public, if they become aware of instances of this, to please bring it to our attention. We will have the hotline available, as well as fax and Internet-based mechanisms. We want to hear about these issues. If we hear about them before election day, there may be ways for us to work with the States—

Senator CARDIN. And that leads me to a last question. Have you sent notices out to the parties of interest so that they know how to contact you, how to work with you, how to make sure that we have avenues available to take corrective action or to document problems for election day?

Ms. BECKER. We have. We have sent out our contact information to dozens of civil rights organizations that we have met with, to State and local election officials. I have met with the National Governors Association, the National Association of State Legislators, the National Secretaries of State, of course, and other State and local officials, and we have given them our contact information. In addition, we will have the hotlines available. We will have district election officers in the districts, who will also be sending out their contact information. So we will have many opportunities for people to contact us if these problems arise.

Senator CARDIN. Thank you.

Senator Cornyn.

Senator CORNYN. Thank you, Mr. Chairman. I do not have any other questions of these witnesses.

Senator CARDIN. Senator Whitehouse.

Senator WHITEHOUSE. Thank you, Mr. Chairman. Just a few questions, if I may, for Ms. Becker about Section 7 of the National Voter Registration Act.

As I understand it, there was a very successful action undertaken against Tennessee several years ago. Recently, you have announced action with respect to Arizona, and there is ongoing litigation regarding New York. I also understand the Department has mailed 18 letters to different States last year requesting information about their compliance with Section 7.

Can you tell us what the response has been to those 18 letters? Do you expect to take any further action as a result of that response? And are there any Section 7 enforcement actions that you envision before the election?

Ms. BECKER. Senator, thank you. We are committed to enforcing all of the provisions of the National Voter Registration Act as well as all the statutes that we are enforcing in the Civil Rights Division.

Based upon the letters that we sent out, two of them were targeted to Nebraska and Iowa, and we were able to receive, I am happy to report, favorable results in that regard in the form of voluntary compliance. Both of those States enacted new State legislation based upon our inquiries, and that is certainly a good thing for the voters in those States. In addition, we have closed some of those investigations, and some of them remain open and active. While I cannot predict any particular timeline—every investigation is on its own timelines. As you know from being a U.S. Attorney,

you can never predict these things. But we certainly are committed to continuing to enforce Section 7 as well as all of the statutes that we enforce in the Civil Rights Division.

Senator WHITEHOUSE. So of the 18, two have resulted in voluntary compliance that has allowed you to close the case out to your satisfaction. Of the remaining 16, could you enumerate how those have turned out at this point?

Ms. BECKER. I do not have the specific—we have two that are currently ongoing and active in the Section 7 area, but I do not know if we have closed all of the other remaining ones or if some of those may remain open. But I know of at least two Section 7 investigations that are currently open and active.

Senator WHITEHOUSE. So that would be—two and two is four, and that leaves 14 remaining.

Ms. BECKER. I do not have the specific numbers for each and every letter that we sent out, Senator Whitehouse.

Senator WHITEHOUSE. Would you mind answering that as a question for the record then?

Ms. BECKER. I would be happy to.

Senator WHITEHOUSE. Great. Thank you.

Thanks, Mr. Chairman.

Senator CARDIN. Well, let me thank both our witnesses. This past week, I was on college campuses, and I know there is some anxiety as to concerns that may develop in regards to voters who are on college campuses and the ID systems, et cetera. We might be submitting a question to you for the record. But if you will just also be very sensitive to the concerns there so that—as Senator Cornyn said and Senator Coburn said, we want to make sure everyone who is eligible to vote has the opportunity to vote, whether they are serving our Nation in military service or whether they are students, that we make it as easy as possible that they can cast their votes on November the 4th.

Thank you both for your testimony. I appreciate it.

Senator CARDIN. We will now turn to our second panel, if they will come forward, and I will first administer the oath, and then I will introduce them. If you will remain standing.

If you will all please remain standing in order to take the oath. Do you affirm that the testimony you are about to give before the Committee will be the truth, the whole truth, and nothing but the truth, so help you God?

Ms. ANDERSON. I do.

Ms. O'LEARY. I do.

Ms. DANIELS. I do.

Senator CARDIN. Thank you. Please be seated.

Our panel consists of Keshia Anderson, who will tell us what happened to her when she tried to vote in the February 2008 Presidential primary in Virginia. Keshia is a special education teacher in Richmond, Virginia, and is a graduate from Virginia State University.

Bryan O'Leary is the Director of Capitolink. He represents a wide range of C&M Capitolink and Crowell & Moring LLP clients with a focus on the defense sector. He served as the National Security Adviser to Senator Coburn. Well, he has a distinguished record. Prior to that he served as the military and foreign affairs

adviser to Senator Burns, a senior member of the Defense Appropriations Committee and the Military Construction and Veterans Affairs Appropriations Committee.

And Professor Gilda Daniels has more than a decade of voting rights experience and served as a Deputy Chief under both the Clinton and Bush administrations. She was the Deputy Chief in 2000 and has worked within the Voting Section to address a myriad of issues that arise during the election. She served in the Department of Justice Civil Rights Division's Voting Section as a staff attorney from 1995 to 1998 and Deputy Chief in that section for 6 years, from 2000 to 2006.

Welcome. It is a pleasure to have you all before our Committee. We thank you for taking the time to be here, and we will start with Ms. Anderson. And your entire statements will be made part of our record, without objection.

STATEMENT OF KESHIA ANDERSON, CHESTERFIELD, VIRGINIA

Ms. ANDERSON. Senator Cardin and members of the Senate Judiciary Committee, it is a privilege to be here today to share my experience attempting to vote in Chesterfield County, Virginia, during the 2008 Presidential primary on February the 12th.

My name is Keshia Anderson, and I am not a public person. I am a mother and school teacher and never thought I would be in front of United States Senators.

I was born and raised in Virginia and graduated from high school in Chesterfield County in 1992—one of just a few African-American students. I now teach special education students.

Chesterfield County is just outside the city of Richmond. It has more people and more money than most Virginia counties. Where I live, there is not as much money, but there are now many African-Americans compared to most areas of the county.

I came here to tell you what happened to me when I tried to vote because of what my grandmother, may she rest in peace, taught me by word and example. She cherished the right to vote. My grandmother took extra jobs cleaning houses to afford the Virginia poll tax to ensure that she could vote. She had to ride the bus 25 minutes to vote, and she sometimes brought elderly family members so they could vote, too.

When I went to vote in this year's historic Presidential primary, like my mother used to do to me, I brought my 7-year-old son. I hope the Department of Justice will take action to prevent what happened to me and many others in Chesterfield County from happening again. Here is what happened.

My mother votes at the same elementary school as I do. She called me and told me at 6:15 a.m. there already was a long line, stretching from the cafeteria out into the hall.

I first arrived to vote around 7:30 a.m. with my son before work. The parking was so bad, we decided to try again later.

Around 5 p.m., we drove through the rain back to our precinct. The situation was no better. The parking lot was so full that people were parked along the grass and the road. Inside, the line was huge, even longer than before. It could have been 200 voters, ex-

tending from the cafeteria where we vote, all the way down to the classrooms. Most of the people waiting were African-Americans.

After more than an hour, the line stopped moving. We weren't told why. We were just told to wait. I was growing frustrated, and my son was getting hungry. His experience was not what I had hoped, and my job meant that I still had papers to grade that evening.

I noticed that some people in line left without voting, sometimes saying they just could not afford to wait or could not stand long enough. One lady near us explained that she would have to pay extra money to have her son stay late at day care so she could vote. But after waiting in line for more than an hour, and not knowing how much longer was needed, she had to leave to pick him up without voting.

Another lady brought her mentally challenged daughter with her. They also had to leave without voting. A third woman said that there were no chairs to rest on, and her handicapped husband was waiting in the car until she got to the front, but they both left without voting.

As my son and I waited, something happened that seemed really absurd. One poll worker announced that anyone voting Republican could go straight to the front of the line and vote. I watched as a few white voters came out of the long line of mostly African-American voters and proceeded directly to the front tables. Shocked and frustrated, I asked why. The poll worker at the precinct explained that the precinct had run out of Democratic ballots.

The poll worker found some computer paper, you know, the old kind with the holes and the perforated lines on the side, and she tore the paper into pieces for our use as ballots. She explained that she had been trying to get more Democratic ballots from the county all day. She told Democratic voters to handwrite our choice for President on the scraps of computer paper. "Barack Obama" was probably spelled many different ways that night.

At about 6:30 p.m., I finally was called to the table. Assured by the precinct workers that my vote would count, I wrote my candidate's name on the torn piece of computer paper and went home. Some voters stayed around, hoping regular ballots might still arrive.

Just before the polls closed at 7 p.m., a friend called saying that state troopers brought 45 more real ballots and that the handwritten ballots would not count. But I was too far away to get back in time, and I knew that 45 ballots weren't nearly enough for everyone in line.

Later, I learned that I was one of the 299 voters in a few precincts given scrap paper ballots that did not count.

Many voters in my precinct were driven away even before having to decide whether to stay and vote on scrap paper. Overcoming bad weather, job obligations, and family care challenges were just the beginning—then parking, voter lines, and delays, finding chairs to rest on, not finding Democratic ballots, or much information, and scrap paper voting.

Many of us in that line were deprived of our right to vote, even though we had overcome all of the obstacles put in our way and had done absolutely everything asked of us, whether reasonable or

not. I came to the precinct twice to try to vote, watched while white Republican voters moved to the front of a long line of mainly African-American voters, and followed every troubling instructions to write the name of my Presidential candidate on torn computer paper.

I was upset and angry about these barriers, especially in a historic Presidential primary between a woman and an African-American. The election drew record participation everywhere. I don't know if my grandmother could have imagined such a contest, but I knew she would not have imagined that there would be obstacles that prevented me from voting in it.

I hope the lesson that my son and other voters learned is not that our precious right to vote can easily be taken away.

Thank you.

[The prepared statement of Ms. Anderson appears as a submission for the record.]

Senator CARDIN. Thank you very much for your testimony.

Mr. O'Leary.

STATEMENT OF BRYAN P. O'LEARY, CAPITOLINK DIRECTOR, CROWELL & MORING LLP

Mr. O'LEARY. Mr. Chairman, thank you for inviting me to testify today.

In 1952, President Harry Truman wrote to Congress regarding military absentee voting. He said, "At a time when these young people are defending our country, the least we at home can do is to make sure that they are able to enjoy the rights they are being asked to fight to preserve."

Over 50 years later, military voting remains a burdensome bureaucratic effort that obstructs our military men and women and their families from being able to exercise their constitutional right to vote. Because of the long delays and the reliance on the U.S. and the military mail systems, our military men and women need to act today to ensure that their vote is counted. For our military men and women deployed to Iraq and Afghanistan and around the world, today is their election day.

The Election Assistance Commission survey results from 2006 show that of the estimated 6 million military, military dependents, and overseas citizens eligible to vote, just under 1 million—992,000—requested their ballot; and of that 992,000, only 330,000 ballots were returned to their local election official.

Again, I would like to reiterate Senator Cornyn's and Senator Coburn's comment that this is a 5.5-percent voter participation rate, which is shocking and shameful.

In addition, 48,628 uniformed and overseas ballots were rejected in 2006. These facts show that the current military voting system has failed our military men and women and their families.

I saw these problems firsthand as a voting assistance officer in the Marines, and I want to emphasize as well, I am not a lawyer. I was not a lawyer in the Marine Corps. I was an officer. I was an F–18 pilot. And I had a military mission: to do that job. That military mission was not nearly as stressful or as tasking as our young platoon commanders and company commanders who are deployed right now in Iraq and Afghanistan. But the Voting Assistance Offi-

cer Program is being managed by the very platoon commanders and company commanders who are trying to fight a war. So while they are trying to fight a war, they have to sift through Federal, State, and local regulations that are all different, deadlines that are all different. And I would like to present to the Senators and the staff after this the specific deadlines for the States, for your States, because, Chairman Cardin, I can assure you that there is a huge number of Maryland National Guardsmen military members who will not be able to vote.

In conclusion, our military men and women serve around the world and risk their lives in defense of freedom, and yet their own ability to exercise their fundamental rights is being obstructed.

This problem could have been solved years ago, yet our industrial age Government has failed to embrace the information age. Technology is available today to securely encrypt and electronically transmit ballots to military men and women around the world.

For this coming election in November, it is critical that the Department of Justice press the Department of Defense and State election officials to ensure that our service men and women are given the time required to receive their ballots and return them on time. These military men and women are citizens first, and as citizens they deserve the full attention of the Department of Justice to protect their right to vote.

Mr. Chairman, thank you for allowing me to testify today. I look forward to your questions.

[The prepared statement of Mr. O'Leary appears as a submission for the record.]

Senator CARDIN. Thank you very much.

Professor Daniels.

STATEMENT OF GILDA R. DANIELS, ASSISTANT PROFESSOR OF LAW, UNIVERSITY OF BALTIMORE SCHOOL OF LAW, BALTIMORE, MARYLAND

Ms. DANIELS. Senator Cardin, it is an honor to appear before you this afternoon to discuss ways that the Department of Justice can better prepare for the 2008 Presidential election.

As you mentioned, I have more than a decade of voting rights experience and served as a Deputy Chief in both the Clinton and Bush administrations from 2000 to 2006. I have served in the Department of Justice, Civil Rights Division, Voting Section as a staff attorney and a manager. I also served as a staff attorney in the Lawyers' Committee for Civil Rights Under Law on its voting rights project. Currently, I am an Assistant Professor at the University of Baltimore School of Law, where I teach election law, among other subjects.

The Department of Justice was surprised, along with the rest of the world, in 2002 when the country was crippled with hanging chads, dimpled ballots, and faulty voting machines. In 2004, it was accused of playing politics with the right to vote. It has another chance to get it right in 2008. Senator Cardin, it is very important that we get it right this time, but all indications show that there is much work to be done.

The Department's current focus on vote integrity minimizes its statutory requirement to monitor and enforce voter access. The 200

individuals who have been charged with various election crimes since 2002 pales in comparison to the half a million citizens whose provisional ballots were not counted in 2004 or the hundreds of thousands who were turned away, stood in long lines, were illegally purged, and/or subjected to other disenfranchising methods. DOJ's focus is wrong and needs adjusting.

In light of the problems and issues with the last two Presidential elections, it is vitally important that the Department use the full breadth of its statutory authority to act proactively to ensure that our democratic process provides every eligible citizen the opportunity to access the ballot and ensure that that ballot will be counted. In order to protect the fundamental right to vote, the Government must act prior to election day. The Department should initiate contact with both State election officials and organizations to engage in a significant exchange of information in a nonpartisan and proactive way.

In 2004, the Department of Justice, Civil Rights Division, Voting Section sent three letters—one in July, another in September, and another in October—to the chief election officials of each State regarding its UOCAVA responsibilities. The letters were sent, in DOJ's words, in "an effort to avoid the necessity of litigation to ensure that States are aware of their obligation under UOCAVA."

Now, while military absentee voting is very important, the DOJ has devoted an inordinate amount of resources to that task and voter fraud inquiries with little left over to address voter access or perennial disenfranchising devices, such as ill-advised voter purges, voter registration problems, disproportionate distribution of voting machines, and voter deception—all of which deny eligible citizens the right to vote.

In my written testimony, I have outlined some of the critical problem areas during the 2004 election cycle, the DOJ's statutory authority to act, and proposed steps that the Justice Department should take to ensure that these problems are not repeated this November. However, it is essential that the Department act now.

Based on my experience, I would like to make the following recommendations:

Immediately, the Department of Justice should immediately send letters to all States outlining Federal voting rights statute requirements regarding voter purges, voter registration, UOCAVA, et cetera, with deadlines for action. And as Ms. Becker mentioned earlier today, they have already done so in regards to their UOCAVA responsibilities and can do so regarding their NVRA and Voting Rights Act responsibilities.

DOJ should also send letters and conduct calls to States with "observed" problems that could violate Federal voting rights statues, for example, lack of adherence to minority language requirements, information on particularly hostile areas or contests.

It should also hold meetings with advocacy groups to "coordinate" election coverage. I am aware there was a meeting yesterday, but it was more to—with all due respect, it was more of a photo opportunity than an actual exchange of ideas or information. I think there is certainly a need in the 60 days prior to the Presidential election to have an exchange of ideas amongst organizations on the grass-roots and national level.

The Department should also provide jurisdictions and advocacy groups with a list detailing election coverage at least 1 week prior to the election. Currently, that list goes out the Friday before the Tuesday election.

It should also begin more extensive election coverage training of Department of Justice staff stressing "voter access" issues instead of "voter fraud." As you are aware, Senator Cardin, there has been an exodus of experienced attorneys in the Voting Section, and it leaves the section with a dearth of experience. For many of these attorneys, it could well be their first Presidential election to actually handle election coverage. Short of deputizing former DOJ Civil Rights Division, Voting Section attorneys, I think that it is imperative that they begin training the DOJ staff in regards to voter access issues and de-emphasize voter fraud.

On election day, the Department should limit United States Attorney and FBI election coverage and "coordinate" communication with advocacy groups. It should also renew efforts to coordinate with civil rights and other organizations to discuss election day preparedness and learn how those groups plan to approach various voting irregularities. For example, if the civil rights organizations are telling their persons on the ground to always ask for a provisional ballot, that could be problematic if those provisional ballots will not be counted. It should also share how DOJ will address these issues.

I also have recommendations for what I think Congress should do in regards to future elections that would address your questions earlier regarding what else is needed in order for the Department to enforce voting rights activity.

Thank you, sir. I see that my time is expiring.

[The prepared statement of Ms. Daniels appears as a submission for the record.]

Senator CARDIN. Thank you very much for your testimony. I should acknowledge your connection to the University of Baltimore. I apologize for not doing that in the introduction. I like to give as much attention to that great school as possible.

Ms. Anderson, let me first just thank you for being here. You put a face on the issue. We talk about people whose votes were not counted who tried to vote, and you give us a real person who went through this. And there unfortunately have been thousands of other people that are in similar situations that you were in, perhaps millions, that cannot stand in line for 2 hours. If you have a child at home or you have got to pick up a child at school or you are taking time off from work in order to vote, it is difficult to justify a couple hours to vote. And why should you have to spend a couple hours to vote with the technology we have today?

One of the problems we have is that it appears that these problems come up more frequently in minority communities. And you start to wonder whether some of this is not just intentional neglect—I am trying to put my words carefully—but in an effort to say, you know, if we hold down the vote in a minority community, so what? It may help our candidate.

I saw in my own State in the last election—I will just give you the example. In a very large African-American-dominated precinct, I received a phone call in the late afternoon. Now, I had traveled

through a good part of Maryland during the 2006 elections, and I saw voting precincts that were crowded in the morning, which is not unusual, and in the middle of the day it got pretty easy to get through the voting machines. And I got a call saying that in these precincts in Prince Georges County, Maryland, the lines are 2 or 3 hours in the middle of the day. And I said, "How can that be?" They said, "Well, they did not have enough voting machines, and then half the voting machines did not operate. And then they did not have this and they did not have that. So we have long lines. And now it is 4 o'clock in the afternoon, and they say it is going to be 3 hours before they can vote, and we are afraid a lot of people are going to give up and leave."

So I went there. I went to that voting place, because I did not believe it, and I saw firsthand that was exactly what was happening. And the circumstances you saw, with parents with their children and a lot of people who physically could not wait that long left. And that should not happen in the United States. It should not happen anywhere, but it should not happen in our country. It should not happen in any precinct. No one should have to go through that in order to cast a vote.

But I really do believe that this is similar to what your mother or your grandmother was fighting to get rid of the poll taxes.

Ms. ANDERSON. Yes, that is correct. She was one of the ones—she was very influential in helping to eliminate the poll tax and eliminate the literacy test that they had at that time.

Senator CARDIN. Right. It seems like we thought we got rid of this, and we now have another challenge. And we are going to figure out a way to do it. The challenge we have, of course, is that a lot of this is under the control of our State and county board of elections. And, yes, the Department of Justice has certain responsibility, and if it is not strong enough, then I think we need to change the laws to make it strong because it is a national responsibility to make sure that our voting rights are protected for every citizen. So I really do thank you very much for your testimony. Thank you for your efforts to vote, and we will demand that this does not happen again and do everything we can to make sure that happens.

Ms. ANDERSON. Thank you. I appreciate that.

Senator CARDIN. Thank you.

Mr. O'Leary, you are absolutely right. This is ridiculous that we cannot get a better system for our military. I look at the number of ballots that come back in Maryland—and I scratch my head—from the military. I mean, it just makes no sense at all. I know a lot of families—I know these people want to vote. So I cannot believe they do not have the interest and did not try to get ballots. And they do not come up, they do not show up in our elections.

So it seems to me the Federal Government has a responsibility to make sure that our men and women who serve in the military, that their votes count. Technology is such that you could develop technology that could assure that those ballots are cast in a lot easier way and get to our election boards and we have paper trails to make sure there is no fraud. That is not difficult with today's technology, is it?

Mr. O'LEARY. It is not. You are absolutely right, Mr. Chairman. In fact, before the 2006 election, Congress acted to have the DOD implement an innovative program that would allot ballot transmission. Now, this is not electronic voting. This is just getting a ballot to the service man or woman, the overseas civilian, and the way it would start was with the defense database, and it was a secure system. It was set up in 3 weeks, and it allowed that service man or woman to connect with the local election official. There are 7,800 local election officials, so one of the big problems is just finding that person. And once they were connected, the service member would get an e-mail saying, "Your ballot is ready." He would log onto the system, download, print his ballot, fill it out, and send it back in the mail.

This is a simple solution. Congress told the DOD to execute it. They did not execute it. They did not tell anybody about it. So, as a result, only about half a dozen or a dozen votes were cast.

There are definitely solutions to this, and this should not really be a partisan issue. This is a good-government issue. There are 96,000 folks from Maryland who are overseas or in the military.

Senator CARDIN. You are absolutely right. Now, this is a Presidential election year, and there is a lot of interest, and my guess is the numbers are going to be much, much higher because soldiers, Americans, are going to want to have their votes counted.

But let us go 2 years from now, and you have State elections, and you have congressional elections. I think they are very interesting, particularly if my name is on the ballot, but it does not quite have the same appeal that a Presidential election has. And most voters really concentrate on the election just a few weeks before.

Now, if you are serving in Iraq or you are serving halfway around the world and you are trying to make sure you get your vote counted and you start working on this 3 or 4 weeks before the election, there is a good chance you may not get your vote counted in today's system.

Mr. O'LEARY. That is absolutely right. In fact, the military postal system right now is recommending that military service members who are deployed send their ballots on September 30th in order to ensure that they get here by November 4th. Now, there are a lot of States that do not even send the ballots out until October.

Senator CARDIN. Also, if you vote on September 30th, they are going to miss all the important campaign messages that a campaign sends out.

Mr. O'LEARY. That is right. You miss the October surprise, and maybe you made a decision before that happened.

Senator CARDIN. That is not right. Again, you are discriminating against the military by not giving them an opportunity to cast a contemporary ballot. It does not have to be election day, but they should certainly be able to cast a ballot a couple weeks before the election to make sure it is going to be counted.

I think this is a Federal responsibility. I think we may have to look at changing the laws. But the response we got from DOJ was not that encouraging, so I think you are going to see on both sides of the aisle we are going to try to do something to deal with that.

Which brings me to Professor Daniels, and I love a lot of your suggestions. I am going to make sure they get over to DOJ. We will transmit it and make sure they have your suggestions on notification and get a reply from them as to whether they will implement some of your suggestions. But it really brings up the point that I am asking Mr. O'Leary.

Some will say if we set up an Internet system for our military, even though we will have protections, paper trails, et cetera, that you may get a fraudulent vote that is cast there because maybe someone will steal someone's ID and get into the system and cast a vote that should not be cast. And I guess my question for you, Professor Daniels, you have really studied the election law system, and we are now having a debate in Congress on voter ID that courts have ruled that that is certainly permissible, and I for one believe that anyone who tries to vote who is not eligible to vote, we should go after that person and prosecute that person.

But at least it has been my experience that the number of people who fraudulently attempt to vote are so minuscule, that we have virtually been able to—we have not even documented any significant problems with people who are not eligible voting. But we have a lot of people like Ms. Anderson who are eligible to vote whose votes never get counted. And the same thing is true in the military. If we open up the system, I am certain we are going to get a lot of people who want to vote and their votes are going to count. And the number of fraudulent ballots is going to be inconsequential.

So I guess my question to you is: As we look at what will be done on election day in 2008, is there a concern that we are now overreacting on the photo IDs and those types of laws where people have a hard time coming up with that type of identification and may be denied the right to vote, whereas we are missing the big picture and making it easier for people like Ms. Anderson to get their votes counted?

Ms. DANIELS. Studies have shown that voter ID really does not have an effect on vote fraud issues, that vote fraud generally occurs in absentee ballots. So it is not the person who shows up at the polling place and says, "Hello, I am Senator Cardin," and they are not Senator Cardin. It is the person who may have assisted in helping someone fill out an absentee ballot.

But even on that level, it is a very small number compared to the numbers of persons—for example, on the provisional ballot issue, there were more than half a million provisional ballots that were not counted in the 2004 election. Out of 1.9 million provisional ballots that were cast, only 1.2 million were counted. And that is from an EAC study, the Election Assistance Commission study.

So the numbers of persons who are turned away or provisional ballots not counted or may not have the appropriate voter ID but still remains an eligible voter, those are the numbers, I think, that the Department of Justice should concentrate on. Those are perennial disenfranchising methods that—it happens year after year after year. Students and voter ID, students not being able to use their college IDs in particular jurisdictions, long lines—those are issues that occur year after year after year that should be addressed.

And I agree with you, military voting is a big issue. But I think an inordinate amount of resources are being used to address that issue and not enough to address the issues that we know will occur in 2008.

Senator CARDIN. And I do not disagree with your assessment that absentee ballots are much easier to deal with where you do not have to personally be present. But it is interesting in Oregon, which is all done by mail, where they do not have any same-day voting, the information that at least has been given to me is that the amount of fraud there is no greater than any other place in the country. In fact, they get a much higher percentage of participation because it is easier.

Ms. DANIELS. I do not think that vote fraud is the issue that we need to concentrate on right now. I think it affects such a small percentage of our citizenry that we need to really concentrate, certainly spend more resources on these other areas.

Senator CARDIN. Right. I agree with that. I remember when we did motor-voter, people said that the sky would fall in. It did not fall in. It just made it a little bit easier for people to get information about registering to vote, and the Federal Government took some responsibility here rather than just saying this is just a State issue.

I really do think we need to take a look at stronger Federal guidelines to guarantee that every person who is eligible to vote in America can register easily, cast their vote easily and make sure that the integrity is in the system that that vote will be counted. I think that is a Federal responsibility, and that is why I think many of us are hoping the Department of Justice will take advantage of the 2008 elections, get information out locally to let the stakeholders know that there is a Federal partner in this. The Federal Government wants to do everything it can to prevent problems from happening; but if there are difficulties, we want to know about it so that we can take the appropriate either criminal actions or corrective actions so that we do not get a repeat of what happened in Virginia and so many other States in prior elections. We have got to stop that from happening again and to make sure that our military can vote. Five percent is unacceptable. I agree with you there.

Well, let me thank the three of you for really adding, I think, a great deal to this hearing. We are going to follow up with the Department of Justice, and we will also follow up with the Department of Defense and with our local officials and try to assure that we have the most aggressive actions taken prior to the November 4th election.

The record will remain open for 1 week for additional questions or submissions for the record. And, with that, if there is no further business, the Committee will stand adjourned. Thank you all very much.

[Whereupon, at 3:55 p.m., the Committee was adjourned.]

[Questions and answers and submissions for the record follows.]

QUESTIONS AND ANSWERS

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

January 16, 2009

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Please find enclosed responses to questions arising from the appearance of Acting Assistant Attorney General Grace Chung Becker and then-Deputy Assistant Attorney General Barry Sabin before the Committee on September 9, 2008. The title of the hearing was "Protecting the Right to Vote: Oversight of the Department of Justice's Preparations for the 2008 General Election."

We hope that this information is of assistance to the Committee. Please do not hesitate to call upon us if we may be of additional assistance. The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,

Keith B. Nelson
Principal Deputy Assistant Attorney General

cc: The Honorable Arlen Specter
Ranking Minority Member

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Committee on the Judiciary
United States Senate

Hearing Entitled "Protecting the Right to Vote: Oversight of the Department of Justice's Preparations for the 2008 General Election"

September 9, 2008

Written Questions for
Grace Chung Becker
Acting Assistant Attorney General
Civil Rights Division

and

Barry Sabin
Deputy Assistant Attorney General
Criminal Division

Written Questions Submitted by Chairman Patrick Leahy

1. During the last midterm election, nearly two years ago, Mexican American Legal Defense and Educational Fund attorneys witnessed anti-immigrant activists aggressively intimidating Latino voters in the 9th precinct in Tucson, Arizona. Three vigilantes armed with a clipboard, a video camera, a badge-like emblem, and a visible firearm stopped only Latino voters as they entered and exited the polls on Election Day, asking them voting questions, writing down their personal information, and attempting to videotape them as they went to vote. The Arizona Republic reported — nearly two years ago — that Russell Dove, a local anti-immigrant activist, has proudly acknowledged his participation in this effort to intimidate Latino voters.

   I have asked the Justice Department about this terrible incident on multiple occasions and have been told that "both the Criminal Division and the Civil Rights Division have opened investigations into the Pima County allegations" and that you could not comment further because it was an ongoing investigation.

   A. Why, after an "open investigation" lasting nearly two years has nobody from the Justice Department, to my knowledge, even spoken to the eyewitnesses?

      RESPONSE: The Civil Rights Division had monitors in Pima County, Arizona during the November 2006 mid-term election. On November 7, 2006, Election Day, the Federal Bureau of Investigation received a complaint regarding possible voter intimidation at the Precinct 49 polling place in Tucson, Arizona. Immediately after the complaint was received, representatives of the Justice

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Department were in contact with the Pima County Elections Department, the Arizona State Attorney General's office, the Tucson Police Department and other relevant entities within the Justice Department structure. Moreover, additional contact was made with persons who possessed first-hand information about the conduct.

At the request of the Criminal Division's Public Integrity Section and the United States Attorney's Office, on November 16, 2006, the FBI commenced a preliminary investigation of this matter. While we cannot provide details regarding the investigation, we can assure you that all leads were pursued and all relevant evidence was considered. The investigation did not produce any evidence suggesting a federal election crime under the supervision of the Criminal Division, and hence the matter was closed. The Civil Rights Division assigned monitors to Pima County for the November 2008 general election.

The Civil Rights Division does not currently have an open investigation into this matter. The Civil Rights Division will continue to review any complaints received regarding potential voter intimidation and consider whether the Federal statutes we enforce are implicated, and if so, whether further action is required.

B. How can you be confident that by waiting so long to investigate this voter intimidation, the witnesses' recollections might becoming stale?

RESPONSE: Please see response to Question 1A.

C. In this instance, we have serious allegations, eyewitnesses, and an admission of involvement, and yet you seem to have taken no action. I am concerned about the Justice Department's ability to prevent voter intimidation if nearly two years after the fact and as we approach another national election you have not even taken these basic investigative steps. What steps is the Justice Department taking to prevent a recurrence of this type of voter intimidation in the upcoming election?

RESPONSE: As part of its comprehensive nationwide monitoring program, the Civil Rights Division sent Federal monitors to Pima County, Arizona, to observe the November 2008 general election. The enclosed press release, which was issued in advance of the election, identifies the locations all over the nation where monitors and observers were sent on Election Day. Additionally, the Civil Rights Division received information and complaints from voters on Election Day through a well-publicized toll free telephone number and Internet complaint form on our Web site. Interpretation services were available to those with limited English and appropriate services were also available to individuals who are hearing impaired. Through the monitoring program, coordination with State and local election officials, ongoing communication with non-governmental

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organizations and the toll-free hotline, the Department ensured the effective exchange of information related to the operation of the election as well as the commitment of the Federal government to vigorously enforce all relevant laws.

D. Was this specific voter intimidation incident mentioned or discussed at your recent training of Federal personnel who will be monitoring and responding to problems on voting day?

RESPONSE: The Civil Rights Division trained Federal personnel on voter intimidation prior to Election Day.

2. One of the witnesses at yesterday's hearing, Keshia Anderson, was a school teacher from Chesterfield County, Virginia. She was effectively prevented from voting in Virginia's primary after waiting in extremely long lines with her son and despite multiple attempts, due to a lack of relevant ballots and false instructions from election officials. In her precinct, Republican voters were told to go right to the front of the line and Democratic voters were told, wrongly, that they could write in their votes on computer paper due to the lack of ballots.

A. What interaction have you had with Chesterfield County about the improper instructions given to voters and their utter lack of preparedness during the primary election so that this does not occur again in two months?

RESPONSE: The Civil Rights Division has an open investigation regarding the events of the February 2008 presidential preference primary in Chesterfield County, Virginia. The Division sent a request to Chesterfield County to submit the emergency balloting procedures used in the February 2008 primary election for review under Section 5 of the Voting Rights Act. The County has made such a submission, which is currently pending for administrative review under Section 5.

B. Did you send election monitors or observers to Chesterfield County in 2004? During the primary in 2008? If not, why not?

RESPONSE: The Civil Rights Division sent monitors to Chesterfield County for the November 2008 general election after it became aware of Ms. Anderson's allegations. The Division did not send monitors in November 2004 and February 2008.

C. I understand that the Department has approved a number of changes to polling places in Chesterfield County under Section of the Voting Rights Act. In granting that approval, did you take into account the experiences of voters like Ms. Anderson in the recent primary? Once approved, what kind of oversight and

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follow-up do you plan to do to make sure that the changes to polling places do not result in even more voters being preventing from casting their vote and having it count? What kind of outreach are you doing to head off problems in places like Chesterfield County?

RESPONSE: The Civil Rights Division has received two administrative submissions under Section 5 this year of polling place and precinct additions and changes from Chesterfield County. The County's submissions advised that it was adopting these changes at least in part to deal with expectations of high voter turnout. The Division interposed no objection to these changes under Section 5. The Division considered all comments received in the course of these submissions, including comments that discussed the events of the February 2008 primary, as well as the views of the County. As we noted above, we have a pending investigation in Chesterfield County, and the Division sent monitors to observe the November 4, 2008 election.

D. I am attaching a copy of Ms. Anderson's written testimony to the Committee. In light of her experiences about which she testified under oath before the Committee, and the experiences of the nearly 300 people like her whose votes were literally thrown in the trash, will you commit to sending election monitors and observers to Chesterfield County in the upcoming election?

RESPONSE: The Civil Rights Division sent monitors to observe the November 4, 2008 election in Chesterfield County.

3. Is the Department doing anything before hand to check that jurisdictions with record numbers of new registrants will have adequate ballots and personnel? How will the Department respond when it receives complaints that many jurisdictions, due to the increased turnout we witnessed during the primary season, have run out of ballots?

RESPONSE: Prior to November 4, 2008, the Acting Assistant Attorney General for the Civil Rights Division had conversations with State and local elections officials and wrote letters to emphasize the need for State and local officials to prepare adequately for the anticipated record turnout at polls throughout the nation. The Voting Section also maintained regular contact with State and local election officials to ensure compliance with Federal law. The Division is not aware of instances during the November 2008 election in which jurisdictions ran out of ballots.

4. On the night of November 4th, when there are lines around the block of a polling location, how will the Justice Department ensure that everyone in line who is eligible to vote gets to cast their vote on an actual ballot and have their vote counted?

RESPONSE: Please see response to Question 3.

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5. The Department's role in making sure that Americans are able to exercise their right to vote and have their vote counted is paramount. In your testimony, you have touted the phone lines the Department will have ready to handle calls from citizens with election complaints. But receiving complaints is not enough to protect the right to vote.

Once a complaint is received, the key question will be how the Department acts to dispel erroneous information that is often circulated on the eve of an election. This Committee reported an important bill, the Deceptive Practices and Voter Intimidation Prevention Act of 2007, S. 453, some months ago that would require the Department to be more proactive in connection with deceptive practices that interfere with Americans' rights to vote, and most often Americans from minority communities. That bill's principal sponsor is Senator Obama. It has some 20 cosponsors including Senator Coburn. Let me ask you some specific questions:

A. In places where photo identification is not required by state law, how would the Justice Department correct the rumor that photo identification is required to vote in that jurisdiction?

RESPONSE: Prior to November 4, 2008, the Acting Assistant Attorney General for the Civil Rights Division wrote to every State and U.S. territory to encourage local election officials to train poll workers on the accurate, uniform and non-discriminatory application of State law identification requirements as well as the Federal identification requirements under the Help America Vote Act, and to encourage States to conduct voter education drives to ensure voters are aware of relevant voting procedures. In addition, during a conference call with election officials from all 50 States, the Acting Assistant Attorney General emphasized the proper and legal application of voter identification requirements and encouraged election officials to contact the Voting Section with any questions. The Division will review any complaints received regarding voter identification requirements and consider whether the Federal statutes we enforce are implicated, and if so, whether further action is required.

B. If letters are again sent to Latino-Americans telling them they cannot vote because they are immigrants, as occurred during the last midterm election in Orange County, how will the Justice Department act to correct such deceptive information?

RESPONSE: The Civil Rights Division will review any such complaints received and consider whether the Federal statutes we enforce are implicated, and if so, whether further action is required. With respect to the Orange County incident, a Federal grand jury returned an indictment in this pending criminal prosecution. The indictment resulted from a joint investigation conducted by the Civil Rights Division, the U.S. Attorney's Office for the Central District of California, and the FBI. An indictment is only an

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allegation and a defendant is presumed innocent unless and until proven guilty. Moreover, the California Attorney General responded quickly and effectively to letters that were distributed in Orange County prior to the November 2006 election. The State's corrective action efforts identified inaccuracies in the letter to which you refer and provided a clear description of the relevant voting requirements. [Press release attached.]

Questions Submitted by Senator Dianne Feinstein

Questions for Acting Assistant Attorney General Grace Chung Becker

Last month, election officials in Montgomery County, Virginia, distributed a false statement discouraging Virginia Tech's 29,000 full-time students from voting in the County. The County

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took much of its information from a State Board of Elections website that listed potential repercussions of registering to vote as a student in Virginia. That website was modified on September 8th to declare simply that state and local election officials "are not trained in these complex areas."

• *What is being done to correct this error? What has been done and what will be done to ensure that election officials do not discriminate against students who reside in college towns?*

RESPONSE: The Civil Rights Division will review these allegations and any other complaints received and consider whether the Federal statutes we enforce are implicated, and if so, whether further action is required. We note that the Division has recently brought and successfully resolved a lawsuit in Texas regarding registration issues encountered by students at Prairie View A&M University in *United States v. Waller County* (S.D. Tex.).

DOJ has authority to prevent distribution of false and deceptive information in many circumstances, such as when voters are discriminated against based on race or language skill.

• *What public education efforts have been undertaken so that people know what their rights are if they are harassed, intimidated, or intentionally misled, and how to get help if their rights are violated?*

RESPONSE: Section 302(b) of the Help America Vote Act requires jurisdictions to post in every polling place information regarding the rights of voters and how to contact appropriate officials to report complaints. The Civil Rights Division conducted outreach to States informing them of these requirements and offered background information for use in preparing these postings. The Division monitors for compliance with this requirement and has brought suit to enforce this requirement, e.g., in *United States v. Galveston County* (S.D. Tex.). The Acting Assistant Attorney General for the Civil Rights Division and other employees in the Civil Rights and Criminal Divisions also met numerous times with non-governmental organizations to inform them about the Federal laws that we enforce and answer questions regarding the Justice Department's role in the upcoming elections. The Civil Rights Division's Web site also includes information on the Federal laws it enforces and the Department's Web site publicized the toll free phone number that voters can call with complaints as well as an Internet complaint form.

Questions for Deputy Assistant Attorney General Barry Sabin

In a letter dated February 1, 2008, the Department told me that "there has been no substantive change in the Department's criminal law enforcement policy against interfering with an ongoing election with regard to election crime investigations and prosecutions." But during the 2004 and 2006 elections, this policy was violated when officials pressured prosecutors to file pre-election suits for partisan purposes or prosecutors took it upon themselves to do so.

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• *Other than Attorney General Mukasey's letter to prosecutors this past Spring, what specific steps have been taken to inform prosecutors that DOJ policy prohibits the prosecution or overt investigation of election crimes in the months and weeks leading up to the election?*

RESPONSE: At the outset, it is important to correct a fundamental misunderstanding contained in this question regarding the Department's handling of election crime allegations: The Justice Department does *not* have a policy that "prohibits the prosecution or overt investigation of election crimes in the months and weeks leading up to [an] election." As you know, the Department does have a long-standing noninterference policy, which discourages overt investigation of election fraud allegations until the election to which the allegations pertain has been certified. As you are aware, this policy has several exceptions. Moreover, it was intended to address the timing of investigations, not the timing of criminal charges. *See Federal Prosecution of Election Offenses* (7th Ed., May 2007) (rev. Aug. 2007) pp. 9-13; 91-94, available at http://www.usdoj.gov/criminal/pin/docs/electbook-rvs0807.pdf.

We now respond to your specific question about recent enforcement guidance relating to election crime matters. Because election crimes strike at the heart of our democratic process, the Department has a strong interest in combating these crimes with all the tools that Congress has provided. At the same time, the Department is keenly aware of the sensitivity of criminal enforcement in this area. On March 5, 2008, the Attorney General sent a memorandum to all Department employees that underscored both the Department's prosecutive interest and the need for impartial decisionmaking in this important area of law enforcement. In this memorandum, the Attorney General emphasized that in prosecuting election crimes, all prosecutors and investigators must be particularly sensitive to safeguarding the Department's reputation for fairness, neutrality, and impartiality; that politics must play no role in decisions regarding any investigations or criminal charges; and that if faced with a question regarding the timing of charges or overt investigative steps near an election, the Criminal Division's Public Integrity Section should be consulted.

In addition, the Attorney General has emphasized repeatedly in speeches and meetings with Department personnel that selective prosecution of anyone for political purposes will not be tolerated. For example, in February 2008, he delivered this message to all United States Attorneys. In July 2008, he gave this same message to over 160 Assistant United States Attorneys and FBI special agents attending the Department's seventh annual Ballot Access and Voting Integrity Initiative.

• *In your written testimony, you noted a considerable increase in the number of FBI agents attending DOJ's Ballot Access and Voting Integrity Symposium this year as compared to previous election years. What are these resources being used for? How will resources be allocated between providing ballot access and investigating voter fraud?*

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RESPONSE: The establishment of the Department's Voting Access and Ballot Integrity Initiative in 2002 has led to an increased Department-wide emphasis on enforcement efforts directed at combating election crimes and protecting voting rights. The Initiative's dual goals reflect the fact that both voting rights violations and election fraud corrupt the integrity of the election process, one by blocking valid votes from being cast, the other by diluting the worth of honest votes that were cast. An important component of the initiative is the annual training of the Department's Assistant United States Attorneys who serve as district election officers in each of the country's Federal judicial districts. To further the goals of the initiative, in 2006 this training was expanded to include FBI special agents.

As part of the ongoing implementation of the initiative, in 2006, the FBI established a program similar to the Department's district election officer program, to oversee the FBI's nationwide handling of election-related matters. Under the program, an FBI special agent in each of the FBI's 56 field offices is designated to serve as an election crime coordinator. These special agents receive training from the FBI and Department attorneys in the Criminal and Civil Rights Divisions concerning the Federal criminal and civil statutes applicable to election crimes and voting rights, the Department's handling of election-related matters, and the appropriate Department headquarters components to be consulted for various types of allegations. Like the Department's 94 Assistant United States Attorneys who serve as district election officers throughout the country, the FBI's election crime coordinators consult with their respective headquarters offices regarding the handling of both election crime and voting rights matters. Hence, allocation of law enforcement resources is not an issue.

Questions Submitted by Senator Benjamin L. Cardin
for
Acting Assistant Attorney General Grace Chung Becker and
Deputy Assistant Attorney General Barry Sabin

1. It is my understanding that there will be a district election official in every jurisdiction, who is fully trained. We briefly discussed what a district election official was during the hearing.

   a. Can you please explain the role of a district election official on Election Day?

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RESPONSE: Under longstanding Department procedures, each United States Attorney appoints an Assistant United States Attorney to serve a two-year term as District Election Officer (DEO) for his or her district. The DEOs are responsible for overseeing the handling of ballot fraud and campaign financing crimes in their respective districts, for coordinating their response to these matters with the Criminal Division's Public Integrity Section at Headquarters, and for receiving and handling complaints from the public on election day.

The DEOs have a distinctly different role than the election monitors coordinated by the Civil Rights Division. Where the DEOs receive complaints that fall within the jurisdiction of the Civil Rights Division, the DEOs refer these matters to the Voting Section or the Criminal Section of the Civil Rights Division.

b. Where specifically will the district election officials be placed?

RESPONSE: As noted above, DEOs serve in each U.S. Attorney's Office for two years, including on Election Day. Their primary responsibilities involve handling election crimes allegations and coordinating their response to these matters with the Public Integrity Section of the Criminal Division. However, the DEOs also have been trained to recognize issues that may implicate the Federal voting rights statutes enforced by the Civil Rights Division and to refer those issues to the Division. The Civil Rights Division's Election Day monitoring efforts are separate and distinct from the efforts of the DEOs. The Civil Rights Division assigned Federal observers and monitors to jurisdictions around the country based on its own analysis of where they were needed in light of the Federal voting rights statutes enforced by the Division.

c. What criteria do you use to make this decision?

RESPONSE: Consistent with past practice, the Division determined these monitoring locations by considering a variety of factors, including: seeking to monitor for compliance in places where the Division has existing consent decrees; where there have been past problems that implicate compliance with the Federal voting rights laws that the Division enforces; and where the Division has reason to believe that there may be possible issues of non-compliance with Federal voting rights laws in the election being conducted. The Division also gave serious consideration to suggestions from members of Congress, election officials and non-governmental organizations.

d. How will DOJ gather and respond to community input regarding where coverage would be most helpful?

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RESPONSE: The Attorney General, the Acting Assistant Attorney General for the Civil Rights Division and other Civil Rights Division employees conducted multiple outreach meetings with non-governmental organizations regarding potential locations for monitoring in advance of the November 2008 election. In addition, Division staff maintained contact with these organizations throughout the time leading up to the election. Prior to Election Day, the Department also publicized contact information for the Civil Rights Division, the Criminal Division and District Election Officers in all 94 U.S. Attorney's Officers. These employees were prepared to receive complaints or concerns from the community.

e. Will you be looking at areas that have a history of problems?

RESPONSE: Yes. In deciding where to send monitors and observers, the Civil Rights Division has considered, among other factors, those places that have a history of voting problems that implicate the Federal voting rights statutes that the Division enforces.

2. What specific procedures do you have in place to help those that are disabled exercise their right to vote?

RESPONSE: The Civil Rights Division is charged with enforcing Section 301 of the Help America Vote Act, which requires that jurisdictions provide at least one voting system in every polling place used in elections for Federal office that is accessible to persons with disabilities and has initiated litigation when necessary to enforce this provision.

In addition, since January 2001, the Department has improved access to polling places and voter registration in at least 57 communities, including Humboldt County, California; Hernando, Mississippi; Kanawha County, West Virginia; Newark, New Jersey; Crittenden County, Arkansas; Tucson, Arizona; Miami, Florida; Monroe County, NY; Loudoun County, Virginia; Florence County, South Carolina; Monroe County, Pennsylvania; Washington County, Utah; Missoula County, Montana; Suffolk, Virginia; Gallup, New Mexico; Lafayette County, Florida; Juneau, Alaska; Vail, Colorado; Hayden, Colorado; Chatham County, Georgia; Brunswick, Maine; Burton, Michigan; Butler County, Missouri; Cape May County, New Jersey; Taos County, New Mexico; Highland County, Ohio; Deschutes County, Oregon; Minnehaha County, South Dakota; Green Bay, Wisconsin; Detroit, Michigan; Springfield, Massachusetts; Carson City, Nevada; Binghamton, New York; Lincoln County, Nebraska; City of Weston, West Virginia; Loudon County, Tennessee; Madison County, Mississippi; City of Burlington, Vermont; City of Bismarck, North Dakota; City of Flagstaff, Arizona; City of Biloxi, Mississippi; Craig County, Virginia; Perry County, Kentucky; Springfield,

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Missouri; Warren County, Illinois; Brookline, Massachusetts; Allendale County, South Carolina; Butte County, South Dakota; New Albany, Indiana; Seward, Nebraska; Fairbanks, Alaska; Narragansett, Rhode Island; Mount Pleasant, Michigan; Santa Fe, New Mexico; Guanica, Puerto Rico; Fajardo, Puerto Rico; and Bowie, Maryland.

Recognizing that the Civil Rights Division cannot review polling place access in every community across the country, it has also published a self-help polling place checklist that State and local governments can use themselves to ensure that their polling places are accessible to people with disabilities. The "ADA Checklist for Polling Places" can be found at the Division's ADA Web site at http://www.ada.gov/votingck.htm. State and local governments have responded positively to this self-help tool, and many States require local election officials to use it to ensure the accessibility of their polling places.

3. Professor Gilda Daniels of the University of Baltimore Law School testified at our hearing and made several specific recommendations for steps for DOJ to take before the election. Please indicate whether you already have or intend to take these following steps before the election.

A. Send letters to all States outlining Federal voting rights statute requirements regarding voting purges and voter registration, with deadlines for actions by the States.

RESPONSE: The Civil Rights Division sent letters to all States and territories prior to the November 2008 general election (attached).

B. Send letters to States with known problems that could violate Federal voting rights statutes, such as lack of adherence to minority language requirements, or a history of racial discrimination or animus in a community.

RESPONSE: The Civil Rights Division sent letters to all States and territories prior to the election describing the Federal laws that it enforces, including the minority language requirements of the Voting Rights Act.

C. Provide Congress, jurisdictions, and advocacy groups with a list of detailed election coverage at least one week prior to the election, with the reasoning process for such deployment decisions.

RESPONSE: During the week before the November 4, 2008 election, the Civil Rights Division issued a press release listing the jurisdictions where it planned to send observers and monitors for the general election. (Press release attached.)

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D. Focus election training coverage for DOJ staff on "voter access" issues, to insure that all eligible voters are given the right to vote, and that their vote is counted.

RESPONSE: The Civil Rights Division did extensive preparation for and training of all DOJ personnel participating in the Division's election coverages for the November 2008 general election. For example, the Ballot Access and Voting Integrity Conference trained over 200 Federal employees on voting and election laws in preparation for the upcoming election, including training on the Federal voting laws enforced by the Civil Rights Division.

Questions Submitted by Senator Joseph R. Biden, Jr.

Questions for the Record

(1) How, specifically, is the DOJ preparing for prevention of and accountability for intimidation and suppression of minority voters, both before and on election day, including:

- false and misleading (and official looking/sounding) mailings and phone calls that tell voters election day has been changed, or one party votes on a later date to ease crowding, or you can not vote if you have unpaid parking tickets or child support, etc.

- intimidation tactics such as armed on and off-duty police in minority neighborhoods warning people away from polling places by saying (or implying by their presence) that they'll be arrested if they have a past criminal conviction, or deported if they are a naturalized citizen (immigrant); and

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- targeted efforts to challenge registrations, or to challenge voters on election day?

RESPONSE: The Civil Rights Division reviews any such complaints received and considers whether the Federal statutes we enforce are implicated, and if so, whether further investigation and enforcement action is required. For example, the Division considers whether there is state action that denies or abridges the right to vote of citizens on account of race, color or language minority status, that may implicate the non-discrimination requirements of Section 2 of the Voting Rights Act or whether there is state or private action to attempt to intimidate, threaten, or coerce citizens that may implicate the anti-intimidation provisions of Section 11(b) of the Voting Rights Act.

The Criminal Section of the Civil Rights Division, in conjunction with the U.S. Attorney's Offices, is responsible for enforcing Federal criminal civil rights statues. The Section's responsibilities include investigating and, where appropriate, prosecuting voting related complaints involving criminal conduct where that conduct appears to target its victims on the basis of race, color, religion or national origin. In an effort to prepare for the election, Section management has coordinated with management in the Public Integrity Section of the Criminal Division and the Voting Section of the Civil Rights Division to ensure that the goals of a fair and smoothly run election are accomplished.

The Acting Assistant Attorney General for the Civil Rights Division sent letters to States and territories in advance of the November 2008 Federal election emphasizing our commitment to remain vigilant in its scrutiny of allegations of voter intimidation or coercion, including those that may target victims on the basis of race, color, religion, or national origin. The Acting Assistant Attorney General described the Division's efforts in this regard in her opening statement when she testified before the House Judiciary Committee in September 2008.

Representatives of the Justice Department have frequently met with members of Congress, congressional staff, members of civil rights groups, and State and local governments and non-governmental organizations, to discuss concerns and questions about the upcoming election, including those relating to voter intimidation and coercion. The Attorney General and the Acting Assistant Attorney General for the Civil Rights Division have met with dozens of civil rights organizations as well as the National Association of Secretaries of States, the National Association of Attorneys General, the National Conference of State Legislators and the National Governors' Association to inform them about the laws that we enforce and to answer questions regarding the Justice Department's role in the upcoming elections.

Federal Criminal statute 18 U.S.C. § 241 arguably covers schemes to prevent voting in a Federal election by misleading voters as to the time, place, and prerequisites for

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voting. Specifically, section 241 criminalizes conspiracies to injure, oppress, threaten, or intimidate that deprive a person of rights protected by the Constitution or Federal law. In the case of voting rights, where the statute applies, it does so regardless of whether the intimidation or suppression is directed at minority voters or motivated by political partisanship. A Federal district court judge recently upheld application of section 241 to a scheme to suppress voter turnout in a Federal election by jamming the telephone lines of entities offering transportation to the polls. *United States v. Tobin*, Cr. No. 04-216-01 SM, 2005 WL 3199672 (D.N.H Nov. 30, 2005). However, section 241 does not expressly state it applies to voter suppression activity and thus its coverage of this conduct is left to judicial interpretation.

In addition, 18 U.S.C. § 245(b)(1)(A) prohibits the use of force or threat of force to willfully injure, intimidate, or interfere with another, or attempting to do so, to prevent the individual from voting, qualifying to vote, campaigning as a candidate, or serving as a poll watcher or election official.

Further, 18 U.S.C. § 594 prohibits using intimidation, threats, or coercion, or attempts to use any of these means, to interfere with the right of another to vote or vote as the individual chooses, or to cause the individual to vote or not vote for any particular candidate for Federal office. Similarly, Section 12(1)(A) of the National Voter Registration Act (42 U.S.C. § 1973gg-10(1)(A)) prohibits intimidating, threatening, or coercing a prospective registrant or voter from registering to vote, voting, or attempting to do so.

(2) What are DOJ's priority locations for oversight, how are those locations being determined, and are local election and other officials and organizations in those locales being informed of such efforts and how they can coordinate with DOJ on those efforts?

RESPONSE: The Civil Rights Division issued a press release during the week before Election Day announcing the jurisdictions where it planned to send observers and monitors for the November general election. (Press release attached.) Consistent with past practice, the Division determined these monitoring locations by considering a variety of factors, including: seeking to monitor for compliance in places where the Division has existing consent decrees; where there have been past problems that implicate compliance with the Federal voting rights laws that the Division enforces; and where the Division has reason to believe that there may be possible issues of non-compliance with Federal voting rights laws in the election being conducted. The Division also gave serious consideration to suggestions from Members of Congress, election officials and non-governmental organizations.

(3) Will DOJ coordinate with local voting rights organizations as resources for information on questionable activities?

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RESPONSE: The Civil Rights Division carefully considered all the information that it received from non-governmental organizations.

(4) What is DOJ's documented effort to inform voters themselves of their rights and of how to report suspicious or illegal activities?

RESPONSE: Section 302(b) of the Help America Vote Act (HAVA), requires jurisdictions to post in every polling place information regarding the rights of voters and how to contact appropriate officials to report complaints. The Civil Rights Division is prepared to take appropriate action if there is a violation of HAVA. In addition, the Civil Rights Division conducted outreach to all States and territories to inform them of these requirements and offered background information for use in preparing these postings. The Division monitors for compliance with this requirement and has brought suit to enforce this requirement, *e.g.*, in *United States v. Galveston County* (S.D. Tex.). Additionally, the Division has conducted extensive outreach to publicize its contact information to receive complaints on Election Day. The Civil Rights Division does this extensive outreach to non-governmental as well as State and local organizations to ensure that they are aware that they can bring complaints to the Division.

(5) What procedures will be in place regarding voting complaints?

RESPONSE: The Civil Rights Division had a system in place for the November 2008 election for complaints to be received via a toll-free telephone number, a TTY number, and a Web-based system on the Civil Rights Division's Web page. The Division had staff available to review and follow-up on complaints that were received. Interpretation services were available to those with limited English and appropriate services were also available to individuals who are hearing impaired. Through the monitoring program, coordination with State and local election officials, ongoing communication with non-governmental organizations and the toll-free hotline, the Department ensured the effective exchange of information related to the operation of the election as well as the commitment of the Federal government to vigorously enforce all relevant laws.

(6) Does DOJ have contingency plans, including increased qualified and authorized staff, to handle complaints if there are widespread reported problems? Does DOJ have sufficient resources – people, funds – to do what they are tasked to do? If not, is there an effort to obtain sufficient resources?

RESPONSE: The Civil Rights Division's resources were adequate to handle the volume of complaints received.

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(7) What steps are being taken by federal election authorities, including DOJ, to make sure that local resources — especially voting machines — are evenly distributed geographically on Election Day and to bring enforcement actions against local election administrators who manifestly distribute resources disproportionately to voting districts of higher average socioeconomic status?

RESPONSE: The Civil Rights Division is prepared to take appropriate action if a jurisdiction's allocation of voting machines constitutes a violation of the Federal laws that it enforces.

(8) After record high turnouts in primaries and widespread problems of ballot shortages, etc., what is being done to be sure localities provide enough ballots at polling places at the beginning of election day, so there are not increased waiting times while there is a scramble to find more ballots?

RESPONSE: State or local election officials are responsible for ensuring adequate ballots at polling places. The Civil Rights Division is prepared to take appropriate action if a jurisdiction's conduct constitutes a violation of the Federal laws that it enforces.

(9) How long does the wait to access a voting machine need to be before we have effectively denied a person their right to vote? If hourly workers or those with children at home have a limited time to vote and encounter long lines, how long must they wait before they are effectively disenfranchised, or lose wages or their job, or the baby sitter leaves?

RESPONSE: That answer is determined on a case-by-case basis. The Civil Rights Division is prepared to take appropriate action if a jurisdiction's conduct constitutes a violation of the Federal laws that it enforces.

(10) What enforcement mechanisms are in place to ensure that a sufficient number of required non-English language materials and interpreters are available at designated polling sites?

RESPONSE: The Civil Rights Division has a vigorous program in place for enforcement of the minority language requirements of Sections 4(e), (4)(f)(4) and 203 the Voting Rights Act. The Civil Rights Division has filed 28 lawsuits in the last eight years, and conducted extensive outreach to State and local election officials and non-governmental organizations. Prior to November 4, 2008, the Acting Assistant Attorney General for the Civil Rights Division sent letters to all States and territories emphasizing the Voting Rights Act's language minority requirements. The Division also provides substantial information about the minority language program on the Voting Section's Web site and is available at the following link: http://www.usdoj.gov/crt/voting/sec_203/activ_203.php#litigation.

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(11) What mechanisms are in place to ensure that all local Boards of Elections have sufficient staff and resources to timely and accurately process all new voter registrations in time for Election Day, and penalties for non-compliance?

RESPONSE: The Civil Rights Division has investigated all complaints it has received of violations of Section 8 of the National Voter Registration Act, which requires timely processing for Federal elections of valid voter registration applications that are timely postmarked or timely received by appropriate State or local officials. The Division has brought lawsuits against jurisdictions in recent years to enforce these voter registration processing protections: *United States v. Pulaski County* (E.D. Ark.); *United States v. Cibola County* (D.N.M.).

(12) What has the DOJ done to curb the rampant abuse of purging eligible voters? Is there notification to the purged voter when his or her name is removed from the voter roll, in time to reregister, and any oversight of this by DOJ?

RESPONSE: Section 8 of the NVRA requires a specific notice be sent to voters who are to be removed from the voter registration list for Federal elections based on information suggesting that they have moved outside of the registrar's jurisdiction, as well as waiting for a period of two Federal general elections after the notice is sent to see if they appear to vote. Section 8 of the NVRA also requires that any program the purpose of which is to systematically remove the names of ineligible voters from the official lists of eligible voters shall be completed not later than 90 days before a Federal election. The Civil Rights Division has investigated all complaints it has received of violations of the voter registration list maintenance protections of Section 8 of the NVRA. The Division has brought several lawsuits in recent years to enforce these protections against wrongful purging, including *United States v. Pulaski County* (E.D. Ark.), *United States v. Cibola County* (D.N.M.), and *United States v. City of St. Louis* (E.D. Mo.).

(13) How will the increase in home foreclosures affect voter rolls, and is there any effort to address this (including public education about re-registration, or relaxed rules for affected voters so they can vote in the location of their old or new residence)?

RESPONSE: The Acting Assistant Attorney General sent a letter to all States and territories prior to the November 2008 election which advised States that Section 202 of the Voting Rights Act ensures that voters who move within 30 days of a Presidential Election can still vote in their original precinct.

(14) Has the DOJ followed up on the complaints from the last election? Please provide all documentation of this.

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RESPONSE: The Civil Rights Division has reviewed and considered all complaints received from the November 2004 election, and continues to conduct additional investigation where required. The Division filed several lawsuits based at least in part on complaints received during the 2004 election cycle, including *United States v. Long County* (S.D. Ga.) and *United States v. Cibola County* (D.N.M.).

(15) What are some of the more egregious election violations being uncovered by the DOJ and what is being done to prevent these violations from continuing?

RESPONSE: The Civil Rights Division has a vigorous program of enforcing the Federal voting rights laws through litigation. Copies of the complaints in these lawsuits can be found on the Voting Section's website, which is available at the following link: http://www.usdoj.gov/crt/voting/litigation/caselist.php.

(16) What are DOJ's statistics on how many "voter fraud" investigations it and other U.S. government agencies initiated, what percentage of those investigations resulted in prosecutable cases, what percent of those prosecutions resulted in convictions, and how that compares to the overall conviction rate? By comparison, what are the same statistics for voter suppression cases?

RESPONSE: As an initial matter, we would like to emphasize that the number of Federal investigations and convictions relating to vote fraud is not a reliable indicator of the extent of the problem in this area of criminal law enforcement. There are a number of reasons for this. Many incidents of vote fraud do not get reported to law enforcement authorities, often because the witnesses are reluctant, elderly, infirm, or intimidated. In addition, some matters are reported to State or local authorities and are handled by those authorities. Finally, most of the current Federal criminal statutes addressing vote fraud are limited to elections that include a Federal candidate. As a result, fraud in connection with large portion of this country's elections is not a Federal election crime.

We now turn to your specific questions. The Department began maintaining data regarding its investigations and prosecutions of vote fraud after the establishment of the Department-wide Ballot Access and Voting Integrity Initiative in October 2002. Since that date, the Department has investigated over 275 vote fraud matters, including vote-buying, ballot-box stuffing, absentee ballot fraud, voter registration fraud, voter intimidation, and voter suppression. Forty-eight of these investigations related to various types of voter suppression, including voter intimidation.

Since October 2002, 151 persons have been charged with various Federal vote fraud offenses and 116 persons have been convicted of these offenses. Five of the convictions involved voter suppression. We do not have data regarding percentages of convictions.

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Questions Submitted by Senator Edward M. Kennedy
for
Acting Assistant Attorney General Chung Becker

As Senator Cardin noted at the Senate Judiciary Committee hearing on September 9, 2008, attempts to deceive or intimidate voters in minority communities have become a perennial problem in recent years. These shameful practices threaten citizens' right to vote for the candidate of their choice and to have their votes counted. Combating such problems is a critical part of the Justice Department's role. I'm interested in knowing more about how you intend to combat such practices in the coming elections, as well as the steps you have taken in the past.

1. Before the November 2006 elections, a Republican congressional candidate's campaign in Orange County, California, mailed a letter to 14,000 registered Latino voters which appeared to be designed to discourage them from going to the polls. The letter, written in Spanish, falsely stated that immigrants may not vote, although eligible naturalized immigrants legally may register and vote in the United States. The letter also declared that "there is no benefit to voting" in American elections. Civil rights organizations and members of this Committee notified the Department of Justice of these letters.

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a. The Department of Justice indicated some time ago that it had begun an investigation of the incident. What is the current status of this investigation?

RESPONSE: On October 1, 2008, a Federal grand jury returned an indictment in this pending criminal prosecution. The indictment resulted from a joint investigation conducted by the Civil Rights Division, the U.S. Attorney's Office for the Central District of California, and the FBI. An indictment is only an allegation and a defendant is presumed innocent unless and until proven guilty. Moreover, the California Attorney General responded quickly and effectively to letters that were distributed in Orange County prior to the November 2006 election. The State's corrective action efforts identified inaccuracies in the letter to which you refer and provided a clear description of the relevant voting requirements.

b. Have any indictments been issued as a result of this incident?

RESPONSE: Please see above response.

c. Please explain in detail what steps, if any, the Department will take to ensure that this kind of activity does not disenfranchise voters in the future?

RESPONSE: The Civil Rights Division will continue to review any complaints received regarding potential voter intimidation and consider whether the Federal statutes we enforce are implicated, and if so, whether further action is required. In addition, the Civil Rights Division trained Federal personnel on voter intimidation issues and the Federal laws we enforce prior to Election Day and will continue to do so in the future in preparation for our election monitoring efforts.

2. During the election on November 7, 2006, anti-immigrant activists reportedly sought to intimidate Latino voters in Tucson, Arizona. One of the activists wore dark clothes with a badge-like emblem and a holstered handgun. He intercepted Latino voters outside the polling place, held a video camera at them and demanded that they write down personal information. We understand that civil rights groups alerted the Civil Rights Division to these events.

a. What efforts, if any, has the Division made to investigate reports of intimidation of Latino voters in Tucson?

RESPONSE: The Civil Rights Division had monitors in Pima County, Arizona during the November 2006 mid-term election. On November 7, 2006, Election Day, the Federal Bureau of Investigation received a complaint regarding possible voter intimidation at the Precinct 49 polling place in Tucson, Arizona. Immediately after receiving the complaint, the Assistant United States Attorney who acts as the District Election Officer (DEO) immediately contacted the relevant observation team from the Voting Section of the Civil Rights Division, who contacted the Pima County Elections Department. The DEO also

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contacted the Arizona State Attorney General's office and the Director of the Elections Crimes Branch of the Public Integrity Section of the Criminal Division at the United States Department of Justice. In addition, an FBI agent contacted the Tucson Police Department. As demonstrated by the rapid and expansive notification that occurred, each State and Federal agency with relevant responsibility took the allegations seriously and investigative information was obtained shortly after the complaint was lodged.

In addition, the FBI received reports from, and interviewed, eyewitnesses to the conduct at issue. Based on the information gathered, a determination was made that no Federal criminal civil rights violation could be proven beyond a reasonable doubt.

The Division does not currently have an open investigation into this matter. The Civil Rights Division will continue to review any complaints received regarding potential vote intimidation and consider whether the Federal statutes we enforce are implicated, and if so, whether further action is required.

In addition, at the request of the Criminal Division's Public Integrity Section and the United States Attorney's Office, on November 16, 2006, the FBI commenced a preliminary investigation of this matter. While we cannot provide details regarding the investigation, we can assure you that all leads were pursued and all relevant evidence was considered. The investigation did not produce any evidence suggesting a federal election crime under the supervision of the Criminal Division, and hence the matter was closed. The Civil Rights Division assigned monitors to Pima County for the November 2008 general election.

b. Have any indictments issued as a result of this incident?

RESPONSE: No Federal indictments have been brought with regard to this matter.

c. Will the Department of Justice have personnel at the polls in Tucson to monitor any voter intimidation efforts?

RESPONSE: The Division did not send monitors to Tucson, Arizona for the November 4, 2008 general election.

d. Do you plan to send monitors to other polling places this year to guard against the kind of voter intimidation efforts reported in Tucson in 2006? If so, where?

RESPONSE: As part of its comprehensive nationwide monitoring program, the Civil Rights Division assigned Federal observers and monitors to jurisdictions around the country based on its own analysis of where they were needed in light of the Federal voting rights statutes enforced by the Division. The enclosed press release, which was issued in advance of the election, identifies the locations all over the nation where

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monitors and observers were sent on Election Day. Additionally, the Civil Rights Division received information and complaints from voters on Election Day through a well-publicized toll free telephone number and Internet complaint form on our Web site. Interpretation services were available to those with limited English and appropriate services were also available to individuals who are hearing impaired. Through the monitoring program, coordination with State and local election officials, ongoing communication with non-governmental organizations and the toll-free hotline, the Department ensured the effective exchange of information related to the operation of the election as well as the commitment of the Federal government to vigorously enforce all relevant laws.

e. Attempts to intimidate Latino voters by activists dressed to resemble law enforcement officials have been reported repeatedly in recent elections. Do you have any comprehensive plan for responding to this problem? Does the Civil Rights Division or any other Department have any plans to inform the public about voting rights in communities where intimidation has been a problem in the past?

RESPONSE: The Civil Rights Division will continue to review any complaints received regarding potential vote intimidation and consider whether the Federal statutes we enforce are implicated, and if so, whether further action is required. In addition, the Civil Rights Division trained Federal personnel on voter intimidation prior to Election Day and will continue to do so prior to general elections.

3. A few days before the November 2006 election in Grand Coteau, Louisiana, a five-foot cross was erected outside the town hall's parking lot, placed in a wooden frame, doused with oil and lit on fire. Because the cross-burning occurred on public property just before a closely contested election campaign involving an African-American mayoral candidate, many African-American voters may have viewed the cross-burning as a threat to those who wished to vote for the African-American candidate.

a. What efforts, if any, has the Division made to investigate reports of intimidation of African-American voters in Grand Couteau, Louisiana?

RESPONSE: The Division sent Federal personnel to St. Landry Parish, Louisiana, to monitor the November 2006 general election. The Division has a pending investigation in the Grand Couteau, Louisiana matter. The Civil Rights Division will continue to review any complaints received regarding potential vote intimidation and consider whether the Federal statutes we enforce are implicated, and if so, whether further action is required.

b. Have any indictments issued as a result of this incident?

RESPONSE: No Federal indictments have been brought with regard to this matter.

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c. Will the Department of Justice have personnel at the polls in Grand Couteau, Louisiana this year to monitor any voter intimidation efforts?

RESPONSE: The Division did not send monitors to Grand Couteau, Louisiana for the November 4, 2008 general election.

4. There also have been reports of possible attempts to disenfranchise African-Americans in the majority African-American town of Greenwood, Mississippi, in connection with the town's racially charged mayoral contest in May 2006. Although election-night results showed that an African-American candidate had defeated the long-term, white mayor, the incumbent was declared the winner the next day, after a series of errors. The Mississippi Supreme Court later ordered a new election after finding significant irregularities in the delivery and counting of absentee ballots, among other problems.

a. Please describe the steps, if any, that the Division made to investigate these reports of voting irregularities in Greenwood, Mississippi.

RESPONSE: The Division does not currently have an open investigation into this matter. The Civil Rights Division will continue to review any complaints received regarding potential vote intimidation and consider whether the Federal statutes we enforce are implicated, and if so, whether further action is required.

b. Will the Department of Justice have personnel at the polls in Greenwood, Mississippi this year to monitor any voter intimidation efforts?

RESPONSE: The Division did not send monitors to Greenwood, Mississippi, for the November 4, 2008 general election.

5. Professor Gilda Daniels testified that "[i]n 2004, the Department received a high number of calls from persons who stated that they registered to vote, yet their names were not on the voter rolls. In many instances, these persons were new registrants and their voter registration application was not processed." As Professor Daniels also noted, and as studies have shown, the improper purging of legitimate voters from the rolls threatens to disenfranchise many Americans.

a. Do you agree that preventing improper voter purges is a critical problem that demands a response from the Department of Justice before November? Please explain in detail the reasons for your response.

RESPONSE: The Civil Rights Division has investigated all complaints it has received of violations of the voter registration list maintenance protections of Section 8 of the National Voter Registration Act. The Division has brought several lawsuits in recent years to enforce these protections against wrongful purging, including *United States v. Pulaski County* (E.D. Ark.), *United States v. Cibola County* (D.N.M.), and *United States v. City of St. Louis* (E.D. Mo.).

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b. Since 2000, there have been repeated reports of improper voter purges in which the names of legitimate voters were removed from voter registration lists. This has been a particular problem in minority communities. Given the information accumulated since then, what efforts have you taken to prevent such purges?

RESPONSE: Please see response to 5.a.

c. What specific plans do you have to ensure that this practice does not disenfranchise voters this November?

RESPONSE: The Civil Rights Division will continue to review any complaints received regarding allegations of improper purging and consider whether the Federal statutes we enforce are implicated, and if so, whether further action is required.

6. You have stated that you will send election monitors to selected polling places throughout the country to monitor elections in November. Although I understand that decisions about precisely where these monitors will be stationed may not be final, it would be extremely useful to have an understanding of the number and location of Department personnel before the election. Please provide your current thinking with regard to where election monitors should be located. If you believe that this portion of your response should not be made public, please indicate that to the Committee.

RESPONSE: Please find the attached press release listing the jurisdictions where monitors and Federal observers were sent during the November 4, 2008 general election.

7. I am troubled by recent reports that some officials in Michigan plan to use lists of homeowners facing foreclosure to challenge these homeowners' right to vote on Election Day. If executed, such plans would deny many eligible voters the franchise, and is likely to have a disproportionate effect on minority citizens, who have been hit particularly hard by sub-prime lending practices. Because foreclosure often takes quite some time, and some homeowners succeed in avoiding foreclosure after receiving a foreclosure notice, there is no legitimate reason to presume that citizens are ineligible to vote merely because their names appear on a foreclosure list. The Department of Justice should do everything possible to ensure that Americans who are threatened with losing their homes do not also lose their votes.

a. What efforts, if any, have you made to investigate these allegations?

RESPONSE: Section 11(b) of the Voting Rights Act provides that no person, whether acting under color of law or otherwise, shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for voting or attempting to vote, or for urging or aiding any person to vote or attempt to vote. The process for determining the eligibility of voters and challenging the eligibility of voters is regulated primarily by

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State law in the first instance. The Department is aware that private litigation was filed in Federal court in Michigan regarding these allegations in Macomb County.

The Department of Justice may take enforcement action regarding voter challenges only where there is conduct that may constitute a violation of a Federal law that the Department is charged with enforcing.

The Department became aware of allegations that private parties may have planned to challenge the eligibility of voters this Fall based on foreclosure notices, and included mention of this concern and of States' legal responsibility to follow Federal law in a letter sent to all States and territories (attached).

b. Given the serious nature of these reports, and the lack of an adequate post-election remedy for those who fail to vote because of harassment or intimidation, will you agree to issue a public notice in Macomb County, Michigan (or any other areas where there have been similar credible reports) informing voters that they are still eligible to vote, even if they are facing foreclosure?

RESPONSE: See response to 7.a.

8. During hearings on reauthorizing the temporary provisions of the Voting Rights Act, Congress received testimony about racially-motivated challenges to Asian American voters in Bayou La Batre, Alabama during the 2004 primary elections, when an Asian American candidate sought a position on the City Council. Supporters of a white incumbent challenged Asian American voters at the polls, and the Department of Justice later found these challenges to be racially motivated.

a. The press has reported that the Department of Justice sent monitors to observe local elections in Bayou La Batre this August 2008 to prevent discrimination against Asian American voters. Do you also intend to monitor this fall's Presidential election in Bayou La Batre?

RESPONSE: The Division sent Federal personnel to monitor local elections in Bayou La Batre, Alabama, in August and October 2008. The Division did not send monitors to Bayou La Batre for the November 4, 2008 general election.

b. Are there any other jurisdictions where the Department will monitor the polls to guard against harassment or intimidation of Asian American voters in November?

RESPONSE: On November 4, 2008, the Division deployed 822 monitors and observers to 59 jurisdictions in 23 States. The enclosed press release, which was issued in advance of the election, identifies the locations that were monitored. Additionally, the Civil Rights Division received information and complaints from voters on Election Day

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through a well-publicized toll free telephone number and Internet complaint form on our Web site. Both of these resources were fully available to individuals who are hearing impaired as well as those who have limited English proficiency.

9. One of the most important people in ensuring enforcement of the law during the upcoming election will be the Chief of the Voting Section. You appointed the current Chief, Chris Coates. Mr. Coates was made Deputy Chief of the Section by Bradley Schlozman when he was Acting Assistant Attorney General. As this Committee knows all too well, Mr. Schlozman politicized hiring and law enforcement in the Division in an effort to promote the interests of the Republican Party and as interim U.S. Attorney indicted voter registration workers just four days before the 2006 election, contrary to longstanding Department policy.

According to Mr. Schlozman, Mr. Coates shares his views. The recent IG/OPR report on the politicization of the selection of immigration judges quoted an email sent by Mr. Schlozman to Monica Goodling about Chris Coates, endorsing him for a position as an immigration judge. It stated:

> Hey Monica. I had a chance to speak with [the candidate] regarding the IJ position. Let me say at the outset that his views on immigration are virtually identical to my own. And you'd be pleased with my views. . . . [He] is a guy I know well and 'saw the light' about 10 years ago. I will get his resume for you, but don't be dissuaded by his ACLU work on voting matters from years ago. This is a very different man, and particularly on immigration issues, he is a true member of the team.

Your decision to make Mr. Coates your lead person in enforcing voting laws as we enter this very important election undermines confidence in your commitment to enforcement of the voting laws.

Plainly, Mr. Schlozman was referring to more than Mr. Coates' views on immigration when he said that he was a "very different man" from the one who worked many years ago for the ACLU on voting matters. What is your reaction to Mr. Schlozman's statement? Does it give you any pause in entrusting Mr. Coates with enforcement of our voting laws in this election?

RESPONSE: Mr. Coates was competitively selected in accordance with well established inter-agency procedures required for selecting career Senior Executive Service (SES) level employees. The Department posted an advertisement that required each applicant to submit a resume or other written statement of qualifications, along with a supplemental statement that describes how the applicant satisfied five "Executive Core Qualifications": (1) Leading Change, (2) Leading People, (3) Results Driven, (4) Business Acumen, and (5) Building Coalitions. After the application period closed, the Civil Rights Division's Administrative Management Section forwarded all application packages to a panel composed of three SES attorneys, including two career SES attorneys. The panel reviewed the packages and selected candidates who were "Highly

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Qualified." The Assistant Attorney General and other senior managers in the Civil Rights Division interviewed each of the applicants designated as "Highly Qualified" by the review panel. After Mr. Coates was selected as the leading candidate for the Voting Section Chief position, the Department forwarded his application package, including his responses to the Executive Core Qualifications, to the Federal government's Office of Personnel Management (OPM). Another panel of SES professionals assembled by OPM reviewed Mr. Coates's qualifications and certified that he was qualified to serve as Voting Section Chief in SES status.

The Civil Rights Division senior managers were not aware of the comments in the IG report related to Mr. Coates and did not consider these remarks during the hiring process. Mr. Coates was selected based upon his qualifications, which includes decades of legal experience in voting matters. Mr. Coates received the Georgia Thurgood Marshall Decade Award and the Georgia Environmental Justice Award for his work as an attorney prior to joining the Civil Rights Division, and he has received a total nine awards for his service to the Division in both Democratic and Republican Administrations.

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U.S. Department of Justice

Civil Rights Division

950 Pennsylvania Avenue, NW - RFK
Washington, DC 20530

VIA FIRST-CLASS MAIL

October 10, 2008

Beth Chapman
Alabama Secretary of State
P. O. Box 5616
Montgomery, AL 36103-5616

Honorable Beth Chapman:

As you know, November 4, 2008 will be an historic presidential Election Day, generating potentially record turnout at polls throughout the nation. Under our country's federal system of government, States and local jurisdictions have primary responsibility for conducting elections. We appreciate the challenges and responsibility that you have in preparing for presidential elections and in complying with the complexities of federal law.

The Civil Rights Division is charged with enforcing federal voting rights statutes, including the Voting Rights Act of 1965, the Uniformed and Overseas Citizens Absentee Voting Act of 1986, the National Voter Registration Act of 1993, and the Help America Vote Act of 2002. Members of the Civil Rights Division's Voting Section have been in frequent contact with many States and jurisdictions regarding federal compliance issues, and our staff remains available to address questions or concerns as they arise in preparation for the election.

As States and local jurisdictions continue preparing for the elections, we ask that you take some time to review the requirements of federal law, ensuring that the necessary steps and procedures required by federal statutes are met by Election Day. In addition, I offer here a few observations that may assist States in planning for the upcoming election, based on the Division's recent election monitoring and law enforcement efforts in jurisdictions across the country. I ask that you share these observations with local jurisdictions that will be conducting elections in your State.

Voter Intimidation:

The Department is committed to ensuring that the upcoming election is fairly and smoothly run and remains vigilant in its scrutiny of allegations of voter intimidation or coercion,

including those that may target victims on the basis of race, color, religion, or national origin. Accordingly, if you are aware of such complaints, please forward them to your local FBI field office, the Criminal Section of the Civil Rights Division at 202-514-3204 or your local United States Attorney's Office. You can also forward complaints to the Voting Section of the Civil Rights Division, which enforces civil laws involving voter intimidation or coercion, at 1-800-253-3931.

In a recent Congressional hearing, I testified about media reports concerning the possible use of foreclosure lists as a basis for challenging voters at the polls. I shared the concern of members of Congress that, if these allegations are true, it would be of concern to the Civil Rights Division because a notice of foreclosure does not necessarily mean that a person has been evicted or has moved from his residence. While state laws govern how challenges can be made at the polls and what information is needed to support those challenges, any challenges must also comply with federal law. Section 202 of the Voting Rights Act ensures that voters who move within 30 days of a Presidential Election can still vote in their original precinct. Moreover, the Voting Rights Act prohibits racially discriminatory challenges. I ask you to pay careful attention to these types of challenges to ensure that these and any other applicable federal laws are followed.

Voter Education and Training of Poll Workers:

With so many first-time voters expected in November, we encourage States and local jurisdictions to conduct voter education drives to ensure that voters are familiar with registration requirements, polling place locations, and other relevant information that affects access to the ballot. For example, new voters who registered by mail should be informed about the identification requirements of the Help America Vote Act. A strong education campaign can help to avoid problems and delays on Election Day caused by voter unfamiliarity with state and federal law requirements.

I appreciate all of your ongoing and careful preparations to minimize long lines at the polls. Proper training of poll workers can facilitate these efforts. I encourage you to continue and, if necessary, enhance the training given to poll workers. We have seen polling places open late because workers do not know how to operate voting equipment. We have also seen voters with disabilities unable to use accessible voting equipment because of poll worker unfamiliarity with the machines and eligible voters being denied the right to vote because of poll worker confusion over procedures. We are aware of concerns that when voting machines malfunction, poll workers distributed provisional ballots instead of paper ballots causing delay and confusion in processing these votes.

I strongly encourage you to include poll worker training on federal law, including, for example, the non-discrimination requirements of Section 2 of the Voting Rights Act, 42 U.S.C. § 1973; the bilingual election requirements for certain covered jurisdictions under Section 203 of the Voting Rights Act, 42 U.S.C. § 1973aa-1a; and the accessible machine and provisional ballot requirements of the Help America Vote Act of 2002, 42 U.S.C. §§ 15481 & 15482. Additional information on federal voting rights requirements can be found on our website,

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http://www.usdoj.gov/crt/voting/index.htm, and you can also contact attorneys in the Voting Section at 1-800-253-3931.

Finally, it is important that poll workers are educated about the laws regarding identification at the polls. The Civil Rights Division recognizes a State's very important interest in safeguarding the integrity of elections. The Division, nevertheless, strongly recommends that poll workers receive training to ensure that valid voting laws, including voter identification law, be enforced consistent with the Voting Rights Act's non-discrimination provisions. For example, the Division recently settled a case where it was alleged that Hispanic voters were asked for identification more often than white voters. In addition, training is important to distinguish between the identification requirements of the Help America Vote Act for first-time voters who registered to vote by mail, which include but are not limited to photo identification, and any state identification requirements. For those jurisdictions that include populations of Native Americans, we have heard concerns that poll workers improperly rejected tribal identification.

Language Minority Provisions:

The language minority requirements of Section 203 of the Voting Rights Act apply if at least five percent of the voting age population or 10,000 individuals in a jurisdiction speak English less than very well and all speak a single non-English language. Covered jurisdictions must ensure that all election information is provided in the minority language through channels best calculated to reach that limited-English population. This may include published election materials and oral information provided to voters at the polls on Election Day, including information disseminated through election judges, clerks and poll workers who answer many questions that voters have. Jurisdictions should identify which polling places have such voters and the language skills of its poll officials in such voting places to assure that the language needs are being met. Additionally, since 2006, it has become mandatory for voting systems in jurisdictions covered by the requirements of Section 203 to have alternative language accessibility in elections for federal office, pursuant to Section 301(a)(4) of HAVA, 42 U.S.C. § 15481(a)(4).

Even if your jurisdiction is not covered by Section 203, you should also be aware of other provisions that apply to language minorities, including sections 4(e), 4(f)(4) and 208 of the Voting Rights Act.

If you have any questions regarding the minority language provisions of federal law, please feel free to contact Susana Lorenzo-Giguere, Special Litigation Counsel for minority language enforcement in the Voting Section. She may be reached by phone (202-514-9822) or e-mail (susana.lorenzo-giguere@usdoj.gov).

We appreciate your efforts during this very demanding election season and share your goal to ensure that all eligible voters will be able to cast a ballot during the November 2008 general election. The Department's Election Day Hotline will be accessible approximately two

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weeks before the election. We will notify you of this number as soon as it is available and encourage you to provide to jurisdictions throughout your respective States.

Sincerely,

Grace Chung Becker
Acting Assistant Attorney General
Civil Rights Division

48220.033

Department of Justice

FOR IMMEDIATE RELEASE
WEDNESDAY, OCTOBER 1, 2008
WWW.USDOJ.GOV

CRT
(202) 514-2007
TDD (202) 514-1888

FORMER CONGRESSIONAL CANDIDATE INDICTED ON FEDERAL OBSTRUCTION OF JUSTICE CHARGE

WASHINGTON - A federal grand jury in Santa Ana, Calif., indicted former congressional candidate Tan Nguyen on a federal obstruction of justice charge today, announced Grace Chung Becker, Acting Assistant Attorney General for the Civil Rights Division, and Thomas P. O'Brien, U.S. Attorney for the Central District of California. The indictment alleges that Nguyen made misleading statements to investigators regarding a letter that was sent to Latino voters in the 47th Congressional District of the State of California prior to the November 2006 federal elections. At the time the letter was sent, Nguyen was running to represent the Orange County-based district in the U.S. House of Representatives.

The grand jury alleged that Nguyen knowingly misled state investigators who were investigating the circumstances surrounding the mailing of the letter. The indictment also alleges that Nguyen's actions were intended to prevent communication to federal law enforcement officers of information relating to Nguyen's involvement in the production and dissemination of the letter and to whether the letter violated federal election laws, including interfering with the federally protected right to vote in federal elections.

An indictment is merely an accusation, and the defendant is presumed innocent unless proven guilty. If convicted, Nguyen faces up to 10 years in prison, a $250,000 fine and three years of supervised release. Nguyen will receive a summons to appear in U.S. District Court in Santa Ana for his initial appearance and post-indictment arraignment on Oct.14, 2008.

This continuing investigation is being conducted jointly by the Criminal Section of the Civil Rights Division, the U.S. Attorney's Office for the Central District of California, and the Federal Bureau of Investigation.

The case is being investigated by Special Agent Julie McWilliams of the Federal Bureau of Investigation, and prosecuted by Civil Rights Division Trial Attorney James Walsh, and Assistant U.S. Attorney Jennifer Waier of the U.S. Attorney's Office for the Central District of California.

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Department of Justice

FOR IMMEDIATE RELEASE
WEDNESDAY, OCTOBER 30, 2008
WWW.USDOJ.GOV

CRT
(202) 5142007
TDD (202) 514-1888

DEPARTMENT OF JUSTICE TO MONITOR POLLS IN 23 STATES ACROSS THE NATION ON ELECTION DAY

WASHINGTON — The Department of Justice announced today that its Civil Rights Division plans to deploy more than 800 federal observers and Department personnel to 59 jurisdictions in 23 states for the Nov. 4, 2008, general election.

Although state and local governments have primary responsibility for administering elections, the Department is charged with and committed to protecting the rights of all citizens to access the ballot on Election Day, and to preventing and prosecuting voter fraud.

In the days leading up to and throughout Election Day, Civil Rights Division staff members will be available at a special toll-free number to receive complaints related to free and fair ballot access (1-800-253-3931) (TTY line 1-888-305-3228), including allegations of voter intimidation or coercion targeted at voters because of their race, color, national origin or religion. In addition, individuals may also report complaints, problems or concerns related to voting via the Internet. Forms may be submitted through a link on the Department's Web page: http://www.usdoj.gov/.

Allegations of voter fraud are handled by the 94 U.S. Attorneys' Offices across the country and the Criminal Division's Public Integrity Section. Complaints may be directed to any of the local U.S. Attorneys' Offices, the local FBI offices or the Public Integrity Section at 202-514-1412.

In anticipation of a record turnout at the polls during this election cycle, Attorney General Michael B. Mukasey reiterated the Department's commitment to using all available tools to ensure a free and fair election.

"The Department of Justice will do all it can to help ensure that elections run as smoothly as possible – and, equally important, that the American people have confidence in our electoral process," Attorney General Mukasey said. "On November 4, hundreds of Department of Justice lawyers, monitors and observers will be working throughout the country to help make sure that all Americans who are entitled to vote are able to do so, and that the elections accurately represent the will of the people."

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Since the passage of the Voting Rights Act of 1965, the Department has regularly sent observers and monitors around the country to protect voters' rights. Under the Voting Rights Act, which protects the rights of Americans to participate in the electoral process without discrimination, the Department is authorized to ask the Office of Personnel Management to send federal observers to areas that have been certified for coverage by a federal court or the Attorney General. The Department also may send monitors from its own staff to elections in other jurisdictions.

Thus far during calendar year 2008 (and not including those individuals involved in the November 4, 2008, monitoring effort), 415 federal observers and 167 Department personnel have been sent to monitor 55 elections in 50 jurisdictions in 18 states.

On Election Day, federal observers will monitor polling place activities in 30 jurisdictions:

- Perry County, Alabama;
- Apache, Cochise, and Navajo Counties, Arizona;
- Kane County, Illinois;
- East Carroll Parish, Louisiana;
- Boston and Springfield, Massachusetts;
- Bolivar, Jefferson Davis, Jones, Kemper, Leake, Neshoba, Newton, Noxubee, Washington, Wilkinson, and Winston Counties, Mississippi;
- Salem County (Penns Grove), New Jersey;
- Cibola and Sandoval Counties, New Mexico;
- Kings County (Brooklyn), New York County (Manhattan), and Westchester County, New York;
- Buffalo and Charles Mix Counties, South Dakota; and
- Dallas, Fort Bend, and Galveston Counties, Texas.

Justice Department personnel will monitor the election in an additional 29 jurisdictions. The jurisdictions are as follows:

- Pima County, Arizona;
- Alameda, Riverside, and Santa Clara Counties, California;
- Duval, Hillsborough, and Seminole Counties, Florida;
- Madison County, Indiana;
- Ford County, Kansas;
- Jefferson and Orleans Parishes, Louisiana;
- Macomb County, Michigan;
- Madison County, Mississippi;
- Alamance County, North Carolina;
- Colfax County, Nebraska;
- Bergen County, New Jersey;
- Cuyahoga County, Ohio;
- Philadelphia, Pennsylvania;
- Dorchester and Georgetown, South Carolina;

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- Bennett, Jackson, Mellette, Shannon, and Todd Counties, South Dakota;
- Gonzales and Waller Counties, Texas;
- Chesterfield County, Virginia; and
- King County, Washington.

The observers and Department personnel will gather information on whether voters are subject to different voting qualifications or procedures on the basis of race, color, or membership in a language minority group; whether jurisdictions are complying with the minority language provisions of the Voting Rights Act; whether jurisdictions permit voters who are blind, disabled, or unable to read or write assistance by a person of their choice; whether jurisdictions allow voters who are blind to cast a private and independent ballot; and whether jurisdictions comply with the provisional ballot requirements of the Help America Vote Act. To assist in these inquiries, the Department has deployed observers and monitors who speak Spanish, and a variety of Asian and Native American languages. Both the federal observers and Department personnel will coordinate monitoring activities and maintain contact with local election officials.

More information about the Voting Rights Act and other federal voting and election-related laws is available on the Civil Rights Division's Web site at http://www.usdoj.gov/crt/voting. More information about the Department's Public Integrity Section is available at http://www.usdoj.gov/criminal/pin/ .

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SUBMISSIONS FOR THE RECORD

WASHINGTON
LEGISLATIVE OFFICE

September 9, 2008

Chairman Patrick Leahy
Committee on the Judiciary
U.S. Senate
Washington, DC 20510

Ranking Member Arlen Specter
Committee on the Judiciary
U.S. Senate
Washington, DC 20510

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OFFICERS AND DIRECTORS
NADINE STROSSEN
PRESIDENT

ANTHONY D. ROMERO
EXECUTIVE DIRECTOR

RICHARD ZACKS
TREASURER

Dear Chairman Leahy and Ranking Member Specter:

On behalf of the American Civil Liberties Union (ACLU), and its hundreds of thousands of members, activists and fifty-three affiliates nationwide, we applaud the Judiciary Committee for holding this oversight hearing of the Department of Justice (DOJ), Civil Rights Division's preparation for the 2008 general election. We welcome this opportunity to submit these comments regarding the appropriate role of DOJ in the upcoming November 2008 elections.

Historic Role of the Voting Section, Civil Rights Division

The Voting Section of DOJ's Civil Rights Division has a vital role to play in ensuring that the fundamental right to vote is protected and that all eligible voters are permitted to exercise their right to vote. The Voting Section was created to protect minorities from voting discrimination and to ensure their participation in all aspects of the political process. It is especially important the Voting Section fulfill its historic role of ensuring that no voter is denied the right to vote based on race, ethnicity, disability, or language proficiency.

Unfortunately, recent revelations of partisan bias in the decision making of the Voting Section seriously undermine voting rights enforcement in this country and breed a lack of confidence and trust in the Voting Section.[1] Partisan bias has undermined the Voting Section's effectiveness and has called into question, the Voting Section's decisions about what to investigate, what kind of cases to bring, and where and why to assign federal monitors. For example, by 2002, the Voting Section shifted its focus from enforcing the voting rights of minorities and election protection efforts to partisan enforcement of election

[1] *See Oversight Hearing on the Voting Section of the Civil Rights Division of the U.S. Department of Justice Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary,* 110th Cong. 3 (Oct. 30, 2007) (statement of Laughlin McDonald, Director, ACLU Voting Rights Project).

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laws.[2] Evidencing this shift, this administration brought a Voting Rights Act case on behalf of white voters in the southern town of Noxubee, Mississippi. In addition to this change in priorities, the 2004 election brought unchecked problems at the polls – improper voter purges, misuse of provisional ballots, and overly aggressive poll watchers.[3]

We, therefore, applaud this congressional oversight of DOJ's preparations for the 2008 elections. Oversight is critical to restoring public trust and confidence in the Voting Section and ensuring that the nation's voting laws are fairly and adequately enforced. In order to protect the fundamental right to vote, DOJ must be prepared prior to Election Day with a comprehensive plan. The following discussion describes areas requiring renewed vigilance by DOJ:

Registration Applications

This election season, citizens are registering to vote at in extremely high numbers. Minority and young voters have demonstrated an enthusiasm to participate in what will prove to be one of the most historic elections in recent memory. Facing what could be an unprecedented administrative challenge for some jurisdictions, DOJ must be vigilant in ensuring that states are in compliance with voting rights statutes.

In 2004, DOJ received many complaints from people who said they were registered to vote, but had not appeared on the voter lists.[4] Frequently, these people were newly registered voters, whose applications had not been processed.[5] It is the responsibility of state election officials to ensure that the counties are processing voter registration applications in a timely matter. However, armed with the knowledge of problems from earlier elections, DOJ should ensure those jurisdictions are in compliance with the law and provide oversight to ensure that applications are being properly and timely processed. Election officials' failure to process applications, resolve eligibility prior to rejection of applications, or clear backlogged applications of new voters, especially when they are more likely to be minority and young voters, could disenfranchise many voters this November.

Purging of Voter Rolls

The Help America Vote Act (HAVA) requires that every state have a computerized statewide voter registration list. The National Voter Registration Act (NVRA) imposes important limitations on purging or otherwise improperly removing names from the voter rolls, including a restriction against purging within 90 days of an election. While modest purging of voter lists may be necessary in some instances, for example, to ensure that deceased persons are no longer registered to vote, properly registered voters are too often inappropriately purged from voter rolls, frequently based on political motives or faulty data.

Under the current administration, DOJ has increased its focus on prosecutions that aim to purge states' voter rolls.[6] Yet, overly aggressive purges wrongly exclude eligible voters. This is just one

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[2] *Lessons Learned in the 2004 Presidential Election: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on Judiciary*, 110th Cong. 2 (July 24, 2008) (Statement of Gilda R. Daniels, Asst. Professor, Univ. of Baltimore School of Law) [hereinafter Daniels Written Testimony].

[3] *Id.*

[4] *Id.* at 3.

[5] *Id.*

[6] *Hearing on Protecting the Right to Vote: Oversight of the Department of Justice's Preparations for the 2008 General Election Before the S. Comm. On the Judiciary*, 110th Cong. 8 (Sept. 9, 2008) (Statement of J. Gerald Hebert, Executive Director & Director of Litigation, The Campaign Legal Center) [hereinafter Hebert Senate Written

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aspect of DOJ's willingness to prioritize combating the "specter of voter fraud," even at the expense of disenfranchising voters.[7] For example, DOJ recently threatened to sue ten states to purge their voter rolls before the 2008 election.[8] The goal of HAVA is to assist voters and the goal of the NVRA is to increase the number of eligible voters. Instead of aggressively pursuing these goals, the Voting Section appears focused on the opposite: concentrating its enforcement on strong-arming states to conduct sweeping purges of their voters' rolls. Making purging a priority of voting rights enforcement is simply contrary to the core mission of the Voting Section.

Training Poll Workers/Election Officials

Although HAVA does not require poll worker training, the Act requires states to indicate how it plans to train and educate poll officials. Unfortunately, untrained poll workers mishandle complications that inevitably arise on Election Day. These workers may arbitrarily enforce voting requirements or discriminatorily turn eligible voters away from the polls. Making matters worse, poll workers too often turn away eligible voters without informing them of their rights or of alternative means of voting. Particularly with periodic changes to the laws and the emerging administrative hurdles, such as the proper distribution of provisional ballots, the legal requirements of requesting voter IDs, the influx of newly registered young and minority voters, and accessibility issues relating to disabled voters, poll workers and election officials must be properly trained to avoid disenfranchising eligible voters.

Government Issued Photo IDs

Voter ID laws are merely a "solution" in search of a problem. Recent studies establish there is no evidence to support claims that in-person voter fraud is a threat to the integrity of elections.[9] While the ACLU supports efforts to curtail fraudulent election practices – when and where they exist – elected officials should be seeking ways to encourage more voters, not inventing excuses to deny voters the ability to cast their ballots.

Although the Supreme Court has found that some forms of photo IDs can be constitutional, the ACLU continues to be concerned that voter ID laws cause an undue burden for poor, minority, disabled, student, and elderly voters. Even the expense or effort needed to obtain a "free" ID is prohibitive for many Americans. With the recent passage of such restrictive laws in a few states, and the possibility of other states following suit, it is critical that election officials be properly trained and that DOJ closely monitor those states where the voter ID laws have changed. DOJ must be aware of both the misapplication of voter ID laws by untrained poll workers, as well as the recent problem of election officials selectively requesting that minority voters produce an ID.[10]

Testimony]; *see also, e.g., Lessons Learned in the 2004 Presidential Election: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on Judiciary*, 110th Cong. 16 (July 24, 2008) (Statement of Daniel P. Tokaji, Associate Prof. of Law, Ohio State Univ., Moritz College of Law).

[7] Hebert Senate Written Testimony, *supra* note 6, at 15.

[8] Daniels Written Testimony, *supra* note 2, at 3. (citing Editorial, *What Congress Should Do,* N.Y. TIMES, Oct. 24, 2004; Stephen Roosevelt, *Bush Administration Orchestrating Massive Voter Purge Before 2008 Election*, Veteransforcommonsense.org (July 17, 2007)).

[9] For more information on the impact of voter ID laws, please see the ACLU's letter to the U.S. Senate Committee on Rules and Administration, *available at* http://www.aclu.org/images/asset_upload_file74_34434.pdf.

[10] *See Lessons Learned in the 2004 Presidential Election: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on Judiciary*, 110th Cong. 9-10 (July 24, 2008) (Statement of J. Gerald Hebert, Executive Director & Director of Litigation, The Campaign Legal Center).

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Caging Practices

Recently, there has been a rise in the practice of voter caging – a voter suppression tactic generally aimed at poor and minority neighborhoods.[11] Voter caging is the practice of sending nonforwardable mail to addresses of registered voters, compiling a list of the mail that is returned, and using that list to purge or challenge voters at the polls on the grounds that the voters on the list do not legally reside at their registered addresses. However, voter caging practices are notoriously unreliable because, for example, voters may live in areas where mail delivery is less reliable, voter rolls often contain typos or clerical errors, a voter may not be listed on the mailbox of her residential voting address, or a voter may be temporarily away from her permanent residence. In these cases, the voters are most likely still validly registered and eligible to vote.

In 2004, political operatives systematically targeted more than 500,000 mostly minority voters in caging schemes.[12] Targeting racial minorities to impair their right to vote is illegal under the Voting Rights Act and the U.S. Constitution. DOJ must be more proactive in its prosecution of this suppression tactic. Despite a history of prosecuting voter caging practices, in 2004, DOJ intervened before the election to defend the operatives of a vote caging scheme by the Ohio Republican party.[13] The scheme targeted newly registered voters in urban areas, most of whom were African American.[14] Ultimately, the federal court ruled against the Republican Party, finding that the scheme had a discriminatory impact.[15]

Stopping racially discriminatory voter caging schemes will require DOJ to end them, not defend them. In 2008, vote caging, voter harassment, and intimidation at the polls continue to be real threats that DOJ must be prepared and willing to address.

Misuse of Provisional Ballots

A consequence of changing laws, misinformation, inappropriate voter challenges, and/or poor poll worker training is the misuse of provisional ballots. States often distribute provisional ballots in an attempt to remedy the fact that eligible voters are turned away from polling places. Unfortunately, provisional ballots are far from a panacea for the disfranchisement of eligible voters. In some instances, election officials may dispense them to voters who have the right to vote by regular ballot. Or election officials may improperly refuse to provide provisional ballots to eligible voters, and instead turn them away from the polls altogether. If provisional ballots are cast, election officials should have appropriate standards for deciding whether those ballots count in the final vote tally – it should not be left up to their discretion.

DOJ must seek to guarantee that all eligible voters have their votes counted by ensuring that states do not improperly dispense, fail to distribute, or discard provisional ballots. DOJ should also ensure that jurisdictions do not administer provisional ballots selectively or with a discriminatory purpose or result.

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[11] *See Protecting Voters at Home and at the Polls: Hearing before Senate Comm. on Rules and Administration,* 110th Cong. 2 (Feb. 27, 2008) (Statement of Justin Levitt, Counsel, Brennan Center for Justice).

[12] *See generally* Teresa James, PROJECTVOTE, CAGING DEMOCRACY: A 50 YEAR HISTORY OF PARTISAN CHALLENGES TO MINORITY VOTERS (2007), http://projectvote.org/fileadmin/ProjectVote/Publications/Caging_Democracy_Report.pdf.

[13] Hebert Senate Written Testimony, *supra* note 6, at 11-12.

[14] *Id.*

[15] *Id.*

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Election Monitors

Under the Voting Rights Act, the Attorney General may send federal monitors to certain jurisdictions to observe Election Day activities and report irregularities. In order have to meaningful observations, monitors must be fully trained on all the civil rights statutes and be sent to those places where there is evidence of possible civil rights violations. In 2004, however, DOJ engaged in sending partisan political staff to monitor the polls in closely contested states.[16] In order to restore trust, DOJ must provide greater transparency in the process – the locations and the reasons for the monitors' dispatch should be made public prior to the election. DOJ should also limit the recent practice of using criminal prosecutors and the FBI as election monitors, in order to avoid the chilling effect that law enforcement personnel can have in some communities.

In addition, election day monitors should not be used to investigate election alleged voter fraud. Unfortunately, despite a longstanding practice of the Criminal Division, we understand from DOJ that the Election Crimes Branch will conduct election fraud investigations of individual voters prior to the election. We urge DOJ, because of the possible chilling effect and possible impact on turnout, that such fraud investigations should take place after the November election, unless the fraud undermines the integrity of the election itself.

Conclusion

The reputation of DOJ and that of the Voting Section has been tarnished by the recent reports of political partisanship, selective enforcement of our nation's voting rights laws, and a shift away from voter protection and access in favor of an undue focus on questionable allegations of voter fraud. The ACLU believes that DOJ's efforts must focus on both expanding the franchise and ending practices which actually threaten the integrity of the federal elections. As we approach this historic election, it is vital that DOJ return to its historic role of expanding access to the polls for all voters regardless of race, national origin, language proficiency, or disability. A vibrant democracy requires the broadest possible base of voter participation.

Sincerely,

Caroline Fredrickson
Director

Deborah J. Vagins
Legislative Counsel

[16] *Id.* at 18.

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Keshia Anderson

Written Testimony

Hearing Before the Senate Judiciary Committee

on

Protecting the Right to Vote: Oversight of the Department of Justice's Preparations for the 2008 General Election

September 9, 2008

Senator Cardin and Members of the Senate Judiciary Committee, it is a privilege to be here today to share my experience attempting to vote in Chesterfield County, Virginia during the 2008 Presidential Primary on February 12.

Background

My name is Keshia Anderson. I'm not a public person. I'm a mother and school teacher and never thought I'd be in front of United States Senators.

I was born and raised in Virginia; graduated from high school in Chesterfield County in 1992; and earned a college degree at Virginia State University. I currently teach special education students in Richmond, Virginia.

Chesterfield County begins just outside the City of Richmond, stretching mostly south and west. It has a bigger population and is wealthier than most Virginia counties, but not where I vote. My precinct has a larger African American population than most areas of the County.

I agreed to come here today and tell you about what happened to me when I tried to vote because of what my grandmother, may she rest in peace, taught me by word and example. She cherished the right to vote. My grandmother cleaned houses. She took extra jobs to save up so she could pay the Virginia poll tax and ensure that she and her family could vote. She had to ride the bus 25 minutes to get to her voting precinct, and she sometimes brought a wheelchair-bound elderly aunt with her so that she could vote too.

When I went to vote in this year's historic presidential primary, like my mother used to do with me, I brought my 7-year-old son, who was learning about Susan B. Anthony and the suffrage movement in school.

I want to try to ensure that what happened to me and so many others in Chesterfield County does not happen again. I am `hoping that the Department of Justice will take action.

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Trying to Vote on Primary Day

The polls were open from 6 AM to 7 PM for the February presidential primary election.

Here's what happened to me.

I heard from my mother, who votes at the same Chesterfield County elementary school as I do. She told me that at 6:15 AM there already was a long line, stretching from the cafeteria out into the hall.

I first arrived to vote around 7:30 AM with my son, before work. The parking was so bad and the voting line so long, that we decided to try again later.

Around 5 PM, we drove through the rain back to our precinct. The situation was no better. The parking lot was so full that people were parked on the grass and along the road. Inside, the line was huge, even longer than before. It could have been 200 voters, extending from the jam-packed cafeteria where voting occurs, out into the hallway and all the way down to the classrooms. Most of the people waiting to vote were African Americans.

The line moved slowly. After more than an hour, as my son and I got nearer to the front, the line stopped moving. We weren't told why. We were just told to wait. I was growing frustrated. My son was getting hungry. His experience was not what I had hoped, and my job meant that I still had papers to grade that evening.

I noticed that some people on line were leaving without voting, sometimes saying they just couldn't afford to wait, or couldn't stand long enough. One lady near us explained that she had paid extra money to have her son stay late at day care so that she could vote. But after waiting in line for more than an hour, and not knowing how much longer was needed, she had to leave without voting to pick him up. Another lady brought her mentally challenged daughter with her. They also had to leave without voting. A third woman said that there were no chairs to rest on and her handicapped husband was waiting in the car until she got to the front, but they both left without voting.

My son and I continued to wait after the line stopped moving. Then something happened that seemed really absurd: one poll worker announced that anyone voting Republican could go straight to the front of the line and vote. I watched as some of the white voters who were there responded by coming out of the long line of mostly African-American voters and proceeded directly to the front tables, no longer having to wait. Shocked and frustrated, I asked "why?" A poll worker at the precinct explained that the precinct had run out of Democratic ballots.

The poll worker then went into another room. I thought she was going to pick up more ballots. But she returned with computer paper instead, the old kind with holes and perforated lines on the side. She explained that she had been trying to get more Democratic ballots from the County all day. She tore the paper in pieces for use as ballots. She told Democratic voters to handwrite the name of our choice for president on the scraps of computer paper. She said our votes would

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count. She also gave me a phone number I could call with any complaints about the new voting procedure. A name like Barack Obama was probably spelled many different ways that night.

At about 6:30 PM, I finally was called to the table. Assured by the precinct worker that my vote would count, I wrote my candidate's name on the torn piece of computer paper and put it in the very full ballot box. Then I went home. Some voters stayed around, hoping regular ballots might still arrive.

Just before 7 PM, I received a call from my son's coach, who was behind us in line, saying that State Troopers brought 45 more real ballots and that the handwritten ballots would not count. I was too far away to get back before the polls closed, and I also knew that 45 ballots weren't nearly enough for all the people who were still in line behind me.

Later, I read in the newspaper that I was one of 299 voters across several precincts who were given scrap paper to vote on and that these votes did not count.

Many voters in my precinct were driven away even before they had to decide whether to stay and vote on scrap paper. Overcoming bad weather, job, and family care challenges were just the beginning-- the obstacle course placed in front of us still included overcrowded and unavailable parking, enormous voter lines and long delays, a lack of chairs to rest on, shortages of Democratic ballots, a lack of information, and new scrap paper voting procedures. Many of us-- and in my precinct there is no question that most of us on line that evening were African Americans-- were deprived of our right to vote, even if we did absolutely everything asked of us, whether reasonable or not. I came to the precinct twice to try to vote, watched white Republican voters moved to the front of a long line of mainly African American voters, and followed very troubling instructions to write the name of my presidential candidate on torn computer paper after assurances that it would count.

I am deeply upset and angry that there were so many barriers and that my vote didn't count in an historic presidential primary election-- between a woman and an African American. This election drew unprecedented participation everywhere. I don't know if my grandmother could have imagined such a contest, or if she could, that I would have been unable to cast a ballot in it and have it count.

I hope the lesson that my son and so many other voters learn is not that it's easy for someone to take away our precious right to vote.

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Save
Student Association for Voter Empowerment

Barriers to the Youth Vote in 2008

A briefing on specific issues and tactics that compromise the ability of young people to exercise their vote

Across all demographics, there are significant challenges when it comes to the exercising the right to vote; however, young voters face a unique set of barriers. The Student Association for Voter Empowerment (SAVE) compiled the following list of impediments to the youth vote from a variety of sources including personal experience, individual interviews, collected testimony, news media, and election protection organizations.

1. **Voter Registration**

   The first step in the process of voting is registration; unfortunately, the numerous requirements that young people confront when attempting to register are particularly onerous.

   In some cases, students face overt legislative attempts to prevent them from voting at their college or university. For example, SAVE heard testimony that every year a bill is introduced in the Maine state legislature prohibiting students living in college owned housing from claiming residency.[1] Fortunately, the bill has not passed; however, if it did, it would effectively disenfranchise thousands of students who wish to vote in their new communities.

   Many local boards of elections across the country effectively practice the discrimination that members of the Maine state legislature preach. Since state statutes expressly prohibit the use of a post office box for registration purposes, officials frequently turn student voters away by failing to recognize dormitory addresses as legitimate residences. When students cannot use their dormitory address, there is no means for them to register in their new community. In instances where election officials do recognize dormitory addresses, the discrepancy between a student's mailing address and actual physical address creates a situation where students are susceptible to voter purging.[2] In such instances, certified mail is sent to student voters' addresses, and if the mail was returned as undeliverable, the information was used as grounds to purge the registered voter from the rolls. Since college students typically have different

[1] Testimony of Chris Appel, *Student Association for Voter Empowerment Hearing on Voter Irregularities*, July 25, 2007.
[2] Ben Adler, "Senate Bill Seeks to Restrict Vote Caging," *Politico*, March 25, 2008.

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mailing and living addresses, they are particularly susceptible to this method of challenging voter eligibility.

Other significant barriers to registration exist beyond challenges to eligibility. Voter registration drives targeting college students are subjected to rules that are not imposed on groups that do not register students to vote. In Tennessee, students were asked to provide identification, typically not required of other registrants.[3] If standards are applied consistently to individuals across the demographic spectrum, the practice would be acceptable; however, when young voters and students are forced to follow a different set of rules, it amounts to discrimination.

Finally, several instances of election officials presenting residency questionnaires to students have been reported.[4] In 2004, the board of elections in Williamsburg, Virginia asked students to complete a questionnaire relating to the location of their parents' home, possession of property outside the town, and their place of worship.[5] Such detailed information was not required of other residents and was collected solely to establish a reason to reject a student's registration.

Clearly, a multitude of challenges confronts students, and those who register students, when taking the initial step in the voting process. However, successfully navigating these initial barriers does not mean a student's vote is secure.

2. Misinformation Campaigns

Misinformation campaigns designed to discourage students from voting have also been widely reported. In some instances, the disinformation is aimed at students prior to registration. Recently, stories surfaced from students at Virginia Tech regarding false claims made by local election officials.[6] Election officials disseminated false information, stating that students who attempted to register at their school address could jeopardize their status as dependants on tax returns, their car and health insurance, and even school scholarships. After the issue received greater public scrutiny, election officials modified their statements; however, the number of discouraged student voters will remain a mystery.

Misinformation is also a tool to dissuade or prevent students from voting on Election Day. Flyers were printed and posted around the University of Pennsylvania in 2004 containing information similar in nature to that at Virginia Tech. The posters warned of serious consequences for out-of-state students who

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[3] Testimony of Courtney Fryxell, *Student Association for Voter Empowerment Hearing on Voter Irregularities*, July 25, 2007.
[4] Rosenfeld, *Count My Vote,* 36.
[5] Testimony of Zach Pilchen, *Student Association for Voter Empowerment Hearing on Voter Irregularities*, July 25, 2007.
[6] Tamar Lewin, "Voter Registration by Students Raises Cloud of Consequences," *The New York Times*, September 7, 2008.

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voted in Pennsylvania.[7] The key difference, however, was that the posters did not appear until after the registration deadline. Consequently, students were scared out of voting at all because it was too late to register in their home districts. Disinformation campaigns represent the most blatant form of discrimination against student voters. The practice is a malicious attempt to discourage students from either registering to vote or casting a ballot.

3. Voter Identification

Voter identification laws have recently garnered legislative success in several states, most notably in Indiana. Proponents of the identification laws claim they are designed to curb voter fraud; however, reports of voter fraud are virtually non-existent and the reports that do exist typically relate to absentee or mail-in ballots. Essentially, voter identification laws target a phantom problem, yet clearly have a negative impact on young voters. According to a Rock the Vote survey, 19 percent of young adults (18-29) report they do not possess a government issued photo ID with their current address.[8] As a result, young voters are forced to rely upon alternative forms of identification. The substitutions for a photo ID, such as utility bills, are not easily obtainable for students because colleges and universities generally pay all the bills for students that live in dormitories. To remedy the problem, Oberlin College took the initiative and issued utility bills to their students for identification purposes[9]. While it was a remarkable effort by the college, it is not a step every school is prepared to take. Instead, SAVE believes it is important for states to recognize college and university IDs as an acceptable alternative. For the students who make it to Election Day eager to vote, it is critical that a voter identification law not derail their effort.

4. Vote Machine and Ballot Allocation

In the recent past, long lines to vote, which result from poor allocation of voting machines and ballots, have marred our elections. A few examples include in Florida, Maryland, and Virginia. In at least one instance, insufficient allocation of machines directly affected student voters from Kenyon College in Gambier, Ohio.[10] There were only two machines located at the polling place, for a district with over 1,000 registered voters, a ratio well in excess of established guidelines. As a result, some students were forced to wait in line up to 10 hours before voting. Many students were unable to wait in line due to other commitments, essentially forced to forfeit there vote. Long lines are far too common and negatively affect young voters.

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[7] Testimony of Cynthia Padera, *Student Association for Voter Empowerment Hearing on Voter Irregularities*, July 25, 2007.
[8] Ben Adler, "Activists: Ruling Hurts Youth Voters," *Politico*, April 28, 2008.
[9] Rosenfeld, *Count My Vote,* 36.
[10] Testimony of Ellery Biddle and Sarah Cohen, *Student Association for Voter Empowerment Hearing on Voter Irregularities*, July 25, 2007.

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All the previous examples of discrimination demonstrate a general sentiment opposing student-voting rights. We have seen barriers established at every step in the voting process—registration, between registration and voting, at the polls, and in the booth. A fear that the student population may overwhelm the community may drive such discriminatory practices. This fear is unwarranted. Young people genuinely wish to become members of their community and often consider registering to vote a positive step in that direction. As leaders in our own communities, we must foster an environment that encourages an active and engaged citizenry, particularly among our youngest citizens. It is the great fear of SAVE that a young adult, who experiences a barrier to voting, will become disillusioned to the extent that they will not participate in the future.

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March 1, 2008

The Honorable Patrick J. Leahy
Chairman, Committee on the Judiciary
United States Senate
Washington, DC 20510

Re: Letter of Support for Grace Chung Becker, Applicant for United States Department of Justice Assistant Attorney General, Civil Rights Division

Dear Senator Leahy:

On behalf of the Asian American Justice Center ("AAJC"), a national civil rights organization dedicated to advancing and defending the civil rights of Asian Americans, we are writing to support the confirmation of Grace Chung Becker to serve as the Assistant Attorney General, Civil Rights Division, for the United States Department of Justice. We have met with Ms. Becker and believe that she has the qualifications, intellectual capacity, and commitment necessary for this position. We therefore ask you to hold a Judiciary Committee hearing for her and seek her confirmation at the earliest opportunity.

Founded in 1991, the AAJC (formerly the National Asian Pacific American Legal Consortium) works to advance the human and civil rights of Asian Americans through advocacy, public policy, public education, and litigation. AAJC is one of the nation's leading experts on issues of importance to the Asian American community including: affirmative action, anti-Asian violence prevention/race relations, census, English as a second language, immigrant rights, immigration, language access, television diversity, and voting rights.

Although we may strongly disagree at times with the Division's position, such as the brief filed by the Solicitor General and joined by the Civil Rights Division in support of the Indiana voter ID laws currently pending before the Supreme Court, we believe that Ms. Becker is willing to work closely with the civil rights groups and can make distinct and valuable contributions to the advancement and protection of civil rights. Most currently we were very pleased with Ms. Becker's leadership on the indictment of Jeremiah Munsen on federal hate crime and conspiracy charges for his role in threatening and intimidating marchers who participated in a civil rights rally in Jena, Louisiana by displaying two hangman's nooses from the back of a pickup truck. Likewise, she is committed to rescuing victims of human trafficking and ensuring that those who commit these crimes are brought to justice. Lastly the Supreme Court brief submitted in *CBOCS West Inc. v. Humphries,* an employment discrimination case, where Ms. Becker took a supportive position of the values that AAJC stands for. Through my discussions with Ms. Becker we also believe that she will continue the excellent work the Department has done with respect to protecting the rights of language minority voters by enforcing Sections 203 and 2 of the Voting Rights Act.

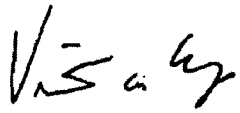
1140 Connecticut Ave. N.W. Suite 300 Washington, DC 20036 (202) 296-2300 (202) 296-2318 www.advancingequality.org

Ms. Becker has the experience necessary to serve as Assistant Attorney General. She has served for the last two years as a Deputy Assistant Attorney General in the Civil Rights Division. Since December 2007, Ms. Becker has served as the Acting Assistant Attorney General for the Division. Ms. Becker previously has served as an Assistant General Counsel on the U.S. Sentencing Commission, and on the Senate Judiciary Committee (as a detailee). Thus, Ms. Becker is well-versed with the issues affecting the Civil Rights Division and is in a position to manage the Division immediately. She also has served in the U.S. Attorney's Office, the Criminal Division of the Department of Justice, the U.S. Department of Defense, the U.S. Army, and two federal judicial clerkships. Her long history of governmental service should be commended.

It should also be noted that Ms. Becker is an active member in Asian American community. She is actively involved in the Asian Pacific American Bar Association, where she often speaks on government service and mentorship. She has also served as an officer on the Board of Directors for the D.C. Area chapter of the Korean American Coalition, a group that we often coordinate our work with.

We support her nomination and look forward to her confirmation as the Assistant Attorney General for the Civil Rights Division of the United States Department of Justice.

Sincerely,



Vincent A. Eng
Acting Executive Director
Deputy Director

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Department of Justice

GRACE CHUNG BECKER
ACTING ASSISTANT ATTORNEY GENERAL
CIVIL RIGHTS DIVISION

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

HEARING ENTITLED

"PROTECTING THE RIGHT TO VOTE: OVERSIGHT OF THE DEPARTMENT OF JUSTICE'S PREPARATIONS FOR THE 2008 GENERAL ELECTION"

PRESENTED

SEPTEMBER 9, 2008

STATEMENT OF GRACE CHUNG BECKER
ACTING ASSISTANT ATTORNEY GENERAL,
CIVIL RIGHTS DIVISION
DEPARTMENT OF JUSTICE

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Good morning Chairman Leahy, Ranking Member Specter, and Members of the Judiciary Committee. I appreciate the opportunity to appear before you this afternoon to discuss the role of the Civil Rights Division in preparing for the 2008 General Election.

For many reasons, this is an unprecedented election year. Voters are registering in record numbers in states across the nation and record numbers of voters are expected at the polls this November 4th. The Civil Rights Division is not only aware of the challenges facing the states—which have primary responsibility for conducting elections—during this voting season, but has been actively engaging with local and state governments, as well as civil rights organizations, doing everything within our authority to ensure that this election is fair and run as smoothly as possible.

Over the past several months, representatives of the Justice Department have frequently met with members of Congress, including this Committee's staff, with members of civil rights groups, and state and local governments, to discuss concerns and questions about the upcoming election and to address the Civil Rights Division's efforts in preparing for this election cycle. I have met with dozens of civil rights organizations as well as the National Association of Secretaries of States, the National Association of Attorneys General, the National Conference of State Legislators and the National Governors' Association to address concerns and answer questions regarding the Justice Department's role in the upcoming elections. The Department remains committed, in both words and action, to ensuring that we effectively implement these responsibilities not only during this election year but for future elections as well.

The right to vote is the foundation of our democratic system of government. The Department strongly supported the Voting Rights Act Reauthorization and Amendments Act of 2006, named for three heroines of the Civil Rights movement, Fannie Lou Hamer, Rosa Parks, and Coretta Scott King. The Department currently is vigorously defending the statute's constitutionality in federal court. On May 30, 2008, a three-judge district court panel in the

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District of Columbia unanimously upheld the constitutionality of the statute. *See Northwest Austin Municipal Utility District No. 1 v. Mukasey*, No. 06-1384 (D.D.C. May 30, 2008). The Department is pleased that the three-judge district court agreed with our position in upholding the constitutionality of the reauthorization of the Voting Rights Act. The plaintiff's notice of appeal to the Supreme Court was filed on July 8, and its jurisdictional statement is due 60 days thereafter. We will continue to vigorously enforce all the provisions of federal law.

I. Legal Authority of the Civil Rights Division

Under our nation's federal system of government, the primary responsibility for the method and manner of elections lies with the States. Article I, Section 2, providing for the election of the House of Representatives, specifies that "Electors in each State shall have the Qualifications requisite for Electors for the most numerous Branch of the State Legislature." The Seventeenth Amendment to the Constitution adopted this same language with respect to the popular election of Senators. Article I, Section 4, Clause 1 of the Constitution states, "The Times, Places and Manner of holding Elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof." However, Article I, Section 4, Clause 2 goes on to provide: "[B]ut the Congress may at any time by Law make or alter such Regulations" with respect to federal elections. The Fourteenth and Fifteenth Amendments likewise authorize congressional action in the elections sphere. The import of the foregoing constitutional provisions is clear: States have the power to determine the qualification of voters subject to various constitutional limits (most notably those imposed by the Fifteenth, Nineteenth and Twenty-Fourth Amendments to the Constitution, prohibiting the States from discriminating based on race or sex and imposing poll taxes), and also to establish election procedures except where Congress exercises its authority to legislate with respect to voting procedures.

The Civil Rights Division is responsible for enforcing several federal laws that protect voting rights, and I will discuss the Division's work under each of those laws. These laws include, among others, the Voting Rights Act of 1965 and subsequent amendments thereto, the National Voter Registration Act of 1993 (Motor Voter or NVRA), the Help America Vote Act of 2002 (HAVA), and the Uniformed and Overseas Citizen Absentee Voting Act of 1986 (UOCAVA). The Voting Section of the Civil Rights Division enforces the civil provisions of these laws. The Voting Section is committed to enforcing vigorously each of the statutes within its jurisdiction. The 18 new lawsuits we filed in calendar year 2006 is double the average number of lawsuits filed annually in the preceding 30 years.

In 2006, the President signed the Voting Rights Act Reauthorization and Amendments Act of 2006, which renewed for another 25 years certain provisions of the Act that had been set to expire. The Voting Rights Act has proven to be one of the most successful pieces of civil rights legislation ever enacted. We will continue to work to ensure that all citizens have equal access to the polls.

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

In 2006, the Division's Voting Section filed and resolved a lawsuit under Section 2 against Long County, Georgia, for improper challenges to Hispanic-American voters – including at least three United States citizens on active duty with the United States Army – based on their perceived race and ethnicity. The Voting Section also filed a Section 2 lawsuit in Ohio in 2006 that challenged the City of Euclid, Ohio's mixed at-large/ward method of electing its city council on the basis that it unlawfully diluted the voting strength of African-American voters. Although African-Americans comprise nearly 30 percent of the city's electorate, and there have been eight recent African-American candidates for the Euclid City Council, not a single African-American candidate has ever been elected to the nine-member city council or to any other city office. In August 2007, the court ruled that the city's method of electing its city council violated the Voting Rights Act. In March 2008, the first election was held under a court-ordered remedial voting plan, and the first African-American was elected to the Euclid City Council from a majority-black voting district. Also among our successes under Section 2 is the Division's lawsuit against Osceola County, Florida, where we brought a challenge to the county's at-large election system. In October 2006, we prevailed at trial. The court held that the at-large election system violated the rights of Hispanic voters under Section 2 and ordered the county to abandon it. In December 2006, the court adopted the remedial election system proposed by the United States and ordered a special election under that election plan that took place in April 2007. In that election a Hispanic representative was elected from a majority-Hispanic voting district to the Osceola County Commission. Further, in April 2008, the Voting Section filed and resolved another suit challenging a district voting plan for the Osceola Board of Education on the grounds that those districts, that were all majority-Anglo, diluted Hispanic voting strength. Just two weeks ago, voters elected the first Hispanic school board member in Osceola County's history under the single member district system adopted pursuant to our settlement.

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

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

Also in 2007, in Fremont County, Wyoming, the Division successfully defended the constitutionality of Section 2 of the Voting Rights Act, for the fourth time in this Administration. In addition, the Division filed and resolved a claim under Section 2 involving discrimination against Hispanic voters at the polls in Philadelphia. In addition, the Voting Section obtained additional relief in an earlier Section 2 suit on behalf of Native American voters in Cibola County, New Mexico. The actions against Philadelphia and Cibola County are noteworthy because both involve claims not only under the Voting Rights Act but also under HAVA and the NVRA. In Cibola County, which initially involved claims under Sections 2 and 203, the Division brought additional claims after the County failed to process voter registration applications of Laguna Pueblo and other Native American voters, removed Native American voters from the rolls without the notice required by the NVRA, and failed to provide provisional ballots to Native American voters in violation of HAVA. In Philadelphia, the Division added to our original Section 203 and 208 claims additional counts under Sections 2 and 4(e) of the Act to protect Hispanic voters, a count under the NVRA pursuant to which the City has agreed to remove from the rolls the names of numerous ineligible voters, including those who are deceased or have moved, and two counts under HAVA – to assure that accessible machines are available to voters with disabilities and that required signs at the polls also are posted in Spanish. The Division continues to monitor Philadelphia's compliance with the settlement agreement reached with that City, and attorneys from the Division monitored the presidential primary in Philadelphia in April 2008. In 2007, the Section litigated a case in Mississippi under Sections 2 and 11(b) of the Voting Rights Act. On June 29, 2007, U.S. Senior District Judge Tom S. Lee found the defendants in *United States v. Ike Brown et al.* (S.D. Miss.) liable for violating the Voting Rights Act by discriminating against white voters and white candidates. This case marked

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the first time that the Division had ever filed a case under the Voting Rights Act alleging that whites had been the victims of racial discrimination in the voting area.

In the Department's most recent action pursuant to Section 2, the Division on July 28, 2008 simultaneously filed a complaint and proposed consent decree against Salem County and the Borough of Penns Grove, New Jersey alleging that the parties violated the Voting Rights Act against Latino voters with hostile and disparate treatment, attempts to intimidate, lack of Spanish-language materials and the denial of the right to receive assistance from their assistor of their choice. The allegations include claims that the county has never translated the actual ballot into Spanish in any election held in Penns Grove, and numerous voters of Puerto Rican descent who cannot understand the ballot in English have been unable to fully exercise their voting rights. On August 25, the court entered the consent decree.

The Division will continue to closely investigate claims of voter discrimination and vigorously pursue actions on behalf of all Americans wherever violations of federal law are found.

In recent years, the Division has broken records with regard to enforcement of Section 208 of the Voting Rights Act. Section 208 assures all voters who need assistance in marking their ballots the right to choose a person they trust to provide that assistance. Voters may choose any person other than an agent of their employer or union to assist them in the voting booth. During the past six years, we have brought 10 of the 12 such claims brought by the Department since Section 208 was enacted twenty-five years ago, including the first case ever under the Voting Rights Act to protect the rights of Haitian Americans.

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

Our cases on behalf of language minority voters have made a remarkable difference in the accessibility of the election process to those voters. As a result of our lawsuit, Boston now employs five times more bilingual poll workers than before. As a result of our lawsuit, San Diego added over 1,000 bilingual poll workers, and Hispanic voter registration increased by over 20 percent between our settlement in July 2004 and the November 2004 general election. There was a similar increase among Filipino voters, and Vietnamese voter registration rose 37 percent. Our lawsuits also spur voluntary compliance: after the San Diego lawsuit, Los Angeles County added over 2,200 bilingual poll workers, an increase of over 62 percent. In many cases,

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violations of Section 203 are accompanied by such overt discrimination by poll workers that Section 2 claims could have been brought as well. However, we have been able to obtain complete and comprehensive relief through our litigation and remedies under Section 203 without the added expense and delay of a Section 2 claim.

In 2006, the Voting Section processed the largest number of Section 5 submissions in its history. The Division has interposed eight objections to submissions pursuant to Section 5 since January 2006, in Georgia, Texas, Alabama, North Carolina, South Dakota, and Michigan, and in 2006 filed a Section 5 enforcement action. Additionally, the Division filed an amicus brief in a Mississippi Section 5 case in 2007. The Division also consented to six actions (note the 6th is filed, but not entered by the court yet) since 2006 brought by jurisdictions that satisfied the statutory requirements for obtaining a release, or "bailout," from Section 5 coverage.

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

The Division has continued to work diligently to protect the voting rights of our nation's military and overseas citizens. The Division has enforcement responsibility for UOCAVA, which ensures that overseas citizens and members of the military, and their spouses and dependents, are able to request, receive, and cast a ballot for federal offices in a timely manner. Just since January 2008, we have taken legal action in two States to resolve UOCAVA violations for the February 5 federal primary elections. In Illinois, we participated as amicus curiae in a case to ensure the State adequately ensured the voting opportunities for UOCAVA voters under their truncated 2008 special election calendar. In Tennessee, a court on January 30 approved a consent decree with Tennessee to resolve our complaint filed over the late mailing of overseas ballots in that state. In calendar year 2006, we filed successful UOCAVA suits in Alabama, Connecticut, and North Carolina and reached a voluntary legislative solution without the need for litigation in South Carolina. In Alabama and North Carolina, we obtained relief for military and overseas voters in the form of State legislation. We also obtained permanent relief in the form of legislation in Pennsylvania to resolve our 2004 suit, and we worked with Mississippi to address a structural issue affecting UOCAVA voters' ability to vote in special elections. Last month, I co-signed (with the Department of Defense) letters to all the chief state election officials reminding them of their UOCAVA responsibilities and urging vigilance in ensuring that overseas voters will not be disenfranchised. The Civil Rights Division will continue to make every effort to ensure that our citizens abroad and the brave men and women of our military are afforded a full opportunity to participate in federal elections.

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

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

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

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

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

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

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

A major component of the Division's work to protect voting rights is its election monitoring program, which is among the most effective means of ensuring that federal voting rights are respected on election day. The Justice Department deploys hundreds of personnel to monitor elections across the country. Thus far during calendar year 2008, 364 federal observers and 148 Department personnel have been sent to monitor 47 elections in 43 jurisdictions in 17 states. For the 2008 elections, the Civil Rights Division will implement a comprehensive Election Day program to help ensure ballot access. As in previous years, the Civil Rights Division will coordinate the deployment of hundreds of federal government employees in counties, cities, and towns across the country to ensure access to the polls as required by our nation's civil rights laws.

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

Such extensive efforts require substantial planning. Our decisions to deploy observers and monitors are made carefully and purposefully so that our resources are used where they are most needed. As mentioned previously, I have met with representatives of a number of civil rights organizations, including organizations that advocate on behalf of racial and language minorities, as well as groups that focus on disability rights, as well as representatives of State and local election officials and Congressional staff members regarding the 2008 general election. These meetings have been a productive forum for discussion of the concerns of national, state and local officials' regarding the 2008 Presidential election.

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

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

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Statement of

The Honorable Benjamin L. Cardin

United States Senator
Maryland
September 9, 2008

OPENING STATEMENT OF
U.S. SENATOR BENJAMIN L. CARDIN OF MARYLAND
AT THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

HEARING ON"PROTECTING THE RIGHT TO VOTE:
OVERSIGHT OF THE DEPARTMENT OF JUSTICE'S PREPARATIONS
FOR THE 2008 GENERAL ELECTION"
TUESDAY, SEPTEMBER 9, 2008

The hearing will come to order.

Today the Senate Judiciary Committee will receive testimony on the subject of "Protecting the Right to Vote: Oversight of the Department of Justice's Preparations for the 2008 General Election."

Let me thank Chairman Leahy for asking me to chair this hearing. Let me also give a special thanks to Senator Kennedy, as we continue to pray for his speedy recovery and return to this Committee and to the Senate. Senator Kennedy is a true leader on so many issues, in particular on the critical civil rights issue of voting before the Committee today. His staff has been instrumental in preparing for today's hearing.

During the 2008 presidential primary season, many states have witnessed record-breaking new voter registrations and voter turnout at the elections.I have particularly been encouraged to see so many young people becoming energized about the candidates in this election, which will shape our nation's future for many years to come.

I am gravely concerned, however, that due to poor civil rights enforcement efforts at the Justice Department and numerous new election laws and rules on the books, that many eligible voters will be disenfranchised in the upcoming general election.

Today's hearing will focus on to what extent the Department of Justice is prepared, or unprepared, for the new challenges we expect to face in the 2008 general election, based in part on our experiences in the 2000 and 2004 general elections. I must tell you that I am not convinced that the Justice Department is planning to do everything in its power to make sure that every eligible vote is counted, and to make sure that no eligible voters are denied the right to fully and fairly participate in elections.

Over the past 2 years this Committee has undertaken extensive investigations into the improper role that politics has played at the Department of Justice. When it comes to the Civil Rights Division, specifically, I am gravely concerned that the Division has lost its way from its historical mission to protect the civil rights of all Americans, particularly the most vulnerable among us.

The Civil Rights Division, in particular, has suffered terrible stains on its reputation under the Bush Administration, in particular during the tenure of former Attorney General Alberto Gonzales. The Division has a poor record of filing disparate impact and pattern and practice cases, and has not made it a priority to file cases to protect African-Americans from discrimination. The Civil Rights Division failed to authorize a single case

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alleging discrimination in voting on behalf of African-American voters between 2001 and 2006.In particular I have been concerned that the Justice Department has been reluctant to file Section 2 Voting Rights Act cases alleging minority vote dilution.

I am disturbed that the Civil Rights Division has also let partisan politics influence its personnel and litigation decisions, including the preclearance of Georgia's restrictive voter identification law in 2005 (which overruled and was contrary to the recommendations of career staff).

I understand that the Office of Professional Responsibility and the Office of the Inspector General are continuing their inquiry into the mismanagement of the Civil Rights Division, and I look forward to reviewing their report in the near future. In particular I want to know what administrative or legislative changes are needed to stop these types of abuses in the future.

I look forward to hearing from today's witnesses from the Department of Justice as to what steps they are going to take before the election to ensure that all eligible votes are counted and that voters are not disenfranchised. Will DOJ send letters to States outlining federal voting rights statute requirements regarding voter purges and voter registration, including deadlines for action? Will DOJ proactively contact States with evident problems that could violate federal voting rights statutes, such as lack of adherence to minority language requirements or areas with a history of deceptive practices designed to suppress minority vote turnout? Will DOJ provide Congress, jurisdictions, and advocacy groups a list of planned election coverage before the election, with its reasoning process? Will DOJ improve its training on "voter access" issues that have taken a backseat to preventing "voter fraud" at the polls?

I look forward to hearing from our distinguished witnesses today on Panel II. Professor Gilda Daniels will testify about her experience as the Deputy Chief of the Voting Section of the Civil Rights Division from 2000 to 2006. Keshia Anderson will tell the Committee what happened when she tried to vote in the February 2008 presidential primary in Chesterfield County, Virginia.

I want to again ask the Justice Department if they have the tools necessary to combat deceptive practices in the upcoming election. If so, enforce the law. If not, help us enact our legislation to give you the tools you need. I chaired a Committee hearing on this issue last year and the Judiciary Committee reported out legislation, S. 453, to address this issue. The House has already passed the bill by voice vote. But I must tell you that the Justice Department has still been much too slow to cooperate to help us fine tune and tweak this bill so that it could pass before this Congress adjourns, so that we can clearly criminalize activities that deliberately attempt to suppress the vote.

After having served in elective office in Annapolis for 20 years and in Washington for 20 years, I understand that campaigns are a rough and tumble business. I expect that candidates will question and criticize my record and judgment, and voters ultimately have a right to choose their candidate.

What goes beyond the pale is when a campaign uses deceptive tactics to deliberately marginalize and disenfranchise minority voters. Sadly, the tactics we saw in the 2006 elections are not new. These tactics seem to deliberately target minority neighborhoods and are blatant attempts to reduce minority turnout.

In previous elections we have seen deceptive literature distributed which gave the wrong date for the election, the wrong times when polling places were open, and even suggested that people could be arrested if they had unpaid parking tickets or unpaid taxes and tried to vote. Other literature purported to give a different general election day for Republicans and Democrats. And in at least one state election, deceptive literature was handed out literally on election day by the polling places in specifically-targeted minority communities. These voter "guides" were handed out by major candidates' campaigns, and contained false and misleading endorsements in an effort to diminish the impact of minority voters in this election.

It has been 138 years since Congress and the states ratified the Fifteenth Amendment to the Constitution in 1870, which states that "the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race [or] color?" The Amendment also gave Congress power to enforce the article by "appropriate legislation." African-Americans suffered through nearly another 100 years of discrimination at the hands of Jim Crow laws and regulations, designed to make it difficult if not impossible for

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African-American to register to vote due to literacy tests, poll taxes, and outright harassment and violence. It took Congress and the states nearly another century until we adopted the Twenty-Fourth Amendment to the Constitution in 1964, which prohibited poll taxes or any tax on the right to vote. In 1965 Congress finally enacted the Voting Rights Act, which once and for all was supposed to prohibit discrimination against voters on the basis of race or color.

It is time for Congress and the Department of Justice to once again take action to stop the latest reprehensible tactics that are being used against African-American, Latino, and other minority voters to interfere with (a) their right to vote or (b) their right to vote for the candidate of their choice, as protected in the Voting Rights Act. These tactics undermine and corrode our very democracy and threaten the very integrity of our electoral process.

Let me close by recalling the voting rights march outside Selma, Alabama. Our own House colleague, Congressman John Lewis from Georgia, was savagely beaten and tear-gassed by police for peacefully marching and protesting on what we now call "Bloody Sunday." He and so many others, including the Rev. Dr. Martin Luther King, Jr., ultimately led a peaceful march to Montgomery help their fellow citizens register to vote. Media coverage of the mistreatment of our own American citizens garnered worldwide attention, and led to the introduction by President Johnson in Congress of the proposed Voting Rights Act. Congress passed this historic act and President Johnson signed it into law less than five months after its introduction.

Today we have the obligation and duty to fulfill the promises made by Congress and the states nearly 140 years after the end of the Civil War, and over 40 years after the enactment of the Voting Rights Act. I hope the Department of Justice understands the serious obligation it has to fully enforce and carry out the law to protect all voters, as this Congress, the nation, and the world will be closely watching this historic election.

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Testimony of Kristen Clarke
Co-Director, Political Participation Group
NAACP Legal Defense and Educational Fund, Inc.

U.S. House Committee on the Judiciary
Subcommittee of 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 Preparation for the 2008 Election

September 9, 2008

NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

The Role of the Voting Section of the Civil Rights Division of the U.S. Department of Justice in Preparation for the 2008 Election

Founded under the direction of Thurgood Marshall, the NAACP Legal Defense and Educational Fund (LDF) is the nation's oldest and, we believe, finest civil rights law firm that has served as legal counsel for African Americans in a significant number of important federal voting rights cases over the course of the last several decades. LDF has also provided testimony in support of the Voting Rights Act of 1965 and other federal voting rights laws and core voting protections. Through extensive litigation, advocacy, public education and election monitoring efforts, particularly in the Deep South, LDF has developed significant expertise regarding barriers to political participation and has focused much attention on the role of the Department of Justice in carrying out the objectives of the Voting Rights Act in order to ensure minority voters' access to the polls.

I currently serve as the Co-Director of LDF's Political Participation Group. Prior to joining LDF, I served for several years in the Civil Rights Division of the U.S. Department of Justice, handling matters arising under the Voting Rights Act of 1965 and other federal voting rights statutes. I have also coordinated a number of federal observer monitoring efforts in various jurisdictions around the country. On behalf of LDF, I submit the following written testimony to offer our recommendations about the role that the U.S. Department of Justice should play during the upcoming 2008 federal election cycle.

The last two presidential elections have significantly undermined public confidence in our political system. Given this reality, the Voting Section of the Civil Rights Division of the Department of Justice (Department) must do its part to help restore confidence in the electoral process. This election cycle has proven to be of historic value. Most significantly, from the political participation perspective, there have been increases in registration and turnout rates in a number of jurisdictions around the country. It is widely anticipated that the high level of voter interest in this election will translate into high turnout at the polls in November. High registration and turnout rates are a sign of an energized electorate – a development that Congress should encourage wherever possible. Many of those who will be voting in November include a significant number of young voters and new voters for whom this will be their first time casting a ballot at the polls.

In our view, there are a number of action steps that the Department of Justice should now take to ensure that all voters, including minority voters, are able to freely and equally access the polls this November. An effective and smooth election cycle requires strong enforcement of federal voting rights statutes on the part of the Department and better leveraging of federal resources, including the Department's federal observer program, to help prevent and deter the problems that might otherwise threaten the integrity of our political process.

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I. Federal Observers Should be Deployed to Protect Minority Voters and Not to Serve Partisan or other Impermissible Objectives

The Justice Department's federal observer program serves an important oversight function that can help protect minority voters' access to the ballot box. Generally, federal observers are deployed in response to complaints about discriminatory voting practices, including acts of harassment or intimidation. Federal observers play an important role in elections by documenting the treatment of voters inside polling places and providing a basis for the Department to intervene, when appropriate, to address those problems that may deny minority voters equal access to the polls. Moreover, the mere presence of federal observers can help neutralize racial tensions or other problems that might otherwise obstruct voter access to the polls.

The resources of the Department's federal observer program should be carefully leveraged and appropriately distributed in covered jurisdictions to help discourage and deter the kind of suppression tactics that would likely emerge in the absence of federal oversight. Most importantly, the federal observer program should be used for its long-standing purpose of protecting minority voter access to the polls. Decisions about where to send observers should not be manipulated by partisan or other impermissible objectives.

Recently, questions have arisen around the decision-making process underlying the Department's deployment of federal observers. For example, recent federal monitoring efforts in Perry and Marion Counties, Alabama, have been met with great distrust among African-American voters who feel that their complaints are not being treated equally to those that may be presented by white voters.[1] Incidentally, Perry and Marion Counties, and their neighbors, served as the backdrop for some of the most significant struggles to extend the franchise to African Americans during the Civil Rights Movement. It is in these counties where Black activists, some of whom have been represented by LDF, were targeted by local prosecutors who sought to discourage voter mobilization efforts aimed at encouraging Black political participation.[2]

It is important that the Department continue to consult with community contacts to ensure that federal observers are deployed to those jurisdictions where tensions may be at their height and where minority voter access is most at risk. Outreach to voters, and to the advocacy organizations serving them, can also help ensure that citizens are aware of the process for lodging a complaint with the Department and the process for formally requesting the deployment of observers. Finally, the Department must be prepared for late requests to deploy observers as history has shown that the most severe problems often do not arise until the eve of an election.

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[1] *See* Dana Bayerle, *Perry County Official Cries Racism in Vote Probe*, Tuscaloosa News (September 1, 2008).

[2] *See* Ron Nixon, *Turning the Clock Back on Voting Rights*, The Nation (October 28, 1999), *available at* http://www.thenation.com/doc/19991115/nixon/single (noting that the history of voter-fraud investigations initiated by white citizens and elected officials dating back to the late seventies and that in many of these cases, the charges have been dismissed).

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II. The Justice Department Should Terminate Its Policy of Using Criminal Prosecutors as Election Monitors Inside Polling Places

Polling places should be intimidation-free spaces in which all voters are able to freely cast their ballot without interference or obstruction. Both federal law and a number of state laws include provisions that are aimed at ensuring that voters do not face intimidation during elections. Nevertheless, the Department of Justice routinely relies upon federal criminal prosecutors to monitor activity inside of polling sites around the country. This practice places voters on a collision course with prosecutors who lie at the core of federal law enforcement efforts, and can have the effect of discouraging and deterring minority voters at the polls on Election Day. Indeed, in those communities where law enforcement officials have had an Election Day presence, citizens believe that the deployments were made with the knowledge of their intimidating impact.

As many know, the Department of Justice routinely deploys federal observers to certain jurisdictions that are certified for coverage under the Voting Rights Act. However, in some instances, the Department receives complaints from voters in jurisdictions that are not certified for federal observer coverage. In those instances, the Department has moved to deploy "attorney monitors" to carry out a role comparable to that of federal observers. Here, the Department relies on the consent of local or state election officials to access polling sites. Because the Department cannot use federal observers in this capacity, they instead rely on Department attorneys, administrative staff and other personnel to monitor the polls. In recent years, the Department has increasingly turned to local U.S. Attorney's Offices for help with its attorney monitoring efforts. The Department, however, fails to distinguish between criminal prosecutors and civil litigators in those offices – thus, needlessly entangling criminal prosecutors in the business of monitoring activity inside of polls on Election Day. The mere presence of criminal prosecutors inside polling places may, in many instances, intimidate the very voters that the Voting Rights Act seeks to protect.

Plainly, criminal prosecutors inside the polls can intimidate voters. In fact, this threat is one that has been acknowledged by the current administration. As recently as November 16, 2006, former Assistant Attorney General Wan Kim of the Civil Rights Division observed that "[f]ederal prosecutors being involved in voter access issues would lead to intimidation of voters at the polls."[3] In addition, in recent testimony before the U.S. Commission on Civil Rights, William Welch, Chief of the Public Integrity Section of the Criminal Division acknowledged that "the Civil Rights Division is responsible for protecting the right to vote" while "other Department prosecutors throughout the country ... prosecut[e] those who corrupt elections."[4] Moreover, the well-publicized voter fraud prosecutions mounted by various U.S. Attorney's Offices in recent years makes the chilling effect that prosecutors can have inside the polls clear.[5] Nevertheless, the Voting

[3] *See* Hearing Transcript, United States Senate, Committee on the Judiciary, Washington, D.C. (November 16, 2006).

[4] *See* Hearing Transcript, U.S. Commission on Civil Rights (June 6, 2008) *available at* http://www.usccr.gov/calendar/trnscrpt/060608ccr1.pdf.

[5] *Id.* at 16 (describing the Attorney General's 2002 Ballot Access and Voting Integrity Initiative).

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Section of the Civil Rights Division actively solicits and recruits criminal prosecutors and deploys them to polling sites around the country.

The Department's actions conflict with a number of statutes that specifically seek to prevent intimidating activity inside of and near polling sites during elections. These statutes intend to prevent any form of undue influence or intimidation that may interfere with a citizen's free exercise of her right to vote, with a focus on the need to bar law enforcement presence.[6] Collectively, these statutes embody the recognition that the mere presence of any law enforcement activity in or around polling places may have a detrimental effect on the free exercise of the right to vote. And this risk has been met with laws which aim "to insure [an] atmosphere at the polling place [that is] free from intimidation of any sort."[7]

Although the above cited election statutes do not explicitly reference criminal prosecutors, the reality is that Criminal Assistant U.S. Attorneys and other federal prosecutors work in tandem with Federal Bureau of Investigation (FBI) agents and other law enforcement personnel to carry out their duties. These factors strongly counsel in favor of the Department abandoning its policy of posting criminal prosecutors inside of polling places. Particularly in small communities, these criminal prosecutors are easily recognizable and well-known and thus, there is no way to neutralize the public's perception that the Department's attorney monitoring efforts are unduly influenced by criminal law enforcement objectives when they should be focused on voter access. Moreover, the Department's use of criminal prosecutors compounds existing problems of suppression and intimidation faced by voters. Terminating the practice of using criminal prosecutors as poll monitors can help ensure that minority voters are less likely to encounter or face intimidation this November.

III. The Justice Department Should Develop Plans for Possible Emergency Litigation on Election Day

As it has done in recent election cycles, we expect that the Justice Department will deploy federal observers and attorney monitors to a number of jurisdictions around the country to ensure minority voter access to the polls. What remains unclear, however, is the Department's action plan for responding to serious problems that may emerge on, or immediately prior to, Election Day. In light of spikes in registration rates in a number of places around the country, it is widely anticipated that there will be correspondingly high rates of turnout and participation on November 4th. High rates of turnout may result

[6] *See e.g.*, La. Rev. Stat. 18:428 (states that "[l]aw enforcement officers shall not be stationed at polling places on election day..." and that such persons are also disqualified from serving as "commissioners-in-charge, commissioners, alternate commissioners, or watchers"); Tenn. Code Ann. § 2-7-103 (states that "[n]o police or other law enforcement officer may come nearer to the entrance to a polling place than ten feet"); Cal. Elec. Code § 18544 (imposes criminal penalties on peace officer, private guard, or security personnel posted at a polling place); 25 Penn. Stat. § 3047 ("[n]o police officer in commission, whether in uniform or in citizen's clothes, shall be within one hundred feet of a polling place . . .")

[7] La. Att'y. Gen. Op. No. 78-1219 (September 18, 1978).

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in long lines as seen during both the 2000 and 2004 presidential elections in places such as St. Louis, Missouri and Cleveland, Ohio.[8] The risk of long lines may be particularly stark in high-density urban areas with significant numbers of newly registered minority voters. Where these problems bear more heavily on minority voters, there is a role for the Department to play to prevent a disparate impact on the minority community.

Although the Department may have observers or monitors on the ground in these areas to document the problems, in some instances, emergency Election Day litigation may be necessary to ensure that all voters receive a fair and equal opportunity to case their ballot. Although the relief sought in any litigation would vary depending on the specific factual circumstances, certainly an extension of poll hours may be appropriate in those jurisdictions that are not equipped or prepared to handle the high turnout that is widely anticipated during the November 4th general election.

The Department has not brought emergency Election Day litigation in recent elections and it is unclear whether the Department is prepared to turn to the courts should particularly egregious problems emerge on November 4th. As a complement to its election monitoring efforts, the Department should develop and publicize its action plan for dealing with Election Day problems that impede minority voters' access to the polls and develop an effective plan to mount emergency litigation when warranted by factual circumstances.

IV. At this Critical Stage, the Department Should Focus Ensure that NVRA-Mandated Agencies Are Transferring Voter Registration Applications to Local Registrars and Ensure that Registrars are Processing all Registration Applications in a Timely Manner

The National Voter Registration Act (NVRA) was passed, in large part, to increase electoral participation by making registration opportunities widely available and accessible. Sadly, in recent years, the Department has chosen to focus its efforts on the voter registration list maintenance rules in the NVRA and has encouraged states to aggressively purge voters from their rolls.[9] Now is the time for the Department to

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[8] *See* Jon E. Dougherty, *Judge orders St. Louis polls kept open, But decision, based on heavy turnout, reversed by appeals court*, WorldNetDaily.com (November 7, 2000) (noting that a state circuit court judge who ordered polling centers in St. Louis kept open an extra three hours because of long lines and a shortage of election officials and voting booths had her decision reversed by an appeals court; nevertheless, resulting a total extension of poll hours by 45 minutes). *See* also Charley Able, *Shortage of voting machines blamed for Douglas County delays,* Rocky Mountain News (November 8, 2006)

[9] *See* Gerry Hebert, *FEC Nominee Hans von Spakovsky: A Repeat Offender*, Campaign Legal Center (June 12, 2007) (observing that in January 2005, former DOJ attorney Hans von Spakovsky used the NVRA to launch an anti-voter initiative demanding that officials in Alabama, Georgia, Indiana, Maine, Missouri, New Jersey and New York purge their voter rolls – practice that disproportionately burdens minority voters), *available at* http://www.clcblog.org/blog_item-133.html. Von Spakovsky's efforts were often carried out through the issuance of Opinion Letters urging jurisdictions to take a particular course of action. In certain instances, these

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refocus its efforts on the central objectives of the NVRA, codified in Sections 5 and 7 of the Act, by ensuring that those agencies required to make registration opportunities available are also transmitting registration forms to election officials in a timely manner. Deadlines for registering to vote in the November 2008 election are fast approaching in many states. It is critical that NVRA-mandated agencies immediately transmit registration forms to allow Registrars sufficient time to receive and process forms.

Similarly, the Department should also ensure that Registrars and local election officials, including those in jurisdictions with significant numbers of minority voters, are processing any new registration forms received in a timely manner to notify voters of their eligibility well in advance of the November election. Some reports indicate that local election officials did not anticipate and have not been prepared for the surge in voter registration applications. However, time is of the essence, and election officials should not stand in the way of voters who have made efforts to be added to the rolls in time to participate in elections this November.

V. Section 5 Should be Enforced as a Statutory Tool to Ferret Out Any Eleventh Hour Voting Changes Aimed at Frustrating Minority Voters' Access to the Polls

The Justice Department must continue to carry out its responsibilities under Section 5 of the Voting Rights Act ensuring that covered jurisdictions do not adopt eleventh-hour voting changes that would worsen the position of minority voters. In particular, the Department should ensure that jurisdictions comply with their obligation to submit voting changes for preclearance and ensure that jurisdictions do not prematurely implement those changes before a final preclearance determination is made. When there is evidence that a jurisdiction has failed to submit a change or evidence that the jurisdiction implemented the change before the Department has rendered a final determination, the Department should file Section 5 enforcement suits to ensure that the change does not impact voters seeking to participate this election cycle. The Department must be expeditious in carrying out its Section 5 responsibilities and should issue objections when jurisdictions have failed to satisfy their burden of proving that a proposed voting change will not worsen the position of minority voters.

In recent times, we have seen jurisdictions submitting voting changes after they have been implemented or prematurely implementing these changes before they have been precleared. Because Section 5 is specifically designed as a prophylactic protection, "post-clearance" directly conflicts with Congress's goal of creating a preapproval process designed to block potentially discriminatory actions *before* they take effect. It is important that the Department emphasize the importance of seeking preclearance and reject efforts that would unravel this core feature of the Section 5 provision.

During this major election cycle, it is equally important that the Justice Department solicit the input of individuals and advocates that live in and work on behalf

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Objection Letters misstated the law and imposed unreasonable requirements on jurisdictions. Where appropriate, the Department should move to retract these Opinion Letters.

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of minority voters in the covered jurisdictions. Community input and public comment continue to represent a core feature of the preclearance process. The Department should encourage and invite Comment Letters on voting changes that appear to pose a threat to minority voters. In recent years, officials within the Department have encountered difficulty soliciting input from minority voters and the organizations that serve them because the Department has failed to refresh these contacts or allowed their lists of contacts to grow stale. The Department must continue to make efforts to cultivate new relationships and establish new community contacts in the covered jurisdictions who can help ensure that jurisdictions satisfy their burden of proof under the revitalized standards adopted by Congress during the recent 2006 reauthorization of Section 5.

VI. The Department Should Actively Investigate Reports of Voter Intimidation and Enforce Section 11(b) of the Voting Rights Act

Intimidating acts preceding an election can create an atmosphere that discourages voters, particularly minority voters, from freely participating in the political process. Often, the acts of intimidation take place in the context of close elections between minority and non-minority candidates or in areas of the country where minority voters are poised to exercise a greater degree of political power as a result of population growth. During recent elections, there have been significant incidents of voter intimidation directed against African-American, Latino, and Asian-American voters. These incidents, occurring in contests at the local, state and federal levels, include cross-burnings; the distribution of misinformation regarding the rules and requirements for voting; deceptive practices aimed at locking targeted voters out of the process; materials aimed at discouraging participation among non-English speakers; and private citizens holding themselves out as law enforcement with the purpose of intimidating voters. These actions make clear that voter intimidation continues to shape the political reality in many covered jurisdictions and stands a tool used to impede minority voters' access to the polls. Accordingly, it is important that the Department use its arsenal of existing laws to reach those who use violence, the threat of violence, or intimidation to suppress the rights of minority voters.

There are two underutilized federal statutes that can reach conduct deemed intimidating or obstructive to voters. The Department has failed, however, to aggressively use these statutes to prevent voter intimidation faced by minority voters. In addition, Section 1971 (b) of the Civil Rights Act of 1957, applicable during federal elections, states that no person "shall intimidate, threaten or coerce ... any other person for the purpose of interfering with the right of such other person to vote." Cases that have been brought under this provision of the Voting Rights Act have been exceedingly rare. It is unclear why the Department has not used this statute to reach the various voter suppression tactics of the type that we have witnessed during recent elections.

Section 11(b) of the Voting Rights Act is another statute which bars conduct deemed intimidating, threatening or coercive to voters. Specifically, Section 11(b) states that "no person [...] shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for voting or attempting to vote." Section 11(b) is an

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important statutory tool available to the Department that can and should be used to address ongoing acts of voter intimidation, particularly those acts that have a racial dimension. Even one or two high-profile prosecutions under this statute would send an important deterrence signal nationwide. Notwithstanding the statutory authorization, since the Act's initial passage in 1965, the Justice Department has brought litigation to enforce Section 11(b) in only three instances.[10]

The Department's litigation in *United States v. Ike Brown, et al.*, 494 F.Supp.2d 440 (S.D. Miss. 2007), represents the first time that the Department has brought a suit under the Voting Rights Act on behalf of white voters. Notably, it also represents one of the only instances in which the Department has moved to use Section 11(b) to reach an act of alleged voter intimidation. The Department argued that a Black voter's publication of a list of ostensibly ineligible white voters amounted to an act of racial intimidation. The court rejected the Department's Section 11(b) claim. In a particularly poignant section of the court's opinion, presiding Judge Tom S. Lee acknowledged the ongoing problem of vote discrimination in Mississippi and suggested that the Department may very well be unresponsive to the concerns of minority voters. In particular, Judge Lee observed that "[t]he court does not doubt that similar discrimination against blacks continues to occur throughout this state, perhaps routinely."[11] The Judge also noted that "it may be true, though the court makes no judgment about this, that the Justice Department has not been responsive, or fully responsive, to complaints by black voters."[12] These judicial observations suggest that the Department must take more seriously and conduct more thorough investigations into allegations of voter intimidation against minority voters.

Conclusion

The 2000 and 2004 presidential elections were both marred by problems ranging from voter suppression, intimidation, long lines and other issues that were particularly stark in minority communities. As a result, the public's confidence in the electoral process has been significantly undermined. The Department of Justice must now take a dramatically different approach to help ensure that states are prepared for the November 2008 election. Working to remove the partisan stain from the way in which federal observers are deployed; terminating the use of criminal prosecutors as poll monitors; developing a plan for emergency Election Day litigation; aggressively enforcing the voter intimidation prohibitions of the Voting Rights Act; ensuring that states are processing registration applications in a timely manner; and effective enforcement of Section 5 to capture eleventh hour voting changes that may discriminate against minority voters are some of the specific steps that the Department should now take to help restore the public's faith and confidence in the way that we conduct elections in our country.

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[10] *Cf.* U.S. v. McLeod, 385 F.2d 734, 741 (5th Cir. 1967) (trial court erred in failing to find that acts of county officials in arresting and prosecuting various persons intimidated and coerced prospective black voters in violation of Section 11(b) of the Act).

[11] *United States v. Ike Brown, et al.*, 494 F.Supp.2d 440 at 486.

[12] *Id.*

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VIA FACSIMILE 202-224-3479, 202-228-1229, 202-224-6331

The Honorable Patrick J. Leahy
Chairman, Committee on Judiciary
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The Honorable Arlen Specter
Ranking Minority Member
Committee on Judiciary
United States Senate
711 Hart Senate Office Building
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The Honorable Orrin G. Hatch
Member, Committee on Judiciary
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104 Hart Senate Office Building
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Dear Mr. Chairman Leahy, Mr. Ranking Minority Member Specter, and Member Hatch:

I understand that Mrs. Grace Chung Becker, Esquire, has been nominated by the President of the United States to be the Assistant Attorney General for the Civil Rights Division (CRT) of the U.S. Department of Justice. I also understand that such nomination is currently before the Senate Judiciary Committee and I urge that such Committee votes her clearly qualified and sends the nomination with favorable recommendation to the full Senate for action as soon as possible.

Please note she graduated magna cum laude from the Wharton School at the University of Pennsylvania and thereafter magna cum laude from Georgetown University Law School and was named to the Order of the Coif and was an Associate Editor of the Georgetown Law Journal. Thereafter she was law clerk first to Judge Penefield Jackson of the U.S. District Court for the District of Columbia (1994-1995) and then to Judge James Buckley of the U.S. Court of Appeals for the D.C. Circuit (1996-1997.

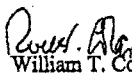
I first met Mrs. Becker at the Judicial Conference of the U.S. Court of Appeals for the District of Columbia held in Nemacolin Woodlands in the Commonwealth of Pennsylvania last month. I talked with her and she certainly made me conclude that she was a very able lawyer and one who, if appointed and confirmed, would do a wonderful job in such important position. I thereafter read the praiseworthy letter that Representative Lamar Smith, Ranking Minority Member of the House Judiciary Committee, wrote, which letter was also signed by 11 other members of the House of Representatives which spelled out her background, her previous experiences and several recommendations which she has already received since she became a member of the Bar.

As you know, for many years I was Chairman of the NAACP Legal & Educational Defense Fund, Inc. and I am still a member of its Board. I thus am aware that the President thereof, John Payton, Esquire, has written a letter dated 11 March, 2008 indicating that Mrs. Becker should not be confirmed. As I read the letter, he basically gives two reasons for his opposition: 1) that she had not had much experience in civil rights matters; and 2) there were two cases in which she was one of those who filed the brief and the LDF disagreed with the brief, even though the courts decided the two cases as urged in the brief, signed by Mrs. Becker along with other lawyers in the Justice Department. My answer to all three objections is simple: 1) she certainly had as much experience in civil rights matters as Burk Marshall did before he was confirmed for the job after being nominated by President Kennedy and once confirmed, he certainly did an outstanding job. With respect to the two cases, I think one ought to find it very difficult to say that a lawyer was involved in a case and signs a brief, what they said or did should be held against them, particularly when in each case, the court decided the case adopting the arguments submitted in such briefs.

I clearly admire John Payton, think he is a very able lawyer and a wonderful person to head up the Legal Defense Fund. Despite this, based upon my investigation of Mrs. Becker, talking with her and realizing what she has already done in life both as a college student, a law student and thereafter working mainly in federal jobs, she is certainly qualified and thus this Committee should recommend her confirmation to the Senate to act thereon favorably before the next recess, if possible. I am attaching herewith a copy of her biographical sketch. I am confident you also will find it very impressive.

"Take care....."

Sincerely,



William T. Coleman, Jr.
Senior Partner and The Senior Counselor
of O'MELVENY & MYERS LLP

WTC, Jr.:ses

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Professor Gilda R. Daniels
Senate Judiciary Committee Hearing
Protecting the Right to Vote: Oversight of the Department of Justice's Preparations for the 2008 General Election
September 9, 2008

Chairman Leahy, Presiding Chair Senator Cardin and other distinguished members of the United States Senate Judiciary Committee, it is an honor to appear before you this afternoon to discuss ways that the Department of Justice can better prepare for the 2008 Presidential Election.

I have more than a decade of voting rights experience and served as a Deputy Chief under both the Clinton and Bush administrations. I was a Deputy Chief in 2000, when the country was crippled with hanging chads, dimpled ballots and faulty voting machines and worked within the Voting Section to address the myriad of issues that arose during that election. I served in the Department of Justice (DOJ), Civil Rights Division, Voting Section as a staff attorney from 1995 to 1998 and a Deputy Chief in that section for six years from 2000 to 2006. I also served as a staff attorney in the Voting Rights Project of the Lawyers' Committee for Civil Rights Under Law for two years. Currently, I am an Assistant Professor at the University of Baltimore, School of Law, where I teach Election Law among other topics.

I. DOJ Presidential Election Experience

In 2000, we witnessed faulty voting machines with hanging chads and dimpled ballots. We also experienced error-filled purges and voter intimidation in minority neighborhoods. Since the 2000 Presidential election the voting rights vocabulary has expanded to include terms such as, "voting irregularities" and "election protection" and created a new debate regarding voter access versus voter integrity. Despite the debates and new legislation in the form of the Help America Vote Act (HAVA),[1] and the continued enforcement of other voting statutes such as the Voting Rights Act[2] and the National Voter Registration Act, (NVRA), problems persist in the operation of our participatory democracy.

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[1] The Help America Vote Act of 2002 has the stated purpose of with the stated purpose of "establish[ing] a program to provide funds to States to replace punch card voting systems, to establish the Election Assistance Commission (EAC) to assist in the administration of federal el ctions and to otherwise provide assistance with the administration of certain federal election laws and programs, to establish minimum election administration standards for States and units of local government with responsibility for the administration of federal elections, and for other purposes." Help America Vote Act (HAVA), Pub. L. No. 107-252, 116 Stat. 1666 (2002); The HAVA is codified at 42 U.S.C. 15301 to 15545

[2] The Voting Rights Act, (VRA), which has been heralded as the most effective piece of Congressional legislation in our nation's history, outlawed practices such as literacy tests, empowered federal registrars to register citizens to vote, and gave the Attorney General the power to bring widespread litigation instead of the piecemeal approach of the past. As a result,

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Although outdated voting machines were not the primary problem in 2004, the use of electronic voting machines birthed new concerns about accuracy and reliability, along with questions regarding poll workers' ability to master the technology. This election enjoyed its share of election administration problems such as the misuse of provisional ballots,[3] overzealous poll watchers, extremely long lines, deceptive voter practices, and ill-advised voter purges. In light of the problems and issues with the last two Presidential elections, it is vitally important that the Department use the full breadth of its statutory authority to act proactively to ensure that our democratic process provides every eligible citizen the opportunity to access the ballot and ensure that the ballot will be counted. In order to protect the fundamental right to vote, the government must act *prior* to Election Day. The Department should initiate contact with both state election officials and organizations to engage in a significant exchange of information in a nonpartisan and proactive way.

II. DOJ Policy and Election Preparation

After the 2000 election and certainly by 2002, the Civil Rights Division, Voting Section shifted its focus from enforcing the voting rights of minorities under Section 2 of the Voting Rights Act (VRA), as evidenced in the lack of cases brought on behalf of African-Americans, to enforcement of Section 203 for language minorities, the protection of overseas and military voters under UOCAVA, HAVA compliance and voter integrity (fraud) issues. In fact, this administration brought the first case pursuant to Section 2 on behalf of white voters in Noxubee, MS.[4] This lack of enforcement of the Voting Rights Act would indicate a well documented shift away from enforcement of statutes that require free and full ballot access to a new emphasis on restricting the ballot in the name of integrity. This must be corrected.

A. Election Coverage

Under Section 4 of the VRA, the Attorney General may send federal observers to any jurisdiction that is required to submit all of its voting changes for review under Section 5 of the VRA or where provided in a Consent Decree. The majority of the Voting Section's preparation relies upon its election coverage,

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wide disparities between blacks and whites in voter registration narrowed considerably throughout the South and the number of African-American elected officials increased tremendously.

[3] The Help America Vote Act requires states to provide provisional ballots, which allow voters whom election administrators would otherwise deem ineligible for reasons ranging from a lack of required ID to a voters name not appearing on the list of registered voters, to cast ballots despite lacking the proper identification or, in some states, attempting to vote in the wrong precinct.

[4] In 2005, the DOJ filed suit against the Noxubee County Democratic Executive Committe , Noxubee County Election Commission and Ike Brown, Chair of the Democratic Executive Committee in Noxubee, MS. See, *United States v. Ike Brown, et.al.*, 494 F.Supp.2d 440 (S.D.Miss. 2007)

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which dispatches DOJ personnel under the direction of Voting Section attorneys to observe Election Day activities and report any irregularities to Voting Section managers and then work with the jurisdiction to correct those problems. The Voting Section, however, has limited staff and with the high rate of career attorney turnover, the level of expertise necessary in the area of election coverage will require an even higher level of training. Although the Voting Section dispatched more personnel to observe elections and upgraded its tracking of Election Day complaints, some of the "election coverage" merely consisted of an attorney with a cell phone in the US Attorneys' office. In order to have a meaningful presence[5] that will dissuade attempts to disenfranchise eligible citizens, the Department should initiate contact with both state election officials and organizations to engage in a significant exchange of information in a nonpartisan and proactive way.

Because of the limited number of senior well trained staff, the Voting Section should provide a separate toll free number to the various Election Protection programs, in order for them to relay vital information of voting irregularities or voting rights statute violations to the Voting Section. Additionally, in preparing for election coverage, the Section should use its pre-election calls to insure that jurisdictions are prepared. It should also release the list of jurisdictions where it will provide election observers at least one week prior to Election Day. It should also limit the recent practice of utilizing the US Attorneys' offices and the FBI, which are primarily trained in identifying voter fraud.

B. Election-Related Investigations

After the 2004 election, the Voting Section launched a few election – related investigations which varied in intensity from phone calls to several visits. There were purge issues in Georgia; students with id problems in South Carolina, Illinois and Georgia; intimidation issues in South Carolina and Pennsylvania; claims of disproportionate voting resources in Florida and Ohio; and National Voter Registration Act issues in Delaware and Maryland. Most of these issues could have been addressed prior to Election Day with proper planning and guidance from DOJ. Many of the calls received or infractions observed on Election Day did not rise to a legally actionable level. Interestingly enough, the DOJ received far fewer calls than the estimated 110,000 that Election Protection groups received; an indication of the level of distrust and lack of confidence in the Department. After any election, however, no immediate remedy exists for the mistakenly purged voter or an uncounted provisional ballot, which further underscores the need for a proactive approach. Disenfranchisement techniques can create a pattern for a jurisdiction or a political party that should be addressed and thwarted well before Election Day.

[5] A benefit to having a more meaningful presence is the ability to collect data and identify potential witnesses for future election-related investigations.

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III. New Problems: Changes in Election Administration Laws

Since the 2004 Presidential election, the electoral landscape has changed. New voter identification and voter registration laws have made it more difficult for citizens to register and vote. Additionally, the use of ill-advised voter purges and deceptive practices continue to effect voters' access and ability to participate in the democratic process. DOJ could and should institutionalize preventative measures to address both new and recurring election related issues.[6] Based upon my experience, I suggest that the DOJ employ the following proactive enforcement practices:

A. Voter ID.

As it pertains to voter id laws, the DOJ needs to monitor those states where the voter id laws have changed, since the 2004 election. Any change in rules that affect a voters' ability to cast a ballot, such as polling place changes, voter id, etc., can cause voter confusion. Therefore, it is essential that DOJ communicate with states to make sure that they are in compliance with voting statutes and that any changes of voting status or location is clearly communicated to the voter, well before the election.

Many states changed their voter id requirements to comply with the HAVA, which required that all first time voters who registered by mail without providing id verifying info must vote in-person and provide an acceptable form of id.[7] In 2000, only eleven states required all voters to show identification. In 2006, the number doubled to twenty-two states requiring all voters to present some form of id. Opponents have argued that voter id laws cause an undue burden on poor, minority, disabled, and elderly citizens and that the expense in obtaining even the "free" ids are cost prohibitive for many Americans.[8] Proponents argue that more restrictive voter id laws are needed to prevent voter fraud.

The most restrictive requirement was passed in Indiana, which requires all voters to show a photo id before casting ballots. If the voter lacks a photo id, she must vote provisionally and subsequently return to the clerk's office and produce

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[6] For further discussion on the cumulative effective of new millennium disenfranchising methods, see, Gilda R. Daniels, *A Vote Delayed is a Vote Denied: A Preemptive Approach to Eliminating Election Administration Legislation that Disenfranchises Unwanted Voters*, forthcoming in the University of Louisville Law Review, November 2008.

[7] HAVA requires the following identification: if voting in person, a drivers license or other photo id, a copy of a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the voter; or if voting by mail, voter must submit with the ballot a copy of a current and valid photo identification; or a copy of a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the voter.

[8] New voter id laws could adversely impact students, who may have a university id, but lack a photo id with an address within the state.

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a photo id or sign an indigency affidavit before the vote can be counted. The Supreme Court recently upheld this law.[9] In 2005, Georgia's passage of a similar voter id law set off what has been called a "firestorm" of activity in the media. Georgia is a state covered by Section 5 of the VRA, which requires specific jurisdictions to submit all voting changes- including but not limited to, polling place changes and redistricting- to either the United States Attorney General or the United States District Court for the District of Columbia for approval.[10] Georgia's submission to the Attorney General and the subsequent preclearance of the id legislation only fueled the flames. The proposed bill reduced the acceptable forms of voter identification from seventeen to five: a driver's license, a passport, a state or government issued ID, a military ID or a tribal ID.[11]

Although federal and state courts, as well as the United States Attorney General, have found these voter id laws constitutional, opponents continue to express their concern regarding the impact on those less likely to possess the requisite identification and their ability to cast a ballot. Thus, DOJ must correspond with states to determine whether a state ahs alerted its citizens to election administration changes or plan to include such information in any pre-election mailings.

B. Voter Registration.

Regarding voter registration, the DOJ should contact those states where problems occurred in 2004, 2006 and during the Presidential primary season to make certain that jurisdictions are in compliance with voting rights statutes. DOJ should provide more oversight to ensure that jurisdictions are not rejecting

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[9] Recently, in *Crawford v. Marion County*, the Supreme Court found that the Indiana legislature's purported rationale for passing the most restrictive voter id law in the country did not violate constitutional principles.

[10] *See*, 28 C.F.R. Part 51, Section 5 Regulations.

[11] The 17 acceptable forms of identification were as follows: valid Georgia driver's license; valid identification card issued by a branch, department, agency, or entity of the State of Georgia; another state, or the United States authorized by law to issue personal identification; valid United States passport; 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; valid employee identification card contain a photograph of the elector issued by any employer of the elector in the ordinary course of business; 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; valid Georgia license to carry a pistol or revolver; valid pilot's license; US military ID; birth certificate; Social security card; certified naturalization documentation; copy of court records showing adoption, name or sex change; utility bill; bank statement showing name and address of the elector; government check or payment with name and address of the elector or other government document showing name and address of the elector. Ga. Code Ann. §21-2-417.

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applications that provide sufficient information to determine the eligibility of an applicant. Further, it should encourage jurisdictions to do more follow-up with voters if the registration application does not provide enough information to determine eligibility.

The electoral process requires that states compile lists of eligible and legal voters. The NVRA requires States to maintain voter registration lists for federal elections. The NVRA considers applications received or postmarked at least 30 days before a federal election as timely. It also requires that election officials notify voters that their applications were accepted or rejected. The concern over voter registration is twofold: 1) the increase in state laws that restrict an organization's ability to register citizens (third-party registration) and 2) the increase in voter registration applications and election administrators' ability to process those applications prior to Election Day. Some states, e.g., Ohio, Florida, and Georgia, have made changes to voter registration procedures that make it more difficult for third parties, such as the League of Women Voters and the NAACP, to conduct voter registration drives. Litigation has already commenced in Ohio, Florida, Georgia and Pennsylvania. The inability of groups to perform voter registration could effectively diminish the number of eligible voters, who are able to register.

In 2004, the Department received a high number of calls from persons who stated that they registered to vote, yet their names were not on the voter rolls. In many instances, these persons were new registrants and their voter registration application was not processed. It is hoped that the remarkable increase in voters for the Presidential primaries alleviated some administrative processing problems. Therefore, state election officials should ensure that the counties are processing voter registration applications in a timely manner.

C. Voter Purges.

Concerning voter purges, DOJ should ensure that purges do not violate the safeguard provisions of the NVRA. At the same time, the DOJ should not ignore the primary purpose of the NVRA to establish procedures that will increase the number of eligible citizens who register to vote in elections for federal office.

The NVRA requires States to keep accurate and current voter registration lists, including purging those persons who have died or moved. Before removing persons or performing list maintenance procedures, the NVRA requires that list maintenance programs are uniform and non-discriminatory, comply with the Voting Rights Act, and can not occur 90 days before a federal election. States may only remove voters after complying with the NVRA's fail-safe provisions, which allow for removal of voters from registration lists if they have "been convicted of a disqualifying crime or adjudged mentally incapacitated," according

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to state law.[12] The process of removing ineligible voters from state compiled registered voter lists is called voter purge. Although state governments have passed legislation that causes specific individuals, such as felons, to be ineligible voters, voter purge can also cause the removal or invalidation of eligible and legal voters from voter lists. Florida has been the center of numerous electoral debates due to the conflicts and controversies that surrounded the 2000 elections. Critics have called the voter purges in Florida during the 2000 election as "A wildly inaccurate voter purge lists that mistakenly identified 8,000 Floridians as felons thus ineligible to vote and that listed 2,300 felons, despite the fact that the state had restored their civil rights."[13]

There are various problems surrounding how voter lists are purged. Approximately, twenty-five percent of the states in an ACLU/Demos survey reported that they compile purge lists without reference to any legislative standards. About half of those surveyed purged their voter lists using only an individual's name and address, not a one hundred percent match involving full name and social security number. No state surveyed had codified any specific or minimum set of criteria for its officials to use in ensuring that an individual with a felony conviction is the same individual being purged from the voter rolls. Two-thirds of the states surveyed do not require elections officials to notify voters when they purge them from the voter rolls, denying these voters an opportunity to contest erroneous purges.

Couple this with reports that DOJ threatened to sue ten states to purge voter rolls before the 2008 presidential election.[14] Concerns have been raised that "the Justice Department's Voting Section is ignoring the primary purpose of the NVRA to 'establish procedures that will increase the number of eligible citizens who register to vote in elections for federal office.'" [15] Instead of carrying out the primary function of the NVRA to increase voter registration, [16]the DOJ's Voting Section is concentrating its NVRA enforcement priority on pressuring

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[12] The NVRA also provides additional safeguards under which registered voters would be able to vote notwithstanding a change in address in certain circumstances. For example, voters who move within a district or a precinct will retain the right to vote even if they have not re-registered at their new address, which is at odds with the way some states administer provisional ballots, only counting those cast in the proper precinct.

[13] Verified Voting Foundation, *Open Voter Purge List,* http://www.verifiedvotingfoundation.org/article.php?id=2394 (June 12, 2004)

[14] *See, New York Times* Opinions/Editorial, *What Congress Should Do*, October 24, 2004Stephen Roosevelt, *Bush Administration Orchestrating Massive Voter Purge Before 2008 Election*, Veteransforcommonsense.org (July 17, 2007).

[15] Id.

[16] In a 2008 report for the Maryland Attorney General's Office, the Task Force on Voting Irregularities reported than in March 2008 only *two* persons were registered to vote at its social services agencies in March 2008. See, *Report of the Attorney General's Task Force on Voting Irregularities,* Maryland Office of the Attorney General, April 29, 2008, p. 12.

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states to conduct massive purges of their voter rolls. Although states need to maintain accurate voter rolls, the DOJ must remind states that they must comply with the safeguard requirements in the NVRA. Again, DOJ should not abandon the mandate of the NVRA to increase voter access to pursue its voter integrity initiatives.

D. Voter Deception.

On the topic of voter deception, the DOJ should use the full breadth of its authority found in 42 U.S.C. 1971(b) and 11(b) of the VRA to thwart deceptive voter practices.[17]

Today, we are seeing a resurgence of deceptive practices, particularly in African American and immigrant communities. Political parties and operatives engage in voter deception in an effort to confuse and thwart eligible voters from participating in the electoral process. These practices are a great cause of concern, but challenging these actions have been met with some resistance. The Justice Department has said, after the 2006 federal election that voter deception was beyond its authority; thus, prompting the initiation of new legislation.

In the 110th Congress, Senators Obama and Schumer introduced the *Deceptive Practices and Voter Intimidation Prevention Act of 2007*, which would criminalize many of the deceptive voter practices and includes penalties of up to five years in prison for anyone who knowingly "conveys false information with the intent to keep others from voting." It increases from one to five years the penalty for anyone convicted of voter intimidation and requires the Attorney General to provide accurate election information when deception allegations are proven and to report to Congress on allegations of deceptions after each federal election. If passed this bill will fill a loophole for clearly deceptive practices and demonstrate the need for punishment and enforcement.

Prior to passage of this legislation, however, DOJ could certainly thwart deceptive practices that rise to the level of intimidation under its Voting Rights Act

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[17] 42 U.S.C. 1971(b) reads as follows:

> No person, whether acting under color of law or otherwise, shall intimidate, threaten, coerce, or attempt to intimidate, threaten, or coerce any other person for the purpose of interfering with the right of such other person to vote or to vote as he may choose, or of causing such other person to vote for, or not to vote for, any candidate for the office of President, Vice President, presidential elector, Member of the Senate, or Member of the House of Representatives, Delegates or Commissioners from the Territories or possessions, at any general, special, or primary election held solely or in part for the purpose of selecting or electing any such candidate.

See also, Section 11(b) of the Voting Rights Act.

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authority.[18] DOJ has authority pursuant to 42 U.S.C. 1971(b) to address voter intimidation and voter deception. The question remains whether it will choose to do so. It could publicize and utilize a toll free number for the sole purpose of chronicling deceptive practices across the nation. Once verified, in addition to sending a press release, the DOJ should immediately coordinate with state agencies and media outlets to correct any misleading information. It should also begin enforcement actions against perpetrators of deceptive practices.

E. Poll Watchers.

Regarding poll watchers, the DOJ should send a letter to states and organizations where this practice was problematic and require the state to fully comply with Sections 2 and 208 of the Voting Rights Act, which outlaws discriminatory voting practices or procedures.

Most states allow candidates to designate persons to "watch" the election process inside the polling place. These poll watchers, however, are not allowed to interfere with the voting process. In 2004, political candidates and parties dispatched thousands of attorneys and other individuals to "monitor" the administration of the election. We saw poll watchers launch an enormous number of strategic challenges to voters' eligibility, some based on race and language ability. Additionally, in some instances, at any given time, polls had more watchers than workers or actual voters.

In 2004, Republicans in Wisconsin attempted to challenge the registrations of 5,600 voters in Milwaukee but were turned down in a unanimous decision by the city's bipartisan election board. In Ohio, Republicans challenged 35,000 voters, after compiling their names through a caging scheme.[19] The people on the list had either refused to sign letters delivered by the Republican Party or the letters had been returned as undelivered. Voters in Ohio won an injunction preventing challengers from remaining at voting-stations[20]

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[18] In 1992, the DOJ filed and settled *United States v. North Carolina Republican Party*, C.A. No. 92-161-CIV-5-F (E.D. N.C.), which involved the United States Senate election in North Carolina with African American Harvey Gantt versus incumbent Jesse Helms. In this action, the North Carolina Republican Party was accused with mailing postcards with misleading information as to voter eligibility, to registered voters prior to the November 1990 election. The postcards recipients were predominately African American.

[19] With one type of caging, a political party sends registered mail to addresses of registered voters. If the mail is returned as undeliverable - because, for example, the voter refuses to sign for it, the voter isn't present for delivery, or the voter is homeless - the party uses that fact to challenge the registration, arguing that because the voter could not be reached at the address, the registration is fraudulent. A political party challenges the validity of a voter's registration; for the voter's ballot to be counted, the voter must prove that their registration is valid.

[20] *Spencer v. Blackwell*, 347 F.Supp.2d 528 S.D.Ohio (2004).

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The Department should send a letter to states and organizations where this practice was problematic. Outreach, through the form of a letter, to organizations and state entities, should remind these groups and elected officials of the voters' rights and the process the poll watcher and poll worker should follow. Although the process for designating a poll watcher varies state to state these laws must comply with Section 2 of the Voting Rights Act, which outlaws discriminatory voting practices or procedures.

F. Provisional Ballots.

A consequence of excessive voter challenges was the use of provisional ballots. In some instances, due to misinformation or a lack of poll worker training, poll workers asked the challenged voter to cast a provisional ballot. In some states, if a voter cast a provisional ballot in the wrong polling place, pursuant to state rules, the provisional ballot was not counted.[21] DOJ should make certain that jurisdictions are not administering provisional ballots with a discriminatory purpose or a discriminatory result.

G. Disproportionate Allocation of Voting Machines

Today, American citizens are registering to vote at exceptionally high rates. Minority and young voters are energized and eager to turnout and participate in what has certainly proven to be one of the most historic election cycles in our lifetimes. However, these efforts will prove futile if ultimately, these voters are unable to cast ballots that will count on Election Day. In many urban locations, voters are subjected to extremely long lines and faulty equipment. Although we had all hoped that HAVA would eliminate such occurrences, it has not. Curiously, the extremely long lines and undercounting of voting machines tend to occur in predominately African American areas. To address this problem DOJ should coordinate with HAVA's Election Assistance Commission (EAC) to determine if certain jurisdictions are "repeat offenders" and bring a Section 2 of the VRA claim. It could also coordinate with the EAC to establish "best practices"

[21] The administration of provisional ballots, however, has been called into question for the myriad of ways that election administrators determine whether to count the ballot. In 2004, the first year that HAVA required state's to provide provisional ballots, nearly 1.9 million of those ballots were cast and 1.2 million provisional ballots were counted, which left more than half a million people disenfranchised. See, Election Data Services, *Election Day Survey*, conducted for the U.S. Election Assistance Commission, at 6-5 (Sept. 27 2005). Moreover, poll worker confusion and unavailable ballots accounted for even more disparities. A People for the American Way report found:

> There was widespread confusion over the proper use of provisional ballots, and widely different regulations from state to state—even from one polling place to the next—as to the use and ultimat recording of these ballots.

See, People for the American Way et al., *Shattering the Myth: An Initial Snapshot of Voter Disenfranchisement in the 2004 Elections*, at 8 (December 2004).

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for determining the number of voting machines per number of registered voters. Finally, Congress should use its Elections Clause Power and amend HAVA to mandate the number of voting machines per precinct and interpret HAVA to provide additional election administration reporting requirements.[22]

IV. Conclusion

In my testimony, I have outlined some of the critical problem areas during the 2004 election cycle and proposed steps that the Justice Department should take to ensure that these problems are not repeated this November. However, it is essential that the Department act now.

The DOJ should immediately: 1) send letters to all states outlining federal voting rights statute requirements regarding voter purges, voter registration, UOCAVA, etc. with deadlines for action; 2) send letters and conduct calls to states with "observed" problems that could violate federal voting rights statues, e.g., lack of adherence to minority language requirements, information on particularly hostile areas/contests; 3) hold meetings with advocacy groups to "coordinate" election coverage; 4) provide jurisdictions and advocacy groups with a list detailing election coverage at least one week prior to the election; and 5) begin more extensive election coverage training of DOJ staff stressing "voter access" issues instead of "voter fraud.

On Election Day, DOJ should limit United States Attorney and FBI election coverage and "coordinate" communication with advocacy groups. DOJ should renew efforts to coordinate with civil rights and other organizations to discuss Election Day preparedness and learn how those groups plan to approach various voting irregularities and share how DOJ will address issues. For future elections, Congress should: 1) use its Elections Clause Power and amend HAVA to mandate the number of voting machines per precinct and 2) interpret HAVA to provide additional election administration reporting requirements.
Finally, Congress should require DOJ to implement a timeline for election coverage proactive activity. Consequently, the best time to correct for potential disenfranchising methods is to establish a proactive plan NOW.

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[22] For further discussion, see, Gilda R. Daniels, *A Vote Delayed is a Vote Denied: A Preemptive Approach to Eliminating Election Administration Legislation that Disenfranchises Unwanted Voters*, forthcoming in the University of Louisville Law Review, November 2008.

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SENATE COMMITTEE ON THE JUDICIARY

[DOJ Election Protection]

[September 9, 2008]

STATEMENT OF J. GERALD HEBERT

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Introduction

Chairman Leahy and Ranking Member Specter, thank you for the invitation and opportunity to appear before this Committee today to discuss the Department of Justice's role in enforcing election law. As a former Acting Chief of the Voting Section and a Justice Department attorney in the Civil Rights Division for more than 20 years, I respect the role that the Justice Department plays in making sure that the conduct of our elections are fair and open to all eligible voters, and that the right to vote is respected. In recent years, I have been deeply disappointed to see the damage done to the integrity and independence of the Department, particularly in the area of election law enforcement. I hope that this committee will do everything it can to make sure that these mistakes are not repeated and that the Justice Department acts vigorously to protect the right to vote in this upcoming election.

Politicization and it's Effect on DOJ Enforcement of Election Law

After numerous congressional hearings, including many by this Committee, and several recent reports of the Department of Justice Office of the Inspector General, the full extent of the recent politicization of the Department of Justice is finally coming to light. In the area of election law, the effects of politicization have been particularly severe.

Although many of us who are former DOJ prosecutors knew of DOJ politicization under the Bush Administration, it was not until the improper firings of United States Attorneys came to light that the nature and extent of this politicization was identified. We still don't know the complete story, but evidence to date suggests that many of these firings took place because political appointees were unhappy with U.S. Attorneys who

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refused to bring election law prosecutions in cases that either lacked merit of failed to raise a sufficient federal interest. For example, U.S. Attorney John McKay was among the U.S. Attorneys fired despite having a very positive performance review. Although the precise reason for his dismissal is still unknown, it seems to have been related to his decision not to convene a grand jury to investigate allegations of voter fraud in the 2004 gubernatorial race in Washington State. In that race the Democratic candidate won by 192 votes out of millions cast and accusations of fraud ensued, as they typically do. However, after an in-depth investigation, Mr. McKay was unable to find any evidence that would allow a criminal prosecution, so he declined to pursue the case any further. But such decisions infuriated Bush Administration officials who saw political gain in such prosecutions. So Mr. McKay was fired.

Another one of the fired U.S. Attorneys, David Iglesias, was pressured to speed up an investigation in order to impact an election. Iglesias received calls from Senator Pete Domenici (R-NM) and Congresswoman Heather Wilson (R-NM) asking him when he would complete an investigation into allegations of public corruption by local Democratic lawmakers in New Mexico. Iglesias told this Committee that he believed the motivation for these calls was a desire to have indictments issued before November of 2006 so that the Republicans would benefit in the upcoming election. He refused to speed up the investigations, and a month after the election ended he was asked to resign. According to a 2008 article by John McKay, Deputy White House Counsel Bill Kelley

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emailed Gonzales' Chief of Staff Kyle Sampson to let him know that Domenici's office was "happy as a clam" to hear of the firing.[1]

Several other U.S. Attorneys were also involved in election-related cases which may have led to their dismissal. U.S. Attorney Carol Lam was asked to resign after a tenure in which she pursued several public corruption investigations that damaged the careers of Republican politicians. Most significantly, Lam had been pursuing the high-profile investigation of former Congressman Randy "Duke" Cunningham. The day after Lam had executed a search warrant on the House of former CIA Executive Director Kyle "Dusty" Foggo, Sampson sent an email to the White House to say that they "should have someone ready to be nominated on 11/18, the day her 4-year term expires."[2] U.S. Attorney Paul Charlton was involved with a corruption investigation of Congressman Rick Renzi (R-AZ), and was fired the month after Congressman Renzi's reelection. And U.S. Attorney Todd Graves refused to sign on to a voter registration lawsuit that was filed against the state of Missouri on the eve of an election. All of these U.S. Attorneys had received positive personnel evaluations and were held in high regard by their peers. Their dismissals were wrong. There seems to be little doubt that they were motivated by a desire to influence the conduct of election-related investigations.

Politicization in the Civil Rights Division

As damaging as these incidents were for the reputation, stature and integrity of the Department of Justice, their effects were even worse when it came to politicization of the Department itself. The actions of Monica Goodling, Kyle Sampson and others have been

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[1] John McKay, Train Wreck at the Justice Department: An Eyewitness Account, 31 Seattle Univ. L. R. 265, 276 (2008). McKay also referenced an email in which Karl Rove bragged to the Chairman of the New Mexico Republican Party that Iglesias was "gone."
[2] Id. at 286.

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extensively documented by the Inspector General's reports and show the degree to which the hiring process at the Justice Department had become infected by partisanship. For the purposes of this hearing, however, the most important report has yet to be released: the report on politicization within the Civil Rights Division, which oversees the civil enforcement of voting rights.

Under the Bush Administration, the Civil Rights Division was occupied by several political appointees who used the Division to pursue political ends. One of the worst offenders was a man who appeared before this committee: Bradley Schlozman, the former Acting Assistant Attorney General of the Civil Rights Division. In testimony in front of this panel on June 5, 2007, Schlozman admitted to bragging about how many Republicans he had hired in the Civil Rights Division. Incredibly, he denied having taken political considerations into account in his hiring practices. New accounts from earlier this summer stated that Justice Department lawyers filed a grand jury referral for perjury, which, according to one article, "is believed to focus on Mr. Schlozman's Senate testimony."[3]

Even aside from his hiring practices, Schlozman led the Division in the wrong direction—away from election protection and towards partisan enforcement of election laws. It was Schlozman who made the decision to pursue the voter registration prosecution which U.S. Attorney Todd Graves refused to approve. Upon Graves' resignation, Schlozman was appointed as interim U.S. Attorney to replace him. On the eve of an election, Schlozman decided to bring voter fraud charges against a few individuals who had submitted phony registrations even though these false registrations were discovered by officials from the Asssociation of Community Organizations for

[3] http://www.nytimes.com/2008/06/17/washington/17attorneys.html?_r=1&hp&oref=slogin

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Reform Now (ACORN)—who had paid the workers—and ACORN alerted the local prosecutor. Schlozman insisted on pursuing a federal case without waiting until after the election had ended. This is despite the fact that Departmental policy at the time specifically precluded such actions because it might impact the outcome of an election. In his testimony, Scholzman said that he was instructed to take this action by the head of the Department of Justice's Election Crimes Branch, a claim that he later retracted.

Another official who distorted the purpose of the Civil Rights Division was Hans von Spakovsky, the former Counsel to the Assistant Attorney General for Civil Rights. As I testified in front of the House Judiciary Committee Subcommittee on the Constitution, Civil Rights and Civil Liberties, on July 24, Mr. Von Spakovsky used his tenure in the Civil Rights Division to deny, rather than to protect, the right to vote. He interpreted the Help America Vote Act (HAVA) to require that states deny the right to vote to potential voters if the information on their voter registration application could not be verified—an interpretation that is not only incorrect, but inconsistent with the entire purpose of HAVA.[4] As a result, the Department of Justice later had to issue a letter to the Arizona Secretary of State to retract Mr. Von Spakovsky's inaccurate legal advice.[5] Von Spakovsky's influence within the Civil Rights Division encouraged states to embark upon projects to eliminate voters from their registration rolls rather than to encourage registration.

Recent Improvements and the Need for Continued Vigilance

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[4] For more information on the appropriate interpretation of HAVA see my statement from the hearing on "Lessons Learned from the 2004 Presidential Elections" on July 24, 2008 in front of the House Judiciary Committee Subcommittee on the Constitution, Civil Rights and Civil Liberties. Online at: http://www.campaignlegalcenter.org/attachments/1888.pdf

[5] The letter is available online: http://www.usdoj.gov/crt/voting/hava/az_id.htm.

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There have been many positive developments in the Justice Department over the last several years. The worst offenders—people like Monica Goodling, Kyle Sampson, Bradley Schlozman, and Hans von Spakovsky—have left the Department. But none have been held accountable for their misdeeds. By holding this hearing, the Committee has wisely recognized that there is still more work to be done. Many of the officials in the Justice Department today were in the Justice Department in 2004 and 2006, when election enforcement was seriously lacking. We can't simply expect the same umpires to make different calls this time around.

Current Justice Department officials have promised that the Department will make election enforcement a priority this November. For example, in a speech delivered at the Ballot Access and Voter Integrity Symposium in Columbia, South Carolina, Attorney General Mukasey said that one of his "highest priorities… [is] to assist state and local governments so that the November elections run as smoothly as possible, and that the American people have confidence that these elections are run smoothly." While this is a goal shared by many, it is meaningless unless it is accompanied by details of what DOJ will actually do to bring this about.

A general commitment to do things right is not enough. We expect that Justice Department officials will say that they are committed to fair elections, but after what this country has been through in the last decade, and given the depth of DOJ politicization, specific assurances are needed that action will be taken. The only way to ensure that the Justice Department will not repeat its mistakes is to get detailed commitments from Justice Department officials about how they will handle problems that arise this fall. This Committee should do whatever it takes to get Department officials to fully answer the

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questions that they are asked. On an issue of this importance, the answer should never be "I don't know" or "let me check on that for you and get back when an answer." The time to answer is now.

DOJ Policy and the Upcoming Election

In his public appearances and in his previous testimony Attorney General Mukasey has only vaguely described what his plans are for this election. There are many specific issues that the DOJ officials must address, and I would like to discuss a few of them.

Ending Politically Motivated Prosecutions

On the subject of politicization, Attorney General Mukasey has delivered a clear message to Department of Justice employees: "Politics must play no role in our efforts." However, making this slogan into a reality will require some concrete changes in policy that may not yet have been made.

One of the most serious issues that has not been fully addressed is the possibility of politically-motivated prosecutions. The most blatant example was Bradley Schlozman's prosecution of ACORN volunteers in the immediate run-up to an election in Missouri. Although Schlozman has admitted that there would have been no disadvantage to delaying the indictment, he insisted on bringing it right before the election. It soon became front-page news and was used in a press release by the Missouri Republican Party to make the Democratic candidate appear to be "stealing" the election.[6] Whatever Schlozman's motive may have been, it appeared that he was trying to help the Republican candidate win. As Senator Leahy made clear during a hearing on June 5,

[6] Senator Feinstein read from the press release in the June 5, 2007 Judiciary Committee hearing at which Schlozman was present.

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2007, such activity is against the policy of the Department of Justice, which prohibits prosecutors from conducting any investigation that is likely to influence the outcome of an election.

Although Schlozman is no longer in the DOJ, the current head of the Public Integrity Division, William Welch, has recently defended Schlozman's prosecution of ACORN in Missouri. In testimony before the United States Commission on Civil Rights, Welch stated that Schlozman's prosecution of ACORN volunteers "was seen as not being in contradiction to the policy" because "no voters needed to be interviewed."[7] I encourage the members of this committee to ask Mr. Welch why he defended the practice of engaging in prosecutions that could affect the outcome of an election, and if he believes that it would be appropriate to engage in these kinds of prosecutions in 2008.

Restoring Enforcement Priorities

In addition to inappropriate prosecutions, another consequence of politicization in the Department of Justice has been a change in priorities. Since 2000, DOJ has gradually increased its focus on prosecutions that aim to purge states' voter rolls and punish the perpetrators of voting fraud. The historical tradition of the Civil Rights Division's Voting Section, the very reason it was created, was to protect minorities from voting discrimination to ensure effective participation all aspects of the political process. And yet, under the leadership of people like Hans von Spakovsky and Bradley Schlozman, DOJ's focus has been on making sure states purge voter rolls. While it is certainly a state's prerogative to remove voters from their rolls, making the purging of voter rolls a

[7] The transcript of Welch's testimony is available online: http://www.usccr.gov/calendar/trnscrpt/060608ccr1.pdf

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priority of voting rights enforcement is simply contrary to the core mission of the Voting Section.

Meanwhile, some of the most powerful tools to protect the right to vote have been neglected. Although there are many important voting rights statutes, the following sections will highlight some examples of voting rights legislation that have been ignored and other issues which have received unwarranted attention.

Fighting Vote Caging With the Voting Rights Act[8]

One area in which the Justice Department needs to be more proactive is in its pursuit of a campaign tactic called "vote caging"—an illegal voter suppression technique used to keep minorities (mostly blacks) from voting.[9] It's a relatively-unknown cousin in the nefarious family of vote suppression techniques. The practice has been adopted and perverted from a practice utilized by direct-mailers to clean up their mailing lists by sending out mail to specific individuals and seeing what comes back as undeliverable. The real problems start when political operatives start cherry picking areas to send such mailers.

"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. These registration challenges can occur prior to Election Day or at the polls.

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[8] For a summary on how to interpret the Section 11(b) of the Voting Rights Act in vote-caging cases see my recent blog entries on the Campaign Legal Center blog: Rattling the Vote Cage Part I (http://www.clcblog.org/blog_item-245.html); Rattling the Vote Cage Part II (http://www.clcblog.org/blog_item-247.html)

[9] "Caging" is a direct mail technique used to describe cleaning up a mailing list. A political organization sends first class mail to a list of voters (or donors) marked "do not forward." Sometimes, the mail is sent return receipt requested. Voters whose mail comes back undeliverable, or who do not return the receipt, are removed from the list – caged, in direct mail parlance.

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The problem with using a caging list to challenge voters is simple. First, the list is most often produced using criteria aimed at a particular racial group (there have been documented instances of caging in African-American precincts, for example). Second, there are plenty of reasons why mail sent to a validly registered voter might be returned as undeliverable or without the signed return receipt requested, especially because political organizations usually make sure that their mailers are non-forwardable. For instance, the voter may be serving abroad in the military or away at college. Address errors, especially in urban areas, are common. A voter may have forgotten to put his or her apartment number on the voter registration form. Typographical errors in preparing the list of voters to whom mail will be sent – Gonzalez becomes Gonzales – can also result in a piece of mail being returned as undeliverable when in fact the individual lives and resides at the listed address. Such typographical errors on registration rolls can also lead one to conclude, in error, that an individual is not registered to vote when in fact he or she is validly registered.

Mail is sometimes returned because the voter has moved. Still, many voters who have moved are still validly registered and eligible to vote. In vote caging schemes where a return receipt is requested, voters simply may not want to accept mail from that particular political party. Reportedly, this was the case in Ohio in 2004, when African-American voters did not want to accept mail from the GOP.

Despite the fact that many voters who might end up on a caging list are validly registered, there is nothing illegal *per se* about compiling a list of voters. What is illegal under the Voting Rights Act and the U.S. Constitution is vote caging that targets minority

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voters, *i.e.,* directing mail to them, and engaging in racial selectivity regarding challenges to their attempts to vote on Election Day.

When former Deputy Attorney General Paul McNulty testified before Congress in 2006, he offered to have DOJ look into the issue of vote caging ("If you're raising with me as Deputy Attorney General the question of caging votes, I'm very happy to work with you on that concern."). To my knowledge, DOJ never responded to Congress on what DOJ found about its review of vote caging. DOJ did not even offer a progress report on how its inquiry into vote caging was going. My guess is DOJ never conducted any such review. I would recommend that this Committee inquire about the DOJ's findings and about whether any vote caging or voter intimidation investigations are presently underway. That should give us a clear indication of whether DOJ will take as seriously the prosecution of those who intimidate voters as they do those who allegedly commit voter fraud.

To bring vote caging and voter intimidation schemes to an end will require vigorous prosecution by the United States Department of Justice. But the Department's priorities have shifted over the years, with the Bush-Ashcroft-Gonzales Justice Department not only ignoring vote caging and voter intimidation schemes, but actively working to give vote-cagers a boost in the courts. Contrast, for example, the Department of Justice's efforts in 1990 in North Carolina, under President George W. Bush's father, to the Department's actions in the 2004 election cycle in Ohio. In 1990, the North Carolina Republican Party and the Jesse Helms for Senate campaign engaged in vote caging by sending black voters 44,000 postcards, giving targeted individuals incorrect information about voting and threatening them with criminal prosecution. The plan was

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to use the mailing to compile a caging list for challenging voters. In response, the Bush I Justice Department, where I served at the time as a federal prosecutor of voting discrimination cases, filed a federal lawsuit against the GOP and Helms' campaign and obtained declaratory and injunctive relief. And DOJ's promised investigation of the vote suppression scheme stopped the effort before the election.

However, in the 2004 election, the Department of Justice intervened to defend the perpetrator of a very similar vote-caging scheme. The Ohio Republican Party developed a caging scheme targeting newly registered voters in urban areas, most of whom were black. An attorney for the Ohio Republican Party even admitted that the plan was to use the returned letters from minority neighborhoods to challenge voters. When the scheme was challenged in court, then Assistant Attorney General Alex Acosta wrote a letter to a federal judge that attempted to offer legal cover for the same practices that 12 years earlier DOJ had sued to stop, (the Acosta letter was drafted by Mr. von Spakovsky). This was unusual not only because it was nearly unprecedented for DOJ to intervene in a case on the eve of Election Day, but because its involvement was entirely unsolicited and it was not a party. Ultimately, the federal judge ruled against the Ohio Republican Party, finding that the vote caging schemes had a discriminatory impact and issuing an injunction to prevent the challenges from going into effect. *Spencer v. Blackwell*, No. 1-04-738-SJD (Order of November 1, 2004).

In the 2008 election, vote caging is a real threat and it is one that DOJ must be prepared to address. This committee should try to secure assurances that, when vote caging does occur, DOJ will immediately seek an injunction to stop voters from being challenged or intimidated. DOJ should make a commitment to take swift action on

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behalf of the disenfranchised minority—and not on behalf of the political operatives trying to suppress the vote.

Enforcing the National Voter Registration Act of 1993

Another election tool which DOJ has failed to adequately enforce is the National Voter Registration Act, (NVRA). The Act was intended to encourage voter registration, in part by requiring certain state agencies, including public assistance agencies and agencies that provide services to the disabled, to assist their clients with registering to vote.[10]

However, despite the fact that NVRA was passed in 1993, many states continue to fail to comply with its provisions. According to a 2007 report of the Election Assistance Commission, voter registration from public assistance agencies nationwide dropped 80% between the initial implementation of NVRA in 1995-1996 and 2005-2006. The report found that only six states provided training every two years to all of their voter registration agencies.[11] And yet, according to a joint report released by Project Vote and Dēmos in February, 2008, in the last seven years DOJ had only prosecuted one state, Tennessee, for failing to register voters under NVRA.[12] That prosecution alone raised nationwide voter registration at public assistance agencies by almost a quarter.[13]

A recent case pursued by ACORN against the state of Missouri's public welfare agencies demonstrates both the extent of states' refusal to comply with NVRA and the

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[10] The section of NVRA which requires voter registration at public assistance agencies is contained in 42 U.S.C. 1973gg-5

[11] The report is available online at: http://projectvote.org/fileadmin/ProjectVote/Publications/EAC_NVRArpt2006.pdf

[12] The full report, *Unequal Access: Neglecting the National Voter Registration Act, 1995-2007*, is available online: http://projectvote.org/fileadmin/ProjectVote/NVRA_Project/Unequal_Access_Final.pdf

[13] According to a project vote press release, available here: http://votetrustusa.org/index.php?option=com_content&task=view&id=2521&Itemid=26

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possibilities for successful litigation. In *ACORN v. Scott*[14], the court found that several offices of Missouri's Department of Social Services did not have any voter registration forms available. However, even offices that did have the forms were not offering registration to many of their clients. By doing some simple calculations the court found that the Department of Social Services needed about 1.5 million voter registration forms to comply with NVRA. However, the Department of Social Services and the Department of Health and Senior Services received a combined total of only 620,000 forms. Hundreds of thousands of people were being denied the opportunity to register to vote. Based on this evidence, Judge Laughrey granted a preliminary injunction requiring the agencies to come into full compliance with NVRA and to implement a monitoring sytem to ensure that they continue to comply.

Thanks to pressure from the 110th Congress, the Department of Justice has started to participate in efforts to make states comply with NVRA. Most recently, DOJ filed an *amicus* brief in the Sixth Circuit case *Harkless v. Brunner* supporting ACORN's NVRA litigation in Ohio. The Department also reached a settlement with the State of Arizona which requires that they comply with NVRA.[15] However, there is still a great deal of work to be done to put every state in full compliance. Moving forward, it would be in everyone's best interest for the Department of Justice to let the public know where NVRA enforcement ranks on their list of priorities and whether they bring more cases to enforce NVRA against states that fail to offer voter registration opportunities at social service or public assistance offices.

Ending Overzealous Voter Purges and Voter Fraud Investigations

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[14] ACORN v. Scott, 2008 U.S. Dist. LEXIS 53580 (W.D. Mo. July 15, 2008)
[15] Available at: http://www.demos.org/pubs/Settlement%20&%20Exhibits.pdf

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Ironically, during the same period of time that the Justice Department did not enforce the voter registration provisions of NVRA, it diligently prosecuted states for violations of a secondary provision, Section 8 of NVRA, which requires states to maintain accurate voting rolls. This is part of a general pattern where DOJ officials have proved willing to go to any lengths to fight the elusive specter of voter fraud, even if it means disenfranchising registered voters. So far, there has been no credible study conducted that shows evidence of significant amounts of voter fraud.

In the meantime, not only is the benefit of purging voter rolls uncertain—the costs can be very high. Purging voter lists frequently results in eligible voters accidentally being taken off of voting lists. According to an article by Steven Rosenfeld, in the 2000 elections in Florida and Missouri more than 100,000 legal voters were incorrectly removed from voter rolls.[16] Voter purges were also a factor in the 2004 elections in Ohio, where over-stretched poll workers had to cope with the additional burden of figuring out how to deal with voters that had been taken off the list. Meanwhile, several former Voting Section attorneys have stated that DOJ misrepresented their data to make the case that voting lists needed to be purged.[17]

Although deterring voter fraud is a laudable goal, the voter fraud paranoia that the Department of Justice suffered from under the Chlozman-von Spakovsky regime has done far more harm than good. DOJ officials should recommit themselves to the defining task of the Civil Rights Division—defending the right to vote. When allegations of voter fraud arise, those allegations should be handled in the same manner as they have been handled throughout DOJ's history: they should be referred to the Election Crimes Branch

[16] Rosenfeld's article is available on the Campaign Legal Center's website: http://www.campaignlegalcenter.org/press-2879.html
[17] See Rosenfeld article, above.

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and dealt with after the election absent some extraordinary circumstances. That way they do not trample the rights of properly registered voters in order to deter an imagined problem or unproven crime.

Preventative Measures

Although the Department of Justice should never be taking steps that could improperly influence the outcome of an election, the Department should be doing everything it can to prevent election mishaps from occurring. Former DOJ official Paul Hancock recently told the United States Commission on Civil Rights that the lesson from *Bush v. Gore* is that "we don't rerun presidential elections." It is imperative that problems are anticipated before they arise so that there is not a repeat of the confusion and chaos experienced in the last few elections.

When problems are not discovered before Election Day, public confidence in the whole political systems suffers. Since 2000, it appears that problems have been on the rise. According to an article by Loyola Law School Professor Richard Hasen, litigation challenging the outcome of elections has gone from an average of 96 cases per year before 2000 to an average of 230 cases per year, with the largest average occurring during the last presidential election.[18] Hasen points out that part of the reason for the large number of cases may be increased political polarization. However, another factor is that the public and partisans on both sides have become less willing to trust the outcome of close elections. When public confidence in election declines, so does the quality of our democracy and the full exercise of the right to vote.

This year, DOJ has some enormous challenges to face in order to ensure that the election runs smoothly. Recent elections have been plagued by a variety of

[18] The article, published in the Loyola Lawyer, is available via Professor Hasen's blog: http://electionlawblog.org/archives/LoyolaLawyer08_HasenArticle.pdf.

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administrative and technical problems, and with the introduction of new voting technology and new voter ID requirements, the confusion of past elections will almost certainly increase—unless it is systematically addressed. If DOJ is serious about making sure that we have a fair and open election this year, they should have a detailed and comprehensive plan to address election problems before they arise. I will devote most of the remainder of my testimony to describing some of the issues that should be a focus of their efforts.

The Basics: Making Sure Voters are Informed

As Paul Hancock said in his testimony to the U.S. Civil Rights Commission, "one of the biggest problems we have in elections is that people don't know where they should go to vote." This is a fundamental issue that the Department of Justice should already be working with local and state governments to solve. Although voters have to figure out where to vote in every election, the recent rise in voter registration and turnout has caused some localities, to increase the number of polling places and to move some polling places to new locations. For residents who have been voting in the same location their whole lives, these changes could come as a surprise. And not only do these voters need to know where to vote, they need know how to vote and what to bring with them to the polling station. In light of recent changes in voting technology, the spread of new voter ID requirements, and the number of new, inexperienced voters, it will be particularly important this year to make sure that citizens are informed.

A vital part of making sure that voters have good information is correcting misinformation when it is spread, whether it is done maliciously, through tactics like vote caging, or by mistake. In a hearing with Attorney General Mukasey, Senator Leahy

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asked how he would respond to two scenarios involving misinformation: voters being told they needed to present an ID when they were not required to and Latino-Americans receiving letters telling them that they could not vote. Mukasey responded that there were a variety of things they could do, such as informing state authorities, making a public service announcement, contacting the local newspaper, and working with organizations active in the Latino-American community.

This list of options is encouraging—but it does not amount to a plan. As with most elements of election enforcement, details matter. Today, this Committee has an opportunity to ask the DOJ officials directly in charge of election enforcement for an actual policy, not merely a list of possibilities. Important questions remain unanswered. We still do not know what DOJ is doing on the ground right now. We don't know how they intend to ensure that states are giving voters the information they need. And we don't know how DOJ officials intend to respond to problems that arise from a state's failure to do so. The Department has had plenty of time to plan for this election—ad hoc solutions and seat of the pants decisions simply will not suffice.

Assignment of Election Monitors

Another important issue about which the Department of Justice needs to be more forthcoming is the assignment of federal poll watchers. As I have stated before, this has been a serious problem for the Justice Department in recent years. In 2004, the Department engaged in the practice of assigning Bush Administration loyalists to monitor the polls in closely contested states. I learned from discussions with Joseph Rich, who was the Voting Section Chief in 2004, that Bradley Schlozman personally reviewed every election monitoring assignment and vetoed many of the Voting Section's

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recommendations. In Ohio, several weeks before the 2004 elections, DOJ's career attorneys had not made a recommendation to have a DOJ presence on Election Day. Mr. Schlozman, however, informed Mr. Rich early on that there would be federal attorneys sent to Ohio, a battleground state in the last election. According to Mr. Rich, Schlozman dispatched Bush loyalists in three cities – Cleveland, Columbus and Cincinnati. While there were civil rights issues that surfaced closer to the election, (after the decision had already been made to send DOJ attorneys to Ohio), the monitoring teams sent to Ohio by Schlozman did little beyond sitting in hotel rooms and taking telephone calls, according to Mr. Rich. To our knowledge, there was no monitoring by these attorneys to check on racially-based challenges or intimidation.

Furthermore, Schlozman himself personally monitored the election in Florida on Election Day in 2006, another battleground state. It was clear to Voting Section management that political appointees at DOJ and in the Civil Rights Division wanted to have Bush loyalists on the ground in that key state. This is yet another example of politicization of the Voting Section's responsibilities, as well as inefficient use of personnel and resources.

Attorney General Mukasey has stated that he is committed to Election Day enforcement and that he will deploy hundreds of monitors to locations around the country, just as has been done in the past. He has said that his goal is to make sure that "complaints are dealt with promptly and appropriately." And he has sent out a memo to remind DOJ employees that they "must not do anything for the purpose of giving an advantage or disadvantage to any candidate or political party."

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However, despite these statements, there are still difficult questions that no one in the Justice Department has clearly addressed. How will election monitors be deployed? What procedure will be followed when civil rights groups request monitors? How will complaints leading up to the election and on Election Day be dealt with? What criteria will be used to evaluate whether a complaint is politically motivated or legitimate?

In deploying election monitors, the Department of Justice should commit to specific policies that provide greater transparency and safeguard against politicization. The DOJ should only assign monitors and observers to those places where there is evidence of possible civil rights violations, or as part of an ongoing investigation into election practices. Another lesson learned from the widespread public suspicion that political reasons were behind monitor/observer placement decisions in 2004 is the following: the Department of Justice, when it announces the locations where the Department will be deploying federal observers, should also make public in a general way the civil rights concerns that underlie their deployment. Such a pronouncement should emphasize the fact that the Department (Criminal Division) has a longstanding policy of not monitoring for election fraud purposes and indeed does not conduct such investigations until after the election unless the integrity of the election itself is at stake. This has been a long-standing practice of the Election Crimes Branch of the Criminal Division and should remain so.

Misallocation of Voting Machines

A July 21 *New York Times* story entitled, "Influx of Voters Expected to Test New Technology," quoted an election expert from the Pew Center on the States as follows:

> Election officials are unanimous in their commitment to ensuring every eligible American's right to vote, but in many places the system they

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> oversee simply isn't designed to handle anywhere near the number of voters that may turn out, said Doug Chapin, director of electionline.org, a project of the Pew Center on the States. In previous elections, the question has been, 'Will the system work for each voter?' But this year the real question is whether the system can handle the load of all these voters.

I share the concern that the current system may not be able to handle the record voter turnout that many anticipate this fall. A report issued by the nonpartisan group FairVote, for example, notes there is a risk that election officials may not allocate a sufficient number of extra ballots or voting machines to precincts experiencing heavy turnouts. Indeed, the FairVote report notes that, consistent with the *New York Times* article, "[t]he swing states that experienced the longest lines, including Florida, Michigan, Missouri, Ohio and Pennsylvania, lack uniform rules for distributing machines and ballots[.]" What we saw in Ohio in 2004 was that state and local officials failed to take adequate steps to ensure that there were sufficient numbers of voting machines in certain precincts. As a result, undue delays ensued, often lasting several hours, and many voters left polling places in frustration, and without casting their votes.[19] In Franklin County, Ohio, a DOJ review completed in June 2005 found that "it was not uncommon for voters to have to wait three or more hours to cast their ballots." The long lines and exceptionally long delay, DOJ found, was "due to the lack of sufficient machines to serve a dramatically enlarged electorate[.]"[20]

DOJ's review acknowledged that there were more registered voters per voting machine in predominantly black precincts than white precincts. What is particularly

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[19] Critics might say "if these people really wanted to vote and it was important to them, they would have stood in line and voted." But such a response fails to take into account the reality that many voters face and the wide variety of circumstances why a person cannot stay for several hours at the polling place to cast a ballot: the need for a single parent to pick up their child at day care, the inability of an elderly or disabled person to wait in line for such a long period, etc.

[20] The letter may be found here: http://www.talkingpointsmemo.com/docs/tanner-franklin-letter/

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unsettling, however, is that DOJ also concluded that the allocation of voting machines actually favored black voters because more white voters were voting on each machine, on average, than black voters. Of course, since many black voters were unable to vote due to the inadequate number of machines and long lines, it follows that fewer blacks would have voted per machine than voters in predominantly white precincts. Moreover, in order for DOJ to make a determination about the allocation of machines and the number of voters by race who cast ballots on those machines, it would have needed data on the flow of voters in black and white precincts; but no such data was gathered because it was with political appointees in the Civil Rights Division. The DOJ conclusion is even more absurd when one considers that it was thousands of black voters, not white voters, who were complaining about being unable to vote.[21] No one in Franklin County disputed that predominantly black precincts lacked enough machines to adequately administer elections, as compared to predominantly white ones.[22]

Distinguished voting rights expert Tova Wang, now Vice President for Research at Common Cause, recently made the point that the allocation of voting machines could prove problematic in 2008: "Allocating enough ballots and machines is tricky science under any circumstances, but especially when turnout is proving to be so unpredictable."[23]

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[21] At Kenyon College in Knox County, Ohio, DOJ found that "there were long delays in voting at the Gambier/Kenyon site, where the majority of the registered voters are college students. Some voters chose to wait until approximately 4:00 a.m. to cast their ballots on Knox county voting machines instead of using available paper ballots." http://www.usdoj.gov/crt/voting/misc/knox.htm

[22] As a former DOJ official, I was struck by the exculpatory nature of the language used in the letters sent to Franklin County and to officials in Knox County, Ohio. Traditionally, the Department's policy is not to discuss the reasons why the Department decided not to take a certain action, but rather briefly to let the subject of an investigation know that the investigation had been completed and no further action would be taken.

[23] Influx of Voters Expected to Test New Technology, *NY Times*, July 21, 2008.

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The misallocation of voting machines is a greater concern this year because of the spike in registrations in minority communities with an African-American leading a ticket. Many states and localities will experience different patterns of turnout and may not be prepared for it. Already there is substantial evidence of increased registration that should be a warning signal to local officials.

Thus, what happened in Franklin County in 2004 might very well happen again in numerous counties throughout the U.S. this fall: administrative failure to prepare for the high turnout combined with a failure to allocate an adequate number of voting machines or ballots in high turnout areas, particularly in predominantly minority areas and other areas that have seen a surge in voter registration numbers. The lesson to be learned from those places that saw a failure to allocate sufficient voting machines in 2004 is this: the allocation of machines should be made to ensure ease of voting for all voters, and not according to a mathematical formula based on outdated data that results in hours-long lines in some precincts and minutes in others.

In response to a question from Senator Leahy about ballot shortages, Attorney General Mukasey told this Committee that he was trying to make sure that state and local authorities have enough equipment to prevent shortages from happening. He said that he could "guarantee" that DOJ was doing "everything we can to prevent or mitigate" a ballot shortage. However, he gave no details on what preventative measures were being taken. This Committee should know exactly what the plan is, because its details could determine whether there are steps being taken that will ensure all eligible voters have their voice heard.

Insufficient Numbers of Poll Officials and Lack of Training

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Another necessary step to ensure that voters are not disenfranchised is a sufficient number of adequately trained poll workers. Although HAVA does not mandate poll worker training, the Act does require states to spell out in their HAVA implementation plans how the state plans to train its poll officials and to educate other election officials (such as general registrars). Information pertaining to voting must also be posted at every polling place on Election Day, including the posting of a sample ballot, instructions on how to vote (including the casting of a provisional ballot), and information about ID requirements for first-time voters who registered to vote by mail.

If poll workers are not adequately trained, voters can be denied their rights. In Virginia, for example, in 2006, a voter who lacked an ID (but who was a duly registered qualified voter) was denied the right to vote. Under state law, the voter was not required to present ID—he had a right to cast an ordinary ballot as long as he signed an affidavit verifying his identity. However, due to a misinformed poll worker, and a misinformed general registrar, who the poll worker contacted for verification, an individual was denied their right to vote. He brought suit in federal court and the County settled the suit. *Gillette, v. Weimer and Prince William County, Virginia Electoral Board, No. 1-08cv188-LMB (E.D. Va.).* I fear the Supreme Court's recent decision in the Indiana voter ID case (*Crawford v. Marion County*) will result in some election officials requiring an ID to vote even when state law does not require it, and even worse, selectively enforcing a voter ID requirement against minority voters at the polls.

State and local governments are responsible for the training of poll workers, just as they are responsible for other elements of election administration. However, the Civil Rights Division has an obligation to try to ensure that the right to vote is not denied. It

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should make every effort to work with local officials to ensure that both poll workers and citizens know the law. And DOJ should inform this committee of what it is doing in this area. Attorney General Mukasey says that they are doing everything they possibly can—so the officials before you today should have a lot to say.

Thank you for the opportunity to testify and to offer these views.

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Statement of Senator Patrick Leahy
Chairman, Senate Judiciary Committee
"Protecting the Right to Vote: Oversight of the Department of Justice's Preparations for the 2008 General Election"
September 9, 2008

The Committee today continues its crucial role overseeing the Department of Justice by examining the plans of the Civil Rights Division and Criminal Division to ensure that the voting rights of all Americans are protected in the upcoming national election. Protecting the precious right to vote is one of the primary missions of the Justice Department. Today, less than two months from a presidential election, we examine the adequacy of the Department's preparation to safeguard the rights of all Americans to vote and have their votes count. I thank Senator Cardin for chairing this important hearing.

For the past several months, our Nation has been engaged in a critical debate over the future direction of our country. This national discussion will be meaningless if Americans are prevented from casting their votes and having them counted. Not only does the right to vote secure the effective exercise of all other rights, it also protects a basic principle of our democracy: All American citizens deserve to have their voices heard in their government. The government's duty to ensure Americans' fundamental right to vote should be above politics.

Yet, during the most recent mid-term elections, we witnessed partisan attempts to obstruct the path to the ballot box for political gain. In Arizona, we saw overt threats by armed vigilantes attempting to intimidate Hispanic-American voters at the polls. We witnessed cross burnings intended to intimidate African-American voters on the eve of an election in Louisiana. We also saw organized efforts in Maryland to deceive minority and low-income voters with false information about polling locations and phony endorsements. Two years after opening investigations into these incidents, we still await answers from the Justice Department on who will be held accountable for these organized efforts to suppress voters.

We also know that photo ID laws have already disenfranchised voters this year. In a committee hearing four months ago, Stanford Law Professor Pam Karlan informed us that "[t]here are already more nuns in Indiana that have been disenfranchised in one election than all the proven in-person vote fraud in Indiana history." I remain disappointed that the acting head of the Civil Rights Division – an institution long committed to expanding voter access – asked the Nation's High Court to uphold Indiana's photo ID law, even though it will limit minority voters' access to the ballot.

These observations come at a time when the Justice Department's reputation has already been tarnished by revelations that it allowed politics to affect – and infect – the Department's priorities, from law enforcement to the operation of the crucial Civil Rights Division. On the brink of an important and historic presidential election, the American people deserve a Justice Department that will protect the right to vote without even a hint of partisanship.

I look forward to learning what preparation the Department has made in advance of Election Day to safeguard the right to vote. First, what is the Justice Department doing prior to Election Day

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to prevent problems at the polls? During the recent reauthorization of the Voting Rights Act, we learned that the ongoing presence of discrimination in voting underscored the continued need for Federal oversight of elections. I hope today the Department will offer us more transparency on how many Federal observers and monitors it will use this November, where it plans to send them, and how it chooses where they go. I also look forward to hearing if the Department will consult and coordinate with civil rights organizations to identify potential voter suppression hotspots.

Second, I want to know that the Justice Department has a comprehensive plan for responding to emergencies on Election Day. Last May, in a hearing on protecting the right to vote, we heard from civil rights organizations about new concerns that could potentially disenfranchise significant numbers of newly registered minority voters. I want to know the Department's Election Day plan to address the problems that may arise from the anticipated large turnout of new voters attempting to cast their ballots. For example, how will the Department address the need to extend hours at polling places, in case of long lines or lack of ballots, to ensure that all eligible voters can cast their ballots?

On a related matter, I am concerned about the Department's practice of using the FBI and U.S. Attorney's offices to provide election coverage. Because law enforcement officials are primarily trained to combat election crimes, I worry that their use in election coverage could be perceived by voters – especially minority voters – as intimidating and, ultimately, chill voter participation.

I also hope the Department will assure us that its prosecutors are currently being trained to avoid influencing election outcomes. My concern is exacerbated by the recent rewriting of the Justice Department's guidebook on "Federal Prosecution of Election Offenses." It not only changed from the "red book" to the "green book," but the traditional practice of not bringing last-minute investigations and actions was turned on its head. I hope the Department will assure us that these guidelines will be changed back to the time-honored rules.

I want to hear the Department's plans for vigorously enforcing the recently reauthorized Voting Rights Act. I am particularly concerned about the Civil Rights Division's recent shift away from enforcing statutes mandating access to the ballot toward a new emphasis on measures that restrict access to the ballot, namely the partisan pursuit of phantom in-person voter fraud.

Last May, I joined several members of this Committee in a letter to the Attorney General asking him to direct the Department to vigorously enforce the Voting Rights Act so that novel photo ID laws would not infringe on the voting rights of racial minorities. We received an insufficient response to our letter. I want to know if the Department will enforce the Voting Rights Act's anti-discrimination provisions against state photo ID laws that deter minority voter participation.

Recent election controversies remind us of the critical role the Justice Department has in protecting the fundamental right to vote. I believe that vigorous oversight – combined with a proactive Civil Rights Division and a reactive Criminal Division – is part of the formula for ensuring that the 2008 Presidential Election will be as open and fair as possible. We continue that process today. I welcome today's witnesses, and I look forward to their testimony.

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Mr. Bryan O'Leary
Crowell & Moring LLP, Capitolink
Testimony Before the Senate Judiciary Committee
Sep 9, 2008

Mr. Chairman, distinguished members of the Committee thank you for inviting me to testify today.

In 1952 President Harry Truman wrote to Congress regarding military absentee voting. He said, *"At a time when these young people are defending our country…the least we at home can do is to make sure that they are able to enjoy the rights they are being asked to fight to preserve."*

Over fifty years later military voting remains a burdensome bureaucratic process that in 2006 resulted in only 22% of service members successfully voting.[1] War fighters are often on-the-move. More often than not ballots are sent to a previous address and are never received by the men and women in the field.[2] A significant percentage are sent out without enough time to be completed, returned and counted before the state deadline.[3] Even when ballots reach members of the Armed Services at their correct address and the ballots make it back to the local election official on time military votes still must overcome legalistic challenges by lawyers dispatched by both political parties and candidates. In short, our military men and women and their families overseas are being systematically disenfranchised by a broken system.

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Military Voter Participation

2006 military voter participation was roughly half that of the general population, 22% (24% domestic military and only 17% overseas military personnel)[4] for military voters as compared to 39% to 40%[5] for the general population.

992,000 Uniformed and Overseas citizens ballots were requested for the 2006 general election, but only one-third of that number (330,000) were cast, and even less were counted.[6]

330,000 uniformed and overseas votes *cast or counted* out of a population of roughly 6 million citizens of voting age (1.3 million military, 1.1 million dependents, an estimated 3.6 million overseas citizens), for an estimated turnout of only 5.5%.[7]

48,628 uniformed and overseas ballots were rejected in 2006.[8]

In summary, the current military voting system has failed our military men and women and their families.

During my service in the Marines I was assigned as the voting officer for a 200 man squadron. I was given the DoD 400 page "Voting Assistance Guide" that detailed the different rules, regulations and deadlines for voting in each state, along with a stack of posters, Federal Postcard Applications (FPCA's) and Federal Write in Absentee Ballots (FWAB's). My instructions were to provide information for Marines who approached me wanting to register to vote and to get the squadron through our upcoming Commanding General's Inspection successfully.

Success on the inspection, however, was not measured by ensuring that a certain percentage of Marines registered to vote, or that the local election officials had the correct addresses of Marines in the unit. Instead

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the only metrics involved displaying the required number of voting posters, having on hand enough post card applications, and letting the Marines know that if they were interested in voting they should see an officer.

Like thousands of other junior officers, I didn't understand the confusing multi-step process and could barely vote myself, let alone help my Marines. I was focused first on my warfighting mission, not on this additional administrative duty. It should not be surprising that our warriors' top priority is keeping their soldiers, sailors, airmen, and Marines alive, not navigating a mess of federal, state, and local laws and regulations.

The Voting Assistance program is executed in a haphazard and inconsistent way and seems most effective when the military unit is not deployed. In 2001 the GAO reported, "voting assistance by the DoD and DoS varied due to incomplete service guidance, lack of oversight, and insufficient command support." In 2004 GAO reported that, "Absentee voting assistance continued to vary because of the collateral nature of the VAO role."[9] Further, in 2004 the DoD Inspector General concluded that 58% of personnel did not even know who their voting assistance officer was let alone know how to register to vote.[10]

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Recommendations

1. With less than sixty days left before election day, members of the military and their families should get on-line today or seek out their voting assistance officer (if they can find them) to register and/or request their absentee balloting materials, even if they believe they are already registered (http://www.overseasvotefoundation.org/ has the most user friendly web application). In all likelihood, their registration will indicate an old address and if not updated their ballot will be returned undeliverable after going to that address. Given the delays involved, even though the election is 2 months away, for our military men and women, *today is your election day*.

2. Congress should rapidly fund and execute expedited ballot delivery from overseas locations using express delivery with full tracking capability.

3. The Justice Department should aggressively investigate the DoD Federal Voting Assistance Program and States that do not allow for adequate time to send, complete, and receive ballots from remote overseas locations. 45 days is the absolute minimum.

4. Congress should establish for all future elections a means for electronic transmission of a blank ballot to service members and other government employees overseas and their families.

5. The Secretary of Defense should place responsibility for military voting under a single Senate confirmed Presidential nominee, an Assistant Secretary of Defense for Voting.

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Background

This is not a new problem. It has been clear for a number of years that the military and overseas voting process has been broken. Instead of fixing the problem, there has been a tendency to shift the blame. The DoD claims that the problem lies with each State and local jurisdiction, the States claim that is the DoD's problem, and the Department of Justice has allowed the DoD to take the blame.

As a Senate staff member I was briefed by the DoD in 2005 on this issue, and I was shocked that nothing had changed since I was a Captain in the Marines. A number of Senate offices vigorously investigated the program and found that the FVAP was living in complete denial that there even was a problem. Even today the Federal Voting Assistance Program office clings to their false claims of increased voter participation in the 2004 election. By their accounts an astounding 79% of military voters participated, they claim a significant improvement over the 2000 election, and a voting rate 15% higher than the general public. They continue to make this claim long after the GAO questioned their survey methodology as being unreliable, "The low survey response rates raise concerns about FVAP's ability to project increased voter participation rates."[11] The GAO goes on to criticize the overall methodology, overseas citizens sampled, the sample size, lack of sampling error, and lack of any analysis of respondents vs. non-respondents. In short, the Federal Voting Assistance Program claims are unscientifically arrived at and are questionable at best.

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In contrast, the Election Assistance Commission, Defense Manpower Data Center, National Defense Committee, Overseas Vote Foundation, and Pew Military Voting Project have provided significant data that counters their claim and provides ample data to demonstrate that only about one in every five military voters cast a vote that is counted.

In 2006 Congress directed the DoD to execute an electronic ballot delivery pilot program. A step short of "electronic voting" this system simply set up a secure connection between the military voter and the local election official which allowed them to receive a blank ballot over the internet, which they would then print, sign and mail back. This system eliminated the problem of ballots being sent to the wrong address. The Pentagon failed to execute the program until the last minute, and didn't tell the local election officials of its existence. It is interesting to note, that this solution that relied on hardened banking system encryption took three weeks and less than a million dollars to execute. In contrast the Voting Program office in the DoD claims that it would take them between 1,000 and 1,700 days to execute a voting over the internet program. If past performance is any measure, I would suggest that no amount of money or time could generate success out of the existing office.

As the "Presidential Designee" for military and overseas voters the Secretary of Defense should shoulder the majority of blame for the failure of his Voting Assistance Program. However, the Department of Justice, Civil Rights Division, has the legal authority to ensure that military and overseas voters have the right to vote. The DoJ has used this authority to initiate legal action with states that have not allowed enough time to ensure

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that military and overseas votes could be sent and returned from overseas and counted before the deadline. Recently most of the legal actions have revolved around special and run-off elections that have a compressed time table.

While the DoJ Civil Rights Division should be applauded for attempting to hold the states accountable, they could do much more. For years it has been made plain to every state that a minimum of 45 days is required to ensure that ballots can make it overseas, have time to reach the voter and be filled out and returned prior to the election. According to Brenda Farrell of the GAO it takes on average 18 days for a ballot to travel one way to a deployed service member.[12] That's at best 36 days for the round trip, plus nine days on the ground (it can be assumed that in a remote location a ballot would be dropped off, completed, and then sent out in the following week's mail).

Given the fact that our Armed Forces are deployed around the world in combat zones, and given the difficulty of getting mail to remote locations in Iraq, Afghanistan, and the Horn of Africa it stands to reason that the DoJ should expand their legal effort to ensure that every state provides the minimum recommended 45 day window to ensure that our soldiers have enough time to allow their votes to be returned on time. Further, if there is a close election – and a single vote may make the difference, for these ballots already cast, due to circumstances outside the control of the war fighter, these "in transit" ballots should be given the opportunity to be counted should they arrive before an election certification. This is certainly within the purview of the Judicial system to offer this short term remedy.

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Conclusion

Our military men and women serve around the world and risk their lives in defense of freedom, and yet their own ability to exercise their fundamental right to vote is being obstructed.

This problem could have and should have been solved years ago, yet our industrial age government has failed to embrace the information age. Technology is available today to securely encrypt and electronically transmit blank ballots to military men and women around the world.

If there is a silver lining it is that private non-profit groups like the Pew Military Voting Project, the Overseas Vote Foundation, Operation Bravo, Everyone Counts, and the National Defense Committee have all stepped up to provide innovative solutions that could be rapidly executed within the existing budget.

For this coming election in November it is critical that the Department of Justice press the Department of Defense and State election officials to ensure that our service men and women are given the time required to receive their ballots and return them on time. These military men and women are citizens first, and as citizens they deserve the full attention of the Department of Justice to protect their right to vote.

Thank you for allowing me to testify today, I look forward to your questions from the members of the Committee.

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[1] Defense Manpower Data Center, Human Resources Strategic Assessment Program, *2006 Survey Results on Voting Assistance Among Military Members and DoD Civilian Employees,* Survey Note No. 2007-010.

[2] EAC. *U.S. Election Assistance Commission, UOCAVA Survey Report Findings.* Sep 2007.

[3] Paul DeGregorio. *Testimony before the U.S. Senate Committee on Armed Services.* U.S. Election Assistance Commission. Sep 28, 2006.

[4] Defense Manpower Data Center, Human Resources Strategic Assessment Program, *2006 Survey Results on Voting Assistance Among Military Members and DoD Civilian Employees,* Survey Note No. 2007-010.

[5] The American National Election Studies. *Voter Turnout 1948-2004.* Dec 21, 2005.

[6] Defense Manpower Data Center.

[7] EAC. *The 2006 Election Administration and Voting Survey: Highlights from the 2006 UOCAVA survey.*

[8] Ibid.

[9] Derek Stewart. GAO Report. *Absentee Voting Assistance to Military and Overseas Citizens Increased for the 2004 General Election, but Challenges Remain.* GAO-06-521. Apr 2006.

[10] DoD IG Report. *DoD Implementation of the Voting Assistance Program.* Report No. D-2004-065. Mar 31, 2004

[11] Derek Stewart. GAO-06-521.

[12] Captain Chas Henry. *Lots of Bullets, Not Enough Ballots.* Naval Institute Proceedings. 2008.

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NATIONAL ASIAN PACIFIC AMERICAN BAR ASSOCIATION

February 1, 2008

The Honorable Patrick J. Leahy
Chairman, Committee on the Judiciary
United States Senate
Dirksen Senate Office Building, SD-224
Washington, D.C. 20510

Re: Letter of Support for Grace Chung Becker, Applicant for United States Department of Justice Assistant Attorney General, Civil Rights Division

Dear Senator Leahy:

On behalf of the National Asian Pacific American Bar Association ("NAPABA"), we are writing to support the confirmation of Grace Chung Becker to serve as the Assistant Attorney General, Civil Rights Division, for the United States Department of Justice. Ms. Becker has the qualifications, intellectual capacity, and commitment to justice necessary for this position. We therefore ask you to hold a Judiciary Committee hearing for her and seek her confirmation at the earliest opportunity.

As you know, NAPABA is a national bar association representing the interests of Asian Pacific American attorneys, judges, law professors and law students. Now in its nineteenth year, NAPABA represents the interests of approximately 50 affiliate organizations and over 40,000 Asian Pacific American attorneys. Through its national network of affiliates and committees, NAPABA provides a strong voice for increased diversity of the federal and state judiciaries, and promotes the professional development of minorities in the legal profession.

NAPABA is deeply committed to supporting the appointment of qualified Asian Pacific Americans to senior government positions. In the history of the Civil Rights Division, no woman has been confirmed as its Assistant Attorney General. Moreover, no Asian American woman has ever served as an Assistant Attorney General or any other Senate-confirmed position at the Department of Justice. Accordingly, Ms. Becker's confirmation would be extremely significant.

Ms. Becker has the experience necessary to serve as Assistant Attorney General. She has served for the last two years as a Deputy Assistant Attorney General in the Civil Rights Division. Since December 2007, Ms. Becker has served as the Acting Assistant Attorney General for the Division. Ms. Becker previously has served as an Assistant General Counsel on the U.S. Sentencing Commission, and on the Senate Judiciary Committee (as a detailee). Thus, Ms.

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The Honorable Patrick J. Leahy
February 1, 2008
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Becker is well-versed with the issues affecting the Civil Rights Division and is in a position to manage the Division immediately. She also has served in the U.S. Attorney's Office, the Criminal Division of the Department of Justice, the U.S. Department of Defense, the U.S. Army, and two federal judicial clerkships. Her long history of governmental service should be commended.

Moreover, Ms. Becker has been active in the community. For example, she has served on the Board of Directors for the D.C. Area chapter of the Korean American Coalition, including as its Executive Vice President in 2001. Ms. Becker also continues to be active in speaking at functions of the Asian Pacific American Bar Association, addressing topics such as mentorship and government service. Ms. Becker clearly recognizes the importance of working with different communities and finding common ground.

Based on her qualifications, professional achievements, and background, Ms. Becker would make a distinct and valuable contribution as the Assistant Attorney General for the Civil Rights Division. Her confirmation would be historic for the Asian Pacific American community. Accordingly, the National Asian Pacific American Bar Association proudly supports the nomination and confirmation of Grace Chung Becker to serve as the Assistant Attorney General for the Civil Rights Division of the United States Department of Justice.

Sincerely,

Les Jin
Executive Director
National Asian Pacific American Bar Association

Helen B. Kim
President
National Asian Pacific American Bar Association

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Department of Justice

STATEMENT OF

BARRY SABIN
DEPUTY ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ENTITLED

"PROTECTING THE RIGHT TO VOTE: OVERSIGHT OF THE DEPARTMENT OF JUSTICE'S PREPARATIONS FOR THE 2008 GENERAL ELECTION"

PRESENTED

SEPTEMBER 9, 2008

Committee on the Judiciary
United States Senate

"Protecting the Rights to Vote: Oversight of the Department of Justice's Preparations for the 2008 General Election"

Statement of
Barry Sabin
Deputy Assistant Attorney General
Criminal Division

September 9, 2008

I. Introduction

Good morning Chairman Leahy, Ranking Member Specter, and Members of the Judiciary Committee. I appreciate the opportunity to appear before you today to discuss the Criminal Division's efforts to enforce federal laws relating to the corruption of the franchise and criminal violations of the Federal Election Campaign Act. As you are aware, the Justice Department has met on a number of occasions this year with members of this Committee's staff to discuss the Department's robust efforts relating to these issues. Additionally, on June 6, 2008, Criminal Division and Civil Rights Division representatives provided a briefing to the United States Commission on Civil Rights. In that forum, the Justice Department outlined the roles of the respective Divisions in the enforcement of federal laws that are designed to make voting accessible and cheating more difficult. We also have met this year with this Committee's staff and addressed issues involving the Department's established policies regarding pre-election criminal investigative activities and other issues of interest to the Committee. The Department remains committed, in both words and action, to ensuring that we effectively implement these responsibilities not only during this election year but for future elections as well.

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II. Public Integrity Section's Role in the Management of Election Crime Cases.

Dating back to the creation of the Public Integrity Section in 1976, the Criminal Division has been responsible for supervising election crime investigations and prosecutions initiated in United States Attorneys' Offices throughout the country. In 1980, an Election Crimes Branch was created within the Public Integrity Section to oversee the handling of these cases. The supervisory responsibilities assumed by the Election Crimes Branch are handled by its Director, a career prosecutor who has spent over 38 years overseeing election crime cases, and by another Section attorney who has done so for over 30 years. These career prosecutors are viewed as dedicated, nonpartisan professionals within the Justice Department and wider legal community.

While Public Integrity Section attorneys on occasion prosecute election crime cases, most of these cases are prosecuted by Assistant United States Attorneys in United States Attorneys' Offices across the nation. The Criminal Division plays a significant role in this area of law enforcement by providing advice to prosecutors and investigators in the field and overseeing the work of the United States Attorneys Offices and the FBI in the challenging and important investigations and prosecutions of this type of criminal activity.

From an operational perspective, the Criminal Division's oversight of election crime matters is designed to ensure that the Department's nationwide effort to combat election fraud and campaign financing crimes is consistent, impartial, and effective. Although the Public Integrity Section does not have formal veto authority over the investigation and prosecution of federal election crimes, U.S. Attorneys' Offices are required to consult with the Public Integrity Section before taking certain actions. With respect to election fraud matters, such as vote buying

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and ballot box stuffing, a U.S. Attorney's Office must consult with the Section before commencing a grand jury investigation, requesting that the FBI conduct a full-field FBI investigation, or bringing criminal charges. For campaign financing matters, such consultation is also required before any investigation is initiated and before any charges are filed. Such consultation is also required before subpoenaing election materials in the possession of State and local elections officials, conducting covert investigations related to elections, and interviewing individual, non-complaining voters prior to an election. Additionally, the Criminal Division has provided written guidance to United States Attorney's Offices on the applicable laws and investigative strategies governing this sort of crime.

On a frequent basis, these Criminal Division attorneys closely coordinate with their counterparts in the Civil Rights Division, particularly that Division's Voting and Criminal Sections, whose missions include ensuring not only that the right to vote is accessible to all who are entitled to the franchise but also that their exercise of the franchise is not suppressed in contravention of federal civil rights laws. This inter-Division consultation assists in the effective enforcement of both election crime and voting rights matters.

III. The Attorney General's Ballot Access and Voting Integrity Initiative

In October of 2002, the Attorney General announced the establishment of a Department-wide Ballot Access and Voting Integrity Initiative to spearhead the Department's increased efforts to protect voting rights and to combat election fraud. The Initiative expands on the Department's long-standing District Election Officer Program, which requires each United States Attorney's Office to designate at least one Assistant United States Attorney to handle the investigation and prosecution of election crimes and to serve as a liaison with the Civil Rights

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Division on ballot access issues within its District. In 2006, the FBI established a similar program, which requires that each of its 56 Field Divisions designate a special agent to serve as Election Crime Coordinator. At the present time, there are 110 Assistant United States Attorneys and 58 FBI Special Agents in the field, and they work with two Supervisory Special Agents at FBI Headquarters and with the two Public Integrity Section experts I previously mentioned. These dedicated civil servants represent the entire Nation from Maine to Hawaii and from Guam to the Virgin Islands.

Another critical feature of the Ballot Access and Voting Integrity Initiative requires that the Criminal Division, jointly with the Civil Rights Division, organize and present annually a Ballot Access and Voting Integrity Symposium. This annual training event is designed to bring together for two days of intensive training all of the Assistant United States Attorneys and FBI Special Agents to whom I have just referred in an effort to ensure that all are trained in the legal and strategic issues implicated in this critical area of the Department's law enforcement responsibilities. Since the Initiative was announced, a total of seven such national training events have been held, the most recent of which took place on July first and second of this year at the Justice Department's National Advocacy Center in Columbia, South Carolina. The conference was attended by over 160 Assistant United Sates Attorneys and Special Agents from every District and Field Division in the United States. While a few FBI agents attended the 2007 conference, this year was the first time that all FBI Special Agents serving as Election Crime Coordinators around the country joined Department prosecutors in the training. The Attorney General personally addressed this audience and discussed the importance of both protecting the voting rights of all Americans and safeguarding the electoral process. In a March 5, 2008,

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memorandum to all Department employees, the Attorney General had emphasized that politics should play no role in the in the investigation or prosecution of election crimes.

A final critical feature of the Initiative requires each United States Attorney's Office and each FBI Field Division to establish and maintain a close liaison with State law enforcement and election administrators concerning ballot access and election integrity complaints. The objective of this coordination is to ensure that complaints involving voting are aggressively sought out and that they are sent to the authority best equipped to resolve the issues involved -- be it an election board, a local or State law enforcement agency, an enforcement component of the Justice Department's Civil Rights Division, or, in instances of federal criminal activity, the FBI.

Since the Ballot Access and Voting Integrity Initiative was announced in late 2002, over 200 individuals have been charged with election crimes, over 170 individuals have been convicted, and 185 matters and cases are currently still pending. These criminal cases have ranged from far-reaching prosecution initiatives involving voter bribery in Eastern Kentucky, North Carolina, West Virginia and East St. Louis to the prosecution of noncitizen voting in Florida, multiple voting in Colorado, Kansas and Missouri, and voting by disenfranchised felons in Wisconsin.

IV. Conclusion

The Criminal Division and the Department's criminal prosecutors in the United States Attorney's Offices complement the work of the Civil Rights Division in election matters. The Civil Rights Division is responsible for protecting the right to vote, while the Criminal Division's Public Integrity Section and other Department prosecutors throughout the country seek to protect

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the value of each person's vote by prosecuting those who corrupt the elections. It is our hope and belief that the Department's election crime prosecutions deter at least some election fraud and thus enhance the integrity of future elections.

I thank you for the opportunity to provide the Committee with information about the Criminal Division's role in combating election fraud. I welcome your questions.

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U.S. House of Representatives
Committee on the Judiciary
Washington, DC 20515–6216
One Hundred Tenth Congress

May 22, 2008

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

The Honorable Arlen Specter
Ranking Minority Member
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Chairman Leahy and Ranking Member Specter:

We are writing to express our strong support for the confirmation of Grace Chung Becker as Assistant Attorney General for the Civil Rights Division (CRT) of the U.S. Department of Justice and to respond to the letter sent by Democratic members of our Committee. Ms. Becker is extremely well qualified and has demonstrated her commitment to the vigorous enforcement of federal civil rights laws and to the principles of equal justice under law.

Since December 2007, Ms. Becker has been serving as the Acting Assistant Attorney General in the Civil Rights Division, where she supervises approximately 700 employees in ten litigating sections. From March 2006 to December 2007, Ms. Becker served as Deputy Assistant Attorney General in the Division, supervising the Criminal Section, the Special Litigation Section, the Educational Opportunities Section, and the Housing and Civil Enforcement Section. As a manager, she has supervised the career professionals as they investigated matters, litigated cases, and negotiated agreements in the United States' enforcement of civil rights laws involving, among other things, law enforcement misconduct; hate crimes; human trafficking; educational opportunities; the civil rights of institutionalized persons in prisons, jails, nursing homes, mental hospitals, and facilities for the developmentally disabled; housing and employment discrimination;

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fair lending; voting rights; and disability rights. In the more than two years at the Division, she has supervised hundreds of civil rights matters involving numerous statutes.

Ms. Becker's professional experience reveals a commitment to public service and illustrates an impressive background in litigation. Indeed, she has spent nearly her entire career in public service. After graduating from law school, she clerked for two well-regarded federal judges, Judge James L. Buckley on the United States Court of Appeals for the District of Columbia Circuit and Judge Thomas Penfield Jackson on the United States District Court for the District of Columbia. She then served as a career prosecutor in both the Department of Justice's Criminal Division and the United States Attorney's Office for the Eastern District of Virginia. In those positions, she personally handled hundreds of cases, coordinated significant international narcotics investigations, tried numerous bench and jury trials, and argued federal appeals in the First, Fourth, Ninth, and District of Columbia Circuits. In addition, Ms. Becker served her country as an Associate Deputy General Counsel at the Department of Defense, Counsel to the Senate Judiciary Committee, and Assistant General Counsel at the United States Sentencing Commission. She also worked as a litigator at one of the nation's most prestigious law firms, Williams & Connolly, where she demonstrated her commitment to the public good by representing some of the most vulnerable individuals in our society pro bono.

Ms. Becker has shown that she can and will enforce federal laws in a fair and even-handed fashion. One striking example of that ability is her exemplary work on the Clinton Administration's investigation of the No Gun Ri massacre, for which she received the U.S. Army's Outstanding Civilian Service Medal, the Army's highest civilian service award. As noted by Patrick T. Henry, Assistant Secretary of the Army (Manpower and Reserve Affairs):

> Grace Chung Becker's sage cultural and historical advice and sound judgment were instrumental in the successful completion of the Army's intensive and thorough review of the alleged massacre of Korean civilian refugees at No Gun Ri in the early months of the Korean War. Her ability to adapt quickly to the Pentagon work environment, establish an effective network to ensure accurate communication and coordination among the various agencies involved, especially the parallel U.S. and Korean review teams, and her "Can Do" work ethic proved invaluable to the favorable outcome of this effort. Ms. Becker's extraordinary performance of duty reflects great credit upon her, this office and the Federal civil service.

As a career attorney, and without regard to partisan politics, Ms. Becker worked closely with Democratic political appointees to ensure that the No Gun Ri matter was thoroughly investigated. Ms. Becker coordinated this exceptionally sensitive inquiry with integrity and resolve but without foregone conclusions. She helped provide the honest answers that the Korean victims, Korean Americans, American service members, and the American people deserved. That same form of leadership is precisely what we need now, as always, in the Civil Rights Division. Ms. Becker embodies that commitment today just as she did while serving President Clinton's administration.

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In her leadership of the Civil Rights Division, Ms. Becker continues to uphold the rule of law. Shortly after Ms. Becker became Acting Assistant Attorney General for Civil Rights, the United States filed an *amicus* brief urging the Supreme Court to sustain the Indiana voter identification law against a facial constitutional challenge. While we recognize the political issue is controversial, but the legal issue has now been settled. The Supreme Court agreed with the argument of the United States, holding that Indiana's interests in furthering election modernization, preventing voter fraud, and safeguarding voter confidence were both neutral and sufficiently strong to require rejection of the facial challenge to the statute. The lead opinion, written by Justice John Paul Stevens, stated: "There is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters." *Crawford v. Marion County Election Bd.*, Nos. 07-21 & 07-25, 2008 WL 1848103, at *8 (U.S. Apr. 28, 2008). The concurring opinion added: "The Indiana photo-identification law is a generally applicable, nondiscriminatory voting regulation." *Id.* at *13 (Scalia, J., concurring). It went on to say: "The universally applicable requirements of Indiana's voter-identification law are eminently reasonable. The burden of acquiring, possessing, and showing a free photo identification is simply not severe, because it does not even represent a significant increase over the usual burdens of voting. And the State's interests are sufficient to sustain that minimal burden." *Id.* at *15 (internal citations and quotation marks omitted).

Further, in response to written questions regarding her nomination, Ms. Becker wrote: "Given our country's history, it is important for the Civil Rights Division to carefully scrutinize voter identification laws when they implicate the federal statutes we enforce. Independent of *Crawford*, the Civil Rights Division will investigate, and take any appropriate enforcement action, if evidence suggests that a voter identification law is being applied in a discriminatory or otherwise illegal manner."

Similarly, while Ms. Becker was overseeing the Civil Rights Division's Educational Opportunities Section (EOS), the Supreme Court considered two consolidated cases addressing the constitutionality of race-based student assignment plans in public schools in Kentucky and Washington State. In these cases, *Meredith v. Jefferson County Board of Education*, No. 05-915, and *Parents Involved in Community Schools v. Seattle School District No. 1*, No. 05-908, the United States filed *amicus* briefs arguing that although, in certain situations, the Constitution allows the limited consideration of race to attain a genuinely diverse student body, the particular student assignment plans at issue did not satisfy strict scrutiny, as required by the Equal Protection Clause of the Fourteenth Amendment to the Constitution. The Supreme Court once more agreed with the position advocated by the Justice Department and struck down the plans.

Ms. Becker has committed to continuing the vigorous enforcement of the federal laws within EOS' jurisdiction. In her written responses, she described the Civil Rights Division's ongoing efforts to desegregate public schools around the nation. She indicated that while she was supervising the Section, "EOS has obtained litigated relief, entered into court-approved consent decrees, or entered into out-of-court settlements in

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more than 35 instances. The relief includes eliminating one-race classrooms and schools, ensuring non-discriminatory hiring, promotion and assignment of faculty and administrators, improving facilities at one-race minority schools, and eliminating racially separate class superlatives and honors. For instance, during my tenure, in *United States v. Calhoun County School District* (SC), the court entered a negotiated consent decree that will reduce racial disparities among the schools. . . . Similarly, in *United States v. Coweta County School Board* (GA), the court entered a negotiated consent decree, which addressed student attendance and assignment, facilities, employee assignment, and transfers."

Ms. Becker's longstanding service as a career attorney and her degree in Management from the Wharton School have provided her with the necessary training to manage the Civil Rights Division. At Ms. Becker's confirmation hearing, she was asked about a July 23, 2006 *Boston Globe* article that discussed the Division's hiring in the Voting, Employment and Appellate Sections from 2001-2006. We would like to point out that Ms. Becker did not supervise any of those sections during that time. In fact, she did not begin working in the Division until March 2006. It would be manifestly unfair not to confirm Ms. Becker based on allegations arising before her tenure and relating to sections she did not supervise at the time. That is especially so because Ms. Becker has shown that she is committed to making personnel decisions on the basis of merit alone, not partisan politics or personal favoritism. Indeed, one of her first actions as Acting Assistant Attorney General was to issue a memorandum reminding the Division that "there will be no discrimination based on color, race, religion, national origin, political affiliation, marital status, disability, age, sex, sexual orientation, status as a parent, membership or non-membership in an employment organization, or personal favoritism.

Moreover, the *Boston Globe* article simply ignores the facts. Ms. Becker's Senate-confirmed predecessor has rebutted the *Globe*'s allegations in detail in response to written questions from the Senate Judiciary Committee, stating:

> There is no political litmus test used in deciding to hire attorneys in the Civil Rights Division. During the past six years, we have hired people from an extremely wide variety of backgrounds and experiences. We will continue to hire the best attorneys available. It is my goal to ensure that every attorney hired to work in the Civil Rights Division has a demonstrated record of excellence, is a talented attorney consistent with that excellent record, and shares a commitment to the work of the Division.
>
> The *Boston Globe* article ignores salient facts pertaining to the Division's hiring record during this Administration. For example, all five individuals hired as career section chiefs during this Administration had previously served as career attorneys in the Division. These five chiefs have an average of approximately 17 years of experience in the Division, and also had a wide variety of work experiences, including working in the Clinton White House, with the American Civil Liberties Union, and as Special Assistant to Acting Assistant Attorney

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> General Bill Lann Lee. In sum, there is no political litmus test used in deciding to hire attorneys in the Civil Rights Division.

Similarly, Ms. Becker made clear during her confirmation hearing that, as a former career attorney herself, she knows the value of career attorneys, and that she will not allow partisan politics to infect the hiring process at the Civil Rights Division.

Ms. Becker's record also reflects her commitment to helping vulnerable communities. While working at the law firm of Williams and Connolly, Ms. Becker handled pro bono matters including, but not limited to, cases involving civil rights and domestic violence. From approximately 2001-2005, she volunteered to serve on a local School Board's Human Rights Advisory Committee that addressed significant community issues, including post-9/11 backlash in public schools.

Ms. Becker also served as the Executive Vice President and a Board member of the Korean-American Coalition (Washington, DC Area Chapter) (KAC-DC), a non-partisan community group that, among other things, conducts voter registration drives and citizenship drives. Writing in support of her nomination, KAC-DC described her "strong commitment" to community service:

> During her tenure on our Board, she demonstrated a wonderful ability to mediate and resolve differences of opinion and find common ground among diverse points of view. She continues to be actively involved in the community and has always displayed a deep sensitivity to issues of concern to ethnic minority communities.

Similarly, the National Asian Pacific American Bar Association commended Ms. Becker's long history of government service and noted her active participation in community service. In its words, "Ms. Becker clearly recognizes the importance of working with different communities and finding common ground. Based on her qualifications, professional achievements, and background, Ms. Becker would make a distinct and valuable contribution as Assistant Attorney General for the Civil Rights Division."

The Asian American Justice Center (AAJC) also supports Ms. Becker's nomination. Even though it disagreed with the Supreme Court case upholding the Indiana voter ID law, it praised her leadership on the prosecution of Jeremiah Munsen on federal hate crime and conspiracy charges for his role in threatening and intimidating marchers who participated in a civil rights rally in Jena, Louisiana by displaying two hangman's nooses from the back of a pickup truck. AAJC "believe[s] that Ms. Becker is willing to work closely with the civil rights groups and can make distinct and valuable contributions to the advancement and protection of civil rights."

The Korean American Voters Council is a non-partisan organization that has registered over 22,000 Korean American voters in New York and New Jersey. In its words, "[Ms. Becker] has been a passionate and lifelong advocate in the pursuit of

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justice, whether combating human trafficking abroad or protecting the human rights for all ethnic minorities here at home."

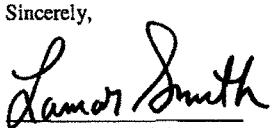
Ms. Becker has received dozens of similar letters of support from Korean Americans community organizations, business, and houses of worship, including but not limited to the Korean American Chamber of Commerce of Los Angeles, California; the New York Society of Korean Businessmen, Inc.; and the Korean American Associations of New England, New York, New Jersey, Dallas, Texas, and elsewhere.

Ms. Becker's nomination is historic. As the Organization of Chinese Americans wrote, in its letter in support of her nomination: "In the history of the Civil Rights Division, no woman has been confirmed as its Assistant Attorney General. Moreover, no [Asian Pacific American] woman has ever served in any other Senate-confirmed position at the Department of Justice. In this context, Ms. Becker's confirmation would be not only timely but extremely significant."

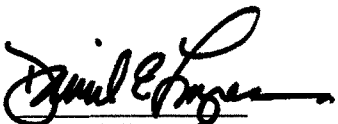
Ms. Becker's biography bears out this endorsement. Born and raised in New York, she is the daughter of Korean immigrants who came to this country with little money but became pioneers of the Korean-American community in New York City, opening one of the first Korean businesses on West 32nd Street. Two of her siblings learned English as a second language in the New York City public schools. As a child, Ms. Becker spent many hours working in her parents' store, where business was conducted in Korean. She eventually attended Stuyvesant High School and earned a B.A. and B.S.E., *magna cum laude*, from the Wharton School of Finance at the University of Pennsylvania with a concentration in Management and a J.D., also *magna cum laude*, from the Georgetown University Law Center, where she was a member of the Order of the Coif and an Associate Editor on The Georgetown Law Journal. In short, she is living the American dream.

We respectfully urge the Senate to quickly confirm Ms. Becker.

Sincerely,



REP. LAMAR SMITH



REP. DANIEL LUNGREN

REP. HOWARD COBLE

REP. CHRIS CANNON

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REP. RIC KELLER

REP. MIKE PENCE

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