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VOTING WRONGS: OVERSIGHT OF THE JUSTICE DEPARTMENT'S VOTING RIGHTS ENFORCEMENT

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

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VOTING WRONGS: OVERSIGHT OF THE JUSTICE DEPARTMENT'S VOTING RIGHTS ENFORCEMENT

WEDNESDAY, APRIL 18, 2012

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to call, at 9:07 a.m., in room 2141, Rayburn House Office Building, the Honorable Trent Franks (Chairman of the Subcommittee) presiding.

Present: Representatives Franks, Chabot, King, Nadler, Conyers, Scott, and Quigley.

Also Present: Representatives Smith.

Staff Present: (Majority) Paul Taylor, Subcommittee Chief Counsel; Zachary Somers, Counsel; Dan Huff, Counsel; Sarah Vance, Clerk; (Minority) David Lachmann, Subcommittee Staff Director; and Veronica Eligan, Professional Staff Member.

Mr. FRANKS. Good morning, and welcome to this Constitution Subcommittee hearing on Voting Wrongs: Oversight of the Justice Department's Voting Rights Enforcement.

Without objection, the Chair is authorized to declare recesses of the Committee at any time.

I want to welcome the panelists here and welcome all of you here this morning.

Today, we examine what the Voting Section at the Department of Justice has been doing and what it has not been doing. As the 2012 Presidential election nears, the Voting Section must ensure that those military members who are defending our Republic have the opportunity to participate in it.

There are approximately two million military voters, many in combat zones, many risking their lives on behalf of all of us, but with limited access to ballots. Accordingly, in 2009, Congress passed the Military and Overseas Voter Empowerment Act, MOVE, which requires States to mail absentee ballots to all military voters at least 45 days before a Federal election. The Military Voter Protection Project analysis shows that inadequate enforcement of the MOVE Act in the 2010 cycle disenfranchised thousands of service members. This year, DOJ must identify violations early, negotiate strong settlements that deter repeat offenses, and ensure military recruitment centers and bases offer opportunities to register or request ballots as required by law.

In 2010, there were at least 14 States with counties that failed to meet the 45-day deadline. Nonprofit watchdogs discovered that DOJ failed to prosecute most of these illegalities, leaving insufficient time for corrective action that would fully protect thousands of military voters.

Where DOJ sued violators for missing the 45-day deadline to mail the ballots, it settled for an extension of time for military voters to return them. But that does not solve the problem, because the absentee ballot must reach the voter by election day to count, no matter when it is returned. Therefore, DOJ's so-called solution systematically disenfranchises military voters.

DOJ didn't require jurisdictions in violation to use Express Mail to send the ballots. While it costs more, DOJ does not hesitate to impose heavy costs on jurisdictions when it suits their ideological agenda, for example, by requiring bilingual ballots for voters who claim to speak English well. Similarly, the Justice Department seems unconcerned about low registration rates for military recruiting centers, even though it aggressively sued States which it thinks register an insufficient number of people at welfare offices.

The Voting Section needs to make a first priority of protecting service members whose first priority is protecting all of us. Instead, the Voting Section is seeking headlines in opposing voter ID laws that an overwhelming majority of Americans support as necessary and non-discriminatory.

In a 2008 case, the Supreme Court recognized, "The electoral system cannot inspire public confidence if no safeguards exist to confirm the identity of voters." It hardly inspires public confidence that a White 20-something can obtain the ballot of the first Black Attorney General. Let me say that one more time. It hardly inspires the public confidence that a White 20-something can obtain the ballot of the first Black Attorney General. There is a little video here to illustrate that point.

[Plays video.]

Mr. FRANKS. Opposing voter ID is consistent with the Voting Section's pattern and practice of making strained legal arguments in areas it favors ideologically.

A starker example of DOJ's uneven priorities is its selective enforcement of the National Voter Registration Act. DOJ is aggressively suing States for not registering sufficient voters at welfare offices, and at the same time it has not brought a single case under Section 8 of the law requiring States to maintain the accuracy of their voter lists, despite documented inaccuracies. The result is the identities of illegal or dead persons could be used to cancel out lawful votes.

With that, I would now recognize the Ranking Member, Mr. Nadler, for his opening statement.

Mr. NADLER. Thank you, Mr. Chairman.

We are back again with another oversight hearing airing allegations, most of them demonstrably false, against the Department of Justice without inviting the Department of Justice to testify.

I have served in the House since 1992 and never before this Congress have I ever seen anything quite like what has become standard practice in this Committee. We hold hearings on legislation stripping the District of Columbia of its basic home rule rights

without the courtesy of allowing the Delegate from the district to testify. We have hearings on the Department of Justice and other executive branch agencies in which witnesses allege misconduct without inviting the Department or the Administration to testify or to rebut.

I suppose I should be grateful that the minority is allowed a single witness. Evidently, some Republican Chairman believe that even this is optional.

This conduct is unbecoming of this Committee and of this House. If we are going to turn these hearings into veritable able kangaroo courts, then we should drop the pretense that we are actually engaged in objective oversight or legitimate fact finding. And I hope that no one will insult our intelligence by telling us that the minority could have invited the Administration to testify as our one sole minority witness that we are allowed.

I say this because the issue before us today, the right to vote in a free and fair election and the right to have our votes counted, is at the heart of our system of government. Indeed, it is a fundamental part of who we are as Americans. Without free and fair access to the ballot for all Americans, our democracy would be a sham.

Devices to suppress voting, like restricting voter registration or selectively requiring photo IDs that are more commonly possessed by White voters and not by minority, young, or elderly voters, betrays our right to a republican form of government—small "r"—as guaranteed by Article 4, Section 4 of the Constitution.

We are even going to have a rehash of long-discredited allegations about the New Black Panther Party case, one in which no voter has ever complained of having been intimidated. As Abigail Thernstrom, a Republican member of the Civil Rights Commission, put it succinctly, "This doesn't have to do with the Black Panthers. This has to do with Republican fantasies about how they could use this issue to topple the Administration. My fellow conservatives on the Commission had this wild notion that they could bring Eric Holder down and really damage the President."

I think it is also important to keep in mind that widespread voter fraud is a talking point, not a demonstrated reality. One Republican witness has submitted a list of alleged voter fraud cases stretching back to the 1990's. What is striking about this list is that many of the cases have nothing to do with voter ID, such as alleged cases of vote buying or stealing ballots; that some States have only one case; and that some States are not even on the list. Very pervasive.

It is especially interesting that the list makes no mention of voter suppression, when just recently former Maryland Governor Bob Ehrlich's campaign manager was convicted and sentenced for using fraudulent robocalls to suppress the vote in the African American community.

I also see no mention of the recent unsuccessful effort by the Republican National Committee to get out from under a 1982 consent decree in which the Republican National Committee agreed to stop engaging in various voter suppression tactics aimed at suppressing minority votes.

The Third Circuit's decision, handed down just a few weeks ago, makes for interesting reading. In the 1982 consent degree the RNC agreed "to refrain from undertaking any ballot security activities in polling places or election districts where the racial or ethnic composition of such districts is a factor in the decision to conduct or the actual conduct of such activities there and where the purpose or significant effect of such activities is to deter qualified voters from voting."

I hope that we will have the opportunity to discuss the issue of voter suppression and the pretextual and nonsensical allegations of voter fraud as an excuse for voter suppression which we see all over the country now.

The Supreme Court has noted the rarity of in-person voter fraud, and I would point out that cases of ballot stuffing or other kinds of alleged fraud have nothing to do with voter ID. It is only in-person voter fraud that has anything to do with voter IDs. In Crawford versus Marion County Election Board, the Court found that "there was no evidence of any in-person voter fraud actually occurring in Indiana at any time in its history."

There have, however, been instances of individuals who are duly qualified voters being turned away. Perhaps most notoriously, again in the State of Indiana, 12 nuns in their 80's and 90's were denied their right to vote because they did not have drivers' licenses and had outdated passports. Sister Julie McGuire, who turned the nuns away, said they hadn't been given provisional ballots because it would be difficult to get the nuns to a motor vehicle branch for non-driver IDs in time for the 10-day window allowed for provisional IDs. Sister McGuire told the Associated Press, "You have to remember that some of these ladies don't walk well. They are in wheelchairs or walkers or electric carts." They were all denied their right to vote.

This Committee in our investigation of the U.S. Attorney firing scandal—I think it was about 4 or 5 years ago—and in another investigation by the IG and the Office of Professional Responsibility uncovered evidence showing that some of the U.S. Attorneys had been fired at the direction of high-level Bush White House officials because of complaints that the U.S. Attorneys did not pursue voter fraud prosecutions that they had determined to be meritless. So they were fired.

In one case, in addition to White House personnel, evidence was uncovered that a Republican Senator and a Republican Member of this House had applied political pressure to get prosecutions initiated before the elections.

I hope that as we receive testimony from Republican party attorneys alleging pervasive voter fraud, we can remember these facts.

Mr. Chairman, it wasn't too many years ago that I had the privilege of working on a bipartisan basis with the Republican Chairman of this Committee to reauthorize the Voting Rights Act. It was a reflection of our belief that the right to vote must be inviolate and that there are still too many challenges to making that a reality for all Americans, especially members of minority communities. Chairman Sensenbrenner and Ranking Member Conyers demonstrated what a genuine commitment to voting rights can accomplish when we put our minds to it.

I also realize that the vote to reauthorize the Voting Rights Act was not unanimous and that some Members of this Committee did not vote for it. That is certainly a Member's prerogative, and I have to respect it. Nonetheless, I would hope that at some point we could return to that bipartisan consensus in favor of the right to vote. Without it, we cease to be the America that all of us believe in. I don't believe we can ever allow that to happen.

I join the Chairman in welcoming our witnesses, and I look forward to the testimony.

Mr. Chairman, I thank you, and I yield back.

Mr. FRANKS. Thank you, Mr. Nadler.

I now yield to the distinguished Chairman of the full Committee, Mr. Smith, for his opening statement.

Mr. SMITH. Thank you, Mr. Chairman.

The foundation of our democracy rests on secure and fair elections. Unfortunately, voter fraud undermines the electoral process and can sway the ultimate outcome of elections. Illegal votes negate the votes of legal voters.

Voter ID laws help ensure the integrity of our elections and protect the rights of lawful voters. So far, 16 States have photo ID requirements for casting a ballot.

We must safeguard the integrity of our voting process in order to safeguard our democracy. But rather than support commonsense proposals to help protect our democratic process, the Justice Department's Voting Section wastes taxpayer dollars in fighting the very laws that promote fair and accurate elections.

Photo identification is part of everyday American life. Citizens are required to show a valid form of identification to open a bank account, cash a check, drive a car, or board a plane. If valid identification is required for these daily tasks, then why is it not required to exercise one of our most valuable democratic rights? Voter ID opponents insist that voter fraud is not a serious problem, but voters disagree. The majority of Americans overwhelmingly support laws that require people to show photo identification before being allowed to vote.

A recent Rasmussen poll survey found that 64 percent of likely U.S. voters agree that voter fraud is a serious problem, while just 24 percent disagree, and 73 percent of respondents believe that a photo ID requirement before voting does not result in any discrimination. In fact, the Supreme Court in a 6-3 decision authored by liberal Justice John Paul Stevens rejected the argument that voter ID laws are discriminatory when it upheld Indiana's strict voter ID law in 2008.

In upholding the Indiana law, the Court cited flagrant historical examples of in-person voter fraud as well as the State's administrative interest in carefully identifying who has voted. The Court also noted the State may have a legitimate interest in requiring photo ID for voters even without evidence of widespread fraud. The Court's opinion quoted the report from the bipartisan Commission on Federal Election Reform co-chaired by former President Jimmy Carter that stated, "The electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud or to confirm the identity of voters."

Most forms of voter fraud are difficult to detect, especially if photo IDs are not required. That same Commission report found voter fraud does occur and could affect the outcome in a close election.

Having lost in both the Federal courts and the Court of public opinion, you would think voter ID opponents would give up. But just last month the Obama administration announced it will challenge the Texas voter ID law which is based on the Indiana law and was overwhelmingly supported by Texas voters. The Justice Department also seeks to challenge a similar law in South Carolina.

The Department claims that the laws are discriminatory because minorities are less likely to have the required IDs, but a closer look at the Department's math shows that their arguments simply don't add up. For example, in South Carolina, 90 percent of Blacks have photo IDs, compared to 92 percent of Whites, so the Justice Department seeks to override a State law because of a difference of less than 2 percent.

The Department's case against the Texas voter ID law is equally troubling. Assistant Attorney General for the Civil Rights Division, Tom Perez, claims that the disparity between photo ID possession by Whites and Hispanics is statistically significant. Data shows that 95 percent of White voters have photo ID, as do 93 percent of Hispanic voters. Once again, the disparity is only 2 percentage points. Even that slight difference may be within the margin of error since Texas, in gathering some of the data, had to guess who is Hispanic based on surname.

Ironically, the Justice Department's own policy requires visitors to show valid photo ID before being allowed to enter its own buildings. If it takes valid identification to walk the halls of the Justice Department, maybe it should take at least that much to determine the outcome of our elections.

If the Department wants to protect the rights of voters, they should work to ensure that States remove ineligible voters from their rolls as required by Federal law. The rights of all voters should be protected and respected by the Obama administration. The misplaced priorities of the Department of Justice wastes taxpayers' money and does little to protect the rights of legal voters.

Thank you, Mr. Chairman. I yield back.

Mr. FRANKS. Thank you, Mr. Chairman.

Without objection, other Members' opening statements will be made part of the record.

Mr. CONYERS. Pardon me, Mr. Chairman.

Mr. FRANKS. Please forgive me. The distinguished former Chairman is recognized.

You snuck up on me, Mr. Chairman.

Mr. CONYERS. Thank you, Chairman Franks.

There is a bit of irony connected with this hearing, isn't there? Here we have the great work of Dr. Martin Luther King in terms of breaking down the segregation in voting that was historic in the South. We have the incident of the Edmund Pettus Bridge in which people were marching to get the rights to vote and were brutally oppressed by law enforcement and other citizens that were not prepared to open up voting for everybody.

Here, 3 years ago, we elected the first African American President as the 44th leader of this great country. Here we have an Attorney General Eric Holder, another distinguished lawyer of color, in charge of the Department of Justice. And now we come this morning to discuss how the Department of Justice is encouraging voter wrongs instead of continuing to work on making this a more open society.

I am the only Member here that was present when the Voting Rights Act of 1965, which came out of this Committee, became law and has been continued on three different occasions. And it seems to me, based on the very complete contrast between Ranking Member Jerrold Nadler's comments and those of the Chairman, it seems to me that there ought to be room in this great Committee of the House Judiciary, which I joined when Emanuel Celler of New York was the chair, that we ought to be able to, without the formality of witnesses, try to get some of the facts straightened out here. This is not complex, and I propose that myself and Jerrold Nadler, Bobby Scott, and Mr. Quigley join with the Chairman of the Subcommittee and the Chairman of the full Committee to try to get some of these matters straight.

Now, share with me the fact that during the previous Administration the Department of Justice utilized its infrastructure and politicized the hiring process that has come out in our own hearings here, overriding the objections of career attorneys in voting rights cases, firing United States Attorneys for not pushing politically motivated prosecutions, and pressuring States to purge voting rolls.

We also found out that since the days of the former acting head of the Civil Rights Division, Brad Schlozman, who the Office of Professional Responsibility and the Office of the Inspector General both found "violated Federal law in order to stock the division with his political equals" the integrity, thank goodness, of the Civil Rights Division has since been restored.

So what we need to do now is examine the unprecedented array of State restrictions on the right to vote. Thirty-four States have introduced legislation, fifteen State laws have been enacted that seriously impact voting in terms of limiting voting by requiring the presentation of photo ID, excluding common forms of identification, declaring proof of citizenship as a condition to vote, limiting or eliminating early voting opportunities, and stalling or eliminating registration efforts.

So, Mr. Chairman, I think we have a huge responsibility on our hands; and I urge all of the Committee—all of the Members of the Committee on both sides of the aisle to join us in seeking the truth about what brings us here today.

I thank the Chairman for the time.

Mr. FRANKS. I thank the gentleman and apologize for overlooking him.

So, without objection, other opening statements by other Members will be made part of the record.

I would like now to introduce our witnesses.

Cleta Mitchell is a partner at Foley & Lardner, LLP, and a member of the firm's political law practice. Ms. Mitchell is also the president of the Republican National Lawyers Association. She has more than 30 years experience in law politics and public policy,

even though she is only 35. She advises candidates, campaigns, and individuals on State and Federal campaign finance law and election law.

Mr. Eric Eversole is the Executive Director of the Military Voter Protection Project and formerly served as litigation attorney in the Department of Justice's Voting Section. He is a Navy JAG officer who served on active duty from 1999 until 2001. Eric is an expert on military voting issues and has testified on numerous occasions before Congress.

Wendy Weiser is the Director of the Democracy Program at NYU School of Law. She has authored a number of reports and papers on election reform and has provided legislative drafting assistance to Federal and State legislators and administrators across the country. She is also an adjunct professor of law at NYU School of Law. Professor Weiser is a graduate of the Yale Law School.

J. Christian Adams is a former Justice Department Voting Rights Attorney and runs the online blog Election Law Center. He served 5 years as an attorney in the Voting Section of the Justice Department where he brought a wide range of election cases to protect racial minorities. Prior to that, he served as General Counsel to the South Carolina Secretary of State.

I would just thank all of the witnesses for appearing before us today.

Each of the witnesses' written statements, their entire written statements, will be entered into the record; and I would ask each of you to summarize his or her testimony in 5 minutes or less.

To help you stay within that time, there is a timing light on your table. When the light switches from green to yellow, you will have 1 minute to conclude your testimony. When it turns red, it signals that the witness's 5 minutes have expired.

Before I recognize the witnesses, it is the tradition of this Subcommittee that they be sworn in, so if you would please stand.

[Witnesses sworn.]

Mr. FRANKS. Thank you. Be seated, please.

Also, the witnesses, I would just warn you to please turn your microphone on before beginning to speak.

I would now recognize our first witness, Ms. Mitchell, for 5 minutes.

TESTIMONY OF CLETA MITCHELL, PARTNER, FOLEY & LARDNER

Ms. MITCHELL. Thank you, Mr. Chairman.

Mr. Chairman, Lamar Smith as well, Mr. Chairman, Mr. Conyers, thank you so much for hosting this hearing and holding this hearing, because it is an important issue. I have been before this Committee and this Subcommittee previously to talk about the issues that are pressing in this country with regard to voter integrity and open, fair, and honest elections.

The Republican National Lawyers Association is an organization of attorneys nationwide who are dedicated to fair, open, and honest elections, and I am proud and honored to serve as its President.

We are here today to talk about the fact that we have an Attorney General who, rather than acting as the chief law enforcement officer of this country who is responsible for enforcing more than

15 Federal laws that make various types of activity criminal activity in the area of elections, that rather than spending his time and the time of his Department of Justice working to ensure that our elections are indeed free of fraud and free of criminal activity, instead, this Attorney General is doing everything in his power to fight the State authorities who are trying to ensure the integrity of our elections.

He has become, instead of being the chief law enforcement officer, a partisan political operative, carrying water for the Democratic National Committee, liberal interest groups, and the Obama reelection campaign. He attacks voter identification laws without regard to the law or the facts.

It is amazing to me that this is yet another example where the Attorney General has decided that he is the arbiter of what the law is, not what the Supreme Court has said but what Attorney General Eric Holder and his political allies believe to be the law, and has ignored the fact that the United States Supreme Court has indeed ruled in the Crawford case that has been referenced earlier here this morning that, despite what the chairman of the Democratic National Committee and the Department of Justice Attorney General Eric Holder say, that voter ID laws are not a poll tax.

The Supreme Court rejected that argument in the Crawford case, and indeed the Court said that a voter identification requirement is not a poll tax because there is a balance. And because the purpose of a voter identification, a photo identification, is to ensure and protect the integrity of the election, that whatever burden may exist is offset by the need to protect the integrity of the elections.

The trial court in that case—the Federal trial court had found that, notwithstanding the arguments put forward by the plaintiffs that there were hundreds of thousands of people without photo identification, an argument that persists to this day but which is not true, in fact that fewer than 1 percent—this was a finding by the Federal trial Court in the Crawford case, that fewer than 1 percent of Indiana voters would not have a photo ID. And the court found that since 99 percent of the voters would in fact have photo identification that it was not an impermissible burden to require that a photo ID be presented.

The Attorney General further ignores the facts, and I could go on and on about the factual evidence that the Attorney General ignores, but let me give you a case study of just 2 weeks ago in Tennessee.

In Tennessee 2 weeks ago, there was an election which required, a Statewide election, where photo identification is required. There were 645,775 votes cast in that election. Of those people who appeared to vote, there were 266 who did not have photo ID or who did not present photo ID, and that included some people who came protesting the new photo ID requirement.

Those people under the law had the right to go—they were able to cast ballots provisionally, were able to go and retrieve photo ID and present it within a period of time. One hundred and twelve of those 266 people did so and returned with photo ID, and their votes were counted. So out of 645,775 votes cast, there were 154 people who, for whatever reason, either did not return, and their votes were not counted. That is.023 percent of those who partici-

pated in the election. It seems to me that is well within the finding of the Indiana Federal trial judge in the case that was upheld by the U.S. Supreme Court.

The Attorney General further mystifyingly decided last week to quote the Republican National Lawyers Association as his source for the fact that no voter fraud exists. If Chairman Nadler will remember, when I last testified before this Committee in 2008 I asked and the Chairman allowed at the time for me to put into the record evidence of voter fraud cases from across the country. And since that time the Republican National Lawyers Association has on its Web site a voter fraud page where we post cases of voter fraud. I have attached that as part of the record, nine pages, 44 States. It is not intended to be exhaustive, but just since February the RNLA has written about 11 cases of voter fraud, all of which have been brought not by the Department of Justice but by State and local authorities.

So the point is that I don't know why the Attorney General would cite RNLA as the source of no voter fraud. I guess believing is seeing.

I would urge this Committee to please continue its oversight, to ask questions. I agree with Chairman Conyers, ask some questions of the Department of Justice and what it is doing to publicize its intent to prosecute election crimes in this election.

I will just close with this one comment, a statement which is from the manual, the Department of Justice Manual on Federal Election Crimes Prosecution. And the manual states that in the United States, as in other democratic societies, it is through the ballot box that the will of the people is translated into government that serves rather than oppresses. Our constitutional system of representative government only works when the worth of the honest ballots is not diluted by invalid ballots procured by corruption.

The RNLA couldn't agree more. We stand ready to assist this Committee in its oversight of the Department of Justice to ensure the protection and the integrity of our elections.

Thank you, Mr. Chairman.

[The prepared statement of Ms. Mitchell follows:]

HOUSE JUDICIARY COMMITTEE – SUBCOMMITTEE ON THE CONSTITUTION
HEARING APRIL 18, 2012
"VOTING WRONGS: OVERSIGHT OF THE JUSTICE DEPARTMENT'S VOTING RIGHTS ENFORCEMENT"
TESTIMONY OF CLETA MITCHELL, ESQ.
PRESIDENT, REPUBLICAN NATIONAL LAWYERS ASSOCIATION ("RNLA")

Mr. Chairman, Members of the Subcommittee:

Thank you for inviting me to appear here today and, most importantly, thanks to the Chairman and the members of the Subcommittee and its staff for organizing today's hearing on this MOST important topic.

The mere suggestion of "Oversight of the Justice Department's Voting Rights Enforcement" is incredibly timely and hugely important. It is my hope that today's hearing is only one of many steps, hearings, questions and demands for information that will be posed to Attorney General Eric Holder, in an ongoing and not sporadic effort to engage in badly needed oversight of this Attorney General and this Dept of Justice.

Attorney General Holder has demonstrated by his actions, his inactions and his public comments that he has departed significantly from his role as America's chief law enforcement officer and has undertaken a role as a chief political operative for the Democratic National Committee and the Obama re-election campaign.

While the Attorney General has taken an oath to fairly and impartially enforce the laws of the United States, that is not what we are witnessing when it comes to the important issue of voting rights, voter integrity and enforcing America's laws against election crimes.

Attorney General Holder has made it manifestly clear that he is more committed to the DNC's partisan political agenda than to ensuring the integrity of America's elections.

This Committee has a constitutional obligation to exercise vigorous oversight of the Executive Branch of Government and this Committee's jurisdiction encompasses the Department of Justice. On behalf of the Republican National Lawyers Association ("RNLA"), which I serve as President, I urge the Committee to make this oversight responsibility a top priority for the rest of this Congress, beginning – but not ending -- with today's hearing.

Despite the almost weekly news reports from across the country of yet another prosecution, investigation or arrest by state or local law enforcement authorities who are engaged in combating voter fraud and election crimes, Attorney General Holder has steadfastly refused even to acknowledge that such cases are happening.

Rather than vigorously investigating or offering assistance from the Department of Justice to other law enforcement authorities in their battle to protect the integrity of elections, Attorney General Holder is, instead, devoting the enormous resources of his office and spending his time denying the existence of such crimes and doing everything in his power to *thwart* and block state efforts to protect the integrity of elections.

The Attorney General seems to believe that he and he alone can decide what the law is and what the Constitution says.

The Attorney General has utterly abandoned the enforcement of federal statutes prohibiting election crimes, and has simply chosen to ignore the Supreme Court's decision that there is no constitutional barrier to a state's decision to require voters to present identification in order to vote. Nor does it matter to the Attorney General that the plain facts confirm that voter fraud and criminal activity involving elections are ongoing in America today.

And rather than doing *anything* to fight these crimes, the Attorney General simply denies that such crimes exist.

In 2008, the United States Supreme Court determined in *Crawford v. Marion County Board of Elections,* affirmed the decisions of the federal District Court and the U.S. Court of Appeals, which rejected the arguments by plaintiffs who, according to the District Court had "not introduced evidence of a single, individual Indiana resident who will be unable to vote as a result of (the voter ID law) or who will have his or her right to vote unduly burdened by its requirements." Further, the Court rejected "as utterly incredible and unreliable" an expert's report that up to 989,000 registered voters in Indiana did not possess either a driver's license or other acceptable photo identification. The Court instead estimated that as of 2005, when the statute was enacted, only around 43,000 Indiana residents lacked a state-issued driver's license or identification card, such that 99% of Indiana's voting age population already possessed the necessary photo identification to vote under the requirements of Indiana law. The Court further noted the absence of *any* plaintiffs who claimed that the law would deter them from voting.

The Supreme Court specifically noted with approval the Court of Appeals' rejection of plaintiffs' argument that the voter ID law should be considered a poll tax, because the voter identification requirement burden on voters was offset by the benefit of reducing the risk of fraud.

The Attorney General has embarked on a politically motivated, partisan mission to prevent other states from enacting laws virtually identical to the Indiana law upheld by the United States Supreme Court.

The Department of Justice is now engaged in litigation against the states – the people -- of Texas and South Carolina to block those state laws requiring presentation of photo identification in order to vote, thus giving effect to the promise Attorney General Holder made last year when he announced that his Department of Justice would take aggressive measures to block laws that *he* deems to be intended to suppress voting.

As my fellow witness, J. Christian Adams points out in his testimony, the facts simply do not support the claims of the Holder DOJ that either the South Carolina or the Texas laws disproportionately disadvantage minorities.

It is worth noting that like the Indiana case, when opponents of voter ID challenged the Georgia voter ID law in 2005, and despite being given ample opportunity by the Court, the plaintiffs were *never* able to present a single instance of a single voter who was denied the right to vote as a result of the Georgia ID law.

In the two cases that have been completely litigated in the federal and state courts to date, the result has been the same: the facts simply do not match the over-heated rhetoric of the liberal partisans who are intent upon blocking every effort in the states to ensure the integrity of the election process.

The RNLA is dedicated to fair, open and honest elections. We believe, as stated in federal law, that a single illegal vote dilutes a legally cast vote. We have embarked over the past several years to provide support to state leaders who promote laws and procedures to protect the integrity of the elections.

So imagine *our* surprise to hear that Attorney General Holder last week quoted – *misquoted* – the RNLA as a source for his statement that 'no voter fraud exists'.

We would invite the Attorney General and the members of this Committee to visit the RNLA website, twitter feed, and blog, where we regularly update and catalogue the instances of voter fraud and election crimes from across the country.
http://www.rnla.org/votefraud.asp

Visit our site, Mr. Attorney General, click on the map, take a look at the mug shots of vote fraud perpetrators, and then tell us again why you say there *is* no vote fraud and how you could possibly ever quote RNLA as your source for that proposition! In fact, I am attaching as an exhibit and making part of the record of this hearing a copy of the RNLA

website with 8 pages listing various election crimes and voter fraud cases over the past several years from across the nation.

In just the past few weeks, RNLA has posted and written about vote fraud cases, prosecutions and trials involving vote fraud in Iowa,[1] Indiana,[2] North Carolina,[3] New York,[4] West Virginia,[5] Virginia,[6] Texas,[7] Massachusetts,[8] Washington state[9] and Florida.[10] All of these since February of this year!

Where is the Department of Justice in these prosecutions? Nowhere. Every one of these prosecutions has been undertaken by state and local authorities.

That is why the RNLA is urging the Committee to begin immediately to ask questions of the Department of Justice and the Attorney General as to *why* the DOJ is doing *nothing* to assist in prosecuting cases of election crimes. The Committee must demand answers from Eric Holder and his politically motivated DOJ attorneys who have utterly failed to vigorously enforce federal laws barring election crimes.

The Department of Justice is responsible for enforcing the federal statutes defining criminal misconduct related to elections, some of which include:

1. Conspiracy Against Rights. 18 U.S.C. §§ 241 and 242
2. Deprivation of Rights under Color of Law. 18 U.S.C. § 242

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[1]Tweeted by @TheRepLawyer, Mar. 5, 2012, 7:50 a.m.
[2]http://www.foxnews.com/politics/2012/04/02/4-indiana-dems-charged-with-election-fraud-in-2008/?test=latestnews#ixzz1r4sEiiNl
[3]Tweeted by @TheRepLawyer, Mar. 10, 2012, 3:55 p.m.
[4]http://www.timesunion.com/local/article/Key-witness-expected-to-testify-in-vote-fraud-3342987.php#ixzz1mxhuwRMC
[5]http://www.foxnews.com/politics/2012/03/07/former-west-virginia-sheriff-county-clerk-plead-guilty-to-attempting-to-steal/
[6]http://www2.timesdispatch.com/news/news/2012/apr/03/3/tdmain01-felons-indicted-on-voter-fraud-charges-in-ar-1813803/
[7]http://cityhallblog.dallasnews.com/archives/2012/02/after-weeklong-trial-break-def.html
[8]Tweeted by @TheRepLawyer, Feb. 2, 2012, 5:04 p.m.
[9]http://www.chronline.com/news/local/article_f113de72-51f2-11e1-8675-001871e3ce6c.html
[10]http://www.nbc-2.com/story/16662854/2012/02/02/nbc2-investigates-voter-fraud

3. False Information in, and Payments for, Registering and Voting. 42 U.S.C. § 1973i(c)
4. Voting More than Once.42 U.S.C. § 1973i(e)
5. Intimidation in voting and registering to vote.42 U.S.C. § 1973gg-10(1).
6. Intimidation of voters.18 U.S.C. § 594
7. Coercion of political activity.18 U.S.C. § 610
8. Federally protected activities. 18 U.S.C. § 245(b)(1)(A)
9. Voter Suppression.18 U.S.C. § 241 and § 242
10. Fraudulent registration. 42 U.S.C. § 1973gg-10(2)(A)
11. Fraudulent voting.§ 1973gg-10(2)(B)
12. Voting by Noncitizens. - Fraudulent registration and voting under the NVRA. 42 U.S.C. § 1973gg-10(2)
13. False claims to register or vote. 18 U.S.C. § 1015(f)
14. False claims of citizenship.18 U.S.C. § 911
15. Voting by aliens. 18 U.S.C. § 611

We know what the Department of Justice did insofar as prosecuting the New Black Panthers for voter intimidation in 2008....NOTHING. DOJ turned a completely blind eye to the clear evidence of criminal misconduct and election crimes.

Where was the Department of Justice when the Bucks County Pennsylvania district attorney found clear evidence of absentee ballot fraud in the congressional race there in 2010. What did the Department of Justice do? Nothing.

The Department of Justice publishes a manual Federal Prosecution of Election Offenses, the Seventh Edition (May 2007) of which is publicly available.

DOJ's obligations under federal law are clearly delineated in the manual. Each of the election crimes listed above is within the jurisdiction and responsibility of the DOJ to aggressively enforce.

The Manual specifically discusses the affirmative steps that DOJ is to take to combat election fraud, including as the first step, "**Publicize your intent to prosecute election fraud**"[11]

What is the Department of Justice 'publicizing' instead? The Attorney General's aggressive efforts to *block* state efforts to protect against election fraud.

The Election Crimes manual describes the requirements and protocols for conducting investigations, comparing signatures on voter registration cards and absentee ballot applications, ensuring that information provided on voter registration and absentee ballot applications is correct and that ballots are cast by the voter who is duly registered.

What is the Department of Justice actually doing? This Committee simply must aggressively inquire and demand of the Department of Justice that it *do its job* and follow the guidelines of its own manual....and *enforce the federal law.*

As the Manual states, "In the United States, as in other democratic societies, it is through the ballot box tbat the will of tbe people is translated into government that serves rather than oppresses....[o]ur constitutional system of representative government only works when the worth of honest ballots is not diluted by invalid ballots procured by corruption."[12]

RNLA couldn't agree more.

This Committee MUST be aggressive in demanding that the DOJ enforce the laws against election crimes and follow its own manual and procedures. The DOJ should be required to tell the American people through this Committee what it is doing to combat voter fraud and election crimes – and what its plans are to protect the integrity of the election in 2012.

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[11] Federal Prosecution of Election Offenses, Seventh Edition (May, 2007), p. 95.
[12] id., p. 1

The Manual provides that the Department of Justice is supposed to announce before Election Day how it intends to safeguard the election. This Committee should ensure that that happens.

It is convenient for the Attorney General to refuse to prosecute election crimes or allegations of voter fraud...and then to declare that no such crimes have been committed and voter fraud doesn't exist.

We have news for you, Mr. Attorney General. Vote fraud is alive and unwell in America and you are derelict in your statutory and constitutional duties by turning a blind eye to its existence.

We urge the Committee to rein in this fiercely partisan Attorney General and to insist upon adherence by the Department of Justice to the enforcement of the laws duly enacted by Congress that were passed to ensure the integrity of America's elections. We must work together to protect the cornerstone of our democracy.

We thank you for the opportunity to appear here today. RNLA is an organization of attorneys nationwide committed to election integrity and we will do everything in our power to assist this Committee in badly needed oversight of the Attorney General and the Department of Justice to make sure that they do their jobs and vigorously enforce the election crimes statutes of the United States.

Thank you.

# # #

ATTACHMENT

RNLA

Republican National Lawyers Association

Advancing Open, Fair & Honest Elections

www.RNLA.org

Vote Fraud: The Evidence

Vote Fraud Is All Over the Map

46 states have had vote fraud convictions or prosecutions in the last decade.*

AL | AK | AR | CA | CO | CT | FL | GA | IA | IL | IN | KS | KY | LA ME | MA | MI | MN | MO | MS | NC | ND | NE | NH | NJ | NM | NV | NY OH | OK | OR | PA | RI | SC | SD | TN | TX | VA | WA | WI | WV | WY

Face to Face with Vote Fraud

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Republican National Lawyers Association
PO Box 18965
Washington, DC 20036
Email: info@RepublicanLawyers.org

*Please note that the convictions or prosecutions listed here are not intended to be a comprehensive list of all instances of vote fraud. The RNLA conducted a limited survey to indicate whether vote fraud charges have been filed in states across the country since 2000. We looked for at least one example in each state. For examples of vote fraud on an almost daily basis, read the RNLA blog.

Alabama

- Clifford Don Twilley: vote buying (2011)
- Karen Tipton Berry: absentee ballot fraud (2010)
- Gay Nell Tinker: absentee ballot fraud (2010)

Alaska

- Rogelio Mejorada-Lopez: non-citizen voting (2005). *See* United States v. Rogelio Mejorada-Lopez, No. 05-CR-074 (2005)

Arkansas

- Robert T. Rogers: illegally cast ballots (2006). *See* Baker v. Rogers, 243 SW. 3d 911 (Ark. 2006)
- Jack Crumbly: illegal signatures on ballots, double voting, and non-resident voting (2006). *See* Willis v. Crumbly, 268 S.W. 3d 288 (Ark. 2006)
- Sherry Tate-Smith: absentee ballot fraud, double voting, non-resident voting (2003). *See* Tate-Smith v. Cupples, 134 S.W. 3d 535 (Ark. 2003)

Arizona

- Gina Thi Canova: voter registration fraud and illegal voting (2011)
- Peter Canova: voter registration fraud and illegal voting (2011)
- Rodney Paul Jones: double voting (2011)
- Margarito Blancas: non-citizen voting (2005)
- Carlos Magallanes: non-citizen voting (2005)

California

- Nativo Lopez: voter registration fraud (2011)
- Eloise Garcia-Mohsin: falsely filing election documents (2010)
- Mark Jacoby: voter registration fraud (2009)

- Domenica Malburg: fraudulent voting and voter registration fraud (2009)
- Leonis Malburg: aiding illegal votes and voter registration fraud (2009)
- Don Cornell Williams: voter registration fraud (2008)

Colorado

- Shah: non-citizen voter registration (2005). *See* United States v. Shah, No. 04-CR-00458 (2005)

Connecticut

- Barnaby Horton: absentee ballot fraud (2003)

Florida

- Maurice Childress: false swearing in an election (2010)
- Greg "Charlie" Burke: voter registration fraud (2008)
- Mohsin Ali: non-citizen voting (2006). *See* States v. Mohsin Ali, 4:05-CR-47 (2006)
- Bennett: non-citizen voting (2005). *See* United States v. Bennett, No. 04-CR-14048 (2005)
- Chaudhury: non-citizen voter registration (2006) United States v. Chaudhury, 4:04-CR-6005 (2006)
- Exavier: non-citizen voting (2005). *See* United States v. Exavier, No. 04-CR-60161 (2005)
- Francois: non-citizen voting (2005). *See* United States v. Francois, No. 04-CR-60159 (2005)
- Bain Knight: non-citizen voting (2005). *See* States v. Bain Knight, No. 04-CR-14047 (2005)
- Lubin: non-citizen voting (2005). *See* United States v. Lubin, No. 04-CR-60163 (2005)
- McKenzie: non-citizen voting (2005). *See* United States v. McKenzie, Case No. 04-CR-60160 (2005)
- O'Neil: non-citizen voting (2005). *See* United States v. O'Neil, No. 04-CR-60165 (2005)
- Lloyd Palmer: non-citizen voting (2005). *See* States v. Lloyd Palmer, No. 04-CR-60159 (2005)
- Velrine Palmer: non-citizen voting (2005). *See* States v. Velrine Palmer, No. 04-CR-60162 (2005)
- Philip: non-citizen voting (2005). *See* United States v. Phillip, No. 04-CR-80103 (2005)
- Rickman: non-citizen voting (2005). *See* United States v. Rickman, No. 04-CR-20491 (2005)
- Shivdayal: non-citizen voting (2005). *See* United States v. Shivdayal, No. 04-CR-60164 (2005)
- Sweeting: non-citizen voting (2005). *See* United States v. Sweeting, No. 04-CR-20489 (2005)
- Torres-Perez: non-citizen voting (2005). *See* United States v. Torres-Perez, No. 04-CR-14046 (2005)
- Velasquez: non-citizen voting (2003). *See* United States v. Velasquez, No. 1:03-CR-20233 (2003)
- Liltovia Rhodes: false swearing in an election (2003)
- Carlos Torres: false swearing in an election (2003)
- Evangeline Williams: false swearing in an election (2003)
- Lilkevia Williams: false swearing in an election (2003)
- Richard Williams: false swearing in an election (2003)
- Kashawn John : false swearing in an election (2003)
- Gilda Oliveros: vote fraud (2003)
- Humberto Hernandez: vote fraud (1998)

Georgia

- Nathaniel Gosha: offering to sell absentee votes and absentee ballot fraud (2004)
- Jackson Jones: buying votes (1999). *See* United States v. McCranie, 169 F.3d 723 (11th Cir. 1999)
- Don McCranie: buying votes (1999). *See* United States v. McCranie, 169 F.3d 723 (11th Cir. 1999)
- Felton Daniels Sr.: vote buying (1997)
- Leonard Eady: vote buying (1997)
- Curtis "Tap" Hamilton: vote buying (1997)
- Janice Revel: vote buying (1997)
- Steele, Gary Mark: vote buying (1997)
- Bryant W. Williams: vote buying (1997)
- George Grover Yawn: vote buying (1997)
- John Jeff Yawn: vote buying (1997)

Idaho

- Jim Brannon: fraudulent absentee ballots, double voting and non-resident voting (2010). *See* Brannon v. City of Couer D'Alene CV 2009-10010 (2010)

Iowa

- Christopher Mettin: non-citizen voting (2011)
- Patrick Lyons: felon voting (2011)

Illinois

- Maria Azada: non-citizen voting (2011)
- Michael Collins: vote fraud (2011)
- Deidra Humphrey: voter registration fraud (2009)
- Charles Powell: vote fraud (2002)

- Charles Powell: vote fraud (2007)
- Kevin Ellis: vote fraud (2007)
- Yvette Johnson: vote buying (2007)
- Jesse Lewis: vote buying (2007)
- Sheila Thomas: vote buying (2007)
- Nichols: vote buying (2005). *See* United States v. Nichols, No. 3:05-CR-30041 (2005)
- Powell: vote buying (2005). *See* United States v. Powell, et al, No. 3:05-CR-30044 (2005)
- Scott: vote buying (2005). *See* United States v. Scott, No. 3:05-CR-3004 (2005)
- Terrance Stith: vote buying (2005). *See* United States v. Terrance Stith, No. 3:05-CR-30042 (2005)
- Sandra Stith: vote buying (2005). *See* United States v. Sandra Stith, No. 3:05-CR-30043 (2005)

Indiana

- Charlie White: voter registration fraud (2011)
- Ricardo Alarrillo: voting in another precinct (2007)
- Jose Arroyo: voting in another precinct (2007)
- Edwin Aviles: voting in another precinct (2007)
- Rachel Aviles: voting in another precinct (2007)
- Larry Battle: voting in another precinct (2007)
- Brian Berkman: voting in another precinct (2007)
- Tonya Bronaugh: voting in another precinct (2007)
- Raymond Carillo: voting in another precinct (2007)
- John Carlyle: voting in another precinct (2007)
- Michelle Chandler: voting in another precinct (2007)
- Dolores Croy: voting in another precinct (2007)
- Robert Crow: voting in another precinct (2007)
- Mario Del Valle: voting in another precinct (2007)
- Alicia Dunbar: voting in another precinct (2007)
- Ivan Dunbar: voting in another precinct (2007)
- Ashley Dunlap: voting in another precinct (2007)
- Ezequiel Godinez: voting in another precinct (2007)
- Florentino Guillen: voting in another precinct (2007)
- Ramon Guillen, Jr.: voting in another precinct (2007)
- Michael Harretos: voting in another precinct (2007)
- Demetreos Hasapis: voting in another precinct (2006)
- Natividad Hernandez: voting in another precinct (2007)
- Mabel Komendat: voting in another precinct (2007)
- Ronald Komendat: voting in another precinct (2007)
- Tamika Lay: voting in another precinct (2007)
- Valerie McGowan: voting in another precinct (2007)
- Alyicia Mendiola: voting in another precinct (2007)
- Antonio Mendiola: voting in another precinct (2007)
- Pedro Moro: voting in another precinct (2007)
- Mark Orosco: voting in another precinct (2007)
- Eduardo Perez: voting in another precinct (2007)
- Glenn Pitts: voting in another precinct (2007)
- Yolanda Ramirez: voting in another precinct 2007)
- Allan "Twig" Simmons: voting in another precinct (2007)
- Constance Simmons-Pedraza: voting in another precinct (2006)
- Tolbert Levones: voting in another precinct (2007)
- Armando Vera: voting in another precinct (2007)
- Arthur Vera: voting in another precinct (2007)
- Elvia Vera: voting in another precinct (2007)
- Shelly White: voting in another precinct (2007)
- Ponciano Herrara: voter fraud (2006)
- Terrance Law: voter fraud (2006)
- Joseph Pedraza: voting in another precinct (2006)
- Randall Artis: vote fraud (2006)
- Roy Davis: voter impersonation (2006)
- Christopher Lopez: vote fraud (2005)
- Michael Lopez: vote fraud (2005)

Kansas

- Leslie McIntosh: double voting (2004). *See* United States v. McIntosh, No. 2:04-CR-20142 (2004)

Kentucky

- Douglas C. Adams: vote buying (2010)
- Stanley Bowling: vote buying (2010)
- Charles Wayne Jones: vote buying (2010)
- R. Cletus Maricle: vote buying (2010)
- Debra L. Morris: vote buying (2010)

- William Bart Morris: vote buying (2010)
- Stivers, William: vote buying (2010)
- Freddy W. Thompson: vote buying (2010)
- Phillip Don Slone: vote buying (2005). *See* United States v. Slone, 411 F.3d 643 (6th Cir. 2005)
- Loren Glenn Turner: vote fraud (2005)
- Ross Harris: vote buying (2004)
- Tyrell Matthews Braud: voter registration fraud (2003). *See* States v. Braud, No. 3:03-CR-0001 (2003)
- Calhoun: vote buying (2003). *See* United States v. Calhoun, No. 7:03-CR-00017 (2003)
- Conley: vote buying (2003). *See* United States v. Conley, No. 7:03-CR-00013 (2003)
- Hays: vote buying (2003). *See* United States v. Hays, No. 7:03-CR-00011 (2003)
- Johnson: vote buying (2003). *See* United States v. Johnson, No. 7:03-CR-00010 (2003)
- Madden: vote buying (2003). *See* United States v. Madden, No. 7:03-CR-00015 (2003)
- Todd Newport: vote buying (2011)
- Donnie Newsome: vote fraud (2003)
- Corey Page: vote buying (2011)
- Michael Page: vote buying (2011)
- Smith: vote buying (2005). *See* United States v. Smith, 139 Fed. Appx. 681 (2005)

Louisiana

- Lincoln Carmouche: bribing a voter (2002)
- Larry Dauzat: vote buying (2002)
- Pamela Thibodeaux: voter registration fraud (2005). *See* States v. Thibodeaux, 6:03-CR-60055 (2005)

Maine

- Delmer Terrill: multiple voting (2010)

Massachusetts

- Fyntrilakis: non-resident voting (1999). *See* Fyntrilakis v. City of Springfield, 713 N.E. 2d 1007 (1999)

Michigan

- Jason Bauer: election fraud (2011)
- Disimone: double voting (2002). *See* People v. Disimone, 650 N.W.2d 436 (2002)
- Adam Mucklin: felon voting (2008)
- Mike McGuinness: election fraud (2011)
- Edward Pinkney: election fraud (2007)
- Woods: election fraud (2000). *See* People v. Woods, 616 N.W.2d 211 (2000)

Minnesota

- Lisa May Burleson: felon voting (2011)
- Alfreda Denise Bowman: voting while ineligible (2011)
- Lavern Antoinette Bowman: voting while ineligible (2011)
- Adam Charles Bromander: voting while ineligible (2011)
- Antonio Vassel Brown: voting while ineligible (2011)
- Murock Francis McLeod, Jr.: voting while ineligible (2011)
- Barbara Ann Nyhammer: double voting, absentee ballot fraud (2011)

Missouri

- Brian Bland: voter registration fraud (2008). *See* States v. Bland, No. 04:07-cr-00763 (2008)
- Bobbie Jean Cheeks a/k/a Dorothy Jones and Bobbie Tobert: voter registration fraud (2008). *See* United States v. Cheeks, No. 04:07-cr-00763 (2008)
- Cowan Cortez: voter registration fraud (2008). *See* States v. Cortez, No. 04:07-cr-00763 (2008)
- Carmen Davis: voter registration fraud (2007). *See* United States v. Davis, No. 07-00010-01-CR-W-FJG (2007)
- Dale D. Franklin: failure or refusal to permit casting of votes (2007). *See* United States v. Franklin, No. 06-00377-01-CR-W-GAF (2007)
- Brian G. Gardner: voter registration fraud (2007). *See* States v. Brian G. Gardner, No. 06-00378-01-CR-W-SOW (2007)
- Gibson Golden: voter registration fraud (2007). *See* States v. Gibson, No. 04:07-cr-00763 (2007)
- Marie Smith Radonna: voter registration fraud (2007). *See* States v. Smith, No. 04:07-cr-00763 (2007)
- Anthony M. Relford: voter registration fraud (2007). *See* States v. Relford, No. 04:07-cr-00763 (2007)
- Kwaim A. Stenson: failure or refusal to permit casting vote 2007). *See* United States v. Stenson, No. 06-00365-01-CR-W-GAF (2007)
- Kenneth Demond Williams: voter registration fraud (2007). *See* States v. Williams, No. 04:07-cr-00763 (2007)
- Tyarie L. Williams: voter registration fraud (2007). *See* States of America v. Williams, No. 04:07-cr-00763 (2007)

- James Scherzer: double voting (2005). *See* United States v. Scherzer, No. 4:04-CR-00401 (2007)
- Lorraine Goodrich: double voting (2005). *See* United States v. Goodrich, No. 4:04-CR-00402 (2007)
- Brandon E. Jones: double voting (2005). *See* United States v. Jones, No. 4:05-CR-00257 (2007)
- Tammy J.Martin: double voting (2005). *See* States v. Martin, No. 4:05-CR-0025 (2007)
- Nonaresa Montgomery: vote fraud (2004)

Mississippi

- Lessadolla Sowers: absentee ballot fraud (2011)
- Terrance Watts:double voting (2011)

- Kenny Ray Bowen: vote fraud (2010)
- Jasper Buggs, Sr.: vote fraud (2010)
- James Bullock: vote fraud (2010)
- Tate King: vote fraud (2010)
- Billy Street: vote fraud (2010)
- Ronnie Wilkerson: vote fraud (2010)
- Lillie Jean Norton: vote fraud (2007)
- Ada Tucker: vote fraud (2007)
- Greg Eason: vote fraud (2003) *See* Eason v. State, 2005 Miss. App. LEXIS 101 (2005)

North Carolina

- Sheila Ramona Hodge: double voting (2011)
- Kierra Fontae Leach: double voting (2011)
- Brandon Earl McLean: double voting (2011)
- Lela Devonetta Murray: double voting (2011)
- Ross "Toogie" Banner: vote buying (2004). *See* States v. Shatley, et al., No. 5:03-CR-00035 (2004)
- Cados Hood: vote buying (2004). *See* United States v. Shatley, et al., No. 5:03-CR-00035 (2004)
- Anita Moore: vote buying (2004). *See* United States v. Shatley, et al., No. 5:03-CR-00035 (2004)
- Valerie Moore: vote buying (2004). *See* United States v. Shatley, et al., No. 5:03-CR-00035 (2004)
- Wayne Shatley: vote buying (2004). *See* United States v. Shatley, et al., No. 5:03-CR-00035 (2004)
- Joshua Workman: non-citizen voting (2003). *See* States v. Workman,. No. 1:03-CR-00038 (2003)

North Dakota

- Jamie Rodahl: double voting (2005)

Nebraska

- Eddie Pierce: voter registration fraud (2010)

New Hampshire

- Christopher Luke Fithian: double voting (2009)

New Jersey

- Eelkis M. Cespedes: vote fraud (2010)
- Octavio A. Dominguez: vote fraud (2010)
- Juana A. Gill: vote fraud (2010)
- Jose E. Gonzalez: vote fraud (2010)
- Lucia A. Guzman: vote fraud (2010)
- Ronald Harris: absentee ballot fraud (2010)
- Lourdes Inoa: vote fraud (2010)
- Inocencio Jimenez: vote fraud (2010)
- Rodriguez, Dalila: vote fraud (2010)
- Jose Ramon Ruiz: vote fraud (2010)
- Marty Small: vote fraud (2010)
- Ernest Storr: absentee ballot fraud (2010)

- Wilson A. Torres: vote fraud (2010)
- Ana Vely-Gomez: vote fraud (2010)
- Joaquin Caceres: tampering with ballots and fraudulently submitting ballots (2009)
- Edwin Crus: tampering with ballots and fraudulently submitting ballots (2009)
- John Fernandez: tampering with ballots and fraudulently submitting ballots (2009)
- Samuel Gonzalez: tampering with ballots and fraudulently submitting ballots (2009)
- Jonathon Kowalski: tampering with ballots and fraudulently submitting ballots (2009)
- Jihad Q. Abdullah: vote fraud (2003)
- David Callaway: vote fraud (2003)
- Toni Dixon: vote fraud (2003)
- Michelle Griffin: vote fraud (2003)
- Floyd Tolliv: vote fraud (2003)

- Floyd Tally: vote fraud (2009)

New Mexico

- David S. Chavez: illegally opening a ballot box (2002)
- Heracio Favela: voter registration fraud and double voting 2009)
- Vicky Martinez: election fraud (2002)

Nevada

- Amy Adele Busefink: vote fraud (2011)
- Christopher Howell Edwards: vote fraud (2011)

New York

- William A. McInerny: absentee ballot fraud 2011)
- John Kennedy O'Hara: lying about voting address (2001)

Ohio

- Daniel "Tate" Hausman: illegal voting (2009)
- Yolanda Hippensteele: illegal voting (2009)
- Amy Little: illegal voting (2009)
- Jacqueline Maiden: recount fraud (2007)
- Kathleen Dreamer: recount fraud (2004)

Oklahoma

- Darryl Cates: absentee ballot fraud (2010)

Oregon

- Lafayette Fredrick Keaton: voter impersonation (2011)

Pennsylvania

- Ashley L. Clarke: registration buying and voter impersonation (2009)
- Alexis Givner: voter impersonation (2009)
- Mario Grisom: vote fraud (2009)
- Eric Lee Jones: vote fraud (2009)
- Eric Eugene Jordan: vote buying (2009)
- Latasha Leann Kinney: voter impersonation (2009)
- Bryan Williams: vote fraud (2009)

- Jerrar Barksdal: voter registration fraud(2006)
- Peggy Bouras: vote fraud (1999)
- Craig Cummons: absentee ballot fraud (1999)
- Shirley Hughes: vote fraud (1999)
- Austin J. Murphy: vote fraud (1999)

Rhode Island

- Robert Costa: fraudulent voting 2004)
- Keith Costa: fraudulent voting 2004)
- Agnes Mancini: fraudulent voting (2011)
- Anthony Mancini: fraudulent voting (2011)

South Carolina

- Christopher Campbell: election fraud (2007)

South Dakota

- Rudolph Vargas: double voting (2005). *See* United States v. Vargas, 05-CR-5008 (2005)
- Becky Red-Earth Villeda: absentee ballot fraud (2003)

Tennessee

- Brenda Woods: procuring an illegal vote (2010)

Texas

- Pecos Trinidad Villalobos: illegally transporting ballots (2004)

Virginia

- Troy Bernard Fobbs Sr.: illegal voting and registration fraud (2009)
- Ben Cooper: vote buying and stealing absentee ballots (2007)
- Wilson: election fraud (2000). *See* Wilson v. Commonwealth, 2000 Va. App. LEXIS 32 (2000)

Washington

- Susan Reisenhoover: voter impersonation (2009)
- Brianna Rose Dabwa: voter registration fraud (2007)
- Robert Edward Greene: voter registration fraud (2007)
- Tina Marie Johnson: voter registration fraud (2007)
- Clifton Eugene Mitchell: voter registration fraud (2007)
- Ryan Edward Olson: voter registration fraud (2007)
- Kendra Lynn Thill: voter registration fraud (2007)
- Jayson Lee Woods: voter registration fraud (2007)

Wisconsin

- Kevin Clancy: voter registration fraud (2010)
- Michael Henderson: illegal voting (2010)
- Edward G.Johnson: illegal voting (2010)
- David Lewis: felon voting (2010)
- Ramon Martinez: felon voting (2010)
- Maria Miles: election fraud (2010)
- Frank Edmund Walton: voter registration fraud (2008)
- Olando Maclin: voting while disqualified 2007)
- Kimberly Prude: felon voting (2007)
- Cynthia C.Alicea: multiple voting (2005). *See* United States v. Alicea 2:05-CR-00168 (2005)
- Ethel M. Anderson: felon voting (2005). *See* United States v. Anderson 2:05-CR-00207 (2005)
- Deshawn B.Brooks: felon voting (2005). *See* United States v. Brooks 2:05-CR-00170 (2005)
- Theresa J. Byas: double voting (2005). *See* United States v. Byas 2:05-MJ-00455 (2005)
- Jiyto L.Cox: felon voting (2005). *See* United States v. Cox 2:05-CR-00209 (2005)
- Brian L. Davis: double voting (2005). *See* United States v. Davis 2:05-MJ-00454 (2005)
- Correan F. Edwards: felon voting (2005). *See* United States v. Edwards 2:05-CR-00211 (2005)
- Joseph J. Gooden: felon voting (2005). *See* United States v. Gooden, 2:05-CR-00212 (2005)
- Alexander T. Hamilton: felon voting (2005). *See* States v. Hamilton 2:05-CR-00171 (2005)
- Derek G. Little: felon voting (2005). *See* United States v. Little 2:05-CR-00172 (2005)
- Milo R. Ocasio: felon voting (2005). *See* United States v. Ocasio 2:05-CR-00161 (2005)
- Kimberly Prude: felon voting (2005). *See* United States v. Prude 2:05-CR-00162 (2005)
- Enrique C. Sanders: multiple voting (2005). *See* States v. Sanders 2:05-CR-00163 (2005)
- Eric L. Swift: felon voting (2005). *See* United States v. Swift 2:05-CR-00177 (2005)

West Virginia

- Ralph Dale Adkins: vote buying (2006); United States v. Adkins, No. 2:04-CR-00162(2006)
- Toney "Zeke" Dingess: vote buying (2006)
- Clifford Odell "Groundhog" Vance: vote buying (2006)
- Greg Stowers: vote fraud (2006)
- Glen Dale Adkins: voting selling (2005). *See* United States v. Adkins, No. 05-CR-00148 (2005)
- Jackie Adkins: vote buying (2005). *See* United States v. Adkins, No. 2:04-CR-00162 (2005)
- Wandell Lee "Rocky" Adkins: vote buying (2005). *See* United States v. Adkins, No. 2:04-CR-00162 (2005)
- Perry French Harvey, Jr.: vote buying (2005). *See* States v. Harvey, No. 05-CR-00161 (2005)
- Mark Oliver Hrutkay: conspiracy to influence voting (2005). *See* United States v. Hrutkay, No. 2:04-CR-00149 (2005)
- Alvin Ray Porter, Jr.: conspiracy to influence voting (2005). *See* United States v. Porter, No. 2:04-CR-00145 (2005)
- Jerry Weaver: vote buying (2005). *See* United States v. Adkins, 2:04-CR-00162 (2005)
- Danny Ray Wells: conspiracy to influence voting (2004). *See* United States v. Wells, No. 02-CR-00234 (2004)
- Johnny Mendez: conspiracy to influence voting (2004). *See* United States v. Mendez, No. 2:04-CR-00101 (2004)

Wyoming

- Carolyn Paseneaux: vote fraud (2000)

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Mr. FRANKS. Thank you, Ms. Mitchell.

I would remind the panelists there that we would like to keep you within the 5-minute timeframe, if possible.

I would now recognize Mr. Eversole for 5 minutes.

TESTIMONY OF M. ERIC EVERSOLE, DIRECTOR, MILITARY VOTING PROJECT

Mr. EVERSOLE. Good morning, Chairman Franks and Members of the Subcommittee. Thank you for allowing me to testify today re-

garding the enforcement of military voter rights and in particular the enforcement of those rights by the Voting Section of the Department of Justice.

As many of the Committee Members know, in 2009 Congress passed the most sweeping military voter reform in over 20 years. That new law, the MOVE Act, promised to usher in a new era for military voters, one that would provide those voters with enough time to receive and return their ballots so that they would be counted on election day.

But a law, no matter how well written, cannot deliver on its promise if the agency responsible for enforcing that law fails to do so or fails to do so in a timely or an effective manner. The agency with that responsibility, the Voting Section of the Department of Justice, has failed to uphold its end of the bargain.

From day one after the MOVE Act was passed in 2009, the Voting Section showed an unwillingness to aggressively enforce the MOVE Act, to conduct meaningful investigations, or to bring actions in a timely manner. These failures were well-documented in 2010, and they continue to occur in 2012. The Voting Section's only response to these failures, one that rings hollow, is that it vigorously enforces the law because it brought 14 cases or reached agreements in 14 States to protect military voting rights.

But numbers alone mean nothing. The questions that must be asked and answered is whether the military voter rights were actually protected in those agreements, were the cases brought in a timely manner, and did the agreements help ensure that service members would be able to have their voices heard on election day. On each count, the Voting Section failed in its responsibility.

The first thing I would say about these 14 agreements is that at least five of them aren't agreements at all. Five of the cases are actually letters of compliance written from the State or the Territory saying that they got the Department of Justice's letter about complying with the law and that they agree to comply with the law. But that is not an agreement. No matter how you slice it, it is a smoke screen.

But even in the cases where there weren't agreement, the other nine cases, it is important to look at the dates of those agreements. All of them are signed just a few weeks before the election, and when you settle a military voter case just a few weeks before the election when our service members are in all four corners of the world, you don't provide them with sufficient time and sufficient remedies to make sure that their rights are protected when violations occur. Justice delayed is justice denied.

But, more importantly, if you look at each of these agreements, many of these agreements do not fully protect our men and women in uniform. Take the cases against New York and Illinois. In both States the Voting Section allowed local jurisdictions to mail absentee ballots to service members in overseas locations less than 30 days before the election, even though they are well aware of the fact that mail to forward deployed locations can take 30 or more days.

The flawed nature of these agreements, especially in New York, became very clear after the election. Of the more than 5,000 military ballots that were turned by New York in 2010, 30 percent of

those ballots were rejected in New York, notwithstanding the settlement agreement reached by the Department of Justice.

Finally, and it can't be overemphasized, all of these agreements fail to address the source of the problem. That is, local election officials have not or will not comply with the law. When local election officials like the ones recently in Wisconsin fail to send out ballots or fail to answer simple questions about whether they mailed out ballots and there are no consequences for that refusal to comply with simple law, then those violations will continue to occur time and again.

Ultimately, for our men and women in uniform to have any hope of having their voices heard on election day, then the Voting Section has to aggressively enforce the MOVE Act, has to do so in a timely manner, and has to ensure that the remedies fully protect their voting rights.

Thanks again for the opportunity to testify today, and I look forward to any questions that the Committee Members have. Thank you.

[The prepared statement of Mr. Eversole follows:]

Testimony of Mr. Eric Eversole

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

Before the Committee on the Judiciary Subcommittee on the Constitution

April 18, 2012

Mr. Chairman and members of the Subcommittee, thank you for providing me, as the Executive Director of the Military Voter Protection Project (MVP Project)[1], an opportunity to testify regarding the enforcement of military voting rights by the Department of Justice. We greatly appreciate the Subcommittee's longstanding support of our men and women in uniform and its efforts to protect their voting rights.

In 2009, Congress passed the most significant military voting reform in 20 years. The new law, the Military and Overseas Voter Empowerment Act ("MOVE Act")[2], required significant changes at both the federal and state level. In particular, the MOVE Act required states and local election officials to send absentee ballots to military voters at least 45 days before the election. It also required states to adopt at least one form of electronic delivery for blank absentee ballots (e.g., internet download, fax, or email). Finally, the MOVE Act required the Department of Defense (DOD) to provide greater military voter assistance by creating offices that would operate under the National Voter Registration Act (NVRA). All of these changes had to be implemented by the November 2010 election.

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[1] The MVP Project is a program of The Legacy Foundation, a 501(c)(3) non-profit organization. More information about our program can be found at www.mvpproject.org or www.legacyfoundation.us.

[2] Pub. L. No. 111-84 §§ 577 to 582, 583(a), 584 to 587, 123 Stat. 2190 (2009). Much of the MOVE Act was codified under the Uniformed and Overseas Citizen Absentee Voting Act, 42 U.S.C. § 1973ff et seq. ("UOCAVA").

A law, however, is only as good as the agency that enforces it and, in this context, the Voting Section of the Department of Justice has failed to uphold its obligations under the law.[3] Time and again, the Voting Section has demonstrated an unwillingness to aggressively enforce military voting rights, take timely action, or negotiate settlements that provide meaningful relief for military voters. These failures were well documented in 2010 and, unfortunately, continue to occur. Without corrective action, thousands of military voters will have their voices silenced on Election Day.

November 2010 Election

From day one, the Voting Section appeared to drag its feet when implementing the MOVE Act and lacked a clear strategy to enforce it. For nearly a year, the Voting Section and DOD promised to provide states with detailed implementation guidance on the MOVE Act, but that guidance never came, and the states were forced to guess how the Voting Section would enforce the new law. This failure not only caused a rash of last-minute litigation on the eve of the election, it created a significant amount of uncertainty for military voters.[4]

Overall, there were at least 14 states with one or more counties that failed to mail absentee ballots at least 45 days before the election in 2010.[5] While a vast majority of the violations were inadvertent errors, there were at least two states, New York and Illinois, where the violations were much more egregious. In New York, for example, after receiving a two-week waiver that allowed the state to begin mailing

[3] Only the Attorney General is authorized to bring a civil action under UOCAVA. 42 U.S.C. § 1973ff-4. That authority, in turn, has been delegated to the Voting Section.

[4] *See* M. Eric Eversole, *Military Voting in 2010: A Step Forward, But A Long Way to Go*, Military Voter Protection Project & AMVETS Clinic at the Chapman University School of Law (2011) (*available at* http://mvpproject.org/wp-content/uploads/2012/01/MVPProject_study_download.pdf).

[5] The states that had violations included Arkansas, Alabama, California, Indiana, Illinois, Kansas, Maryland, Mississippi, Nevada, New Mexico, New York, North Dakota, Virginia, and Wisconsin.

absentee ballots on October 1, 2010, 13 counties (including 3 in New York City) failed to meet this deadline and waited until October 5, 2010, or later, to mail absentee military ballots. Similarly, in Illinois, at least 35 counties failed to meet the 45-day deadline and, like New York, several counties waited until October 5, or later, to mail absentee ballots. In total, more than 45,000 military and overseas ballots were mailed less than 25 days before the November 2010 election.

Unfortunately, many of the settlement agreements negotiated by the Voting Section failed to fully protect military voters. Take, for example, the cases against New York and Illinois. Even though standard mail delivery to a warzone can take 30 or more days for the one-way delivery of a ballot,[6] the Voting Section negotiated a settlement with both states that allowed counties to mail absentee ballots using standard mail delivery. In other words, many of the ballots sent under these agreements to warzones would not have arrived before the election.

The flawed nature of these agreements became evident after the election. In New York, for example, local election officials rejected 1,609 of the 5,090 absentee military ballots (or 32 percent) that were returned in 2010.[7] Many of the ballots appeared to have been rejected because they arrived after the deadline negotiated between the Voting Section and New York. Clearly, the Voting Section's settlement agreement did not adequately protect military voters in New York.

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[6] The challenges associated with mail delivery to a war zone were documented in 2004 by the Government Accountability Office, which found that 25 percent of military mail took more than 18 days to make the one-way trip to Iraq. U.S. Gov't Accountability Office, GAO 04-484, Operation Iraqi Freedom: Long-standing Problems Hampering Mail Delivery Need to Be Resolved, pp. 9–13 (2004), *available at* http://www.gao.gov/new.items/d04484.pdf. The Military Postal Service Agency recommends that absentee ballots be sent at least 30 days before the election. *See Federal Voting Information*, Military Postal Service Agency, http://hqdainet.army.mil/mpsa/vote.htm (last visited April 16, 2012).

[7] Eversole, *supra* note 3, at 8.

More problematic was the Voting Section's attempt to avoid enforcement actions by advising jurisdictions to send federal-only ballots to military voters, especially in cases where the state could not certify state races.[8] This federal-only ballot presumably would allow the state to meet the strict requirements of UOCAVA (which applies only to federal elections), but would affect the military voter's right to vote in state and local races and could lead to other violations of the law. In Maryland, for example, a federal judge found a violation of a military member's fundamental right to vote in state and local elections when Maryland sent federal-only ballots, based on ill-advised guidance from the Voting Section, during the 2010 election.[9]

Another problem that plagued the Voting Section was its failure to discover and pursue cases in a timely manner. Of the 14 cases where a state or local jurisdiction failed to meet the 45-day deadline, the Voting Section pursued cases against only eight of those jurisdictions.[10] Many of those cases were discovered by third parties including by the MVP Project.[11] The delay in discovering these cases caused most of them to be

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[8] There is evidence that at least three jurisdictions received this advice, including Maryland, the District of Columbia, and the Virgin Islands (V.I.). *See* Letter from Linda H. Lamone, State Administrator, Maryland State Board of Elections, to Robert Carey, Director of the Federal Voting Assistance Program (Aug. 25, 2010), *available at* http://www.fvap.gov/resources/media/md_waiver_withdrawal.pdf; *see also* Letter from Carol Thomas-Jacobs, Chief, Civil Division, Virgin Islands, U.S. Department of Justice, to Thomas E. Perez, Assistant Attorney General, U.S. Department of Justice (Sept. 2, 2010), *available at* http://www.justice.gov/crt/about/vot/misc/vi_uocava_letter.pdf; *see also* http://www.youtube.com/overseasvote#p/c/3A63B59A550D845D/13/x5VALB712o8 (Webcast of Rokey Suleman, the Elections Director for the District of Columbia, saying that the Voting Section offered the District a federal-only solution).

[9] *Doe v. Walker*, No. 10cv2646, at 13–25 (D. Md. Oct. 29, 2010).

[10] The eight states include Illinois, Kansas, Mississippi, Nevada, New Mexico, New York, North Dakota, and Wisconsin.

[11] Of the 14 cases mentioned above, eight cases were discovered by third parties including violations in Alabama, Arkansas, California, Illinois, Indiana, Nevada, New Mexico, and Virginia. Six of those cases were identified in a September 27, 2010, letter from the MVP Project. *See* Letter from Eric Eversole, Executive Director of the MVP Project, to Hon. Eric Holder, U.S. Attorney General (Sept. 27, 2010), *available at* http://mvpproject.org/wp-content/uploads/2012/01/2010.09.27HolderLetter.pdf.

settled only two or three weeks before the election. Such last-minute litigation creates significant uncertainty for military voters and limited options for a remedy.

As for the remaining six cases, it appears that the Voting Section may have ignored these violations based, in part, on a faulty interpretation of the MOVE Act. As noted above, the MOVE Act requires a state to mail absentee ballots "not later than 45 days before the election."[12] While the language is clear, the Voting Section interpreted this provision to mean that military voters were only entitled to 45 days of total time to receive and return their ballot, disregarding whether those 45 days accrued before the election as required by the law. In other words, so long as a state provided a total of 45 days to receive and return absentee ballots, then the Voting Section refused to pursue a case or a remedy.

Consider, for example, Illinois, where state law provides military voters with an additional 14 days after the election to return their absentee ballot. Thus, as part of the Voting Section's settlement with Illinois, even though more than 35 counties violated the law, the Voting Section pursed remedies only against the six counties that sent their absentee ballots more than 14 days after the deadline.[13]

Not only does this interpretation effectively rewrite UOCAVA, but it creates a situation where absentee military voters in one state are treated differently and disparately as compared to other military voters in the same state. For example, in Illinois, military voters in most counties (the ones following state and federal law) received a total of 59 days to receive and return their absentee ballots (45 days before

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The Voting Section sent a single e-mail in response to the letter, but provided no further information regarding the results of its investigations or how the violations were resolved.

[12] 42 U.S.C. §1973ff-1(8)(A).

[13] Consent Decree, United States v. The State of Illinois, No. 10-cv-06800 (D. Ill., Oct. 22, 2010) (*available at* http://www.justice.gov/crt/about/vot/misc/il_uocava_cd.pdf).

the election plus 14 days after the election). In the 35 counties that violated the law, however, the Voting Section permitted the state and counties to treat the military voters much differently based solely on their counties' failure to comply with the law. Such disparate treatment creates a potential violation of these voters' right to equal protection.[14]

Finally, notwithstanding the Voting Section's claim that it would "vigorously" and "fully" enforce the MOVE Act, that claim must not apply to the Department of Defense and its obligations under the MOVE Act. As noted above, DOD had an obligation to create installation voting assistance offices that would be covered by the NVRA.[15] These offices were supposed to provide the same type of voting assistance received by civilians at their local driver's license branch or public assistance office. Unfortunately, DOD did not comply with this requirement before the 2010 election and the Voting Section took no action apparent action.[16]

2012 Primary Elections

In some respects, the Voting Section appears to have learned from its errors in 2010. The Voting Section has been more proactive in calling states to see whether they will be monitoring local election officials and whether they will be in compliance for the 2012 elections. Of particular importance, the Voting Section initiated litigation against

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[14] As the Supreme Court emphasized, "Having once granted the right to vote on equal terms, the state may not, by later arbitrary and disparate treatment, value one person's vote over another." *Bush v. Gore*, 531 U.S. 98, 104 (2000).

[15] 10 U.S.C. § 1566a(a). While the MOVE Act did not require the Secretary of Defense to make the NVRA designation, that designation occurred on November 15, 2010. *See* http://www.dtic.mil/whs/directives/corres/pdf/DTM-10-021.pdf.

[16] *See* M. Eric Eversole and Hans A. von Spakovsky, *A President's Opportunity: Making Military Voters a Priority*, Heritage Foundation Legal Memorandum No. 45 (2011) (*available at* http://www.heritage.org/research/reports/2011/07/a-presidents-opportunity-making-military-voters-a-priority#_ftn35).

New York because its presidential primary date made it impossible for the state to mail absentee ballots at least 45-days before the election. A federal judge agreed ordering the state to move its primary to June 2012 and, thus, ensuring that military voters will be able to participate in the November election.[17]

Unfortunately, many of the problems that occurred in 2010 are reoccurring in 2012. Thus far, at least three states—Alabama, Ohio, and Wisconsin—have had local election officials that failed to mail absentee military ballots at least 45 days before their respective primaries. In Wisconsin, for example, at least 65 municipalities did not mail absentee ballots to military voters as required by federal law and, like New York in 2010, had municipalities that mailed their absentee ballots less than 30 days before the election.[18] Alabama, in turn, had violations in 47 counties and many of those ballots were sent less than 30 days before the election.[19]

Like many of the cases in 2010, the Voting Section is discovering the violations and taking action with little or no time to remedy the violation. For example, the Alabama complaint was filed only 18 days before the election and the Wisconsin complaint, as well as a consent decree, was filed 11 days before the primary election. Such late-filed actions provide little time to notify affected military voters and, more importantly, they limit a judge's ability to remedy the violation. This is particularly true

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[17] Dan Wiessner, "Judge faults N.Y. lawmakers, adopts new primary calendar," Feb. 9, 2012 (*available at* http://newsandinsight.thomsonreuters.com/Legal/News/2012/02_-_February/Judge_faults_N_Y__lawmakers,_adopts_new_primary_calendar/).

[18] Consent Decree, *United States v. Wisconsin*, No. 12-cv-197 (D. Wis., Mar. 23, 2012) (*available at* http://www.justice.gov/crt/about/vot/misc/wi_uocava_cd12.pdf.)

[19] Order on Preliminary Injunction, *United States v. Alabama*, No. 12-cv-179 (D. Ala., Mar. 12, 2012) (*available at* http://www.justice.gov/crt/about/vot/misc/al_uocava_pi_opinion.pdf).

in cases like Alabama where there is no consent decree and the case has to be litigated. A judge in such a case has few available remedies.

Worse yet, the Voting Section once again allowed the local jurisdictions in Wisconsin and Alabama to mail overseas military ballots using first class mail, even though they were being sent less than 30 days before the election. In both states, the Voting Section should have required the use of express mail delivery, especially if the ballots were being sent overseas. No one should be surprised when military voters are disenfranchised again in both states.

Most shocking, however, was the Voting Section's willingness to settle the Wisconsin case without knowing whether 350 municipalities—that is, nearly 20 percent of all municipalities—had mailed their absentee military ballots at all or on time. While the settlement agreement required the Government Accountability Board to order a report from the non-responding local jurisdictions, there was no remedy or consequence if the municipality refused to provide that information. In fact, on the day before the election, one local reporter indicated that 56 clerks still had not provided the requested information.[20] The military voters in these municipalities were left unprotected by the Voting Section.

Finally, it still is not clear whether the DOD has fully implemented the provisions requiring NVRA assistance on military installations. However, given the low participation rates in several state primaries, it is unlikely that these voting assistance offices have been fully created or in compliance with the NVRA. For example, South Carolina reported that it sent out 191 absentee ballots to military and overseas voters and New Hampshire sent out for its primary, while New Hampshire mailed out 163

[20] Kirsten Adshead, "Call to Duty: Military members at risk of missing WI," April 2, 2012, (http://www.wisconsinreporter.com/call-to-duty-military-members-at-risk-of-missing-wi-vote).

absentee ballots.[21] Both figures represent a small percentage of the military and overseas voters in these states. The same can be said about the 22,657 military and overseas voters who requested an absentee ballot in Florida. Had DOD fully implemented the voter assistance offices on each installation, as required by the MOVE Act, the participation rates among military voters should be much higher.

Conclusion

Ultimately, in order to ensure full compliance with the MOVE Act for the 2012 elections, the Voting Section has to ensure violations are discovered and addressed in a timely manner. It needs to investigate violations at the county or local level and, if more expedient, address those issues at the local level. And, to the extent it provides guidance to the states or settles a case, it must ensure that such advice or settlement complies with the Constitution and does not disenfranchise voters in state races. Finally, DOJ must ensure that its sister agency DOD fully complies with its obligations under the MOVE Act. Our men and women in uniform deserve to have their rights protected in the same way they protect our rights.

[21] Pew Election Dispatches, "New Hampshire Dispatch: Ballots Already Cast in Presidential Primary," Dec. 6, 2011; Pew Election Dispatches, "Primaries Dispatch: Thousands of Military and Overseas Ballots Already Cast in Upcoming Elections," Jan. 17, 2012 (available at http://www.pewcenteronthestates.org/initiatives_detail.aspx?initiativeID=85899362969).

Mr. FRANKS. And I thank you, Mr. Eversole.
Professor Weiser, you are recognized for 5 minutes.

TESTIMONY OF WENDY WEISER, DIRECTOR OF DEMOCRACY PROGRAM, NEW YORK UNIVERSITY SCHOOL OF LAW

Ms. WEISER. Thank you, Mr. Chairman and Members of the Subcommittee, for this opportunity to testify.

This is a critical time for voting rights in America, and the Department of Justice has a critical role to play. I will make three points today.

First, as Chairman Conyers noted, the past 2 years have seen a massive wave of new State laws making it harder for eligible American citizens to vote. Overall, 22 new State laws and two executive actions have been put in place in 17 States restricting voting. These range from requiring certain forms of photo identification to vote, to making it harder to register to vote, to cutting back on early voting, among other things. This is the biggest setback in voting rights in decades and an abrupt reversal of the longstanding trend in American history to expand access to the franchise. Millions will be affected, and some will be especially hard hit: minorities, the poor, people with disabilities, students and older Americans.

Second, the Department of Justice has a critical role to play with respect to these new laws. Under the Voting Rights Act, States with a history of discriminating in voting must get pre-clearance from the Department or a Federal court before implementing changes to their voting laws. States have the burden to show that their new laws will not discriminate against minorities, and the Department must review the evidence and make a determination as to whether States have met that burden. And that is exactly what the Department has been doing with respect to these new voting restrictions: applying the law, nothing more, nothing less.

It has appropriately found that Florida, Texas, and South Carolina have not met their burden of showing that their new laws won't discriminate against minorities. And the Brennan Center is in fact involved in those matters. The new law in Florida has made it so hard for civic groups to register fellow citizens to vote that the League of Women Voters and groups across the State have shut down their voter registration drives. And this especially hurts minorities, who register at voter registration drives at twice the rate of White citizens. Florida also cut back on Sunday early voting, which was used especially by African American and Hispanic churches.

New strict photo ID laws in both Texas and South Carolina also disproportionately harm minorities. Texas' own data show that as many as 795,000 registered voters—that is not just eligible but registered voters—do not have State photo IDs, and Latino citizens are between 46 percent and 120 percent more likely than White voters to lack those IDs.

A quick word on voter ID laws. There may be disagreements about voter ID as a policy matter, but everyone should agree that voter ID laws should not gratuitously disenfranchise voters. Unfortunately, that is what many of the new laws we are seeing this year do. They are far more restrictive than the ID laws of the past, limiting the forms of ID that will be accepted, cherry-picking the IDs that certain groups may not have, and eliminating exemptions and fail-safe protections for voters who don't have IDs.

These aren't reasonable ID laws. They require IDs that 11 percent of eligible Americans don't have, and those who participate in primaries are disproportionately among those who do have those IDs. And these laws don't have a way for people without IDs to verify their identities and to vote, as Virginia Governor Bob McDonnell just complained when he sent back a bill in that State last week.

I should add that Section 5 of the Voting Rights Act is not the only law that these new restrictions may run afoul of. Just yesterday, for example, the Ninth Circuit Court of Appeals ruled 9-2 that a law in Arizona that requires proof of citizenship to register to vote violates the Federal Motor Voter Law.

Third, in contrast to these controversial new voting laws, there is a commonsense bipartisan solution that would actually improve the integrity of our elections and public confidence: modernizing our ramshackle voter registration system. As Mr. Adams noted in his written testimony, the voter rolls are a mess. A Pew Study recently found that one in four eligible Americans are not registered to vote and that one in eight voter registration records have serious errors.

Better enforcement of the NVRA, including Section 7 and Section 5, would certainly help, but the real problem is that in most of the country we still rely on an antiquated, error-prone, paper-based voter registration system. Congress can help the States bring our voting system into the 21st century by passing a law to modernize voter registration across the country. This would add millions of eligible voters to the rolls, increase accuracy, reduce opportunities for fraud and abuse, and cut costs. It is a solution everyone can get behind.

Thank you very much.

[The prepared statement of Ms. Weiser follows:]

BRENNAN
CENTER
FOR JUSTICE

United States House of Representatives

Subcommittee on the Constitution
Judiciary Committee

Statement of
Wendy R. Weiser
Director, Democracy Program
Brennan Center for Justice at NYU School of Law

April 18, 2012

Mr. Chairman and the Members of the Subcommittee on the Constitution:

On behalf of the Brennan Center for Justice,[1] I thank you for providing me the opportunity to present testimony at this important hearing. Both the U.S. Department of Justice and Congress play critical roles in ensuring free, fair, and secure elections in America.

A recent study I co-authored, *Voting Law Changes in 2012*, documents the record number of bills introduced and passed this past year that restrict access to voting.[2] Make no mistake: these sweeping voting law changes raise grave concerns. Many of these new statutes were enacted in states covered by the Voting Rights Act's Section 5. These states must demonstrate that new voting laws do not improperly impact minority citizens. The U.S. Department of Justice has the duty to review those laws. The Justice Department has appropriately exercised its obligation to assure that these states follow the Voting Rights Act. It has enforced the clear dictates of law—nothing more, nothing less. The Department can and should do more to affirmatively enforce critical federal statutes protecting opportunities for voter registration. Congress, too, should step forward to modernize our ramshackle voter registration system.

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[1] The Brennan Center is a nonpartisan think tank and legal advocacy organization that focuses on issues of democracy and justice. Among other things, we seek to ensure fair and accurate voting procedures and systems, and to maximize the participation of eligible American citizens in elections. We have done extensive work on a range of issues relating to voting rights, including work to modernize our voter registration system, remove unnecessary barriers to voter participation; make voting machines more secure and accessible; defend the federal Voting Rights Act; and expand access to the franchise. Our work on these topics has included the publication of studies and reports; assistance to federal and state administrative and legislative bodies with responsibility over elections; and, when necessary, participation in litigation to compel states to comply with their obligations under federal law and the Constitution. This testimony is submitted on behalf of a Center affiliated with New York University School of Law, but does not purport to represent the school's institutional views on this topic.

[2] WENDY R. WEISER & LAWRENCE NORDEN, VOTING LAW CHANGES IN 2012 (2011), *available at* http://brennan.3cdn.net/d16bab3d00e5a82413_66m6y5xpw.pdf.

Common sense, nonpartisan reforms could add all eligible voters to the rolls while cutting costs, reducing errors, and curbing any chance for fraud. We should move past partisan "voting wars" and bring our systems into the 21st Century.

In my testimony today, I will focus on: (1) the recent state legislative developments affecting voting and elections, including laws requiring government-issued photo ID to vote; (2) the impacts of the new laws, including those that are being examined by the Department of Justice and the courts; (3) the Department's efforts to enforce federal voting laws; and (4) the need for additional steps to improve the election system for all eligible Americans.

I. New Laws Restricting Voting in the States

For decades, our nation has expanded the franchise and knocked down old barriers to full electoral participation. The last two years have seen an abrupt change in course, with a wave of state laws and legislation that create new restrictions on voting access. These laws take many forms—from eliminating election-day registration, to restricting voter registration drives by community groups, to reducing the number of days for early voting and limiting the number of days for voter registration.

As of today, during the 2011-12 legislative sessions, twenty-four (24) laws and executive actions restricting access to the polls were passed, and at least seventy-four (74) measures are still pending in state legislatures across the country.

The restrictions fall into five major categories: (1) requirements that voters provide specific kinds of government-issued photo ID to vote or have their votes counted; (2) requirements to provide documentary proof of citizenship in order to register and vote; (3) new restrictions on voter registration; (4) cutbacks on the availability of early and absentee voting; and (5) actions permanently depriving previously incarcerated citizens of their right to vote. Here is an overview of recent state legislation impacting voting rights, grouped by subject area:

a. Restrictive Photo ID

By far the most common election-related legislation introduced and passed in 2011 and thus far in 2012 is legislation requiring voters to produce certain forms of photo ID to vote. Prior to 2011, only two states had imposed strict photo ID requirements.[3] During the 2011 and 2012 legislative sessions, however, seven states have passed strict "no-photo, no-vote" voter ID laws for citizens who vote in person;[4] and three of those extended the new photo ID requirements to

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[3] Those states are Indiana and Georgia. *See* WEISER & NORDEN, *supra* note 2, at 4; Brennan Center for Justice, *2012 Voting Law Changes: Passed and Pending Legislation That has the Potential to Suppress the Vote*, available at http://brennan.3cdn.net/1f40bff8cb538f751a_88m6b5rob.pdf.

[4] Alabama, Kansas, South Carolina, Tennessee, Texas, Pennsylvania, and Wisconsin. Tennessee, however, allows certain voters without ID to cast a regular ballot after swearing an affidavit of identity at the polls. *See* WEISER & NORDEN, *supra* note 2, at 6-7; Brennan Center for Justice, *2012 Voting Law Changes: Passed and Pending Legislation That has the Potential to Suppress the Vote*, available at http://brennan.3cdn.net/1f40bff8cb538f751a_88m6b5rob.pdf.

absentee voters.[5] Mississippi similarly adopted a strict photo ID requirement for all voters via a ballot measure to amend the state constitution. Rhode Island passed a photo ID law that allows voters without ID to cast a ballot that will count if their identities are later verified by signature match.[6]

Overall, thirty-four (34) states saw bills introduced requiring photo IDs for voting. Of the states that do not have voter ID laws, only three—Oregon, Vermont and Wyoming—did not consider voter ID legislation this year or last. In five states, governors' vetoes prevented photo ID legislation from becoming law.[7] In Minnesota, voters will consider a ballot initiative to require photo ID for voting in November 2012; and Missouri voters may also consider a voter ID ballot initiative, depending on the resolution to a legal challenge.

In addition, Virginia's legislature recently sent a voter ID bill to Republican Governor Bob McDonnell, who just last week stated that he would not sign the law unless the legislature softened the requirement to present a photo ID in order to cast a ballot. His proposed amendments included an expansion of the list of acceptable IDs, an increase in the time voters have to provide the required ID, and a proposal to count the provisional ballots of voters who lack the required identification after signature verification.[8]

b. Proof of Citizenship

At least seventeen (17) states saw legislation introduced that would require documentary proof of citizenship in order to register or vote. Very few official documents actually establish citizenship: birth certificates, naturalization certificates, and passports are among the rare examples. Proof of citizenship laws passed this past year in Alabama, Kansas, and Tennessee. Alabama[9] and Kansas[10] will require all new voter registration applicants to produce documentary proof of citizenship, while Tennessee[11] will require individuals flagged by state officials as potential non-citizens to produce such documentation. Until this year, only two states (Arizona, through its controversial Ballot Proposition 200, and Georgia) had passed proof of citizenship laws, and only one (Arizona) had such a requirement in effect.[12] In contrast, all other states rely

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[5] Kansas, Texas, and Wisconsin. *See* WEISER & NORDEN, *supra* note 2, at 6.

[6] *Id.*

[7] Minnesota, Missouri, Montana, New Hampshire and North Carolina. *See id.* at 5 n.17.

[8] Matthew Ward, *Virginia Governor Seeks to Soften Voter ID Legislation*, CHICAGO TRIBUNE, Apr. 10, 2012, *available at* www.chicagotribune.com/news/sns-rt-us-usa-voterid-virginiabre83a03b-20120410,0,479433.story.

[9] S.B. 256, 2011 Gen. Assemb., Reg. Sess. (Ala. 2011), *available at* http://alisondb.legislature.state.al.us/acas/searchableinstruments/2011RS/Printfiles/SB256-int.pdf.

[10] H.B. 2067, 2011 Sess. (Kan. 2011), *available at* http://www.kslegislature.org/li/b2011_12/year1/measures/hb2067/.

[11] S.B. 352, 107th Gen. Assemb., 2011 Sess. (Tenn. 2011), *available at* http://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=SB0352.

[12] ARIZ. REV. STAT. §§ 16-152(A)(23), 16-166 (2011).

on the affidavit signed by a new registrant, under penalty of perjury, swearing that she is a U.S. citizen and that she meets all other voting eligibility requirements.

c. Making Voter Registration Harder

At least sixteen (16) states saw bills introduced to end highly popular Election Day and same-day voter registration, limit voter registration mobilization efforts, and reduce other registration opportunities. Florida and Wisconsin passed laws making it more difficult for people who move to stay registered and vote. Ohio and Maine, meanwhile, eliminated same-day voter registration, used by tens of thousands in 2008 alone, although the people of Maine voted to restore same-day voter registration,[13] and Ohio's law is now being challenged by ballot referendum in November 2012.[14]

Florida, Illinois, and Texas passed laws restricting voter registration drives and other community-based voter registration activity. Florida enacted a law which effectively shut down registration drives that previously registered hundreds of thousands of citizens in that state.[15] Florida's new law now requires that groups and individuals who wish to help voters register first pre-register with the state, submit within 48 hours every voter registration application received, continually submit extensive forms and reports, and keep track of every voter registration application they distribute.[16] While Texas law had already required private citizens to be deputized by a local election official before they could register anyone to vote, the new law now requires these individuals to complete certain training requirements, which may include a final exam, before they can help register any new voters.[17]

d. Reducing Early and Absentee Voting

At least nine (9) states saw bills introduced to reduce their early voting periods, and four tried to reduce absentee voting opportunities. Florida, Georgia, Ohio, Tennessee, and West Virginia succeeded in enacting bills reducing early voting. These cutbacks were proposed in spite of the fact that early voting was used by nearly one-third of all voters in 2008.[18] Five states—Florida, Georgia, Ohio, Tennessee, and West Virginia—enacted laws that shortened the

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[13] Eric Russell, *Mainers Vote to Continue Election Day Registration*, BANGOR DAILY NEWS, Nov. 8, 2011, *available at* http://bangordailynews.com/2011/11/08/politics/early-results-indicate-election-day-voter-registration-restored/.

[14] WEISER & NORDEN, *supra* note 2, at 25-26. Because the law's challengers met the requirements to put the law before voters on the ballot, Ohio's new law will not be in effect in 2012.

[15] H.B. 1355, 114th Reg. Sess. (Fla. 2011), *available at* http://www.flsenate.gov/Session/Bill/2011/1355; H.B. 1570, 82d Leg., Reg. Sess. (Tex. 2011), *available at* http://www.capitol.state.tx.us/tlodocs/82R/billtext/pdf/HB01570F.pdf#navpanes=0.

[16] WEISER & NORDEN, *supra* note 2, at 21.

[17] *Id.*

[18] R. MICHAEL ALVAREZ ET AL., 2008 SURVEY OF THE PERFORMANCE OF AMERICAN ELECTIONS 12 (2009), *available at* http://www.vote.caltech.edu/drupal/files/report/Final%20report20090218.pdf.

early voting period.[19] In the law that will be put before voters this November, Ohio cut the state's previous early voting period of thirty-five days and eliminated early voting on Saturday afternoon and Sunday.[20] Florida shortened the early voting period from two weeks to one, and eliminated voting on the Sunday before Election Day.[21]

e. Making it Harder to Restore Voting Rights

Governors Terry Branstad of Iowa and Rick Scott of Florida both issued executive actions reversing previously adopted policies of restoring voting rights to citizens with past felony convictions.[22] In Iowa, 80,000 citizens in the last six years had their voting rights restored under this now reversed policy.[23] In Florida, about 150,000 citizens had their rights restored between 2007 and 2010. In fact, up to one million people could have benefited from the practice reversed by Governor Scott and his clemency board; based on the prior rates of restoration, we estimate that approximately 100,000 Floridians would have had their voting rights restored by 2012 but for that executive action.[24]

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[19] H.B. 1355, 2011 Leg. Sess. (Fla. 2011), *available at* http://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?FileName=_h1355er.docx&DocumentType=Bill&BillNumber=1355&Session=2011; H.B. 92, 2011 Gen. Assemb. (Ga. 2011), *available at* http://www.legis.ga.gov/Legislation/20112012/116254.pdf; H.B. 194, 129th Gen. Assemb., Reg. Sess. (Ohio 2011), *available at* http://www.legislature.state.oh.us/BillText129/129_HB_194_PS_N.html; S.B. 772, 107th Gen. Assemb., 2011 Reg. Sess. (Tenn. 2011), *available at* http://www.capitol.tn.gov/Bills/107/Bill/SB0772.pdf; S.B. 581, 80th Leg., 1st Sess. (W. Va. 2011), *available at* http://www.legis.state.wv.us/Bill_Text_HTML/2011_SESSIONS/RS/pdf_bills/sb581%20ENR.pdf.

[20] H.B. 194, 129th Gen. Assemb., Reg. Sess. § 3509.01(B) (Ohio 2011), *available at* http://www.legislature.state.oh.us/BillText129/129_HB_194_PS_N.html. The Ohio Secretary of State has interpreted another law that passed in 2011, H.B. 224, to end the period of in-person absentee voting at 6 PM on the last Friday before Election Day and thereby eliminate the last weekend of early voting prior to the election for all but uniformed and overseas absentee voters. Under this interpretation, one challenged by some Ohio legislators and voting rights groups, early voting on this last weekend will be eliminated regardless of the outcome of the November referendum.

[21] 2011 FLA. LAWS 40, *available at* http://laws.flrules.org/files/Ch_2011-040.pdf; *see also* Justin Levitt, *A Devil in the Details of Florida's Early Voting Law*, ELECTION LAW BLOG (May 23, 2011), *available at* http://electionlawblog.org/?p=18296.

[22] IOWA EXEC. ORDER NO. 42 (July 4, 2005), *available at* http://brennan.3cdn.net/563fe831695be5a1fa_nwm6bvbik.pdf (repealed by Gov. Branstad); FLA. PAROLE COMM'N, RULES OF EXECUTIVE CLEMENCY (Mar. 9, 2011), *available at* https://fpc.state.fl.us/PDFs/clemency_rules.pdf.

[23] WEISER & NORDEN, *supra* note 2, at 34.

[24] *See id.* at 34-35, 37 n. 1.

South Dakota recently passed a law imposing further restrictions on voting by citizens with past felony convictions by disenfranchising persons on probation.[25] This new law adds to the state's existing requirement that an individual complete any term of imprisonment or parole before his or her voting rights can be restored.

II. The Impact of the New Voting Laws

The new laws significantly alter the rules by which many Americans register and vote, placing new restrictions on the ways citizens can register and requiring more administrative steps in order to vote. In October, the Brennan Center estimated that these changes will make it harder for five million eligible Americans to vote.[26] To put that number in perspective, it is larger than the margin of victory in two of the last three presidential elections.

The litany of new state voting laws will have a disproportionately large impact on certain voters—especially the young, students, the elderly, minorities, women, low-income, and disabled voters. The new laws hit these groups hardest for multiple reasons. Some are less likely to have access to the type of documentation required by the new laws, or lack documentation with a current name or address. And some may rely on methods of voting and registration eliminated or restricted by the laws at higher levels than the general population. Below is some statistical evidence of how each of these groups may be especially affected by particular laws that have been passed.

a. The Impact of Photo ID Laws

Before examining the data concerning the impact of the new photo ID laws, it is worth noting that not all photo ID laws are created equal. Photo ID laws in place before the 2011 and 2012 legislative sessions were by and large less restrictive than the current crop of ID laws in three key ways: they accepted more forms of ID; they provided more exemptions and failsafe options for those without conforming IDs;[27] and they made it easier for voters without photo IDs

[25] H.B. 1247, 2012 Leg. Sess. (S. Dak. 2011), *available at* http://legis.state.sd.us/sessions/2012/Bill.aspx?Bill=1247.

[26] *See* WEISER & NORDEN, *supra* note 2, at 37 n.1 (explaining basis of estimate). That figure continues to change, as states continue to pass new laws and as courts and voters reject some previously-enacted laws and as restricting voting.

[27] For example, in Florida, voters who do not have photo ID can vote a provisional ballot that will count if the signature on the envelope matches that on their registration record. In Michigan and Louisiana, voters without ID can vote a regular ballot after swearing an affidavit of identity at the polls. Indiana's photo ID law provides three categories of exceptions to the strict voter ID requirement: one for the indigent, a second for those with religious objection to being photographed, and a third for those living in state-licensed facilities that serve as their precinct's polling place. Voters seeking to claim an exemption from the law based upon a religious objection or based upon their status as an indigent voter must go to the polls on Election Day and cast a provisional ballot. Within 10 days following the election, the voter must visit the county election office and affirm that the religious or indigence exemption applies. In Georgia, if a voter does not have a photo ID, she may go to the county registrar within three days and obtain a free photo ID and the provisional ballot will be counted.

to obtain such IDs, through affirmative education and outreach and, in Indiana's case, by having far greater citizen access to ID-issuing offices. In contrast, for example, unlike in Indiana and Georgia, the new South Carolina and Texas laws exclude state-issued employee photo IDs, and the new laws in Kansas and Wisconsin provide *no* mechanism for *any* voters without photo ID to vote a ballot that would count at the polls. Unfortunately, this means that there is a far higher likelihood that lack of ID will prevent citizens in these states from voting.

As the Brennan Center published in our report, *Citizens Without Proof*, based on a national survey conducted by the Opinion Research Corporation, 11% of voting-age Americans do not have the kinds of current government-issued photo ID required by the most restrictive new identification laws passed this past year.[28] The numbers are far worse for specific populations. For example, 18% of 18-24 year-old citizens and 18% of citizens 65 or older lack current government-issued photo IDs.[29] Among African Americans, approximately one in four do not possess such ID.[30] And according to another study, 78% of African-American men aged 18-24 in Milwaukee County, Wisconsin do not have a driver's license.[31]

Other independent empirical studies have come to the same conclusions. For instance, the 2001 Commission on Election Reform co-chaired by former Presidents Carter and Ford found that between 6 and 11 percent of voting-age citizens lack driver's licenses or alternate state-issued photo IDs.[32] A 2008 survey of registered voters in eighteen states found that 8% lack a valid, state-issued photo ID with their current address.[33] A 2007 Indiana survey found that over 13% of registered Indiana voters lack a valid Indiana driver's license or an alternate Indiana-issued photo ID, and that state residents with only a high-school degree are 9.5% less likely to have access to valid photo ID than college graduates.[34] A 2009 Indiana study found that

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[28] BRENNAN CENTER FOR JUSTICE, CITIZENS WITHOUT PROOF (2006), *available at* http://www.brennancenter.org/content/resource/citizens_without_proof_a_survey_of_americans_possession_of_documentary_proo/; *see also* WENDY WEISER, KEESHA GASKINS & SUNDEEP IYER, 'CITIZENS WITHOUT PROOF' STANDS STRONG, Sept. 8, 2011, at http://www.brennancenter.org/content/resource/citizens_without_proof_stands_strong/ (responding to a recent attempt to criticize this study).

[29] *Id.*

[30] *Id.*

[31] JOHN PAWASARAT, THE DRIVER LICENSE STATUS OF THE VOTING AGE POPULATION IN WISCONSIN 3 (2005), *available at* http://www4.uwm.edu/eti/barriers/DriversLicense.pdf.

[32] THE NATIONAL COMMISSION ON FEDERAL ELECTION REFORM, TO ASSURE PRIDE AND CONFIDENCE IN THE ELECTORAL PROCESS (2001), *available at* http://fl1.findlaw.com/news.findlaw.com/hdocs/docs/election2000/electionreformrpt0801.pdf.

[33] LORRIE FRASURE ET AL., 2008 COLLABORATIVE MULTI-RACIAL POST-ELECTION SURVEY: COMPARATIVE MULTI-RACIAL SURVEY TOPLINES 24 (2008), *available at* http://cmpstudy.com/assets/CMPS-toplines.pdf.

[34] MATT A. BARRETO, STEPHEN A. NUNO, & GABRIEL R. SANCHEZ, VOTER ID REQUIREMENTS AND THE DISENFRANCHISEMENT OF LATINO, BLACK AND ASIAN VOTERS (2007), *available at* http://www.brennancenter.org/dynamic/subpages/download_file_50884.pdf.

81.4% of all white eligible citizens had access to a driver's license, compared to only 55.2% of black eligible citizens.[35] A 2006 national survey sponsored by the Center on Budget and Policy Priorities found that 8.9% of African-Americans born in the U.S. do not have a passport or birth certificate available.[36] And a 2007 regression analysis of data from the Georgia Secretary of State and the Georgia Department of Driver Services determined that, compared to white voters, black voters were over three times more likely to lack photo ID.[37]

Data provided by Texas and South Carolina to the Department of Justice confirm that a substantial number of eligible voters who are already registered—and an even greater proportion of minority voters—lack the IDs required by the new state laws. As the Department of Justice recently noted, Texas's data showed that the number of *registered* voters in the state who do not have a driver's license or a comparable non-driver's photo ID ranges from 603,892 to 795,955, and Hispanic registered voters are between 46.5% and 120% more likely than white voters to lack such ID.[38] (The state did not provide data about African-American voters.) According to South Carolina's data, 239,333 registered voters do not have state-issued driver's or non-driver's IDs, 81,393 of whom are minorities, and minorities were almost 20% more likely than white voters to lack DMV-issued photo IDs.[39]

A number of the new photo ID laws are drafted in a way that makes it more difficult for voters of color and younger voters to qualify. For example, South Carolina, Texas, and Tennessee explicitly exclude state-issued student photo IDs from the list of acceptable identification,[40] and Wisconsin included requirements that Wisconsin State University's student IDs did not meet (at least at the time of enactment).[41] Texas and Tennessee, despite not allowing state student IDs, do allow the use of concealed-carry handgun permits to vote. This legislative choice disproportionately harms African Americans, who are under-represented among concealed-carry handgun permit holders and over-represented among students. For instance,

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[35] Matt A. Barreto et al., *The Disproportionate Impact of Voter-ID Requirements on the Electorate—New Evidence from Indiana*, PS: POLITICAL SCIENCE AND POLITICS 111 (January 2009), *available at* http://faculty.washington.edu/mbarreto/papers/PS_VoterID.pdf.

[36] ROBERT GREENSTEIN, LEIGHTON KU & STACEY DEAN, SURVEY INDICATES HOUSE BILL COULD DENY VOTING RIGHTS TO MILLIONS OF U.S. CITIZENS 1 (2006), *available at* http://www.cbpp.org/files/9-22-06id.pdf.

[37] M.V. HOOD III & CHARLES S. BULLOCK, III, *Worth a Thousand Words?: An Analysis of Georgia's Voter Identification Statute*, 36 Am. Politics Research, no. 4, July 2008 at 555-579, *available at* http://apr.sagepub.com/content/36/4/555.abstract.

[38] Letter from Thomas E. Perez, Assistant Attorney General, U.S. Dep't. of Justice, to Keith Ingram, Director of Elections, Office of the Texas Secretary of State, Mar. 12, 2012, 3, *available at* http://brennan.3cdn.net/fe6a21493d7ec1aafc_vym6b91dt.pdf.

[39] Letter from Thomas E. Perez, Assistant Attorney General, U.S. Dep't. of Justice, to C. Havird Jones, South Carolina Assistant Deputy Attorney General, Dec. 23, 2011, *available at* http://brennan.3cdn.net/594b9cf4396be7ebc8_0pm6i2fx6.pdf.

[40] *See* WEISER & NORDEN, *supra* note 2, at 8.

[41] *Id.*.

African Americans make up 16.9% of the Texas public university student population,[42] but received less than 7.7% of the state's concealed-carry permits in 2010.[43]

Racial minorities will also frequently face greater obstacles to obtaining the newly required documentation. For example, acceptable forms of identification under the Texas law can be obtained at driver's license offices. Approximately one-third of Texas counties, however, do not have a driver's license office, and Latinos in these counties are significantly less likely to have common photo IDs. According to the most recent data Texas provided to the Justice Department, 14.6% of Latinos in counties without driver's license offices do not have either a driver's license or a personal identification card, compared with 8.8% of non-Latinos.[44] Latino households are also less likely to have access to a vehicle, making it harder for Latinos to travel the distance to the closest driver's license office.

These impacts translate into real consequences for real people.[45] Dorothy Cooper, a 96-year-old African-American woman in Tennessee, illustrates what can happen to women when the names on their birth certificate do not match the married names on their registration records: she was reportedly denied a free ID card and told she could not vote at her polling place, as she had in almost every election in the last 75 years.[46] In the state's recent primaries, 285 voters reportedly cast provisional ballots because they did not have photo IDs.[47] In South Carolina, it has been reported that husband-and-wife physicians who have been registering their patients to

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[42] U.S. CENSUS BUREAU, *2009 American Community Survey*, *available at* http://www.census.gov/acs/www/data_documentation/data_main/ (demonstrating significance at the 5% level, using a Z test for a single sample proportion) (data obtained by creating a custom table from the 2009 American Community Survey one-year estimates in the U.S. Census Bureau's Data Ferrett).

[43] TEX DEP'T OF PUBLIC SAFETY, CONCEALED HANDGUN LICENSING BUREAU, INFORMATION BY RACE/SEX, *available at* http://www.txdps.state.tx.us/administration/crime_records/chl/PDF/2010Calendar/ByRace/CY10RaceSexLicAppIssued.pdf.

[44] *See* Letter from Thomas E. Perez, Ass't Attorney General, Civil Rights Div., Dep't of Justice, to Keith Ingram, Dir. of Elections, Tex. Sec'y of State, Mar. 12, 2012; *see also* Sundeep Iyer, *Unfair Disparities in Voter ID,* BRENNAN CENTER BLOG, Sept. 13, 2011, *available at* http://www.brennancenter.org/blog/archives/the_accessibility_of_texas_dlo_locations/ (Latino voters make up about 33% of Texas citizen voting age population but more than 60% of those who live more than 20 miles from a state driver's license office).

[45] For additional stories of individuals affected by voter ID laws, see Lawyers' Committee for Civil Rights Under Law, *Think Getting "Free" ID is Easy? Think Again!*, at http://www.lawyerscommittee.org/page?id=0046; Think Progress, *Nine People Denied Voting Rights By Voter ID Laws*, at http://thinkprogress.org/justice/2012/03/22/449243/report-nine-people-denied-voting-rights-by-voter-id-laws/; Justin Levitt, Testimony Before Senate Committee on the Judiciary, Sept. 8, 2011, at http://www.judiciary.senate.gove/pdf/11-9-8LevittTestimony.pdf.

[46] Ansley Haman, *96 Year Old Chattanooga Resident Denied Voting ID,* CHATTANOOGA TIMES-FREE PRESS, Oct. 5, 2011, *available at* http://timesfreepress.com/news/2011/oct/05/marriage-certificate-required-bureaucrat-tells/.

[47] Daniel Potter, *Voter ID Law Triggers 285 Provisional Ballots; Not All Count*, WPLN NEWS, Mar. 9, 2012, *available at* http://wpln.org/?p=34932.

vote for the past 29 years are unable to help many of their patients register to vote, even though they have offered to pay for IDs, because many of their patients do not have birth certificates.[48]

In contrast to the claims of many photo ID supporters, photo ID laws risk depressing voter turnout. Indeed, the most rigorous empirical study to date,[49] recently described in the leading journal of political science methodology, *Political Analysis*,[50] concludes that the strictest forms of voter ID requirements reduce turnout among registered voters. And contrary to the claims of some,[51] there is no evidence that photo ID laws increase turnout. At a time when Hispanic voting rates, as well as raw numbers, went up sharply up in neighboring states, Hispanic turnout in Georgia went up much less than in sister states without a photo ID requirement in effect. In fact, adjusting for growth in the voting-age Hispanic citizen population, the increase in Hispanic votes cast between 2006 and 2010 was over 250% greater in North Carolina than in Georgia. Similarly, the increase in black turnout in North Carolina was 129.7% greater than the increase in black turnout in Georgia between 2006 and 2010.[52]

b. Photo ID Laws Do Not Improve Election Integrity

Photo ID laws also fail to meaningfully improve the security of our elections system. The only problem they have the potential to address is in-person impersonation fraud, and study after study confirms that problem to be exceedingly rare, and far rarer than the disenfranchisement caused by photo ID requirements.

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[48] Dawn Hinshaw, *S.C. Husband-and-Wife Doctor Couple at Center of Voting Rights Movement*, THE SUN TIMES, July 18, 2011, *available at* http://www.thesunnews.com/2011/07/18/2283993/sc-husband-and-wife-doctor-couple.html.

[49] R. MICHAEL ALVAREZ, DELIA BAILEY, & JONATHAN N. KATZ, THE EFFECT OF VOTER IDENTIFICATION LAWS ON TURNOUT (Oct. 2007), *available at* http://brennan.3cdn.net/c267529c2bb704c85d_u0m6ib08s.pdf.

[50] R. Michael Alvarez, Delia Bailey, & Jonathan N. Katz, *An Empirical Bayes Approach To Estimating Ordinal Treatment Effects*, POLITICAL ANALYSIS 26-30 (2010), *available at* http://brennan.3cdn.net/a5782740e4185414a8_snm6bhfwg.pdf.

[51] For example, as Hans von Spakovsky stated on PBS NEWSHOUR (March 14, 2012): "In fact, the turnout of African-Americans and Hispanics, for example, in Georgia *went up significantly* in the state in the two federal elections held since [voter ID was instituted]."

[52] Data on voter turnout by race in North Carolina were extracted from the November 2006 and November 2010 state voter history files, available at ftp://www.app.sboe.state.nc.us/enrs/. Data on voter turnout by race in Georgia were extracted from the voter turnout reports produced by the Georgia Secretary of State's Office; the reports are available at http://sos.georgia.gov/elections/voter_registration/Turnout_by_demographics.htm. Hispanic population growth adjustments were calculated by indexing the rate of voting-age Hispanic citizen population growth in North Carolina to the rate of voting-age Hispanic citizen population growth in Georgia; population growth data were obtained from the Current Population Survey's Voting and Registration Supplement, available at http://www.census.gov/hhes/www/socdemo/voting/.

These laws are justified by wild charges of massive voter fraud. A leading proponent, John Fund, for example, has published a book entitled *Stealing Elections: How Voter Fraud Threatens Our Democracy.*[53] But as Heritage Foundation fellow Hans von Spakovsky told *The New York Times*:

> "The left always says that people who are in favor of this claim there is massive fraud," said Mr. von Spakovsky, of the Heritage Foundation. "No, I don't say that. I don't think anybody else says that there is massive fraud in American elections…."[54]

For several years, the Brennan Center has studied claims of voter fraud in order to distinguish unfounded and exaggerated tales of fraud from reliable, verified claims of election misconduct. Our analytic method was published in a monograph entitled *The Truth about Voter Fraud*, which catalogs the recurrent methodological flaws that lead to allegations of voter fraud, and debunks baseless — though often repeated — reports of voter fraud.[55] In our research we have found virtually no fraud of the type that a photo ID requirement could fix. To the contrary, allegations of voter fraud typically prove baseless upon inspection. A recent example occurred in South Carolina, where state election officials proved that what had appeared to be voting in the name of dead people was actually just mistakes in list matching and clerical errors.[56] There is little to no reliable evidence of any in-person impersonation fraud in the country. Again, this form of fraud is *the only* misconduct that photo ID laws address.

Other available studies also show that the incidence of in-person voter impersonation is extraordinarily rare. Between October 2002 and September 2005, as part of a high-priority national effort to investigate and enforce laws against voter fraud, the Department of Justice brought 38 cases; of those, only one conviction involved impersonation fraud.[57] In a

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[53] JOHN FUND, STEALING ELECTIONS: HOW VOTER FRAUD THREATENS OUR DEMOCRACY (Encounter Books, 2d ed., 2008).

[54] Michael Cooper, *New State Rules Raising Hurdles at Voting Booth*, THE NEW YORK TIMES, Oct. 2, 2011, Page A1, available at http://www.nytimes.com/2011/10/03/us/new-state-laws-are-limiting-access-for-voters.html?sq=hans%20von%20spakovsky&st=cse&scp=2&pagewanted=all.

[55] JUSTIN LEVITT, THE TRUTH ABOUT VOTER FRAUD (2007), *available at* http://www.brennancenter.org/content/resource/truthaboutvoterfraud/.

[56] Officials in the state's motor vehicle department had claimed that 950 dead people allegedly voted in recent elections. The state's Election Commission examined 207 of those alleged instances and found no evidence of poteutial fraud in 197, and insufficient evidence to make a determination in the remaining 10. *See* Pam Fessler, *In South Carolina, New Report Finds No Evidence of 'Dead' Voters*, NPR, Feb. 23, 2012, at http://www.npr.org/blogs/itsallpolitics/2012/02/23/147295537/in-south-carolina-new-report-finds-no-evidence-of-dead-voters; *see also* Justin Levitt, *New report of potential "dead voters" in South Carolina … and it's not even Halloween*, ELECTION LAW BLOG, Jan. 12, 2012, at http://electionlawblog.org/?p=27864.

[57] U.S. Department of Justice, Criminal Division, Public Integrity Section, "Election Fraud Prosecutions and Convictions; Ballot Access and Voting Integrity Initiative, October 2002 – September 2005," *available at* http://cha.house.gov/media/pdfs/DOJdoc.pdf.

comprehensive examination of the 9,078,728 votes cast in Ohio's 2002 and 2004 general elections, a total of four were found to be fraudulent meriting legal action by the Board of Elections and County Prosecutors; there is no evidence that any of the four convictions could have been prevented by a photo ID law.[58] A comprehensive analysis of the 2004 Washington gubernatorial election revealed 6 cases of possible double voting and 19 cases of alleged voting in the name of deceased individuals out of a total 2,812,675 ballots cast; the rate of ineligible voting that thus might have been remedied by ID requirements was 0.0009%.[59] In an extensive study searching for voter fraud in all 50 states, Barnard political scientist Lorraine Minnite concluded that deliberate instances of voter fraud are extremely rare.[60]

Efforts to document the existence of impersonation voter fraud typically come up empty. After reviewing reams of papers filed by supporters of Indiana's voter ID law in 2007, the U.S. Supreme Court identified only one proven case of impersonation fraud in recent decades, and one infamous historic example from 1868.[61] The Brennan Center's comprehensive review of all alleged voter fraud incidents submitted to the Court in that case showed that only a handful of allegations that could possibly have involved impersonation fraud and only one proven case that could possibly have been prevented by an ID requirement.[62] Similarly, a website recently put up by the Republican National Lawyers Association attempts to gather information about voter fraud prosecutions and convictions in all fifty states over the past decade.[63] The information collected on that website, however, shows only *two potential* cases of impersonation voter fraud, one by mail and one whose facts could not be determined. Instead, the site lists cases of potential double voting, potential non-citizen voter registration or voting; potential voter registration fraud; potential absentee ballot fraud; potential vote buying; and potential voting from the wrong residence.[64] None of these forms of fraud would be addressed by a photo ID requirement at the polls.

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[58] COHHIO and League of Women Voters Ohio, *Let the People Vote: A Joint Report on Election Reform Activities in Ohio* (June 14, 2005), *available at* http://moritzlaw.osu.edu/electionlaw/litigation/documents/NEOCH-MotionforPI-10-14-08-ExE.pdf.

[59] *Borders v. King County*, No. 05-2-00027-3 (Wash. Super. Ct. Chelan County June 24, 2005).

[60] LORRAINE MINNITE, THE MYTH OF VOTER FRAUD (2010)

[61] *Crawford v. Marion County Election Board*, 533 U.S. 181, 195 nn. 11, 12 (2007).

[62] JUSTIN LEVITT, ANALYSIS OF ALLEGED FRAUD IN BRIEFS SUPPORTING CRAWFORD RESPONDENTS (Dec. 2007), at http://brennan.3cdn.net/45b89e6d14859b0f8e_i2m6bhcv9.pdf.

[63] *See* Republican National Lawyers Association, Voter Fraud: The Evidence, at http://www.rnla.org/votefraud.asp,

[64] Specifically, the site lists 25 cases of potential double voting, 25 cases of potential non-citizen voter registration or voting; 47 cases of potential voter registration fraud; 32 cases of potential absentee ballot fraud; 72 cases of potential vote buying; 57 cases of voting from the wrong residence; 28 cases of potential voting by unqualified voters; 13 other cases of specific but non-ID related fraud; and 2 cases of unspecified fraud. *Id.*

Some claim the low incidence of evidence of voter impersonation fraud is because it is so difficult to detect.[65] In truth, there are multiple means to discover in-person impersonation fraud, all of which might be expected to yield more reports of such fraud, if it actually occurred with any frequency. An individual seeking to commit impersonation fraud must, at a minimum, present himself at a polling place, sign a pollbook, and swear to his identity and eligibility. There will be eyewitnesses: pollworkers and members of the community, any one of whom may personally know the individual impersonated, and recognize that the would-be voter is someone else. There will be documentary evidence: the pollbook signature can be compared, either at the time of an election or after an election, to the signature of the real voter on a registration form, and the real voter can be contacted to confirm or disavow a signature in the event of a question.[66] There may be a victim: if the voter impersonated is alive but later arrives to vote, the impersonator's attempt will be discovered by the voter. (If the voter impersonated is alive and has already voted, the impersonator's attempt will likely be discovered by the pollworker; if the voter impersonated is deceased, it will be possible to cross-reference death records with voting records, as described above, and review the actual pollbooks to distinguish error from foul play.) If the impersonation is conducted in an attempt to influence the results of an election, it will have to be orchestrated many times over, increasing the likelihood of detection.

It is telling that there have been only a handful of potential instances of impersonation fraud among the hundreds of millions of ballots cast during a period when investigating voter fraud was expressly deemed a federal law enforcement priority,[67] and when private entities were equipped and highly motivated to seek, collect, and disseminate such reports. Every year, there are far more reports of UFO sightings.[68] The scarcity of reports of in-person impersonation fraud, in this context, is itself meaningful.

c. The Impact of Proof of Citizenship Laws

Nationwide, at least 7% of voting-age Americans do not have ready access to proof of citizenship documentation, according to our 2006 study.[69] Based on this, the Brennan Center estimates that well over half a million citizens may not have the necessary proof of citizenship documentation now required in Kansas and (in some cases) Tennessee, and that will be required

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[65] *See, e.g.*, *Crawford v. Marion County Election Board*, 472 F.3d 949, 953 (7th Cir. 2007).

[66] It is no answer that the individual may have submitted a fraudulent registration form in a fictitious name, presumably outside of the presence of an election official, before arriving in person to vote in that fictitious name. Federal law already contemplates this hypothetical and unlikely possibility, by providing that any registrant new to the jurisdiction who submits a registration form by mail must at some point, and through a broad range of means, offer reliable proof of his identity before voting. 42 U.S.C. § 15483(b).

[67] *See* Dep't of Justice, Fact Sheet: Department of Justice Ballot Access and Voting Integrity Initiative, July 26, 2006, http://www.usdoj.gov/opa/pr/2006/July/06_crt_468.html; Eric Lipton & Ian Urbina, *In 5-Year Effort, Scant Evidence of Voter Fraud*, N.Y. TIMES, Apr. 12, 2007.

[68] *See, e.g.*, UFO Casebook, Breaking UFO News Reports, http://www.ufocasebook.com/.

[69] CITIZENS WITHOUT PROOF, *supra* note 28.

in Alabama, to register to vote.[70] New proof of citizenship requirements may especially harm women, who are much less likely to have updated proof of citizenship documents that reflect their current legal name. According to our 2006 study, one third of voting-age women do not have access to proof of citizenship with their current legal name.[71]

Citizens with low income may also have difficulty complying with proof of citizenship requirements. At least 12% of citizens earning less than $25,000 lack ready access to proof of citizenship documentation.[72] Moreover, such documentation can be prohibitively expensive for the poorest citizens; for example, birth certificates cost between $15 and $25.[73] Other documents, such as certificates of naturalization, can cost hundreds of dollars.[74] Although Alabama and Kansas provide for free birth certificates if needed in order to register, Tennessee does not. Moreover, Alabama and Kansas' free birth certificates will not help those born out of state.

d. The Impact of New Voter Registration Restrictions

New laws restricting voter registration drives will result in far less community-based voter registration activity, which will have disparate impacts on minority voters.

Florida's former Republican Governor Charlie Crist has called the new law in Florida "a step backward," explaining that "creating barriers to voter registration or access to the polls is contrary to our democratic ideals."[75] Though it has been in effect for only a short time, the impacts of the new Florida law's onerous burdens are already clear. Multiple groups, whose charitable missions revolve around protecting and expanding the franchise, have ceased or significantly curtailed voter registration activities throughout the state out of fear that they will be unable to comply with the law's requirements and thus be subject to fines, crippling civil and criminal penalties, and devastating reputational harm. Community registration groups who have in the past brought thousands of new voters onto Florida's rolls have explained the law's impacts to their work:

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[70] The citizen voting age population of the states is around 9 million, and approximately 7% of citizens do not have proof of citizenship documentation. CITIZENS WITHOUT PROOF, *supra* note 28.

[71] *Id.*

[72] *Id.*

[73] *Texas Vital Statistics – Birth Certificates,* TX. DEP'T OF STATE HEALTH SERVS., http://www.dshs.state.tx.us/vs/reqproc/certified_copy.shtm ($22); *Ordering Birth Certificates*, KAS. DEP'T OF HEALTH AND ENV'T, http://www.kdheks.gov/vital/birth_howto.html ($15); *Vital Records*, GA. DEP'T OF PUB. HEALTH, http://health.state.ga.us/programs/vitalrecords/birth.asp ($25).

[74] U.S. CITIZENSHIP AND IMMIGRATION SERVICES, N-600, APPLICATION FOR CERTIFICATE OF CITIZENSHIP, *available at* http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=a936cac09aa5d010VgnVCM10000048f3d6a1RCRD.

[75] Charlie Crist, *Florida Laws Erect Barriers to Voter Participation*, TAMPA BAY TIMES, April 10, 2012, *available at* http://www.tampabay.com/opinion/columns/article1224203.ece.

- Deirdre Macnab, President of the League of Women Voters of Florida [LWVF], explained: "As a result of the new Law, LWVF has ordered a statewide cessation of voter registration until the Law is enjoined or limited in such a way as to substantially reduce the organizational and financial risk to the League, its members, and volunteers… The local Leagues operate on a decentralized model with an all-volunteer force, which has successfully registered tens of thousands of Floridians to vote over the last 72 years without incident. The 48-hour requirement would require LWVF and its local Leagues to dramatically revise their procedures in a manner that would require volunteers to become detailed timekeepers and create strict schedules to ensure that forms were handed in before the clock strikes 48 hours—and do all this under the ticking time bomb of civil penalties and fines." Moreover, "[m]any LWVF volunteers are elderly and depend on others for transport. They may have a particularly hard time meeting the 48-hour deadline."[76]

- Rock the Vote's [RTV] President Heather Smith stated, "RTV is extremely concerned that the Law will make it exceedingly difficult to encourage student volunteerism with us. The Law now requires each 'registration agent' to sign a sworn form detailing severe felony penalties that result from false registration. While we train our volunteers to ensure no one falls afoul of these laws, introducing a student to civic participation and volunteerism via a list of felony penalties, in turn signed under felony penalty of perjury, is intimidating and scary for many students. The nature of the required form will lead to fewer students who are willing to participate in and volunteer in RTV's voter registration activity, particularly on a spontaneous basis." Likewise, Ms. Smith affirms that "[T]here is no question that we will have to drastically cut back, or perhaps discontinue, our registration efforts in Florida. We have already suspended our Democracy Class program [a voter registration training module for high school teachers] and our in-person voter registration work in the state of Florida since the Law's passage." The cessation of RTV's Democracy Class in Florida is particularly significant because RTV has "had to turn down requests from individuals and teachers in Florida to collaborate on voter registration activity due to the Law's burdensome new requirements."

The new restrictions on voter registration drives will disproportionately harm minority and young voters. In Florida, for example, African Americans and Latinos registered to vote through voter registration drives at twice the rate as white voters in 2004 and 2008.[77] Community-based voter registration drives typically register significant numbers of citizens to

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[76] Brennan Center for Justice, Testimony before Congressional Field Hearing, New State Voting Laws II: Protecting the Right to Vote in the Sunshine State, January 27, 2012, *available at* http://www.brennancenter.org/content/resource/new_state_voting_laws_ii_protecting_the_right_to_vote_in_the_sunshine_state/.

[77] Letter from Lee Rowland, Democracy Counsel, Brennan Center for Justice & Mark A. Posner, Senior Counsel, Lawyers' Comm. for Civil Rights Under the Law, to Chris Herren, Chief, Voting Section, U.S. Dep't. of Justice 12 (July 15, 2011), *available at* http://brennan.3cdn.net/4713a8395c96f48085_p7m6iv6sh.pdf.

vote in Florida and elsewhere. According to the U.S. Census Bureau's Current Population Survey, as of the November 2010 election, 7.3% of all registered voters, which would translate to 585,004 Florida citizens, had been registered to vote through such third-party drives in Florida. Those numbers are significantly higher for communities of color. As of 2010 in Florida, 16.2% of African-American registered voters and 15.5% of Hispanic registered voters in Florida were registered through drives, compared to only 8.6% of non-Hispanic white registered voters.[78] Similarly, African Americans and Latinos registered to vote through voter registration drives at approximately twice the rate of white voters in 2004 and 2008.

Unsurprisingly, during its consideration by the legislature, the law was strongly opposed by minority leaders in Florida. And, because of its disparate impact, numerous civil rights organizations and individuals (including several represented by the Brennan Center) have intervened in *Florida v. United States* to illustrate how the law harms minority voters.[79]

e. The Impact of Early Voting Changes

Minority voters will also bear the brunt of new laws restricting early voting. In 2008, a large number of American-American churches in Florida and Ohio organized successful "souls to the polls" drives, whereby churchgoers were provided free rides to the polls for early voting on Sunday. In Florida, 33% of citizens who voted early on the Sunday before Election Day were African American, even though African Americans make up only 13% of the citizen voting age population.[80] Additionally, 24% were Latino, even though Latinos make up only 16% of the citizen voting age population.[81] Now, Florida has eliminated voting on the Sunday before the election, and Ohio has passed a law eliminating Sunday voting entirely.

f. The Impact of Laws Making It Harder to Restore Voting Rights

Actions to prevent the restoration of voting rights to previously incarcerated citizens will prevent tens and possibly hundreds of thousands from being able to vote and disproportionately hit minorities the hardest. A total of 5.3 million American citizens are not allowed to vote because of a criminal conviction, even though 4 million of those have completed their sentences.[82] A disproportionately high number of these citizens are African American and Latino. Nationwide, 13% of African-American men have lost the right to vote, a rate that is

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[78] U.S. Census Bureau, Current Population Survey (Nov. 2010).

[79] A letter by the Brennan Center and the Lawyers' Committee for Civil Rights Under Law further detailing these racial impacts, which was submitted to the Justice Department in opposition to the preclearance of the Law on behalf of the National Council of La Raza and the League of Women Voters of Florida, is available at http://brennan.3cdn.net/3463b136d6b952b158_6nm6ii1sn.pdf.

[80] Rowland & Posner, *supra* note 77.

[81] *Id.*

[82] JEFF MANZA & CHRISTOPHER UGGEN, LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY 76 (2006).

seven times the national average.[83] Latinos are also incarcerated at higher rates than Whites; Latinos represent 21% of the prison population despite representing only 16.3% of the total U.S. population.[84] The new South Dakota law expanding disenfranchisement to voters on probation is likely to have a disproportionate impact on the state's Native American voters, who make up 8.8% of the state's population and 26.8 % of the state prison population.[85]
By reversing the policy of restoring voting rights to previously incarcerated individuals, states exacerbate existing disparities in the criminal justice system by keeping a population with a disproportionately high number of minority voters off the voter rolls.

III. The Role of the Department of Justice in Enforcing Federal Protections of the Right to Vote

The Department of Justice, through its Voting Rights Section, plays a critical role in the monitoring and enforcement of laws protecting the right to vote, including the seminal Voting Rights Act of 1965, the National Voter Registration Act of 1993 (NVRA or "Motor Voter" Law), the Help America Vote Act of 2002 (HAVA), and the Uniformed and Overseas Citizens Absentee Voting Act of 1986 (UOCAVA), as amended by the 2010 Military and Overseas Voter Empowerment Act (MOVE Act).

The significant bulk of the Department's recent voting rights enforcement actions have been taken under UOCAVA and the MOVE Act to enforce the rights of military and overseas voters. According to the Department's website, it has filed 8 cases and reached 10 settlements since 2009 to enforce UOCAVA and the MOVE Act.[86] In contrast, the Department brought only two enforcement actions to enforce the states' obligations to offer voter registration services at public service and disability agencies under the NVRA's Section 7, and only one more over the past decade.[87] The Department's other enforcement actions since 2009 include 6 cases and 2 settlements under the language minority provisions of the Voting Rights Act, one case under Section 2 of the Voting Rights Act, which protects against the illegal dilution of minority votes, and one under the Voting Rights Act's rules against voter intimidation.[88] In addition, the

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[83] SENTENCING PROJECT, FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES 1 (Mar. 2011), *available at* http://www.sentencingproject.org/detail/publication.cfm?publication_id=15.

[84] BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2009 (2010) 27, *available at* http://felonvoting.procon.org/sourcefiles/usdojbsj_prisoners_2009.pdf; Karen R. Humes, Nicholas A. Jones, and Roberto R. Ramirez, OVERVIEW OF RACE AND HISPANIC ORIGIN: 2010 3, *available at* www.census.gov/prod/cen2010/briefs/c2010br-02.pdf.

[85] ACLU VOTING RIGHTS PROJECT, VOTING RIGHTS IN INDIAN COUNTRY 45 (Sept. 2009), *available at* https://www.aclu.org/files/pdfs/votingrights/indiancountryreport.pdf.

[86] U.S. Department of Justice, *Cases Raising Claims Under the Uniformed and Overseas Citizens Absentee Voting Act*, *available at* http://www.justice.gov/crt/about/vot/litigation/recent_uocava.php#wi_uocava12.

[87] U.S. Department of Justice, *Cases Raising Claims Under the National Voter Registration Act, available at* http://www.justice.gov/crt/about/vot/litigation/recent_nvra.php#louisiana.

[88] U.S. Department of Justice, *Cases Raising Claims Under Section 2 of the Voting Rights Act, available at* http://www.justice.gov/crt/about/vot/litigation/caselist.php.

Department has considered thousands of voting changes submitted for preclearance by states and localities covered under Section 5 of the Voting Rights Act,[89] and it has raised objections to a handful of those voting changes (17 listed on the Department's website).[90]

a. Enforcement of Section 5 of the Voting Rights Act

The Voting Rights Act of 1965 is widely regarded as the most effective federal civil rights statute of the 20th Century, and was reauthorized by Congress in 2006 with overwhelming support. Under Section 5 of the Act, certain jurisdictions with a history of discriminatory voting practices must demonstrate—either to a three-judge federal court or the Department of Justice—that changes to their voting laws do not have a retrogressive impact on minority voters, a process known as preclearance. Under Section 5, these states bear the burden of demonstrating that their voting laws have neither the purpose nor effect of harming the state's minority voters. When jurisdictions submit voting changes to the Department of Justice for preclearance, the Department is obligated to assess the evidence submitted by those jurisdictions and to determine whether they have met their burden of showing that those changes have no discriminatory purpose and no discriminating effect. When jurisdictions file preclearance actions in federal court, the Department is the defendant in those actions.

Although the Department has considered thousands of requests for preclearance of voting changes over the past three and a half years, it has only considered three so far relating to the new laws restricting voting:

- In June of 2011, South Carolina sought preclearance from the Justice Department for its new voter ID law requiring voters to produce government-issued photo ID at the polls. The Department rejected the state's request, in part because the state's own data demonstrated that "minority registered voters were nearly 20% more likely to lack DMV-issued ID than white registered voters, and thus to be effectively disenfranchised by [the] new requirements."[91]

- Similarly, the state of Texas submitted its new photo ID law to the Department of Justice in July 2011, seeking preclearance for the State's photo ID law. The Department objected to preclearance, among other reasons, because the state's own data showed that

[89] U.S. Department of Justice, *Notices of Section 5 Activity Under the Voting Rights Act of 1965, as Amended, available at* http://www.justice.gov/crt/about/vot/notices/noticepg.php (listing all Section submissions and actions by date).

[90] U.S. Department of Justice, *Section 5 Objection Determinations, available at* http://www.justice.gov/crt/about/vot/sec_5/obj_activ.phpv.

[91] Letter from Thomas E. Perez, Assistant Attorney General, U.S. Dep't. of Justice, to C. Havird Jones, South Carolina Assistant Deputy Attorney General, Dec. 23, 2011, *available at* http://brennan.3cdn.net/594b9cf4396be7ebc8_0pm6i2fx6.pdf.

a Hispanic voter is between 46.5 and 120 percent more likely than a non-Hispanic voter to lack the main state-issued photo IDs.[92]

- The state of Florida withdrew an administrative preclearance request from the Department of Justice, and filed a federal lawsuit in the District of Columbia in 2011 before the Department had issued an opinion on provisions of the state's new law that restricts early voting and voter registration. After reviewing all evidence provided by the state, the Department has taken the position in court papers that Florida has not met its burden of showing that recent restrictions on voting and voter registration were passed with neither the intent nor the effect of harming minority voters.[93]

In each of these cases, which are now being considered by three-judge panels of the District of Columbia,[94] the Department properly found that states have failed to meet their burden under the Voting Rights Act that the laws at issue do not harm minority voters. What is more, in none of these cases have the states at issue offered evidence of the existence of an actual problem these new legal restrictions were supposedly designed to address. South Carolina, for instance, did not submit "any evidence or instance of either in-person voter impersonation or any other type of fraud that is not already addressed by the state's existing voter identification requirement and that arguably could be deterred by requiring voters to present only photo identification at the polls."[95]

These findings reflect not the Department's opinions or views of the underlying policies, but rather the Department's analysis of whether the states have made the required showing under federal law. It bears noting that the Department of Justice under the last Administration, although it controversially precleared Georgia's photo ID law over the recommendations of staff analysts, raised an objection to Michigan's closure of a DMV branch office in part because that would make it more difficult for minority citizens served by that office to obtain the photo IDs required by the state's voting laws.[96] As the Department noted in its recent letter to Texas, minorities in Texas similarly have less access to ID-issuing offices.[97]

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[92] Letter from Thomas E. Perez, Assistant Attorney General, U.S. Dep't. of Justice, to Keith Ingram, Director of Elections, Office of the Texas Secretary of State, Mar. 12, 2012, *available at* http://brennan.3cdn.net/fc6a21493d7cc1aafc_vym6b91dt.pdf.

[93] *Florida v. United States*, Case No. 1:11-cv-01428 (D.D.C. Mar. 2, 2012) at Dkt. 83 (joint status report filed by Department of Justice and Defendant-Intervenors, noting that the United States' position is that the State has not met its burden, to demonstrate that the law's provisions are entitled to preclearance under Section 5 of the Voting Rights Act).

[94] The Brennan Center is counsel to intervening defendants in each of those cases.

[95] Letter from Thomas E. Perez to C. Havird Jones, *supra* note 91.

[96] Letter from Grace Chung Becker, Acting Assistant Attorney General, U.S. Dep't of Justice, to Brian DeBano and Christopher Thomas, Dec. 26, 2007, available at http://www.justice.gov/crt/about/vot/sec_5/ltr/l_122607.php.

[97] *See* Letter from Thomas E. Perez to Keith Ingram, *supra*, note 92.

In addition to enforcing Section 5, the Department has been forced to defend its constitutionality in a number of lawsuits. Six states and local jurisdictions launched a facial attack on the Voting Rights Act, arguably the most successful piece of civil rights legislation in our nation's history. Shelby County, Alabama; Kinston, North Carolina; and the states of Arizona, Florida, Georgia, and Texas have all recently engaged in litigation asking that a key provision of the Voting Rights Act be found unconstitutional. The Brennan Center, along with other groups, has intervened in these cases, and argues, among other things, that Section 5 continues to serve a compelling and critical need in today's America. Indeed, the impact of the recent voting laws on minority voters detailed above demonstrates that Section 5 continues to play a vital role in safeguarding voting rights.

b. Enforcement of the NVRA

While the Department of Justice has been actively enforcing several federal voting laws, there have been few actions to enforce the National Voter Registration Act—and Section 7 of the NVRA in particular. Section 7 is designed to increase the number of registered voters on the rolls by providing voter registration opportunities for individuals who access services at public assistance agencies. This law is a critical protection to ensure that millions of low-income citizens have opportunities to register to vote. Enforcement of Section 7 has been far too rare, especially considering the hugely successful outcomes of such enforcement.

According to a report from Dēmos and Project Vote, despite overwhelming evidence of state noncompliance with the NVRA and repeated urging from civil rights groups and members of Congress, the Department of Justice has made little public effort to enforce the statute.[98] Yet when Section 7 is enforced, via privately-filed lawsuits or administrative action by the Department of Justice, the results are stunning, and voter registration rates at targeted agencies increase dramatically. For example, as the Dēmos and Project Vote report details, "[a]fter adopting plans in 2004 to improve agency-based registration, Iowa experienced an increase in the number of voter registrations by 700 percent over the previous presidential election cycle and an astounding 3,000 percent over the previous year."[99] Similar results were seen in Maryland, North Carolina, and Tennessee after those states were targeted for enforcement advocacy by civil rights groups.[100]

The positive results of NVRA Section 7 compliance demonstrate that enforcement of this statute could produce extremely positive results for voters, particularly low-income voters served by that section. Similar benefits could be achieved by ensuring full compliance with Section 5 of the statute, which requires states to provide voter registration opportunities and to update voter

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[98] DOUGLAS R. HESS AND SCOTT NOVAKOWSKI, UNEQUAL ACCESS: NEGLECTING THE NATIONAL VOTER REGISTRATION ACT, 1995-2007 13 (2008), *available at* http://projectvote.org/images/publications/NVRA/Unequal_Access_Final.pdf.

[99] *Id.* at 8.

[100] *Id.* at 8-9.

registration records at motor vehicle offices. We recommend that the Department put a renewed emphasis on ensuring the states' compliance with the NVRA.

IV. Improving the Voter Registration System

Rather than simply rely on the Department of Justice's enforcement of the NVRA, Congress should work to pass new legislation to improve our voter registration system to make it more secure and accessible to all eligible voters. Congress has a role to set minimum standards for the states to follow in registering voters for federal elections. Modernizing our voter registration systems will not only make the voter rolls more complete and accurate and save money, it will also further curb the small potential for voter fraud.

Our current voter registration system is outmoded, costly, and rife with error. Despite technological advances, the system still relies largely on handwritten paper forms, and places the onus of registering on the voter rather than state officials. A recent study by the Pew Center on the States found that about 50 million eligible Americans are not captured by the current voter registration system and 1 in 8 voter registration records contains significant inaccuracies.[101]

As the Brennan Center has previously documented, registration-related problems are the biggest obstacle voters face each election season.[102] Our current voter registration system was not designed for a mobile society where one in six Americans moves every year. Of the 57 million citizens who were not registered to vote in 2000, one in three was a former voter who had moved but failed to register. Unsurprisingly, registration problems alone kept up to 3 million eligible Americans from voting in 2008.[103]

There is an emerging bipartisan consensus that we need to modernize our voter registration system. Experts, election officials, and policy-makers have urged a common-sense, cost-efficient way to update our outmoded, voter-initiated, paper-based registration system.[104] The proposed plan would simplify the registration process and bring 50 to 65 million eligible Americans into the electoral process. At the same time, it would ease burdens on election officials and make our voting system less susceptible to fraud and less expensive for taxpayers. Legislation to modernize voter registration would automate the registration process at places like departments of motor vehicles and social service agencies and would ensure that voter records

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[101] PEW CENTER ON THE STATES, INACCURATE, COSTLY, AND INEFFICIENT, Feb. 2012, at http://www.pewcenteronthestates.org/uploadedFiles/Pew_Upgrading_Voter_Registration.pdf.

[102] *See* WENDY WEISER, MICHAEL WALDMAN & RENEE PARADIS, VOTER REGISTRATION MODERNIZATION (2009), at http://www.brennancenter.org/content/resource/voter_registration_modernization/.

[103] R. MICHAEL ALVAREZ ET AL., 2008 SURVEY OF THE PERFORMANCE OF AMERICAN ELECTIONS – FINAL REPORT: EXECUTIVE SUMMARY 5 (2009), *available at* http://www.vote.caltech.edu/drupal/files/report/2008%20Survey%20of%20the%20Performance%20of%20American%20Elections%20Executive%20Summary.pdf.

[104] *See generally* WEISER ET AL., *supra* note 102.

are accurate and up to date. This type of reform would both improve the system and obviate concerns about under-enforcement of the voting laws.

Four key components are necessary to modernize our voter registration system:

- *Automated Registration*: States should automatically register consenting eligible citizens to vote when they interact with other state agencies, using existing databases and without relying on paper forms. The states' experience with automated registration to date make clear that this reform dramatically improves the voter registration system, increasing voter registration rates, reducing error, and reducing costs.[105] States have typically recouped the costs of this upgrade within a year or so, and have reaped ongoing savings.[106]

- *Portable Registration:* Once an eligible citizen is on a state's voter rolls, she should remain registered and her records move with her so long as she continues to reside in that state. Voters should remain permanently registered unless they move between states.

- *Online Registration*: Studies show that online registration is more secure and cost-effective than paper. The federal government can encourage the development of a system that permits voters to submit and update their voter registration online.

- *Safety Net*: To ensure accurate rolls and that voters are not disenfranchised by registration errors, states should allow eligible citizens to register or correct their registrations up to and on Election Day.

A modernized voter registration system benefits voters, election officials, and the integrity of our voting systems. Our current registration system demands an enormous amount of time, money, and effort from local officials. Excessive clerical work also distracts from the planning and supervision necessary to ensure a sound Election Day. This overburdened registration process exacerbates other problems on Election Day, leading to long lines, chaotic polling locations, and overwhelmed volunteers. Voter registration modernization will free up resources and allow election officials to concentrate on important pre-election preparations to ensure elections run smoothly, rather than processing a surge of registration forms typically received a week or two before Election Day. Key reforms can make the system work better for election administrators and the voters they serve.

In addition, the current patchwork of voter registration laws and procedures leaves the system vulnerable to fraud and tampering. Voter registration modernization leverages existing

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[105] The benefits states have achieved by automating the voter registration process at motor vehicle offices are documented at length in CHRISTOPHER PONOROFF, VOTER REGISTRATION IN A DIGITAL AGE (Wendy Weiser, ed. 2010), *available at* http://www.brennancenter.org/content/resource/voter_registration_in_a_digital_age/, and BRENNAN CENTER FOR JUSTICE, VOTER REGISTRATION FOR THE 21ST CENTURY (2010), at http://www.brennancenter.org/content/resource/voter_registration_for_the_21st_century/.

[106] *Id.*

and reliable government information to update the voter rolls, increasing their accuracy and reliability. These are common-sense reforms that meaningfully achieve the goal of increasing election security while also expanding the franchise.

States that have implemented key modernization reforms have enjoyed increased registration rates, cost savings, and fewer registration errors.[107] Many states have successfully implemented components of a modernized voter registration system, with support from a broad and bipartisan array of elected officials and election administrators:

- *Automated registration*: 17 states and the District of Columbia have partially or fully automated the voter registration process at motor vehicle offices (Arizona, Arkansas, California, Delaware, Washington D.C., Florida, Georgia, Kansas, Kentucky, Michigan, New Jersey, North Carolina, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, and Washington). Of those, 11 and the District of Columbia are fully paperless.

- *Portable registration*: 16 states and the District of Columbia have portable or permanent voter registration: Colorado, Delaware, Washington D.C., Idaho, Iowa, Maine, Maryland, Minnesota, Montana, New Hampshire, North Carolina, Ohio, Oregon, South Dakota, Washington, Wisconsin, and Wyoming. That number includes the 8 states that accomplish portable registration using Election Day or same-day registration.

- *Online registration*: 10 states have implemented online registration (Arizona, Colorado, Delaware, Indiana, Kansas, Louisiana, Nevada, Oregon, Utah, and Washington). That number includes one state (Nevada) that has online registration only in its largest county, which covers more than 70% of the state population. That number does not include California, which passed a law requiring online registration but has not yet put it in place, and other states that are in the process of developing online systems.

These measures have been adopted and supported by a broad bi-partisan group of state officials.[108] They both increase voter registration rates and decrease the potential for fraud—while significantly cutting costs. They are worthy of serious consideration by Congress and could go a long way to creating more secure and accessible elections for all Americans.

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[107] *See id.*

[108] See WENDY WEISER, CHRISTOPHER PONOROFF & NHU-Y NGO, MODERNIZING VOTER REGISTRATION: MOMENTUM IN THE STATES (Mar. 2009), at http://www.brennancenter.org/content/resource/vrm_state_momentum/.

Mr. FRANKS. Thank you, Professor Weiser.
Mr. Adams, you are recognized for 5 minutes, sir.

TESTIMONY OF J. CHRISTIAN ADAMS, ATTORNEY, ELECTION LAW CENTER, PLLC

Mr. ADAMS. Thank you.

Chairman Franks, Ranking Member Nadler, and Members of the Committee, thank you for this opportunity to testify.

Free and fair elections are the cornerstones of our constitutional Republic. The Department of Justice has a long and admirable role in securing the right to vote free from racial discrimination. Ahead of the November, 2012, election, I can report on some encouraging developments regarding the Justice Department's enforcement of voting laws as well as several discouraging ones.

An area where the Justice Department deserves some praise is in the relatively smooth redistricting process after the 2010 census. Some of this is attributable, of course, to States going to court for approval instead of only to the Voting Section. This was a calculated strategy by the States. Because in the 1990 redistricting cycle, for example, the Justice Department was forced to pay out nearly $2 million in court-imposed sanctions for lawyer misconduct during the redistricting process. Some of the lawyers and staff who worked on those cases which were the subject of sanctions are still at the Justice Department, and States have understandably sought to bypass the administrative process and go straight to Federal court.

Unfortunately, there is some troubling behavior from the Justice Department. First, let me note that it is a false perception that the Obama administration has more vigorously protected minority voting rights than the Bush administration. The numbers prove otherwise. The current Justice Department is woefully lacking in enforcing Section 2 of the Voting Rights Act. Section 2 of the Act is the broad prohibition on racial discrimination in elections.

While the Bush administration vigorously enforced Section 2, enforcement under the Obama administration has flatlined. In fact, the current Administration has failed to initiate a single Section 2 investigation which resulted in an enforcement action since taking office.

Loud critics of the Bush administration claim that enforcement of Section 2 during that time was lacking, when in truth it was vigorous. The Bush administration filed multiple Section 2 cases to protect national racial minorities. In fact, if you include all Section 2 cases to protect national racial minorities, the Bush administration filed 14 cases. Again, the Obama administration has filed exactly one, and that is a case against Lake Park, Florida, a matter which I brought which was launched during the Bush administration and filed in March of 2009.

In response to criticism for failing to enforce Section 2, this Justice Department has recently adopted a curious new public policy position saying that they have initiated a record number of Section 2 investigations. This is in fact a public relations sham, and I describe how in my written testimony.

These investigations do not even reach the preliminary point of whether it is possible to draw a minority-majority district in most cases. Numbers can't lie. Not a single case has been filed by the Obama administration since the Lake Park case in March of 2009, a case which I brought and the Bush administration started.

A couple of other points are important about voter ID to understand. The Department's use of Section 5 to block election integrity measures has now taken place in numerous examples. The first example was in 2009 when a Section 5 objection was entered to stop Georgia's law that required that only citizens be registering to vote. The most recent example, of course, is in South Carolina and Texas with voter ID.

Under the interpretation by this Justice Department, unless the States can prove an absolute absence of the slightest trace of disparate statistical impact, then the DOJ will object to voter IDs in covered States. Mississippi and Virginia should take careful note. For example, in the South Carolina voter ID law, 90 percent of African Americans were shown to have photo ID and 91.6 percent of Whites.

Justice refused to consider as determinative the practical safe harbors contained in the voter ID statutes. In South Carolina, for example, the State would provide free rides to State offices to obtain free voter ID. Voters would even be allowed to cast a ballot on Election Day if they didn't have ID if they filled out an affidavit saying they had a reasonable impediment to obtaining voter ID and swearing to their identity. The burden was on the State to prove the affidavit was false.

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

Thank you very much.

[The prepared statement of Mr. Adams follows:]

Testimony of

J. Christian Adams

House Judiciary Committee
Subcommittee on the Constitution

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

April 18, 2012

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

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

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

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

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

Redistricting

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

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

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

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

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

Voting Rights Act Section 2

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

National Voting Registration Act Section 8

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

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

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

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

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

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

Election Integrity Laws and Section 5 of the Voting Rights Act

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

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

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

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

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

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

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

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

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

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

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Mr. FRANKS. Thank you, Mr. Adams.

I want to thank all of you for your testimony, and I will now begin the questioning by recognizing myself for 5 minutes.

Mr. Eversole, there are approximately 2 million military voters; and hundreds of thousands of those, of course, have been deployed throughout combat zones across the world. And as they risk spilling their blood to defend their country, it is clear to me that their

Justice Department is failing to ensure that they can exercise their right to vote.

In 2010, only 4.6 percent of military voters were able to cast an absentee ballot that counted, and only 5.5 percent could do so in 2006. The total military voter turnout for 2010 was just 11.6 percent. By contrast, the national voter participation rate in 2010 was 41.6 percent.

So, Mr. Eversole, how is the Department of Justice failing to ensure the deployed members of the military can cast their legal vote for their commander in chief?

Mr. EVERSOLE. Thank you, Mr. Chairman.

At the very beginning, they have to make sure to conduct timely investigations when those ballots are supposed to go out, 45 days before the election. You can't wait one or 2 weeks after that 45-day deadline to start your investigation and then take two or three more weeks to conduct the investigation and file an action, like they did a couple months ago or a month ago in Alabama 18 days before the election. When you settle cases 18 days before the election, that timeframe provides very, very limited remedies, if any at all, other than adding some days, and it prevents service members, especially those serving on the front lines, the ones who need the most time, an opportunity to get their ballots. So that is where it starts.

Then once you have a case you have to make sure that your remedies actually protect the service members. The New York case was atrocious in 2010 where 30 percent of the service members, notwithstanding a Department settlement agreement, were still disenfranchised under the Department's agreement. Those voters were abandoned, and it has to do better on that end as well.

Mr. FRANKS. Thank you, Mr. Eversole. It does seem to me like one bipartisan conclusion should be that those who are dying to protect this country and this Republic should see their constitutional right to vote protected by this Republic.

Let me, if I could, go to you, Ms. Mitchell. You know, you formulated a pretty compelling argument the DOJ is aggressively trying to block State efforts to protect against election fraud, and it reminds me of DOJ's efforts to block State laws cracking down on illegal immigration, in a sense, because it almost seems that, instead of enforcing the law without fear or favor, the Obama Justice Department is spending a lot of time making sure laws it doesn't like do not get enforced by anyone. And the recent Rasmussen polls show that the overwhelming majority of Americans support voter ID laws as necessary and nondiscriminatory. Why do you think DOJ is insisting on fighting the American people on this issue?

Ms. MITCHELL. Well, Mr. Chairman, that is the $64,000 question. I don't understand how it is possible for anyone to object to the simple practice of showing identification to demonstrate that you are who you say you are when you go vote. That polling place that we saw on that videotape is where I vote. It is across the street from where I live.

I mean, I got from the District of Columbia my new voter registration card. It is on a piece of typing paper. One of our RNLA members lives in the District of Columbia, and she got five of them, five different names sent to her apartment. Now, if she were not

an honest person, she could just walk in and pretend to be each one of those people.

And what mystifies me is why anybody would oppose simple procedures that will protect the integrity of our election. And what is troubling is that the Justice Department, rather than taking steps as a law enforcement entity, an agency, and as our chief law enforcement officer Eric Holder should be out among the public saying we are going to publicize what their election crimes manual says, we are going to prosecute vigorously election crimes, they are not doing any of that.

And it just strikes me that when you have the Pew Charitable Trust report to which Dr. Weiser referred where 24 million—one of every eight—voter registrations is either—it says either no longer valid or significantly inaccurate, where you have 1.8 million deceased individuals listed as voters, you have 2.75 million people who have registered in more than one State, the simple act of producing an ID to say that you are an authentic, eligible voter under the law seems to me completely reasonable, and that is what the law of the land is. The Supreme Court has upheld that; and our Attorney General, our Justice Department should be enforcing that.

Mr. FRANKS. Thank you, Ms. Mitchell.

And I would now recognize the distinguished Ranking Member, Mr. Nadler, for 5 minutes.

Mr. NADLER. Thank you.

First, I never want to impugn the integrity of our witnesses, so I will presume that Mr. Eversole was not aware of what I am about to say. Because he told us that the Justice Department refused to enforce the law for military ballots in New York and let New York get away with 30 days when that wasn't enough time.

The fact is the Justice Department sued the State of New York, resulting in a Federal court decision that ordered the primary in New York moved from September to June in order to enforce the 45-day law. It was the Republican majority in the State Senate that refused to move the State primary because Congress only has jurisdiction over Federal elections.

So that we now have a primary in June for Congress and for U.S. Senate in order to comply with the 45-day law because the Justice Department brought suit, and the State lost in court, in Federal court, but we have a September primary for State elections because the Republican majority in the State, apparently not caring about enforcing the law on 45 days, refused to move the State primary to match the Federal primary. So we are going to waste $50 million.

So don't tell me or this Committee or anybody else that the—at least in New York, that the Federal—the Justice Department hasn't enforced that provision. They brought suit against the State of New York, they won the lawsuit, and the Federal court ordered the primary moved from September to June for that reason. And since I am running in that June primary, I know the facts.

Thank you.

Ms. Weiser—Professor Weiser, I am sorry—no, that wasn't a question. It was a statement of fact. I will give him a question to answer if none of this will count toward the 5 minutes.

Mr. FRANKS. You have got it.

Mr. NADLER. Thank you. Mr. Eversole?

Mr. EVERSOLE. Well, you know, 1,700 ballots were rejected in New York, so they brought an action in 2010. 1,700—more than 1,700, I think it was 1,789 military voters were denied their ballot, notwithstanding the settlement agreement that the Department of Justice brought. Those ballots were thrown in the trash.

Mr. NADLER. In your testimony, you didn't bother mentioning the Justice Department then sued the State of New York.

Mr. EVERSOLE. You are right. They did recently sue the State of New York. That is a factual matter. But, again, they allowed for a remedy here that does not require——

Mr. NADLER. So the remedy—so the truth is, then—so the truth would be, I think you and I would agree, although I don't know the facts about the first step, but assuming what you are saying is true, the facts would be that for the 2010 election they did not act adequately, but they corrected it for the 2012 election, brought suit, did not reach a consent decree, won the lawsuit, and moved—and the court ordered the primary moved. You didn't bother mentioning this to the Committee.

Mr. EVERSOLE. Well, and that is a fair point. But the point I would also make that I think needs to be made very clearly is that they did not protect those military voters in the State race, and there is a 2010 decision in the district of Maryland that says that when you deprive a service member of their State rights, their State right to vote, that that is a constitutional violation.

Mr. NADLER. Well, except that the fact is that they—that the Justice Department, I believe, argued for that in the Federal court, and the Federal court ruled otherwise. The Federal court said that they had no jurisdiction to order the State to move the State primary.

Mr. EVERSOLE. Okay.

Mr. FRANKS. Mr. Nadler, you are back on the clock here.

Mr. NADLER. Thank you.

Ms. Weiser.

Mr. FRANKS. He did mention in his testimony exactly as you have said.

Mr. NADLER. I am sorry?

Mr. FRANKS. It is in his written testimony exactly as you have said.

Mr. NADLER. Okay.

Professor Weiser, Ms. Mitchell said that the Attorney General's cases against voter ID laws lack merit on the law. Is that correct?

Ms. WEISER. Absolutely not.

I should start by noting that the Crawford case that has been mentioned a number of times has no bearing on the Voting Rights Act cases that the Department is currently involved in. That was a constitutional action against Indiana's voter ID law before the law had ever been put in place, and it did not involve allegations of discrimination on the basis of race.

Right now, under the Voting Rights Act, what the Department is required to look at is whether or not the States have met their burden of showing that these laws will not harm minorities. The evidence that the States themselves put forward show that minori-

ties will, in fact, be disproportionately harmed by these laws and that tens and in some cases hundreds of thousands of minority voters who are already registered to vote won't be able to vote under the laws in place.

Mr. NADLER. Now, Ms. Weiser, there is, I believe, in Texas or in some States the voter ID laws prevent use of the State-issued student ID for college that is necessary to get the in-State tuition rate. So, in other words, to protect their own fisc I presume that they are pretty serious about making sure they give a State ID card and a State University ID card only to a State resident.

Ms. WEISER. Uh-huh.

Mr. NADLER. And this is specifically precluded from being used as a voter ID, but gun-carrying registrations are allowed. Is there any justification in terms of accuracy? In other words, is it harder to get a gun card than—do you have to prove your residency more to get a gun registration than you do to get an in-State student voter? Is there any possible justification for this, other than the fact you don't like student voters and you like hunters?

Ms. WEISER. There are certainly different requirements for obtaining student IDs and for obtaining the concealed handgun licenses. Both of them, though, are fairly rigorous, and both of them require—look at a variety of pieces of evidence. So there really is no justification for this kind of cherry-picking.

Most earlier photo ID laws that have been passed in the past recognize all forms of State-issued photo IDs, including student—State-issued student photo IDs, State-issued employment IDs. These kind of IDs are now being excluded by the laws that we are seeing this year and for no good reason.

Mr. NADLER. Has there any reason been stated?

Ms. WEISER. I am not aware of any good reason that has been stated.

Mr. NADLER. Thank you.

Could you finally—before my time runs out, could you elaborate on how voter ID laws disenfranchise certain classes of voters?

Ms. WEISER. Yes. Pardon me?

Mr. NADLER. Could you elaborate on how these voter ID laws disenfranchise certain classes of voters?

Ms. WEISER. Certainly.

The evidence is and all—study after study shows that minorities, young people, low-income people are far less likely to have the kinds of State-issued photo IDs required by these laws. This has been confirmed repeatedly. And even in the few elections where photo ID laws have already been put in place, there have been a number of people who have been denied the right to vote, some even mentioned by Ms. Mitchell today. But there have been thousands of provisional ballots cast across the country by people who did not have a photo ID at the polls and countless more people who didn't show up because they couldn't meet those requirements, and I would be certainly happy to provide more information to the Committee on that.

Mr. NADLER. Thank you.

Mr. FRANKS. I now recognize Mr. King for 5 minutes.

Mr. KING. Thank you, Mr. Chairman.

I apologize, I slipped in here a little bit late after you had opened your opening remarks, and I missed that video, and I would ask if they could run that video again, at least for my benefit.

Mr. FRANKS. Absolutely.

Mr. CONYERS. Mr. Chairman, I will not object.

Mr. FRANKS. The Chairman appreciates that.

It is the gentleman's time, I believe, anyway.

[Played video]

Mr. KING. Thank you, Mr. Chairman. I thank staff for queuing that up for me again.

I am shocked that the Attorney General isn't shocked. I am shocked that the Attorney General hasn't offered a response to this in a meaningful way.

I sit in this Committee, and I have a friendly relationship with the former Chairman of the Judiciary Committee. And I remember and he will remember me presenting an acorn to him about 2007 asking for hearings on ACORN, and we had a good discussion on that. We had private meetings working that to try to get that done.

I remember the gentleman from New York, Mr. Nadler, say before this Committee that he thought it would be a good idea to investigate ACORN and walk that back some subsequent to that time. But it would have been a good time to investigate ACORN.

It took a James O'Keefe to get this ACORN issue brought before America, and I carry this acorn in my pocket every day to remember what happens to the foundation of American liberty when you have corrupt elections, when you have elections and votes that are being disenfranchised by fraudulent votes.

Mr. NADLER. Mr. Chairman, point of personal privilege.

Mr. KING. We can suspend the clock.

Mr. FRANKS. We will suspend. Please, sir.

Mr. NADLER. I don't believe I ever at any time said that I thought it would be a good idea to hold a hearing on ACORN. I did not, and I do not think that. I said at the time, if memory serves, that I would be happy to hold a hearing if credible evidence were developed that would justify that, but I never said it would be a good idea to hold a hearing on ACORN.

Mr. FRANKS. Has the gentleman reconsidered since?

Mr. NADLER. I have not.

Mr. FRANKS. Okay, just wanted to make sure.

Mr. KING. I think I am reclaiming my time that I didn't lose, and I will acknowledge the clarity that is in the memory of Mr. Nadler. However, it gave me a high degree of optimism that we would do the investigation that we needed to do and should have done. And at that point if there had been a follow-through on the part of the then majority we would have had a bipartisan approach to cleaning up corruption in elections.

We did not get that. Instead, we got a waived vote on the floor of the House and the Senate that shut off all funding to ACORN itself, and so that has to be a part of the thought process that we are looking at at corrupt elections. And they admitted to over 400,000 false or fraudulent voter registrations, and there have been multiple prosecutions for fraud, as Ms. Mitchell said. And so I would turn my——

Maybe I do have a couple other narratives quickly. And that is I went to Massachusetts for Scott Brown's election, 3 days, and I went into the voting booth or into the voting area in a Vietnamese region in Boston. And there a fellow came up that did not speak English. They asked him who he was, and they couldn't understand the name that he was giving. They turned the voting rolls around and said, which one are you? He picked one and went in and voted. That is just a snapshot of what goes on in the polls in America.

We have had the witness or the Secretary of State of New Mexico before this Committee, and when I asked her—this is several years ago—when I asked her, if I am working the voting area in New Mexico and I am a registered voter and I decide I am going to vote when I leave my shift and someone walks in and says they are Steve King, can I stop them? Can I challenge them? Answer, no.

So on down to Venezuela, if you want to go vote for Hugo Chavez, you have to show a picture ID.

In my short time that I have remaining, I would like to direct my question to Ms. Mitchell. In the States you have listed in your testimony, the 10 States—it starts with Iowa and it ends with Florida—can you tell me whether it is the Attorney General or the Secretary of State that is moving these actions for voter fraud and what the political affiliation would be of those who are advocating cleaning up the voter fraud that is taking place in America?

Ms. MITCHELL. No, Mr. King, I don't know the partisan affiliation. But what I can tell you is that they are State and local authorities, both election officials and local law enforcement or district attorney. There is not a single instance where the Department of Justice is assisting in the prosecution. And that is one of the things that is disturbing to me, is that it is convenient, isn't it, to announce that—to not prosecute these cases of voter fraud or election crimes and then to announce there are none. That to me is quite convenient, and I think that is what this Committee needs to ensure does not continue to happen.

Mr. KING. I thank the witnesses, and I yield back the balance of my time.

Mr. FRANKS. Thank you, Mr. King; and I will not overlook you this time, Mr. Conyers. You are recognized for 5 minutes.

Mr. CONYERS. Thank you, Mr. Chairman.

May I have unanimous consent to put in the Election Protection—You Have the Right to Vote document?

Mr. FRANKS. Without objection.

Mr. CONYERS. Thank you.

[The information referred to follows:]

Think Getting "Free" ID Is Easy? Think Again!

Proponents of government-issued photo ID laws say it's simple to get "free" identification to exercise our most fundamental right. In a **recent interview (http://www.newschannel5.com/story/16350471/governor-haslam-raising-concerns-about-voter-id-law)**, Republican Tennessee Governor Bill Haslam, who signed into law voter ID requirements for Tennessee, stated he has hesitations with the new law because it will make it "unnecessarily hard" for some people in his state to vote.

"Given human nature, people tend not to address things until the last minute sometimes," Haslam said.**"I'm concerned about that last minute, when seniors say, 'I really want to vote, I want to vote at the polling place, I don't want to vote absentee. Oh, I need to get a photo ID! ... and I'm concerned about the waiting time [at driver's licensing stations]."**

We've heard about people across the country struggling to obtain IDs in states with new government-issued photo ID requirements. Below you will find the stories we've collected from a diverse group of hardworking Americans.

If you live in a state that requires government-issued ID to vote and have questions about what is needed to get a free ID, check out our **Voter ID Toolkits (http://www.lawyerscommittee.org/page?id=0047)**.

Indiana

Angela Hiss

Notre Dame University student Angela Hiss was barred from voting in Indiana because her Illinois driver's license was not accepted as proof of identification. Thousands of students like Angela will have difficulty voting in the next election because of repressive voter ID laws. **Read more (http://articles.latimes.com/2008/may/07/nation/na-voterid7)**

Pennsylvania

Bea Bookler

Bea Bookler has voted in every election since 1940 but now 72 years later she may not be able to cast what she believes might be her last vote. At 93 years old, Ms. Bookler lives at an assisted living facility in Chester County, no longer posseses photo ID and does not have her birth certificate to obtain ID. **Read More (http://articles.philly.com/2012-03-27/news/31245392_1_voter-id-bill-id-requirement-law-disenfranchises/2)**

South Carolina

Amanda Wolf

Amanda Wolf used to be able to vote using her student ID card. Under South Carolina's new voter ID requirements, however, Amanda has had to wait 6 months to even get the paperwork necessary for her to apply for an acceptable form of ID to allow her to vote. Adopted in Georgia, Amanda's name was different on her birth certificate, which also included the names of her birth parents. When Amanda went to Vital Records to ask for a change, she found out that they would only accept a major credit card, which she didn't have. Finally, after 6 months and with the help of a judge, she was able to get her new birth certificate and apply for an ID. **Read**

more (http://video.pbs.org/video/2197962217/)

Delores Freelan

59-year-old Delores Freelan of South Carolina lives on disability, and cannot afford to petition her home state of California to change her name and fix an error on her birth certificate. Without a valid birth certificate, she cannot get a photo ID to vote. **Read more (http://www.thesunnews.com/2011/07/09/2268138/group-targets-voter-id-law.html)**

Donna Suggs

Donna Suggs, born by midwife, does not have a birth certificate. Because her birth was never reported, Donna could not get the necessary birth certificate to apply for an ID to vote. Only after an attorney stepped in to help was Donna able to successfully get her free ID. **Read more (http://video.pbs.org/video/2197962217/)**

Larrie Butler

Larrie Butler, born and raised in South Carolina, is 85 years old. Denied a new driver's license because he doesn't have a birth certificate, Larrie went to vital records to get one and was told he'd need to provide his school and out-of-state driving records. When he returned with the documents, Larrie was told he had failed to prove his identity because he could not get his elementary school records, as the school had since closed. He was then told that he could only get a birth certificate if he paid to get his name changed.

Watch the video below for Larrie's own account of the incident

Willie Blair

Willie Blair, a 61-year-old sharecropper from Sumter, South Carolina has never been to school and cannot read. His name, given to him by his stepfather, does not match the name on his birth certificate, meaning he cannot

use the certificate to get a photo ID to vote. **Read more (http://www.npr.org/2011/10/19/141508278/opponents-say-s-c-s-voting-law-unfair-for-the-poor)**

Tennessee

Al Star

A homeless man was initially denied a free state voter ID he requested to replace his lost driver's license. After being turned away at the Department of Safety, he contacted his US Representative and eventually received his free ID. **Read more (http://blogs.tennessean.com/politics/2011/nashville-homeless-man-says-he-got-voter-id-runaround/)**

Darwin Spinks

86-year-old Darwin Spinks, who served in World War II and Korea, had to pay for a "free" Tennessee voting ID. **Read more (http://thinkprogress.org/justice/2011/10/26/353712/tennessee-veteran-voter-id-pay/)**

Dorothy Cooper

96-year-old Dorothy Cooper of Tennessee could not get a free voter ID because she could not produce her marriage license. Ms. Cooper presented a birth certificate, a rent receipt and a voter registration card, but was still denied the ID. Now, for the first time since the 1960s, she may not be able to vote. **Read more (http://thinkprogress.org/justice/2011/10/05/336392/96-year-old-tennessee-woman-denied-voter-id-because-she-didnt-have-her-marriage-license/)**

Lee and Phyllis Campbell

Lee and Phyllis Campbell, a retired couple from Tennessee, were asked to pay for a new license because the free IDs involve "too much paperwork." Mr. and Mrs. Campbell testified before members of the House Judiciary Committee about their ordeal. **Read more (http://democrats.judiciary.house.gov/sites/democrats.judiciary.house.gov/files/documents/Campbell111114.pdf)**

Marie Crittenden

92-year-old Marie of Etowah, Tennessee has consistently voted since 1948. However, with the passage of new voter ID requirements, Marie almost couldn't vote. After being misinformed about the necessary identification and paperwork numerous times, Marie could only vote due to the determined aid of her niece, who convinced the election commission to use common sense and allow Marie to cast her ballot. **Read more (http://www.wrcbtv.com/story/16664815/92-year-old-tackled-voter-id-issues)**

Thelma Mitchell

For 30 years Thelma Mitchell cleaned the Tennessee state capitol, including the governor's office. Now the 93-year-old won't be able to vote for the first time in decades after being told that her old state ID failed the new voter ID regulations and cannot produce a birth certificate. **Read more (http://thinkprogress.org/justice/2011/12/28/395287/93-year-old-tennessee-woman-who-cleaned-state-capitol-for-30-years-denied-voter-id/)**

Virginia Lasater

91-year-old Virginia Lasater of Murfreesboro, Tennessee could not get a voter ID because, with 100 people ahead of her and no chairs, she could not physically wait at the DMV. Ms. Lasater has been voting and working

on campaigns for more than 40 years, and now may be denied her right to vote. Read more (http://www.nashvilleledger.com/editorial/Article.aspx?id=55529)

Wisconsin

Anthony Sharp

19-year-old African-American Milwaukee resident does not have any of the accepted forms of photo ID under the law and does not have the income to afford the $20 certified copy of his birth certificate in order to vote. Read more (http://www.aclu.org/voting-rights/aclu-files-lawsuit-challenging-wisconsins-unconstitutional-voter-id-law)

Bettye Jones

Bettye Jones is 76 years old and has voted in every election since 1959. Active in the Civil Rights movement, she fought for her right to vote and never dreamed it could be taken away. Bettye's mother gave birth to her in a time when African Americans in the South could not get hospital care, meaning that Bettye was born at home. No birth certificate was ever filed to record her birth. However, Bettye has a current and valid Ohio driver's license and had never had any problems voting until she moved to Wisconsin. Here, Bettye found that she will be denied the right to vote. With no birth certificate on file, she cannot get the ID that Wisconsin requires to cast a ballot; the state's law will also not allow her to use her out of state driver's license to prove her identity. Read more (http://www.huffingtonpost.com/judith-browne-dianis/bloody-sunday-then-and-no_b_1324148.html)

Carl Ellis

Carl is a U.S. Army veteran living in a homeless shelter in Milwaukee. His only photo ID is a veteran ID card, which is not accepted under the law. Read more (http://www.aclu.org/voting-rights/aclu-files-lawsuit-challenging-wisconsins-unconstitutional-voter-id-law)

Chris Larsen

Wisconsin Department of Safety worker Chris Larsen was fired after encouraging his co-workers to inform citizens that IDs are free for the purposes of voting. To save money, Wisconsonites will only receive ID cards for free if they know on their own that they need to check a box on their application, otherwise they will be charged. Read more (http://tpmmuckraker.talkingpointsmemo.com/2011/09/wis_employee_fired_for_e-mail_defying_voter-id_pol.php)

Florence Hessing

96-year-old Florence is disabled and rarely leaves her home, voting by absentee ballot. After writing to the state asking how to get a photo ID under Wisconsin's new government-issued photo ID law, she was told it would cost her $28, even though Wisconsin ID cards are supposed to be free. To even apply for the ID, Florence needed a birth certificate, of which her natal state of Iowa told her they had no official record. Read more (http://www.npr.org/2012/01/28/146006217/why-new-photo-id-laws-mean-some-wont-vote?sc=tw)

Gil Paar

Mr. Paar who served in the military for four years was not allowed to vote because his Veteran's card, which is issued by the United State Department of Veterans Affairs and contains both his photo and address is not one of the approved forms of government-issued photo ID under Wisconsin's new voter ID law. Despite having a driver's license that would have allowed him to vote, Mr. Paar refused because a VA card is the only form of

photo ID that many veterans have. Read more (http://www.journaltimes.com/news/local/mount-pleasant-man-refuses-to-vote-after-finding-veteran-s/article_03e78de0-5cf8-11e1-a5e2-001871e3ce6c.html?mode=story)

JoAnne Balthazor and Jeannie Vasen

69-year-old JoAnne Balthazor of Wisconsin waited at the DMV for almost 2 hours to receive her free ID for voting. Jeannie Vasen, 43, didn't have enough money with her to get a replacement ID, and ended up leaving without getting her ID after Wisconsin DMV workers failed to inform her the ID was free. She later returned and got her free ID. Read more (http://host.madison.com/wsj/news/local/govt-and-politics/article_e1412868-a434-11e0-bc0c-001cc4c002e0.html).

Lauren Ehlers

A student at UW-Madison, Lauren Ehlers had registered to vote two months before the election. However, when she arrived to the polls at 7 a.m. so she could vote before work, Lauren was turned away because her name was not on the rolls. She had to return to the same polling place later in the day to provide a document to proving her address of residence just so she could cast a ballot. Read more (http://www.thedailypage.com/daily/article.php?article=36026)

Marge Curtin

62-year-old Marge Curtin has lived and voted in the same area for 40 years. Although her name and address were listed on the rolls and the poll workers, including her friend of over 40 years, knew and recognized her, Marge was not allowed to vote because she didn't have a photo ID. Recently injured in a car accident, Marge said she didn't think she'd be able to make the long trip to the DMV to get an ID and went to vote at the polls anyway, as she always does. Unfortunately, here she discovered that she was barred from voting despite her unquestionable identity. Read more (http://www.thedailypage.com/daily/article.php?article=36026)

Rita Platt and John Wolfe

On a day off from work, Rita and John drove 45 minutes to a DMV to get Wisconsin driver's licenses so they could vote in the upcoming election. However, when they arrived shortly after the DMV had opened, they were told that the computers were down. The couple decided to fill out the necessary paperwork, in the hopes that the computers would be up and running by the time they'd gone through the approval steps.

After presenting a current Iowa driver's license, social security card, bank statement, and pay stub, John was denied an ID and told he hadn't proven his identity. Rita was told that neither her expired Iowa driver's license nor pay stub from the state qualified as proof of identification and that she'd need to pay for a certified birth certificate or bring a US passport to be approved. Even though Rita had previously had a Wisconsin driver's license and the worker could still find her in the system, Rita was informed that she could not get a license or even a voter ID. Read more (http://www.wivoices.org/2011/12/10/wisconsin-couple-unable-to-get-id-to-vote/)

Ruthelle Frank

Ruthelle is an 84-year-old elected official and has served on her village board since 1996, who without a birth certificate cannot obtain an ID needed to vote under Wisconsin law. Read more (http://www.wausaudailyherald.com/article/20111204/WDH06/112040373/Voter-ID-becomes-law-unintended-consequences)

Ruthelle explains the difficulty she faces in trying to obtain photo ID:

What's your story? **Tell us how voter ID laws have affected you! (http://signup.lawyerscommittee.org/p/dia/action/public/?action_KEY=4850)**

Mr. CONYERS. Now, we have a serious set of problems about voting, and we need to do as much about it as possible. But it is hard for me to imagine that the Attorney General of the United States, the chief law enforcement officer, Eric Holder, is somehow laying down on the job about getting people registered and able to vote more easily and to have—to ensure that their votes are counted.

What we are in need of in this Committee is to have a hearing that examines the number of laws that significantly impact access to voting, and that is the presentation of voter ID, and I am going

to ask our attorney, Ms. Weiser, to expand on why some of these forms of identification are, in fact, restrictive.

Second, that we don't have any massive fraud problems. We have no record of people voting in great numbers who should not be voting. And then there is this old scheme going on in many States to eliminate early voting opportunities, same day registration, and even registering people to vote. I think these are the kind of problems that this Committee could do much more with, and I am going to ask the Chairman and the Ranking Member to join me and Chairman Smith in additional hearings in this area.

I would like now to yield to our distinguished witness.

Ms. WEISER. Thank you. Thank you, Mr. Chairman.

As I noted, the ID laws that we have seen passed this year are far more restrictive than the ones we have seen in the past, and they ask for IDs that 11 percent of Americans, largely minorities, younger voters, older voters, people with disabilities, the poor, do not have. The fact that 73 percent of Americans might think this is a good idea is not surprising, when 89 percent of them actually have these forms of IDs, but we do not allocate—but this kind of support is not a good enough reason to exclude the 11 percent of people who do not have those IDs. That is not what constitutional rights or the Voting Rights Act are for.

And I should note that, despite what has been said, the reason, the justification put forward for these laws is one that is actually nonexistent. The kind of voter fraud that these laws address, in-person impersonation fraud, has been shown investigation after investigation, study after study to be virtually nonexistent. An American is more likely to be hit by lightning than to commit this kind of voter fraud.

And it is not because people have not been looking or because the Department of Justice has not made this enough of a priority. From 2002 through 2005, this was, in fact, a top priority of the Department of Justice to investigate and prosecute voter fraud. And what they came up with is 38 possible cases and only one that involved in-person impersonation fraud over hundreds of millions of votes cast. So this is really something that we already have good laws in place that prevent this.

Mr. CONYERS. Professor, do you have any view of *Crawford v. Marion* that we need to clear up in this discussion before the Subcommittee today?

Ms. WEISER. Well, certainly I should add that the *Crawford* case did not hold that voter ID laws generally are constitutional or that they are not discriminatory. What the *Crawford* court said is that the Indiana law on the record, the very limited record before it, before the law had ever been put in place, could not be invalidated on its face. The plaintiffs had to come back if they wanted to and actually show that the law, as applied in real life, would actually discriminate or would actually disenfranchise eligible voters before the Court would actually consider that kind of challenge. So it actually made no pronouncement about the legality under the Constitution or any other law of voter ID laws in particular as applied in the real world.

Mr. CONYERS. Thank you. And thank you, Mr. Chairman.

Mr. FRANKS. Thank you, Mr. Conyers.

I would now recognize Mr. Scott for 5 minutes.

Mr. SCOTT. Thank you, Mr. Chairman.

Ms. Weiser, following up on that, there appears to be a difference in challenges whether you are a noncovered State in a constitutional challenge in free clearance under section 5. In the *Crawford* case that you have indicated there was no evidence of a discriminatory effect, and if you don't know one way or the other, what happens to a constitutional challenge?

Ms. WEISER. In a constitutional case, you need to actually prove—you need to prove the discriminatory intent. In the Voting Rights Act, the burden is on the State.

Mr. SCOTT. And if there is no—if you don't know one way or the other, you lose the constitutional challenge?

Ms. WEISER. That is correct.

Mr. SCOTT. But the State does not carry its burden to show that it is not discriminatory, so it cannot be precleared if nobody knows. Is that right?

Ms. WEISER. That is right.

Mr. SCOTT. And the covered States, the covered—isn't it true that the covered States are covered the old-fashioned way, they earned it?

Ms. WEISER. Certainly they covered—this Congress amassed a very extensive record in 2006 demonstrating that the States that are covered under section 5 of the Voting Rights Act still have a problem of discriminating against minorities in voting and still merit coverage under that law.

Mr. SCOTT. Thank you.

Ms. Mitchell, you mentioned somebody that got multiple voter cards, presumably because people didn't bother to change address, and they all got sent to the same person. Are you suggesting that we need procedures to protect against somebody showing up multiple times in the same precinct, claiming to be different people in the same precinct? Is that something we need to concentrate on?

Ms. MITCHELL. I think whatever steps we can take to ensure the integrity of the election is appropriate.

Mr. SCOTT. You are not suggesting that somebody showing up multiple times in the same precinct is a problem?

Ms. MITCHELL. You think that that can't happen? I absolutely believe it can happen. These polling places are chaotic.

Mr. SCOTT. Okay. Somebody showing up multiple times in the same precinct is a problem that needs a focus.

Can you tell me the process, Ms. Mitchell, of obtaining an ID sufficient to comply with voter ID laws, what the process is if you don't have an ID?

Ms. MITCHELL. If you do not have an ID, it varies from State to State. But I can tell you that in most of these States, generally speaking, certainly in the case of South Carolina and in the case of the Virginia law that is pending at the moment, in most of these cases, there are alternatives. You can cast provisional ballots. The States will issue free IDs, will provide transportation to obtain the IDs.

Mr. SCOTT. Okay. What is the process? What documents do you need?

Ms. MITCHELL. To be able to get an ID? I do not know the answer to that question. You go and have your photograph taken at a——

Mr. SCOTT. Are you a lawyer?

Ms. MITCHELL. I am, but that varies from State to State.

Mr. SCOTT. Okay.

Ms. MITCHELL. So which jurisdiction are you asking about?

Mr. SCOTT. Well, maybe that is the point. If you don't have an ID, you don't even know where to—a lawyer doesn't even know, can't even articulate where you would start.

Ms. MITCHELL. Well, different States would have different requirements. For instance, if you move into the District of Columbia—when I moved into the District of Columbia, you can present a utility bill, you can present a copy of a—you can show your check, a checkbook that has your name on it, you can show a lot of different kinds of information.

Mr. SCOTT. But that is not a photo—that is not with your photo ID.

Ms. MITCHELL. No, that is in order to obtain your photo ID.

Mr. SCOTT. You can get a photo ID sufficient with a utility bill?

Ms. MITCHELL. In most jurisdictions, yes.

Mr. SCOTT. Okay. How do you prove your citizenship?

Ms. MITCHELL. Well, the Federal law requires that you have to have a birth certificate or a passport. And, actually, it is the Federal law today, as enacted by Congress in 1986, that in order to get a job every employer in this country is supposed to require two forms of proof of citizenship.

Mr. SCOTT. Ms. Weiser, can you explain how long it takes to get some of these documents and some of the problems? Like if you were adopted or if you are old and no hospital records are available and if your name doesn't agree with the birth certificate, like you were married or divorced or something, what kind of complications can occur and how long it can take to get an ID?

Ms. WEISER. Certainly. Ms. Mitchell is correct that the requirements for obtaining photo ID do vary State by State, but in virtually every State a birth certificate is required, and that is something that certainly has caused a lot of problems for many potential voters seeking to get IDs.

There was a highly publicized case of a 96-year-old woman, Dorothy—I forget her last name—from Tennessee who did not have a copy of her birth certificate and was unable to obtain photo ID in order to vote, and she had been voting for 70 years. This is something that many individuals get caught up in a catch-22 of needing a birth certificate to get a photo ID, and of needing a photo ID in order to get a birth certificate issued, as one example.

Many States certainly do not have expedited procedures for people to get photo IDs. There is a lot of processing that goes into that, and that could also create a lot of snafus for people seeking to vote, as another example.

Mr. SCOTT. How long can this take?

Ms. WEISER. I don't know the range of time, but I am happy to provide that in writing after.

[The information referred to follows:]

BRENNAN
CENTER
FOR JUSTICE
at New York University School of Law

The following is additional written information to supplement my response to Mr. Scott's question on page 62, line 1392 of the transcript:

The time it takes to obtain a state-issued photo ID varies, depending on what documentation the voter has in his or her possession, whether the voter has the financial resources to obtain any additional documentation needed to obtain photo ID, and whether the voter has access to transportation to get to an ID-issuing office in the state.

Most states require birth certificates to obtain photo IDs. If a voter does not have a birth certificate in his or her possession, that can add significantly to the total time it takes a voter to obtain photo ID. The time it takes to obtain a birth certificate varies from state to state.

In Wisconsin, Pennsylvania, Kansas, and Tennessee—all states with new strict photo ID laws—voters can obtain birth certificates on the day they request them *only* if they show up in person to the office that maintains vital records in the state capital—Madison, Harrisburg, Topeka, and Nashville, respectively. Otherwise, according to official state websites, a voter must wait up to four weeks in Wisconsin, 10 days in Kansas, and six weeks in Tennessee, for his or her application to be processed. A voter can accelerate this process by using VitalChek, a private online document request service that is accepted in most states that require photo ID to vote, with the exception of Texas and Georgia, which use different online document request services. But this service is extremely costly, doubling or even tripling the cost of a birth certificate. What is more, the processes in Kansas and Pennsylvania to waive the cost of a birth certificate are not available for users of VitalChek.

Only Pennsylvania and South Carolina do not require a voter to obtain a birth certificate or similar documentation to obtain an ID suitable for voting. A person born in Pennsylvania can provide proof of residence, and the state will then undertake a process to confirm the person's birth and citizenship. That process typically takes up to ten days, according to the state's official website. South Carolina requires only a voter registration card to obtain a photo ID voter registration card, but the voter has to travel to the county seat to obtain that card.

Once a voter has all the underlying documentation required to obtain photo ID and access to an ID-issuing office, it typically takes several hours for a voter to obtain a state-issued photo ID.

Ms. WEISER. And I should also add that the documents that are required to obtain photo IDs that are supposedly free now in the States that are requiring them typically cost money and typically are not made available for free, with the single exception of the Kansas birth certificate, which now can be made available for free. And so these IDs will also create financial burdens for those seeking to obtain them simply for voting.

Mr. SCOTT. And so it doesn't prevent you from voting, it just puts a little barrier. So you can't identify a single person who was denied the right to vote. But if you are trying to register—if a thousand people are trying to register, a lot of them are just not going

to get their paperwork in on time to be able to register and show up to vote; is that true? Some of them——

Ms. WEISER. That certainly sounds accurate. But there are also many people who, no matter how hard they try, are still unable to obtain photo IDs, even those who think about it months and months in advance of the election. So, for some people, it is actually an absolute barrier as well.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. FRANKS. And thank you, Mr. Scott.

Without objection, the Chair would submit for the record an article by Hans von Spakovsky, Every Single One: The Politicized Hiring of Eric Holder's Voting Section. I commend it to your reading.

[The information referred to follows:]

- PJ Media - http://pjmedia.com - Click here to print.

Every Single One: The Politicized Hiring of Eric Holder's Voting Section

Posted By Hans A. von Spakovsky On August 8, 2011 @ 12:00 am In Uncategorized | 124 Comments

Recently released documents — disclosed by the Obama Justice Department only after a court battle — reveal that the Civil Rights Division at the Department of Justice is engaging in politicized hiring in the career civil service ranks. Typical Washington behavior, you say? Except the hiring in question is nearly unprecedented in scope and significantly eclipses anything the Bush administration was even *accused* of doing. And the evidence of the current political activity is far less impeachable than what was behind the libelous attacks leveled at officials from the Bush years.

For nearly a year, the Civil Rights Division rebuffed PJ Media's Freedom of Information Act request for the resumes of attorneys hired into the Division during the tenure of Eric Holder. PJM was finally forced to file a federal lawsuit earlier this year. Only then did Justice relent and turn over the documents. The result leaves little wonder why PJM's request was met with such intense resistance.

The Department's political leadership clearly recognized that the resumes of these new attorneys would expose the hypocrisy of the Obama administration's polemical attacks on the Bush administration for supposedly engaging in "politicized hiring" — and that everyone would see just how militantly partisan the Obama Civil Rights Division truly is. Holder's year-long delay before producing these documents — particularly when compared to the almost-instantaneous turnaround by the Bush administration of a virtually identical request by the *Boston Globe* back in 2006 — also shows how deep politics now runs in the Department.

As Richard Pollock of PJ Media observed [1] in an article, none of this should surprise anyone even remotely familiar with Holder's highly partisan nature. Indeed, Holder boasted to the American Constitution Society [2] (an organization started as a liberal counterweight to the Federalist Society) back in June 2008 that the Obama Justice Department was "going to be looking for people who share our values," and that "a substantial number of those people would probably be members of the American Constitution Society." The hiring records from Holder's initial thirty months in office underscore how serious he was about this mission.

This is the first in a series of articles by PJ Media about the Civil Rights Division's hiring practices since President Obama took office. These accounts will put to the test Holder's repeated (and all-too-rarely scrutinized) statement [3] that ideological considerations play no role in the hiring of career attorneys in his Department — a test that the Department's practices clearly fail.

The evidence will demonstrate that, in contrast to the Bush administration's Civil Rights Division — which hired individuals from across the political spectrum — there has been nary a token conservative welcomed into the Division under Holder. More than that, though, this series will show that the ranks of new civil servants arriving in Holder's civil rights shop in protected civil service slots are some of the most strident ideologues in Washington.

But don't just take my word for it. Let the resumes speak for themselves.

We start today with the Civil Rights Division's Voting Section. This Section is responsible for enforcing, among other things, all aspects of the Voting Rights Act. This includes reviewing redistricting and other pre-clearance submissions under Section 5 of the Voting Rights Act that covered jurisdictions throughout the country must submit to the Justice Department for approval. Redistricting maps, voter ID statutes, citizenship verification laws, and a host of other politically contentious election issues rest in the hands of these Voting Section bureaucrats.

Long a refuge of partisan activists and ideological crusaders, the Section has been filling its ranks over the last 30 months with like-minded liberals ready to do the bidding of left-wing advocacy organizations. Sixteen attorneys have come on board in this hiring binge. Who are these new radicals?

Bryan Sells: Mr. Sells was recently hired as one of the Voting Section's new deputy chiefs. He comes to the Department from the ACLU's Voting Rights Project, where he worked for nearly 10 years as a Senior Staff Counsel. During his tenure, his organization strongly opposed all voter ID laws [4], and

challenged the right of states to verify the U.S. citizenship [5] of individuals seeking to register to vote. He also characterized state felon disenfranchisement laws [6] – which are expressly authorized in the Constitution — as a "slap in the face to democracy," and consistently took the most aggressive (and generally legally unsupportable) positions on redistricting cases [7] throughout the country.

Meredith Bell-Platts: The other new deputy chief hired by the Voting Section, Meredith Bell-Platts, also comes from the ACLU's Voting Rights Project, where she, too, spent nearly 10 years. Much of her time there was devoted to blasting voter ID requirements, which she claimed [8] were motivated by people who do not want to see blacks vote (an issue on which she consistently lost in court). Before arriving at the ACLU, Ms. Bell-Platts was a founding member of the *Georgetown Journal of Gender and the Law*, a publication whose stated [9] "mission is to explore the impact of gender, sexuality, and race on both the theory and practice of law" and thereby "complement[] a long tradition of feminist scholarship and advocacy at the [Georgetown] Law Center."

Anna Baldwin: While all of the new trial attorneys hired into the Voting Section have streaks of radicalism, few can match Ms. Baldwin. A financial contributor to the Obama presidential campaign, she clerked for two liberal Clinton appointees on the federal bench and then worked briefly at Jenner & Block (a D.C. law firm which has been a major feeder of Democratic political appointees to the Obama administration), where she primarily pursued liberal positions in pro bono litigation. During law school, she interned at the International Labor Rights Fund and Women's Agenda for Change.

Prior to that, Baldwin served for three years as field coordinator for Equality Florida, where she "coordinated lobbying and state legislative policy work on behalf of Florida's gay, lesbian, bisexual, and transgender communities." Meanwhile, in her undergraduate days at Harvard, she was a member of the "Queer Resistance Front" [10] and was frequently covered in the *Harvard Crimson* for her radical antics. A review of these campus newspaper articles suggests that Ms. Baldwin will have to work very hard to separate her activist politics from her role as an apolitical civil servant. Then again, if she takes her cues from most of her Voting Section colleagues, she won't even need to attempt such separation. As the New Black Panther Party voter intimidation case showed, partisanship and law enforcement are one and the same in Holder's Civil Rights Division.

Risa Berkower: Ms. Berkower was hired into the Voting Section following a clerkship with U.S. District Judge Christopher Droney, a liberal jurist who President Obama recently nominated [11] to the Second Circuit and whose brother is the former state chairman of the Connecticut Democratic Party. During law school at Fordham, she interned in the Department of Education's Office for Civil Rights, a notorious hotbed of left-wing activity. She also worked on the "Student Hurricane Network" [12] with members of the NAACP LDF, the Advancement Project, and the Lawyers' Committee for Civil Rights. It was in her undergraduate days at Yale, though, that she really let her left-wing political colors shine. While on the Yale College Council, she wrote an editorial [13] advocating support of unionization of Yale graduate students and advocated "neutrality" in card-check reform (which has become a major Obama initiative as a sop to organized labor).

It is quite ironic that a lawyer who refused to oppose the effort by unions to get rid of the secret ballot, a fundamental mainstay of our democracy, is now charged with protecting voting rights. All of the leadership positions on Berkower's resume were conspicuously redacted by the Obama administration in its FOIA response to PJM. And lest you think she abandoned her radical ways since arriving in the Civil Rights Division, Ms. Berkower is the same Voting Section attorney who negotiated the outlandish consent decree with the state of Rhode Island earlier this year in a case under Section 7 of the National Voter Registration Act which, as Christian Adams detailed [14] extensively, ignored the requirements of federal law and represented a gross abuse of federal authority.

Daniel Freeman: Mr. Freeman comes to the Voting Section following a fellowship at the New York Civil Liberties Union. He previously interned at the ACLU, where he assisted the organization with its efforts to attack the Bush administration's national security policies. He also helped to challenge the "state secrets privilege" and to support the rights of terrorist detainees at Guantanamo Bay during an internship at Human Rights First.

On his resume, Freeman proudly notes his membership in the liberal American Constitution Society, as well as his service as co-chair of the Yale Law School Democrats. Of course, being a member of the American Constitution Society does not bar you from federal employment. Yet the Bush administration was castigated [15] for hiring lawyers who were members of the Federalist Society. Incidentally, Mr. Freeman is helping lead the Voting Section's review of redistricting submissions [16] from the state of Alabama.

Jenigh Garrett: Ms. Garrett worked for approximately five years as an assistant counsel at the NAACP Legal Defense and Education Fund (LDF), where she worked on voting-related litigation. She co-drafted the NAACP LDF's amicus brief in *Crawford v. Marion County Board of Elections*, claiming that voter ID laws are unconstitutional (a position the Supreme Court rejected in an opinion by Justice John Paul Stevens).

Garrett also was a member of the organization's litigation team in *Hayden v. Paterson*, arguing that felon disenfranchisement laws violate the Voting Rights Act (a position the Second Circuit rejected). She is a member of the American Constitution Society and recently gave a presentation at Yale Law School on "The Future of Black Legal Scholarship and Activism." Although DOJ's FOIA shop notably redacted her other activities on her resume, perhaps legislators in Virginia can ask her about them: she is the redistricting point of contact [16] for the Commonwealth.

Abel Gomez: Mr. Gomez initially came to the Voting Section in the waning days of the Clinton administration as part of a wave of hiring engineered by former Acting Assistant Attorney General Bill Yeomans. The intent: stack the Civil Rights Division with left-wing activists before President Bush took office. Gomez had previously served for six years as a public defender in Tallahassee, Florida. In 2007, he left the Civil Rights Division to join another component of the Department of Justice, but was eager to rejoin the Voting Section once Obama and Holder were in charge. In addition to his voting work, FEC records reveal that he is a significant financial contributor to the "Gay and Lesbian Victory Fund" and to organizations opposing California's Proposition 8 (Marriage Protection Act).

Bradley Heard: Before joining the Voting Section, Mr. Heard worked for a number of years at the Advancement Project, a radical left-wing voting organization. The Advancement Project has worked closely with the ACLU, NAACP LDF, Lawyers' Committee for Civil Rights, and other liberal advocates to oppose voter ID statutes, felon disenfranchisement laws, and citizenship verification regulations, and to take myriad other militant positions on state and federal voting rights laws. Mr. Heard fit right in at the Advancement Project, having previously founded the Georgia Voter Empowerment Project, which describes its mission [17] as increasing the "civic participation levels of progressive-minded Georgians."

Amusingly, before moving to Washington, Mr. Heard had a nasty breakup with his plaintiff's civil rights firm in Atlanta. He commenced litigation [18] against his partners, who in turn claimed he was engaging in misconduct. Heard then sought criminal arrest warrants against his former partners, charging that they had engaged in false voter registration and voting by an unqualified elector, both felonies. The court declined to issue the warrants. South Carolina officials can ask Mr. Heard about these events during his review of the state's redistricting submission; after all, he is the point of contact [16] for the Voting Section.

Michelle McLeod: Ms. McLeod has overcome substantial adversity [19] in her personal life, and her story is an admirable one in many respects. But her liberal bona fides are equally genuine, and likely represent the primary reason why she was hired into the Voting Section under Eric Holder's regime. Ms. McLeod came straight to the Justice Department after her graduation from law school at the University of Maryland, where she worked as a research assistant to Professor Sherrilyn Ifill [20], a radical academic whose writings and media appearances on voting rights and race issues take her well out of the mainstream.

Ms. McLeod also worked in the law school's Post-Conviction Appellate Advocacy Clinic, assisting convicted felons with their direct appeals and *habeas corpus* challenges. As an undergraduate at East Carolina University, she interned for the SEIU Local's New York Civic Participation Project, where she wrote articles favorable to labor unions. She also interned for the National Employment Law Project, drafting pro-union articles and other publications relating to workers' rights. She is now one of the Voting Section's points of contact [16] for redistricting in Mississippi.

Catherine Meza. Ms. Meza, who contributed $450 to Barack Obama's presidential campaign before getting hired by the Voting Section, has a rich history of liberal advocacy. During law school at Berkeley, she interned for (i) the NAACP LDF, where she worked on voting rights and "economic justice" issues, (ii) Bay Area Legal Aid, (iii) the ACLU of Northern California, (iv) the Mexican American Legal Defense and Education Fund (MALDEF), (v) Centro Legal de la Raza, and (vi) the East Bay Community Law Center Workers' Rights Clinic. She also worked as a legislative intern for Democratic Rep. (now Sen.) Robert Menendez of New Jersey as part of a fellowship with the liberal National Association of Latino Elected and Appointed Officials. On her resume, Meza proudly proclaims her membership in the American Constitution Society and her role as an Advisory Board Member of the Thelton Henderson Center for Social Justice. Talk about filling the whole bingo card! Meanwhile, while

working a brief stint at the Fried Frank law firm after law graduation, she assisted on a pro bono case [21] seeking to preserve the confidentiality of ID cards issued to illegal aliens by the city of New Haven, Connecticut, an effort to help illegal aliens avoid being prosecuted for violating federal law. She also helped draft a report [22] for the United Nations Committee on the Elimination of All Forms of Racial Discrimination in which she suggested that the U.S. "government's programs and policies continue to perpetuate segregation and concentrate poverty in communities of color."

Kelli Reynolds: Ms. Reynolds arrived in the Voting Section having worked for several years as the Senior Redistricting Counsel and Assistant General Counsel at the NAACP. While there, she managed the organization's National Redistricting Project, no doubt working closely with many of her now-colleagues in the Voting Section. She also boasts on her resume of her membership in the American Trial Lawyers Association (or, as that plaintiffs' lawyers group now likes to euphemistically refer to itself, the "American Association for Justice").

Elise Shore. Ms. Shore came to the Voting Section by way of the "Southern Coalition for Social Justice," where she worked as a legal consultant focusing on "voting rights, immigrant rights, and other civil rights and social justice issues." The far left-wing positions of this group are nicely summarized on its website [23]. Ms. Shore also made a $1,000 contribution to Barack Obama's presidential campaign.

Before joining the Southern Coalition for Social Justice, she worked for more than two years as a Regional Counsel for MALDEF. There, she was an outspoken critic [24] of Georgia's voter ID law and well as its proof of citizenship requirements for voter registration (which, incidentally, have been found to be non-discriminatory by a federal court) and described how heartened she was that the Civil Rights Division had objected to the registration law under Section 5 of the Voting Rights Act. But her joy must have been fleeting: the Division later capitulated and withdrew its objection after Georgia filed a federal declaratory judgment action. It will be interesting to see if Shore can put her politics to the side in her role as the Voting Section's point of contact [16] for all redistricting submissions in the state of Florida.

Jaye Sitton: Ms. Sitton first joined the Civil Rights Division during the Clinton administration, but left immediately before President Bush took office in order to become an international human rights lawyer [25]. (This desire not to serve in a Republican administration seems to be a recurring theme among many of the individuals hired into the career ranks of the Division during the Clinton years.) Before recently returning to work as an attorney the Voting Section, she volunteered to work in North Carolina for Barack Obama's 2008 presidential campaign.

Sitton is a member [26] of the "Intersex Society of North America," an organization [27] "devoted to systemic change to end shame, secrecy [28], and unwanted genital surgeries [29] for people born with an anatomy that someone decided is not standard for male or female [30]." She also taught a course on "sexuality, sexual orientation, gender, and the law" at the College of William and Mary Law School, and wrote a law review article [31] titled "(De)Constructing Sex: Transgenderism, Intersexuality, Gender Identity and the Law" for the *William and Mary Law Journal*.

Sharyn Tejani: Ms. Tejani is another activist who has come to the Voting Section to masquerade as a career civil servant. She also first joined the Civil Rights Division during the Clinton administration but left within two months of President Bush taking office. Her resume boasts of her work defending affirmative-action programs, i.e., racial quotas, during that earlier stint of employment. She recently returned, however, after having worked as a Senior Policy Counsel for the National Partnership for Women and Families [32], a left-wing organization that advocates greater abortion rights and is deeply involved in judicial nomination battles in favor of liberal candidates and in opposition to conservative candidates. Prior to that, Tejani served for more than three years as an advisor to one of the Democratic commissioners on the EEOC, and for three additional years as the Legal Director of the Feminist Majority Foundation. In her writings, she has advocated for the Paycheck Fairness Act [33], which would require equal pay for men and women even when there are legitimate work- and experience-related reasons for those pay disparities. She also wrote an article [34] for *Ms. Magazine* sharply criticizing any efforts by the Commission on Opportunity in Athletics to modify Title IX regulations to stop the discrimination that has occurred against men's sport programs.

Justin Weinstein-Tull: Mr. Weinstein-Tull, a $250 contributor to President Obama's 2008 campaign, was hired into the Voting Section following a clerkship for Judge Sidney Thomas, one of the most liberal judges on the Ninth Circuit. One can see why Judge Thomas was eager to have him in chambers. Indeed, Mr. Weinstein-Tull interned with the ACLU of Southern California, worked as a research associate at the liberal Urban Institute, and served as a fellow at the Congressional Hunger

Center.

He also wrote a law review article for the *University of Virginia Law Review* in which he criticized [35] the Supreme Court's decision in *Gonzales v. Carhart* – affirming the constitutionality of the Partial-Birth Abortion Ban Act of 2003 — as a setback to a woman's right to choose abortion. Mr. Weinstein-Tull will now be one of the Voting Section's points of contact [16] for redistricting submissions from the state of North Carolina.

Elizabeth Westfall: Last, but certainly not least, is Ms. Westfall. According to the Federal Election Commission website, she contributed nearly $7,000 to Barack Obama's 2008 presidential election campaign, contributed another $4,400 to Hillary Clinton's 2008 presidential campaign, contributed $2,000 to Wesley Clark's presidential campaign in 2004, contributed $3,000 to John Kerry's presidential campaign and compliance fund in 2004, contributed $500 to former Senate Democratic Majority Leader Tom Daschle's PAC in 2004, and contributed $2,000 to Hillary Clinton's U.S. Senate campaign in 2000.

In addition to this incredible funding of Democratic candidates, Westfall worked for six years at the far-left Advancement Project, directing [36] its Voter Protection Program and managing its litigation and advocacy activities. She also previously served as a staff attorney at the Washington Lawyers' Committee for Civil Rights in its Fair Housing Group, and worked on the Hill as a legislative assistant to then-Congressman Bill Richardson (D-NM).

On Westfall's self-drafted [36] Harvard alumni biography, she notes that she has testified before the U.S. Congress about supposed "barriers" to voter registration, "unwarranted" purging of the voter rolls, and voter caging. While those subjects may sound benign, in fact, the Advancement Project and the Lawyers Committee claim that common-sense reforms like voter ID or requiring proof of citizenship are "barriers" to voting and registration and that removing voters who have moved or otherwise become ineligible to vote is "unwarranted purging."

"Vote caging," an imaginary crime the Left dreamed up several years ago, faults any efforts by private parties to challenge the eligibility of voters when first-class mail sent to their registration addresses is returned by the U.S. Postal Service as undeliverable because they no longer live there. This despite the fact that federal law specifically authorizes election officials to use the USPS for that very purpose. Just the kind of neutral, detached attorney a state wants reviewing its redistricting submissions and applying the heavy hand of the federal government in voting rights enforcement actions. California's redistricting submission will be in the hands [16] of Ms. Westfall.

These 16 new attorneys, liberal partisans one and all, now join the career civil service ranks of an already heavily politicized Voting Section in the Civil Rights Division. Supervision, meanwhile, comes from Deputy Assistant Attorney General Julie Fernandes, whose public pronouncements [37] about her refusal to apply the voting rights laws in an even-handed and race-neutral format are now infamous. The likelihood of the federal voting-rights laws being enforced in a fair and neutral fashion by this group of radicals is incredibly slim. Eric Holder clearly recognizes, as Ronald Reagan astutely observed, that "personnel is policy," and Holder and his staff are doing everything in their power to ensure that the policies and legal positions advanced by the Civil Rights Division bureaucracy are in line with those of the Obama administration.

The real scandal, however, is the utter disregard by the so-called "mainstream media" and DOJ Inspector General's Office of the blatant politicization of the hiring process in the Obama Civil Rights Division. I previously wrote [38] about the absurdity of the attacks on Bush civil rights officials who were unfairly pilloried for supposedly hiring on the basis of political affiliation. I pointed out how the IG's Office and the former Civil Rights Division attorney who spearheaded the Office of Professional Responsibility's joint review glibly ignored all evidence that did not fit their biased narrative. A blind eye was turned towards the numerous liberal attorneys who were hired and promoted in the Voting Section during the Bush years.

Now, though, with the Obama Civil Rights Division virtually devoid of conservative hires, the press has gone silent and DOJ's internal watchdogs have expressed nothing but indifference. This is particularly ironic given that almost all of these hires previously worked at organizations labeled as "liberal" by the joint OIG/OPR report attacking the Bush administration. So by the OIG/OPR's own prior standards, the Obama administration has hired individuals exclusively from only one side of the political aisle. Once again, the one-way ratchet.

No apology will be forthcoming to the Bush Justice Department officials who were subjected to outrageous and unwarranted attacks, of course. But at least the public record is being fleshed out.

Perhaps the Inspector General's Office will redeem itself as a credible organization in its new probe of the Voting Section's activities over the last 20 years. Whatever happens inside DOJ, though, at least the public is now aware that the almost daily rhetoric about neutrality that emanate from Eric Holder and his civil rights chief, Thomas Perez, is belied by their hiring decisions.

From the racially motivated dismissal of the New Black Panther Party lawsuit, to the partisan Section 5 objection [39] to the change to nonpartisan elections in Kinston, N.C., on the offensive and patronizing grounds that blacks are not smart enough to know who to vote for without a party label next to the candidate's name, to the baseless objection to Georgia's citizenship verification requirements (later withdrawn by the Voting Section [40] in the face of a federal lawsuit), to the dilatory and inept efforts [41] to protect the voting rights of active military personnel, to the complete and total paucity of enforcement of Section 8 of the NVRA (requiring that voting rolls be purged of dead and ineligible voters), Eric Holder's tenure has been distinguished by weighty evidence of partisan and ideological decision-making.

It seems that enforcement activity is governed predominantly by political, not legal, factors. And with the new radical ideologues in the Voting Section, it is difficult to imagine the situation improving any time soon. Americans deserve much better from their Department of Justice.

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[1] observed: **http://pjmedia.com/blog/pajamas-doj-foia-request-comes-back-redacted/?singlepage=true**
[2] boasted to the American Constitution Society: **http://www.nytimes.com/2008/12/11/us/politics/11network.html**
[3] statement: **http://www.cbsnews.com/2102-18563_162-4930388.html?tag=contentMain;contentBody**
[4] voter ID laws: **http://www.aclu.org/voter-id**
[5] verify the U.S. citizenship: **http://www.aclu.org/voting-rights/aclu-intervenes-georgia-voting-rights-act-challenge**
[6] felon disenfranchisement laws: **http://www.aclu.org/racial-justice-voting-rights/voting-rights-florida-under-attack-again**
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[16] review of redistricting submissions: **http://www.justice.gov/crt/about/vot/poc.pdf**
[17] mission: **http://www.gavep.org/**
[18] litigation: **http://www.law.com/jsp/article.jsp?id=1181552742786&slreturn=1&hbxlogin=1**
[19] overcome substantial adversity: **http://www.reedsmith.com/press_office/search_press_office.cfm?widCall1=customWidgets.content_view_1&cit_id=22253**
[20] Professor Sherrilyn Ifill: **http://www.law.umaryland.edu/faculty/profiles/faculty.html?facultynum=069**

Mr. FRANKS. And without objection all Members will have 5——

Mr. NADLER. Mr. Chairman.

Mr. FRANKS. Please.

Mr. NADLER. I ask to be recognized for two unanimous consent requests.

Mr. FRANKS. Please.

Mr. NADLER. First, Mr. Chairman, I ask unanimous consent to place in the record the recent Third Circuit Court of Appeals decision in RNC versus DNC rejecting the RNC's motion to get out from under the 1982 consent decree barring the RNC's—that is Re-

publican National Committee's—historic practice of voter intimidation and disenfranchisement. The court said the continuation of the consent decree was still necessary. I ask unanimous consent this be placed in the record.

Mr. FRANKS. Without objection.

Mr. NADLER. Thank you.

[The information referred to follows:]

United States Court of Appeals,
Third Circuit.
DEMOCRATIC NATIONAL COMMITTEE; New Jersey Democratic State Committee; Virginia L. Feggins; Lynette Monroe
v.
REPUBLICAN NATIONAL COMMITTEE; New Jersey Republican State Committee; Alex Hurtado; Ronald C. Kaufman; John Kelly, **Republican National Committee**, Appellant.

No. 09–4615.
Argued on Dec. 13, 2010.
Opinion Filed: March 8, 2012.

John W. Bartlett, Angelo J. Genova (argued), Rajiv D. Parikh, Genova Burns, Newark, NJ, for Appellee, Democratic National Committee.

Bobby R. Burchfield (argued), Jason A. Levine, Vinson & Elkins, Washington, DC, for Appellant, Republican National Committee.

James R. Troupis, Middleton, WI, for Amicus Appellant, Republican Party of Wisconsin.

Karl S. Bowers, Jr., Hall & Bowers, Columbia, SC, for Amici Appellants, Karl S. Bowers, Jr., Asheegh Agarwal, Esq., Roger Clegg, Esq., Robert N. Driscoll, Eric Eversole and Hans A. Von Spakovsky.

Before: SLOVITER, GREENAWAY, JR., and STAPLETON, Circuit Judges.

OPINION

GREENAWAY, JR., Circuit Judge.

***1** In 1982, the Republican National Committee ("RNC") and the Democratic National Committee ("DNC") entered into a consent decree (the "Decree" or "Consent Decree"), which is national in scope, limiting the RNC's ability to engage or assist in voter fraud prevention unless the RNC obtains the court's approval in advance. The RNC appeals from a judgment of the United States District Court for the District of New Jersey denying, in part, the RNC's Motion to Vacate or Modify the Consent Decree.[FN1] Although the District Court declined to vacate the Decree, it did make modifications to the Decree. The RNC argues that the District Court abused its discretion by modifying the Decree as it did and by declining to vacate the Decree. For the following reasons, we will affirm the District Court's judgment.

I. *BACKGROUND*

A. *1981 Lawsuit and Consent Decree*

During the 1981 New Jersey gubernatorial election, the DNC, the New Jersey Democratic State Committee ("DSC"), Virginia L. Peggins, and Lynette Monroe brought an action against the RNC, the New Jersey Republican State Committee ("RSC"), John A. Kelly, Ronald Kaufman, and Alex Hurtado, alleging that the RNC and RSC targeted minority voters in an effort to intimidate them in violation of the Voting Rights Act of 1965 ("VRA"), 42 U.S.C. §§ 1971, 1973, and the Fourteenth and Fifteenth Amendments to the Constitution of the United States. The RNC allegedly created a voter challenge list by mailing sample ballots to individuals in precincts with a high percentage of racial or ethnic minority registered voters and, then, including individuals whose postcards were returned as undeliverable on a list of voters to challenge at the polls. The RNC also allegedly enlisted the help of off-duty sheriffs and police officers to intimidate voters by standing at polling places in minority precincts during voting with "National Ballot Security Task Force" armbands. Some of the officers allegedly wore firearms in a visible manner.

To settle the lawsuit, the RNC and RSC entered into the Consent Decree at issue here. The RNC and RSC agreed that they would:

[I]n the future, in all states and territories of the United States:

(a) comply with all applicable state and federal laws protecting the rights of duly qualified citizens to vote for the candidate(s) of their choice;

(b) in the event that they produce or place any signs which are part of ballot security activities, cause said signs to disclose that they are authorized or sponsored by the party committees and any other committees participating with the party committees;

(c) refrain from giving any directions to or permitting their agents or employees to remove or deface any lawfully printed and placed campaign materials or signs;

(d) refrain from giving any directions to or permitting their employees to campaign within restricted polling areas or to interrogate prospective voters as to their qualifications to vote prior to their entry to a polling place;

***2** (e) refrain from undertaking any ballot security activities in polling places or election districts where the racial or ethnic composition of such districts is a factor in the decision to conduct, or the actual conduct of, such activities there and where a purpose or significant effect of such activities is to deter qualified voters from voting; and the conduct of such activities disproportionately in or directed toward districts that have a substantial proportion of racial or ethnic populations shall be considered relevant evidence of the existence of such a factor and purpose;

(f) refrain from having private personnel deputized as law enforcement personnel in connection with ballot security activities.

(App. at 401–02.) [FN2] The RNC also agreed to, "as a first resort, use established statutory procedures for challenging unqualified voters." (*Id.*)

B. *1987 Enforcement Action and Consent Decree Modifications*

In Louisiana during the 1986 Congressional elections, the RNC allegedly created a voter challenge list by mailing letters to African–American voters and, then, including individuals whose letters were returned as undeliverable on a list of voters to challenge. A number of voters on the challenge list brought a suit against the RNC in Louisiana state court. In response to a discovery request made in that suit, the RNC produced a memorandum in which its Midwest Political Director stated to its Southern Political Director that "this program will eliminate at least 60,000–80,000 folks from the rolls ... If it's a close race ... which I'm assuming it is, this could keep the black vote down considerably." *Democratic Nat'l Comm. v. Republican Nat'l Comm.*, 671 F.Supp.2d 575, 580 (D.N.J.2009) (citing Thomas Edsall, *Ballot Security Effects Calculated: GOP Aide Said Louisiana Effort "Could Keep the Black Vote Down,"* WASH. POST, OCT.. 24, 1986 at A1.) Although the DNC was not a party to the action in Louisiana state court, it brought an action against the RNC for alleged violations of the Consent Decree after this memorandum was produced.

The RNC and the DNC settled the lawsuit, this time by modifying the Consent Decree, which remained "in full force and effect." (App. at 404.) In the 1982 Decree, the RNC had agreed to specific restrictions regarding its ability to engage in "ballot security activities," but that Decree did not define the term "ballot security activities." (App. at 401.) As modified in 1987, the Decree defined "ballot security activities" to mean "ballot integrity, ballot security or other efforts to prevent or remedy vote fraud." *Democratic Nat'l Comm.*, 671 F.Supp.2d at 581. The modifications clarified that the RNC "may deploy persons on election day to perform normal poll watch[ing] functions so long as such persons do not use or implement the results of any other ballot security effort, unless the other ballot security effort complies with the provisions of the Consent Order and applicable law and has been so determined by this Court." (App. at 405.) The modifications also added a preclearance provision that prohibits the RNC from assisting or engaging in ballot security activities unless the RNC submits the program to the Court and to the DNC with 20 days' notice and the Court determines that the program complies with the Consent Decree and applicable law.[FN3]

C. *1990 Enforcement Action*

***3** In 1990, the DNC brought a lawsuit alleging that the RNC violated the Consent Decree by participating in a North Carolina Republican Party ("NCRP") program. The DNC alleged that the RNC had violated the Decree in North Carolina by engaging in a program of the North Carolina Republican Party ("NCRP") in which 150,000 postcards were sent to residents of predominantly African–American precincts. This program allegedly attempted to intimidate voters by warning that it is a "federal crime ... to knowingly give false information about your name, residence or period of residence to an election official." *Democratic Nat'l Comm.*, 671 F.Supp.2d at 581. The postcards falsely stated that there was a 30–day minimum residency requirement prior to the election during which voters must have lived in the precinct in which they cast their ballot.

The District Court found that the DNC failed to establish that the RNC conducted, participated in, or assisted in the postcard program. However, the Court also found that the RNC violated the Consent Decree by failing to give the state parties guidance on unlawful practices under the Consent Decree or copies of the Decree when the RNC gave them ballot security instructional and informational materials. The Court held that the RNC must provide a copy of the Consent Decree, or information regarding unlawful practices under the Consent Decree, along with any such instructional or informational materials that the RNC distributes in the future to any state party.

D. *2004 Enforcement Action (the "Malone enforcement action")*

In 2004, the week before the general election for President, Ebony Malone ("Malone"), an African–American resident of Ohio, brought an enforcement action against the RNC, alleging that the RNC had violated the Consent Decree by participating in the compilation of a predominantly-minority voter challenge list of 35,000 individuals from Ohio. Malone's name was on the list. To compile the list, the RNC had sent a letter to registered voters in high minority concentration areas of Cleveland and the Ohio Republican Party sent a second mailing approximately a month later. Registered voters whose letters were returned as undeliverable were added to the challenge list.

Seeking solace pursuant to the Decree, Malone sought before the District Court a preliminary injunction barring the RNC and any state organizations with which it was cooperating from using the list in ballot security efforts.

On November 1, 2004, the DNC appeared before the District Court at an evidentiary hearing in support of Malone. The RNC argued that Malone's suit was non-justiciable due to irregularities in her registration which would result in her being challenged by the Ohio Board of Election regardless of any separate challenge brought by the RNC. The RNC also claimed that it had complied with the Decree and that the potential challenge to Malone voting was a "normal poll watch function[ ]" allowed by the Decree. (App. at 405.) Finally, the RNC asserted that the Ohio Republican Party, which was not subject to the Decree, would carry out any challenge to Malone's eligibility to vote.

***4** Following an evidentiary hearing, the District Court issued an Order barring the RNC from using the list to challenge voters and directing the RNC to instruct its agents in Ohio not to use the list for ballot security efforts. The District Court rejected the RNC's argument that Malone's claims were non-justiciable because she would suffer irreparable harm if she had to endure multiple challenges to her eligibility to vote. The District Court found that the RNC had violated the procedural and substantive provisions of the Consent Decree by participating with the Ohio Republican Party in devising and implementing the ballot security program and failing to obtain preclearance for the program.

The RNC requested that our Court stay the Order. The panel denied the request for a stay and affirmed the District Court's Order, noting that emails between the RNC and the Ohio Republican Party showed collaboration between the two organizations sufficient to support the District Court's factual findings.

The RNC petitioned for rehearing en banc. We granted the petition for rehearing en banc the next day, Election Day, November 2, 2004. This Court vacated the panel's ruling and stayed the District Court's Order. Before the entire Court could hear the matter en banc, Malone cast her ballot without being challenged. After Malone voted without challenge, Justice Souter, in his capacity as Circuit Justice for the Third Circuit, denied Malone's application to the Supreme Court seeking reinstatement of the injunction. We dismissed the appeal as moot, without addressing the merits.

E. *2008 Enforcement Action*

On November 3, 2008, the DNC alleged in a lawsuit that the RNC violated the Consent Decree by hiring private investigators to examine the backgrounds of some New Mexico voters in preparation for challenging those individuals' voting eligibility. The DNC requested a preliminary injunction to prevent the RNC from using the information gathered by private investigators in any ballot security efforts. The District Court denied the DNC's Motion for a Preliminary Injunction, concluding that the RNC did not direct or participate in any ballot security measures, and held that the RNC had not violated the Consent Decree.

F. *Motion to Vacate or Modify the Consent Decree*

On November 3, 2008, shortly after the District Court denied the DNC's Motion for a Preliminary Injunction, the RNC submitted the Motion to Vacate or Modify the Consent Decree that is currently at issue. The RNC submitted several arguments in support of its motion: (1) since the 1987 modification, the enactment of (a) the National Voter Registration Act of 1993 (the "NVRA" or "Motor Voter Law"), 42 U.S.C. §§ 1973gg *et seq.*, (b) the Bipartisan Campaign Reform Act of 2002 ("BCRA"), 2 U.S.C. §§ 431 *et seq.*, and (c) the Help America Vote Act of 2002 ("HAVA"), 42 U.S.C. §§ 15301 *et seq.* increased the risk of voter fraud and decreased the risk of voter intimidation; (2) the Consent Decree extends to types of conduct that were not included in the initial 1981 Complaint; (3) the Decree was interpreted too broadly and inconsistently with the parties' expectations at the time they entered the 1982 and 1987 settlements; and (4) the Decree violates the First Amendment by restricting communications between the RNC and state parties.

***5** The District Court held an evidentiary hearing on the motion during May 5 and 6, 2009 and also received post-hearing submissions from the parties. On December 1, 2009, the District Court issued an opinion, denying the motion to vacate the Decree. First, the District Court rejected the RNC's argument that the Consent Decree was void because it " 'improperly extend[s] to ... private conduct' and grants prospective relief beyond what the DNC could have achieved if the original 1981 action had been litigated." *Democratic Nat'l Comm.*, 671 F.Supp.2d at 595. The Court, instead, held the Decree was not void because parties can settle lawsuits by agreeing to broader relief than a court could have awarded otherwise. Furthermore, the Court held that the RNC was barred from asserting this argument because the RNC willingly entered the Decree as a means of settling the initial 1981 lawsuit and the RNC again consented to the Decree, as modified, in 1987. The District Court also held that the Decree did not violate the First Amendment because, under the Decree, the RNC is free to communicate with state parties about subjects other than ballot security. Additionally, the Court noted that the First Amendment applies only to state actions and does not prevent private parties from agreeing to refrain from certain types of speech.

Next, the District Court considered the RNC's arguments that the Decree should be vacated or modified due to changes in law, changes in fact, and the public interest in the RNC combating voter fraud. The Court found that neither the purported changes nor the public interest justified vacating or modifying the Decree. While the Court found that the Decree was not sufficiently unworkable to warrant vacating the Decree, the Court did find that four workability considerations justified modifying the Decree. Those considerations are that: (1) the potential inequity of the RNC being subject to suits brought by entities who were not party to the Decree when, under the BCRA, the RNC has to defend lawsuits using "hard money," [FN4] while the DNC would not have to spend any money on such suits because it would not be a party [FN5]; (2) the twenty-day notice requirement for preclearance prevents the RNC from combating mail-in voter registration fraud in a number of states with later mail-in voter registration deadlines; (3) the Decree lacked a clear definition of normal poll watching activities and the parties have not provided a definition, which has led the RNC to refrain from normal poll watching activities that the Decree was never intended to prohibit; and (4) the Decree lacked a termination date.

Thus, although the District Court denied the request to vacate the Decree, the Court granted the motion to modify the Decree. The District Court's modifications can be summarized as follows:

1. Only parties to the Consent Decree, RNC and DNC, may bring an enforcement suit regarding a violation of the Decree.

2. The preclearance period is shortened from 20 days to 10 days.

***6** 3. "Ballot security" is defined to include "any program aimed at combating voter fraud by preventing potential

voters from registering to vote or casting a ballot." *Democratic Nat'l Comm.*, 671 F.Supp.2d at 622. The modification also includes a non-exhaustive list of ballot security programs.

4. "Normal poll-watch function" is defined as "stationing individuals at polling stations to observe the voting process and report irregularities unrelated to voter fraud to duly-appointed state officials." *Id.* The modification includes a non-exhaustive list of activities that do and do not fit into the Decree definition of normal poll-watch function.

5. The Decree does not apply to any RNC program that does not have as at least one of its purposes the prevention of fraudulent voting or fraudulent voter registration.

6. The Consent Decree expires on December 1, 2017 (eight years after the date of the modification). If, before that date, the DNC proves by a preponderance of the evidence that the RNC violated the Decree, the Decree will extend for eight years from the date of the violation.

The RNC filed a timely appeal.

II. *JURISDICTION AND STANDARD OF REVIEW*

The District Court had subject matter jurisdiction over the litigation pursuant to 28 U.S.C. § 1331. We have jurisdiction over the appeal from the Consent Order, which contained an explicit reservation of appellate jurisdiction over the enforcement of the settlement terms, pursuant to 28 U.S.C. § 1291. *See Keefe v. Prudential Prop. & Cas. Insurance Co.*, 203 F.3d 218, 223 (3d Cir.2000); *see also Halderman v. Pennhurst State Sch. & Hosp.*, 901 F.2d 311, 317 (3d Cir.1990) (holding that courts have jurisdiction to enforce settlement agreements incorporated into orders).

[1][2] We review the District Court's decision modifying and refusing to vacate the Consent Order for abuse of discretion. *Delaware Valley Citizens' Council for Clean Air v. Pennsylvania*, 755 F.2d 38, 41 (3d Cir.1985). To demonstrate that a district court abused its discretion, an appellant must show that the court's decision was "arbitrary, fanciful or clearly unreasonable." *Moyer v. United Dominion Indus., Inc.*, 473 F.3d 532, 542 (3d Cir.2007) (quoting *Stecyk v. Bell Helicopter Textron, Inc.*, 295 F.3d 408, 412 (3d Cir.2002)).

III. *ANALYSIS*

A. Legal Standard

[3] This Court has emphasized that, by signing a consent decree, signatories make a "free, calculated and deliberate choice to submit to an agreed upon decree rather than seek a more favorable litigated judgment." *United States Steel Corp. v. Fraternal Assoc. of Steel Haulers*, 601 F.2d 1269, 1274 (3d Cir.1979). Federal Rule of Civil Procedure 60(b) provides that a court may relieve a party from an order when "the judgment is void," "applying it prospectively is no longer equitable," or for "any other reason that justifies relief." FED.R.CIV.P. 60(b)(4), (5), (6). Rule 60(b) does not provide, however, that an order may be rescinded or modified merely because it is no longer convenient for a party to comply with the consent order. *Rufo v. Inmates of the Suffolk County Jail, et al.*, 502 U.S. 367, 383, 112 S.Ct. 748, 116 L.Ed.2d 867 (1992); *see Bldg. & Constr. Trades Council of Phila. & Vicinity, AFL–CIO v. NLRB ("BCTC")*, 64 F.3d 880, 887 (3d Cir.1995) (holding that *Rufo*'s interpretation of Rule 60(b)(5) is a rule of general applicability and not limited to institutional reform litigation).

***7** [4] The Supreme Court interpreted Rule 60(b)(5) in *Rufo*, clarifying that "a party seeking modification of a consent decree bears the burden of establishing that a significant change in circumstances warrants revision of the decree." *Rufo*, 502 U.S. at 383, 112 S.Ct. 748. Such a party must establish at least one of the following four factors by a preponderance of the evidence to obtain modification or vacatur: (1) a significant change in factual conditions; (2) a significant change in law; (3) that "a decree proves to be unworkable because of unforeseen obstacles"; or (4) that "enforcement of the decree without modification would be detrimental to the public interest." *Id.* at 384, 112 S.Ct. 748.

[5] The Court elaborated on the change in law factor, holding that a decree must be modified if "one or more of the obligations placed upon the parties has become impermissible" and that a decree may be modified if "law has

changed to make legal what the decree was designed to prevent." *Id.* at 388, 112 S.Ct. 748. Typically, courts should not grant modification or vacatur "where a party relies upon events that actually were anticipated at the time it entered into a decree." *Id.* at 385, 112 S.Ct. 748. If a party agreed to the decree notwithstanding the anticipated change in conditions, "that party would have to satisfy a heavy burden to convince a court that it agreed to the decree in good faith, made a reasonable effort to comply with the decree, and should be relieved of the undertaking under Rule 60(b)." *Id.*

[6][7] Although *Rufo* provides a general interpretation of Rule 60(b)(5), it does not provide a "universal formula" for deciding when applying a decree prospectively is no longer equitable. *BCTC*, 64 F.3d at 888. In addition to the *Rufo* standard, a court determining whether to vacate or modify a decree should respond to the specific set of circumstances before it by considering factors unique to the conditions of the case. *Id.* (noting that "equity demands a flexible response to the unique conditions of each case"); The additional factors a court should typically consider before modifying or vacating a decree under Rule 60(b)(5) include:

> the circumstances leading to entry of the injunction and the nature of the conduct sought to be prevented; the length of time since entry of the injunction; whether the party subject to its terms has complied or attempted to comply in good faith with the injunction; and the likelihood that the conduct or conditions sought to be prevented will recur absent the injunction.

Id.

[8] In weighing these factors, "the court must balance the hardship to the party subject to the injunction against the benefits to be obtained from maintaining the injunction" and the court should also "determine whether the objective of the decree has been achieved." *BCTC*, 64 F.3d at 888. While the decree and changed fact or law need not be completely inconsistent with each other, for such a change to justify vacatur, it must be significant, meaning that it renders the prospective application of the decree inequitable. *See BCTC*, 64 F.3d at 888.

***8** [9] After a moving party has established a change warranting modification of a consent order, "the district court should determine whether the proposed modification is suitably tailored to the changed circumstance." *Rufo*, 502 U.S. at 391, 112 S.Ct. 748. The modification "must not create or perpetuate a constitutional violation"; it "should not strive to rewrite a consent order so that it conforms to the constitutional floor"; and a court should not try to modify a consent order except to make those revisions that equity requires, given the change in circumstances. *Id.*

B. Discussion

[10] The RNC asks that our Court vacate a decree that has as its central purpose preventing the intimidation and suppression of minority voters. When, as here, a party voluntarily enters into a consent decree not once, but twice, and then waits over a quarter of a century before filing a motion to vacate or modify [FN6] the decree, such action gives us pause. Further, the RNC, with the advice of counsel, twice chose to limit indefinitely its ability to engage in certain activities enumerated in the Decree by entering into a decree with no expiration date.

At present, Appellant seeks review of the District Court's order denying vacatur because it prefers not to comply with the Consent Decree at a critical political juncture—the upcoming election cycle. *See Rufo*, 502 U.S. at 383, 112 S.Ct. 748. However, we cannot disturb the District Court's opinion unless it abused its discretion, meaning that its decision was "arbitrary, fanciful, or clearly unreasonable," *Moyer*, 473 F.3d at 542, when it found that the RNC failed to demonstrate that prospective application of the Decree, with the Court's modifications, would not be equitable.

In reviewing the District Court's opinion and its modifications to the Decree, we do not take lightly Judge Debevoise's nearly three decades of experience presiding over all matters related to this Decree. *See Reconstruction Fin. Corp. v. Denver & R.G.W.R. Co.*, 328 U.S. 495, 533, 66 S.Ct. 1384, 90 L.Ed. 1400 (1946) (according special weight to a district judge's finding that a reorganization plan provided adequately for the equitable treatment of dissenters "[i]n view of the District Judge's familiarity with the reorganization"); *Jenkins by Jenkins v. Missouri*, 122 F.3d 588, 604 (8th Cir.1997) (noting that a district judge had gained extensive knowledge of the conditions relevant

to a specific lawsuit because the judge had presided over the litigation for twenty years, from the time of its inception).

We shall review whether the District Court abused its discretion by first holding that the Decree need not be vacated due to any First Amendment violation.[FN7]

Next, we shall review whether the District Court abused its discretion regarding Rule 60(b)(5). First, we shall analyze whether the District Court abused its discretion regarding the broad changed circumstances factors outlined in *Rufo*. Second, we shall analyze whether the District Court abused its discretion regarding the *BCTC* factors specific to the parties and Consent Decree at issue.[FN8] Third, we will inquire into whether the Court abused its discretion by holding that its prescribed modifications to the Decree were "suitably tailored to the changed circumstance[s]." [FN9] *Rufo*, 502 U.S. at 393, 112 S.Ct. 748.

***9** The RNC has not demonstrated, by a preponderance of the evidence, the circumstances necessary for vacatur or for modifications, other than those ordered by the District Court. For the reasons set forth herein, we find that the District Court did not abuse its discretion in declining to vacate the Decree or in making the modifications to the Decree that it ordered.

1. *First Amendment*

The RNC argues that the Consent Decree should be vacated because the Decree violates the First Amendment in two ways. The RNC claims that the 2004 modifications to the Decree, which bar the RNC from engaging in ballot security activities absent District Court preclearance, serve as a prior restraint on the RNC's right to engage in political speech. Additionally, the RNC alleges that the District Court's 1990 Order unconstitutionally forces speech by requiring the RNC to provide a copy of the Decree, or information regarding unlawful practices under the Decree, along with any ballot security instructional or informational materials that the RNC distributes to any state party.

[11][12] As the District Court correctly noted, in this context, the First Amendment applies only to state action. *Cent. Hardware Co. v. NLRB*, 407 U.S. 539, 547, 92 S.Ct. 2238, 33 L.Ed.2d 122 (1972). Under *Shelley v. Kraemer*, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948), court enforcement of certain private agreements constitutes state action. *Id.* at 19–20, 68 S.Ct. 836 (holding that a state court injunction to enforce a racially restrictive covenant against parties who did not wish to discriminate is state action); *Switlik v. Hardwicke Co., Inc.*, 651 F.2d 852, 860 (3d Cir.1981) ("the state court's enforcement of an agreement between two private individuals can, in certain instances, constitute state action" (citing *Shelley*, 334 U.S. 1, 68 S.Ct. 836)).

Although a court's enforcement of a consent decree can constitute state action under *Shelley*, *Shelley's* holding may not have sufficient reach to encompass the enforcement of this Decree. The Supreme Court has declined to find state action where the court action in question is a far cry from the court enforcement in *Shelley*. *See Blum v. Yaretsky*, 457 U.S. 991, 1004–05, 102 S.Ct. 2777, 73 L.Ed.2d 534 (1982) (recognizing that state approval of or acquiescence to a private choice does not convert that choice into state action); *Lavoie v. Bigwood*, 457 F.2d 7, 11 (1st Cir.1972) (noting the theory that, under *Shelley*, court enforcement of a private agreement may only be state action if, "in resorting to a state sanction, a private party must necessarily make the state privy to his discriminatory purpose").

[13][14] Even if court enforcement of this Consent Decree constitutes state action, "speech rights are not absolute." *Tennessee Secondary Sch. Athletic Ass'n v. Brentwood Acad.*, 551 U.S. 291, 295, 127 S.Ct. 2489, 168 L.Ed.2d 166 (2007). "[C]onstitutional rights ... may be contractually waived where the facts and circumstances surrounding the waiver make it clear that the party foregoing its rights has done so of its own volition, with full understanding of the consequences of its waiver." *Erie Telecomm., Inc. v. City of Erie, Pa.*, 853 F.2d 1084, 1096 (3d Cir.1988). Court enforcement of a private agreement to limit a party's ability to speak or associate does not necessarily violate the First Amendment. *Ry. Emps. Dep't. v. Hanson*, 351 U.S. 225, 76 S.Ct. 714, 100 L.Ed. 1112 (1956) (holding that court enforcement of a union shop agreement, which would require all railroad employees to become union members does not violate the First Amendment right to association). [FN10]

***10** [15] The Supreme Court has long recognized that a party may waive constitutional rights if there is "clear" and "compelling" evidence of waiver and that waiver is voluntary, knowing, and intelligent.[FN11] "Such volition and understanding are deemed to be, and indeed have been held to be, present, where the parties to the contract have bargaining equality and have negotiated the terms of the contract, and where the waiving party is advised by competent counsel and has engaged in other contract negotiations." *Erie Telecomm.*, 853 F.2d at 1096.

[16][17] "The question of waiver of a federally guaranteed constitutional right is, of course, a federal question controlled by federal law." *Brookhart v. Janis*, 384 U.S. 1, 4, 86 S.Ct. 1245, 16 L.Ed.2d 314 (1966). The Supreme Court has held that courts must " 'indulge every reasonable presumption against waiver' of fundamental constitutional rights." *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938) (quoting *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393, 57 S.Ct. 809, 81 L.Ed. 1177 (1937)). Determining whether waiver was voluntary, knowing, and intelligent in any particular case rests "upon the particular facts and circumstances surrounding that case, including the background, experience and conduct" of the waiving party. *Id.*

Here, in 1982, the RNC, with the assistance of counsel, voluntarily entered into the Decree. In consideration of the DNC and other plaintiffs amicably resolving all matters that were or could have been raised in the 1982 lawsuit, the RNC signed a settlement agreement in which they committed, among other provisions,

> to refrain from undertaking any ballot security activities in polling places or election districts where the racial or ethnic composition of such districts is a factor in the decision to conduct, or the actual conduct of, such activities there and where a purpose or significant effect of such activities is to deter qualified voters from voting ...

(App. at 401–02.) The RNC agreed that the terms of the Decree would bind the RNC, its agents, servants, and employees, "whether acting directly or indirectly through other party committees." (*Id.* at 402.)

In 1987, the RNC once again entered into a settlement stipulation, with the assistance of counsel, agreeing to modify the 1982 Decree. The Decree, as modified, clarified that "ballot security" efforts meant "ballot integrity, ballot security or other efforts to prevent or remedy voter fraud." *Democratic Nat'l Comm.*, 671 F.Supp.2d at 581. The modifications allow the RNC to engage in normal poll watch functions on Election Day so long as the people it deploys do not use or implement the results of any ballot security effort without a determination by the District Court that the ballot security effort complies with the provisions of the Decree and applicable law. In order to secure such a determination, the RNC must submit a description of the program to the District Court following twenty days' notice to the DNC. Only with the District Court's approval secured in this fashion can the RNC engage, assist, or participate in any ballot security program.

***11** [18] A court can enforce an agreement preventing disclosure of specific information without violating the restricted party's First Amendment rights if the party received consideration in exchange for the restriction. *See Alfred A. Knopf, Inc. v. Colby*, 509 F.2d 1362, 1370 (4th Cir.1975) (noting that executing a secrecy agreement can "effectively relinquish[ ] ... First Amendment rights").

That the Decree and its 1987 modification resolved all issues that could have been raised by the DNC and other plaintiffs in that litigation was sufficient consideration to evidence a waiver. *See D.H. Overmyer Co. of Ohio v. Frick Co.*, 405 U.S. 174, 186–87, 92 S.Ct. 775, 31 L.Ed.2d 124 (1972) (holding that the presence of consideration constitutes some evidence of a waiver).

The Supreme Court has held that there is a valid waiver of constitutional rights where the party that waived "was a corporation with widespread activities and a complicated corporate structure; [the parties] had equal bargaining power; and [where the waiving party] did not contend that it or its counsel was unaware of the significance of the [instrument in which it waived notice]." *Erie Telecomm.*, 853 F.2d at 1095 (citing *D.H. Overmyer*, 405 U.S. at 186, 92 S.Ct. 775). Here, the RNC has widespread activities, had equal bargaining power with the plaintiffs, and has not contended that it was unaware of the significance of the Decree, which it was free to decide not to enter into. The RNC also received consideration—the plaintiffs in the 1982 and 1987 lawsuits relinquished all claims that could have arisen from those actions. The RNC "may not now seek to withdraw from performing its obligations and from discharging its burdens, while it still continues to retain all of the benefits it

received ... as a result of the agreement[ ]." *Erie Telecomm.*, 853 F.2d at 1097. The 1982 and 1987 settlement agreements, signed by counsel for the RNC, are clear and compelling evidence that the RNC voluntarily, knowingly, and intelligently waived certain First Amendment rights.

The RNC alleges that the District Court Orders from 1990 and 2004 violate its First Amendment rights. However, neither order imposes limitations on the RNC's First Amendment rights beyond those that the RNC voluntarily waived in 1982 and 1987. In 1990, the Court held that the RNC must provide a copy of the Consent Decree, or information regarding unlawful practices under the Consent Decree, along with any ballot security materials that the RNC distributes to any state party. Despite the RNC's arguments before our Court, any restrictions on the RNC's ability to communicate and associate with state and local parties are self-imposed and waived by the RNC entering into the Decree in 1982 and 1987.

In 2004, the District Court issued an Order barring the RNC from using a voter challenge list targeting precincts with large African–American populations that the RNC had compiled in coordination with the Ohio Republican Party. The District Court found that the RNC had violated the Decree both procedurally and substantively by participating with the Ohio Republican Party in devising and implementing the ballot security program and failing to obtain preclearance for the program. The 2004 Order does not impose any additional limitation on the speech rights of the RNC beyond those present in the 1982 and 1987 Decree and modifications, in which the RNC consented and agreed to certain restrictions of its rights. Hence, neither the 1990 nor 2004 Orders present a basis for a First Amendment challenge.

***12** In 1982 and 1987, the RNC voluntarily agreed to create and abide by the very provisions that it now challenges as unconstitutional. The District Court's enforcement of the Decree against the RNC does not result in a First Amendment violation. The District Court did not abuse its discretion in denying the request to vacate the Decree on this basis.

2. Rufo *Factors*

We now address the three *Rufo* factors in turn.

a. Changed Factual Circumstances

[19] The Decree and its 1987 modification aim primarily to prevent the RNC from "using, [or] appearing to use, racial or ethnic criteria in connection with ballot integrity, ballot security or other efforts to prevent or remedy suspected vote fraud" and to neither "hinder[ ] [nor] discourag[e] qualified voters from exercising the right to vote." (App. at 404–05.) Given these purposes of the Decree, only a change that decreases minority voter intimidation and vote suppression ex ante can be a "significant change [that] warrants revision of the decree." *Rufo*, 502 U.S. at 383, 112 S.Ct. 748.

The RNC argues that the following factual changes warranted vacatur or modification of the Decree: first, the President and Attorney General of the United States and the President of the RNC (former) are African American; [FN12] second, that minority voter registration and turnout have increased; and third, that increased availability of alternative voting mechanisms such as early voting or permanent absentee voting are more widely available. The RNC also presented testimony at the evidentiary hearing before the District Court that the appointment of African–Americans as the RNC Chairman and Chief Administrative Officer decreased the likelihood that the RNC would engage in ballot security programs resulting in minority vote suppression. Testimony presented by the RNC further claimed that "with an African–American President, and an African–American Attorney General, [ ] the laws that are already on the books regarding voter fraud, voter intimidation, and voter suppression are going to be actively pursued by this Justice Department." (Hr'g Tr. 65:22–66:2.)

The RNC argues that increases in minority voter registration and voter turnout are changes in factual circumstances rendering the Decree unnecessary because this data "demonstrat[es] that minority voters are not being suppressed." (Appellant's Br. 33.) Furthermore, the RNC asserts that the availability of alternative voting methods, such as early voting or permanent absentee voting, allows voters who are worried about intimidation at precincts on Election Day to avoid such intimidation by voting from home or voting early. It contends that records of voters using these alternative voting mechanisms undermine allegations of disenfranchisement and that "the availability of

provisional ballots squelches any effort to disenfranchise a voter who appears at the polls." (*Id.* at 38.)

The RNC's argument that the fact that President Obama, Attorney General Eric Holder, RNC Chairman Michael Steele,[FN13] and another RNC leader are minorities justifies vacatur or modification of the Decree hardly requires a serious response. The RNC posits that a minority President and Attorney General of the United States increase the likelihood of prosecution for violations of the Voting Rights Act ("VRA"), such as intimidation of minority voters. Are we to conclude that all issues that affect African–Americans will now get greater funding, greater attention, and more focus because of President Obama? Our jurisprudence cannot depend on such assumptions.

***13** Even assuming that VRA violations will be more vigorously litigated by the current administration, that litigation would likely be brought after the VRA has been violated, so it will not prevent minority voter intimidation or vote suppression ex ante. Similarly, a handful of minorities temporarily [FN14] occupying leadership positions in the RNC does not mean that minority voter intimidation or suppression will decrease.

Contrary to the RNC's assertions, the increase in minority voter registration and voter turnout since 1982 does not demonstrate that "minority voters are not being suppressed." (Appellant's Br. 33.) The RNC has submitted no evidence to support its supposition. Voter registration and turnout data is not statistically relevant regarding the argument that revision of the Decree is warranted. Moreover, the increase in minority voter registration and voter turnout could be evidence that the Decree is necessary and effective. The RNC's data on minority voter registration and turnout demonstrates that, since the RNC consented to the Decree in 1982, minority voter registration and turnout have increased significantly. The Decree's purpose is to help ensure that potential minority voters are not dissuaded from going to the polling station to vote, as they might be if the RNC were unfettered by the Decree.

Despite the RNC's bald assertion to the contrary, the availability of alternative voting mechanisms is not a factual change that prevents polling place voter suppression and intimidation. The RNC has presented no evidence demonstrating how alternative voting mechanisms, such as allowing voters to vote prior to Election Day or to mail in their votes, would prevent the RNC from "using, [or] appearing to use, racial or ethnic criteria in connection with ballot integrity, ballot security or other efforts to prevent or remedy suspected vote fraud" at polling stations. (App. at 404–05.) Furthermore, as the District Court notes, voters should not have to avoid voting at polling stations on Election Day in order to avoid voter intimidation.

None of these alleged factual changes renders the continuation of the Decree inequitable. The District Court did not abuse its discretion by declining to vacate or modify the Decree based on the RNC's asserted factual changes.

b. Changes in Law [FN15]

[20] The RNC's arguments regarding changes in law brought about by the enactments of the Motor Voter Law or NVRA, BCRA,[FN16] and HAVA are only relevant to our review if they render prospective application of the Decree inequitable. To do that, they must have some bearing on the purpose of the Decree—decreasing the RNC's engagement in minority voter intimidation and suppression. The RNC asserts that the Motor Voter Law, BCRA, and HAVA increase the risk of voter fraud and increase the ease with which eligible voters can register to vote, vote, and file a provisional ballot if they are challenged at polling stations. Even if the RNC's assertions are true, which has not been established, the RNC has failed to carry its burden of establishing that a significant change in circumstances warrants revision of the Decree. Additionally, none of the changes in law that the RNC puts forth make "one or more of the obligations placed upon the parties [ ] impermissible under federal law" or "make legal what the decree was designed to prevent." *Rufo*, 502 U.S. at 388, 112 S.Ct. 748.

***14** "One of the NVRA's central purposes was to dramatically expand opportunities for voter registration and to ensure that, once registered, voters could not be removed from the registration rolls by a failure to vote or because they had changed addresses." *Welker v. Clarke*, 239 F.3d 596, 598–99 (3d Cir.2001) (citing 42 U.S.C. § 1973gg(b)).[FN17] The NVRA authorizes election officials to use mailings to update voter registration rolls. Additionally, the NVRA imposes criminal penalties on individuals who submit false voter registration forms, knowingly cast a forged ballot, or manipulate the tabulation of votes, and it specifies criminal penalties for intimidating, threatening, or coercing any person who is registering to vote or voting. 42 U.S.C. § 1973gg–10(1)(A), 10(2).

The RNC argues that the NVRA renders the Decree antiquated because it has led to significant increases in minority voter registration and turnout. The RNC also asserts that the NVRA creates an increased risk of voter fraud. This argument, that the enactment of a law that expands voter registration opportunities renders inequitable a Decree that aims to prevent voter intimidation and suppression, is unpersuasive. The District Court correctly notes that any increase in minority voter registration or voter turnout caused by the Motor Voter Law is irrelevant to the Decree because "the Consent Decree was not designed to encourage minority voter registration, but rather to prevent voter suppression." *Democratic Nat'l Comm.*, 671 F.Supp.2d at 614. Additionally, the District Court cites evidence that the Motor Voter Law reduces the threat of voter registration fraud, but does not attempt to prevent voter suppression. *Id.*

Nor does the NVRA "make legal what the decree was designed to prevent." *Rufo*, 502 U.S. at 388, 112 S.Ct. 748. The NVRA authorizes election officials, not the RNC, to use mailings to update voter registration lists. 42 U.S.C. § 1973gg–6(c)–(d). The NVRA does not authorize targeting such mailings at predominantly minority precincts nor does the NVRA authorize the presence of voter fraud security teams targeted at predominantly minority precincts on Election Day, both actions that the Decree is designed to prevent.

The NVRA provision that makes voter intimidation subject to a criminal penalty is not relevant to the purpose of the Decree because it would not prevent minority voter intimidation or suppression. The provision allows for criminal penalties to be imposed ex post, only after voters had been intimidated and had lost their opportunity to cast their ballots. This provision does not render inequitable the application of the Decree, in which the RNC agreed not to "us [e], [or] appear[ ] to use, racial or ethnic criteria in connection with ballot integrity, ballot security or other efforts to prevent or remedy suspected vote fraud." (App. at 404–05.)

[21] The "central provisions" of the BCRA were "designed to address Congress' concerns about the increasing use of soft money and issue advertising to influence federal elections." *McConnell v. FEC*, 540 U.S. 93, 132, 124 S.Ct. 619, 157 L.Ed.2d 491 (2003). The "BCRA made a number of dramatic changes to campaign finance law to achieve these goals, including barring national political parties from soliciting soft money." *Shays v. Federal Election Comm'n*, 528 F.3d 914, 918 (D.C.Cir.2008) (citing 2 U.S.C. § 441i(a)). The BCRA also "barred state parties from spending soft money on 'federal election activity,' including 'get-out-the-vote activity' and 'voter registration activity.' " *Id.* (quoting 2 U.S.C. § 441i(b)(1)).

***15** The RNC argues that the BCRA's prohibition on the spending of soft money by state parties for voter registration and get-out-the-vote activity has heightened the risk of voter fraud because it is difficult to track the voter registration efforts of the increased number of groups registering voters. As the District Court mentions, the Decree does not prevent the RNC from collaborating with non-party organizations to register voters and the RNC has not demonstrated that any ineligible voter registered by a non-party organization has ever actually cast a vote. The RNC has not demonstrated that this provision of the BCRA is a significant change in the law that warrants revision of the Decree.

[22] "HAVA is concerned with updating election technologies and other election-day issues at polling places." *Gonzalez v. Arizona*, 624 F.3d 1162, 1184 (9th Cir.2010). One purpose of HAVA was "to prevent on-the-spot denials of provisional ballots to voters deemed ineligible to vote by poll workers." *Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565, 574 (6th Cir.2004).[TN18] HAVA also established complaint procedures to challenge alleged voting violations. 42 U.S.C. § 15512. The RNC argues that HAVA increases the risk of voter fraud and reduces the risk of vote suppression by allowing voters to cast provisional ballots.

The provisional ballot portion of HAVA is not aimed at preventing voter suppression or intimidation and does not render the prospective application of the Decree inequitable. Despite the RNC's assertions, the fact that HAVA affords every voter the opportunity to cast a provisional ballot is only effective if those voters are not intimidated by voter fraud efforts, such as those targeted by the Decree. As the District Court notes, voter intimidation could prevent voters from entering the polls to obtain a provisional ballot. *Democratic Nat'l Comm.*, 671 F.Supp.2d at 612–13, 616 ("Some voters ... may choose to refrain from voting rather than wait for the qualifications of those ahead of them to be verified ... Others may be prevented from waiting by responsibilities ...") (citing DNC Hr'g Ex.

18 at 6; RNC Hr'g Ex. 26 at 56; *League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 478 (6th Cir.2008)). The opportunity to cast a provisional ballot is not relevant to the purpose of the Decree because it does not decrease minority voter intimidation or suppression.

The availability of complaint procedures for alleged voting violations under HAVA does not "make legal what the decree was designed to prevent." *Rufo*, 502 U.S. at 388, 112 S.Ct. 748. Moreover, the HAVA complaint procedures, unlike the Decree, do not aim to prevent the RNC from targeting its voter fraud efforts at precincts with higher populations of minorities.

The District Court did not abuse its discretion when it found that the Motor Voter Law, BCRA, and HAVA have "not altered [the] calculus" of in-person voter fraud or voter intimidation to an extent that justifies vacating or modifying the Decree due to a change in law. *Democratic Nat'l Comm.*, 671 F.Supp.2d at 613.

c. Public Interest

***16** [23] The RNC argues that vacating the Decree would benefit the public interest by allowing the RNC to engage in programs attempting to prevent voter fraud, which the RNC alleges are hampered by the Decree. Additionally, the RNC contends that there is little need to prevent the intimidation and suppression of minority voters. Specifically, the RNC asserts that voter fraud is a danger and that "political parties, candidates, the Government, and the public all have an undisputed interest in protecting the integrity of the election process." (Appellant's Br. at 50.) Thus, the RNC argues that it should be permitted to address voter fraud free from the constraints of the Decree.

If the RNC establishes that "a durable remedy has been implemented, continued enforcement of the order is not only unnecessary, but improper." *Horne v. Flores*, 557 U.S. 433, ——, 129 S.Ct. 2579, 2595, 174 L.Ed.2d 406 (2009) (holding that the United States Court of Appeals for the Ninth Circuit employed a heightened standard for its Rule 60(b)(5) inquiry instead of the required flexible approach). However, the RNC has pointed to no remedy other than the Decree that prevents the RNC from "using, [or] appearing to use, racial or ethnic criteria in connection with ballot integrity, ballot security or other efforts to prevent or remedy suspected vote fraud." (App. at 404–05.)

The District Court declined to determine whether laws passed by Congress sufficiently address the dangers of voter fraud, recognizing that such is not the task of the federal court. *Bartlett v. Strickland*, 556 U.S. 1, 17, 129 S.Ct. 1231, 1245, 173 L.Ed.2d 173 (2009) ("Though courts are capable of making refined and exacting factual inquiries, they 'are inherently ill-equipped' to 'make decisions based on highly political judgments' ...") (quoting *Holder v. Hall*, 512 U.S. 874, 894, 114 S.Ct. 2581, 129 L.Ed.2d 687 (1994) (Thomas, J., concurring in judgment)). Instead, the Court noted that Congress is better equipped to make this determination by weighing the dangers of voter fraud against the dangers of voter intimidation.

The District Court rejected the RNC's argument that the Decree must be vacated or modified because the risk of voter fraud outweighs the risk of voter suppression and intimidation. As the District Court correctly points out, the Decree only requires preclearance for programs involving the prevention of in-person voter fraud. Furthermore, the District Court has never prevented the RNC from implementing a voter fraud prevention program that the RNC has submitted for preclearance, at least in part, because the RNC has never submitted any voter fraud prevention program for preclearance.

Although the RNC pointed to charges that were noted in the Carter–Baker Commission Report against eighty-nine individuals and fifty-two convicted individuals to demonstrate the pervasiveness of voter fraud, those purported instances of voter fraud ranged "from vote-buying to submitting false voter registration information and voting-related offenses by non-citizens." (RNC Hr'g Ex. 26 at 45.) Thus, only a fraction of that alleged fraudulent activity was related to in-person voter fraud, which is the type of fraud addressed in the Decree.

***17** The FBI report that the RNC submitted regarding irregularities in Wisconsin during the 2004 election did not specify whether the voting irregularities under investigation involved votes cast in person or votes cast through absentee voting or some other alternative process. In support of the notion that most alleged incidents of voter fraud are not related to in-person voting and are, thus, irrelevant to the Decree, the DNC submitted evidence of voting

irregularities in Florida during the 2004 election, which was also cited by the RNC, that showed that "the majority of those accused of wrongdoing were elected officials and political operatives." *Democratic Nat'l Comm.*, 671 F.Supp.2d at 607.

The Supreme Court has also noted the rarity of in-person voter fraud. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 194, 128 S.Ct. 1610, 170 L.Ed.2d 574 (2008) (noting that there was "no evidence of any [in-person voter] fraud actually occurring in Indiana at any time in its history"); *see also id.* at 226, 128 S.Ct. 1610 (Souter, J., dissenting) ("[T]he State has not come across a single instance of in-person voter impersonation fraud in all of Indiana's history."); *Democratic Nat'l Comm.*, 671 F.Supp.2d at 609 ("Justice Stevens acknowledged that, of the 'occasional examples' of in-person fraud on which his ruling was based, all but one had been shown to have been 'overstated because much of the fraud was actually absentee ballot fraud or voter registration fraud.' " (quoting *Crawford*, 553 U.S. at 196 n. 12, 128 S.Ct. 1610)). Thus, the RNC has not established that in-person voter fraud is sufficiently prevalent such that applying the Decree prospectively is no longer equitable. Even if the public has an unmet need for the prevention of in-person fraud, the Decree does not prevent the RNC from combating in-person voter fraud if it obtains preclearance. If the risk of voter fraud is as great and consequential as the RNC alleges and an RNC voter security program is a significant part of efforts needed to prevent that voter fraud, it would seem that the RNC would have attempted to obtain preclearance for a voter security program at least once since 1987.

The RNC argues that "minority voters are not being suppressed," and, thus, the Decree does not serve public interest. (Appellant's Br. 33.) The District Court noted as an example, however, that the voter-challenge list in *Malone* included 35,000 registered voters who were predominantly minorities. Without the enforcement of the Decree provisions, these voter-challenge lists that are racially-targeted, in intent or in effect, could result in the intimidation and deterrence of a number of voters.

When confronted with such targeted voter-challenge lists, some eligible voters may choose to refrain from voting instead of waiting for the verification of their own eligibility or that of others ahead of them in line. *(See, e.g.*, DNC Hr'g Ex. 18 at 6 (quoting a former Political Director of the Republican Party of Texas, who stated that photo identification requirements "could cause enough of a dropoff in legitimate Democratic voting to add three percent to the Republican vote."); RNC Hr'g Ex. 26 at 56 (portion of the Carter–Baker Commission Report on "Polling Station Operations," in which the Report noted voter fraud security in some minority communities may be "intimidating" and that, during the 2004 election, "[p]roblems with polling station operations, such as long lines, were more pronounced in some places than others. This gave rise to suspicions that the problems were due to discrimination ...").)

***18** The District Court did not abuse its discretion by finding that public interest concerns, including the prevention of voter fraud and the prevention of voter suppression and intimidation, do not justify vacatur or modification of the Decree.

d. Workability

[24] The RNC argued before the District Court that there were workability issues that required modification of the Decree, as a practical matter. The District Court held that there were four workability issues that weighed in favor of modification: (1) the potential inequity of the RNC being subject to suits brought by entities who were not party to the Decree when, under the BCRA, the RNC has to defend lawsuits using "hard money," while the DNC does not have to spend any money on such suits because it would not be party to them [FN19]; (2) the twenty-day notice requirement for preclearance prevents the RNC from combating mail-in voter registration fraud in a number of states with later mail-in voter registration deadlines; (3) the Decree lacks a clear definition of normal poll watching activities and the parties have not provided a definition, leading the RNC to refrain from normal poll watching activities, which the Decree was never intended to prohibit; and (4) the Decree lacked a termination date.

The District Court, accordingly, modified the Decree in the following ways: (1) allowed only parties to the Decree, the DNC and NJDSC, to bring an enforcement action under the Decree; (2) decreased the preclearance notice requirement from twenty days to ten days; (3) provided clearer definitions and examples of "ballot security" [FN20] and "normal poll watching" [FN21] activities; and (4) added an eight-year expiration date, December 1, 2017, to the Decree, allowing for an extension of the Decree for another eight years if the DNC proves by a preponderance of the evidence that the RNC has violated the Decree.

In addition to determining whether the District Court abused its discretion by declining to make more extensive modifications to the Decree than it did based on workability concerns, we analyze, also under the abuse of discretion standard, whether the District Court's "proposed modification is suitably tailored to the changed circumstance." *Rufo*, 502 U.S. at 391, 112 S.Ct. 748. As noted above, the modification "must not create or perpetuate a constitutional violation"; it "should not strive to rewrite a consent order so that it conforms to the constitutional floor"; and a court should not try to modify a consent order other than making those revisions that equity requires because of the change in circumstances. *Id.*

The District Court held that the Decree should be modified because the BCRA creates a potential inequity between the RNC and the DNC if third parties are allowed to bring suits to enforce the Decree against the RNC. Without modification, the RNC would have to defend such third-party suits with limited "hard money" because it cannot solicit "soft money" under the BCRA while the DNC, not a party to such suits, would not have to expend resources on these third-party suits. Accordingly, the District Court modified the Decree so that only the DNC and NJDSC can bring an enforcement action under the Decree so that both parties would have to spend "hard money" on the enforcement action. This modification eliminates any potential BCRA-caused inequity in the prospective application of the Decree.

***19** In this respect, the Court revised the Decree only to the extent required because of the change in circumstances brought about by the BCRA. Limiting the ability to bring Decree enforcement actions to parties to the Decree is a modification suitably tailored to the equitable concerns brought about by the "hard money" restrictions in the BCRA.

The RNC argues that this modification does not address the workability issues caused by the costly and distracting enforcement actions filed shortly before Election Days because the money the RNC would have to spend defending those suits takes money away from the RNC's political efforts, regardless of whether the DNC also has to spend money to bring those suits. The nature and timing of election cycles may cause the need to defend against Decree enforcement suits to arise at inconvenient times, but resolving those issues before Election Day is crucial to enforcing the Decree by ensuring access to the polls and preventing suppression of minority votes.

[25] In effect, the RNC contends that the Decree should be vacated because it is unworkable for the RNC to spend any money defending itself in enforcement actions. This argument is not persuasive. When the RNC twice consented to the Decree and gained its benefits, it should have anticipated that it would likely need to spend money defending itself in future enforcement actions. Neither modification nor vacatur are justified "where a party relies upon events that actually were anticipated at the time it entered into a decree." *Rufo*, 502 U.S. at 385, 112 S.Ct. 748.

The District Court noted that a number of states now have voter registration deadlines less than twenty days before the election and that the RNC has a valid interest in preventing fraudulent voter registration. The District Court modified the Decree by decreasing the notice requirement for preclearance from twenty days to ten days.

The RNC argues that the ten-day preclearance period should be eliminated because it forces the party to reveal its Election Day strategy to the DNC in order to combat voter fraud and is, therefore, unworkable. The RNC has requested zero days for preclearance or, at least, some decrease in the time period for the preclearance notice requirement.[FN22] The RNC asserts that "any preclearance requirement is tantamount to a prohibition on Election Day activities by the RNC" because it means that the RNC must foresee Election Day issues twenty to thirty-five days in advance of an election; "forc[es] the RNC to disclose its tactical thinking and Election Day strategy far enough in advance for the DNC and others to craft counter-strategies"; and it "requires the RNC to place equivalent numbers of poll watchers in all precincts, regardless of political or practical considerations." (Appellant's Br. at 52–54.)

The RNC's argument is wholly speculative. The RNC's supposed knowledge and experience of unworkability is mere conjecture because, since the preclearance provision was added to the Decree in 1987, the RNC has never attempted to obtain preclearance. Contrary to the RNC's argument, the preclearance provision does not require the RNC to disclose its tactical thinking and Election Day strategy except with regard to ballot security activities. The RNC points to no statement of the District Court and no provision of the Decree that requires the RNC "to place

equivalent numbers of poll watchers in all precincts." (Appellant's Br. at 52–54.)

***20** On the contrary, the Decree does not require any preclearance for normal poll watching functions, so the Decree would in no way prohibit the RNC from placing different numbers of poll watchers in precincts. Further, there is no basis for any RNC argument that the preclearance provision requires the RNC to place the same number of voter fraud security team members at each precinct. The RNC does not know what level of program detail the District Court would require before granting preclearance.[FN23] The preclearance provision does not prevent the RNC from achieving its objective of normal poll-watching, carrying out approved ballot security programs, or implementing any other Election Day strategies that do not "us|e|, |or| appear| | to use, racial or ethnic criteria in connection with ballot integrity, ballot security or other efforts to prevent or remedy suspected vote fraud." (App. at 404–05.)

With no preclearance provision, the RNC could implement any ballot security program and would only be subject to enforcement of the Decree after potential minority voter intimidation and suppression had already occurred. Thus, the elimination of the provision would thwart the Decree's purpose of preventing minority voter intimidation and suppression ex ante. The District Court shortened the preclearance time to allow the RNC to combat more of the potential voter registration fraud that might occur closer to Election Day, a modification suitably tailored to address the inequity the District Court identified.

Although the Decree was never intended to prohibit normal poll watching activities, the RNC claims that is has refrained from engaging in normal poll watching activities because the Decree's definitions of such activities are unclear and it fears it would unintentionally violate the Decree. To address this workability concern, the District Court modified the Decree to provide clearer definitions and examples of "ballot security" and "normal poll watching" activities. With the District Court's modifications, "[b]allot security" is defined to include "any program aimed at combating voter fraud by preventing potential voters from registering to vote or casting a ballot," [FN24] and "[n]ormal poll-watch function" is defined as "stationing individuals at polling stations to observe the voting process and report irregularities unrelated to voter fraud to duly-appointed state officials." *Democratic Nat'l Comm.*, 671 F.Supp.2d at 622.

The District Court's modifications more clearly define ballot security and normal poll-watch function under the Decree and provide lists of examples of both.[FN25] The RNC contends that it cannot engage in normal poll-watch functions because the definitions of the terms remain unclear. Contrary to the RNC's argument that the District Court's definitions and non-exhaustive lists of examples "worsen the problem," (Appellant's Br. at 55), the modifications of adding specific definitions and examples of ballot security and normal poll-watch functions give both the RNC and the DNC more clarity regarding what types of activities require preclearance, which do not require preclearance, and which are prohibited by the Decree.

***21** Given these modifications, any hardship to the RNC is not a product of the terms of the Decree. Clarity allows the RNC to engage in normal poll watching activities while still maintaining adherence to fulfillment of the Decree's purpose. The District Court's modification is suitably tailored to resolve the prior ambiguity and does not strive to conform to the constitutional floor by allowing the RNC to engage in all activities without preclearance. *See Rufo*, 502 U.S. at 391, 112 S.Ct. 748. The modification clarifies the previous ambiguity.

The District Court agreed with the RNC that the lack of an expiration date in the Decree was "inherently inequitable." *Democratic Nat'l Comm.*, 671 F.Supp.2d at 621. The District Court modified the Decree by adding an eight-year expiration date, December 1, 2017, and allowing for an extension of the Decree for another eight years if the DNC proves by a preponderance of the evidence that the RNC has violated the Decree. The RNC argues that the District Court's December 1, 2017 expiration date is an abuse of discretion and that the appropriate Decree termination date is either eight years after the parties entered into the Decree in 1982, eight years after the Decree's modification in 1987, or, at worst, eight years after the Malone litigation.

Although a considerable number of years have passed since the RNC and DNC agreed to the Decree in 1982 and 1987, the parties entered the Decree voluntarily and for over a quarter of a century neither party objected to the duration of the Decree. The District Court did not abuse its discretion by declining to vacate the Decree due to the

length of time since its entry. *See BCTC*, 64 F.3d at 889 (declining to hold that "the mere passage of time" is itself "sufficient to constitute the type of changed circumstances that warrant lifting of an injunction"). Thus, it does not follow that the original decision not to include an expiration date requires vacatur now that the Decree has an expiration date.

The District Court noted that it was imposing a termination date of eight years from its ruling because the Civil Rights Division of the Department of Justice, which is charged with enforcing the Voting Rights Act, also imposes consent decrees with time limits of eight years, which can be extended for good cause. The RNC has not shown that the District Court's decision to set a termination date of eight years from the date of its order modifying the Decree with provisions allowing for an extension of that termination date for good cause is "arbitrary, fanciful or clearly unreasonable." *Moyer*, 473 F.3d at 542.

By adding an eight-year expiration date, December 1, 2017, to the Decree, the District Court modified the Decree to remedy the inequity that it perceived to be caused by the lack of expiration date.[FN26] Accepting *arguendo* that the Decree without a time limit is "inherently inequitable," the provision allowing for an extension of the Decree for another eight years if the DNC proves by a preponderance of the evidence the RNC has violated the Decree preserves the purpose of the Decree so that the modification does not rewrite the consent order more than equity requires. Moreover, we do not adopt the RNC's argument that the District Court abused its discretion by not starting the eight year period from the date of the entry of the Decree or from its 1987 modification, "thus requiring ... immediate vacatur." (Appellant's Br. 42.) The District Court concluded, with ample record support, that the purpose of the Decree had not yet been fulfilled and vacatur would not have been suitably tailored to its findings.

***22** The RNC has not established by a preponderance of the evidence that any workability issues remaining after the District Court's modification are so acute that prospective application of the Decree is inequitable. The District Court did not abuse its discretion by declining to vacate due to workability.

The RNC has not established that any of the District Court's decisions were "arbitrary, fanciful or clearly unreasonable." *Moyer*, 473 F.3d at 542. Thus, the District Court did not abuse its discretion by holding that the RNC did not establish by a preponderance of the evidence that any of the following four *Rufo* factors necessitated vacatur or modifications beyond those ordered by the District Court: (1) a significant change in factual conditions; (2) a significant change in law; (3) that "a decree proves to be unworkable because of unforeseen obstacles"; or (4) that "enforcement of the decree without modification would be detrimental to the public interest." *Rufo*, 502 U.S. at 384, 112 S.Ct. 748. Furthermore, the District Court's modifications were suitably tailored to the changed workability circumstances.

3. *BCTC Factors*

[26] We noted in *BCTC* that a court determining whether to vacate or modify a decree should respond to the specific set of circumstances before it by considering factors unique to the conditions of the case. *BCTC*, 64 F.3d at 888. The factors raised in the District Court that are unique to the circumstances of this case are whether the RNC has complied or attempted to comply in good faith with the terms of the Decree and the likelihood that the conduct sought to be prevented will recur absent the Decree. For any change to justify vacatur, it must be a significant change, rendering the prospective application of the Decree inequitable. *See BCTC*, 64 F.3d at 886.

The RNC claims that it has complied with the Decree since 1987 and that it is highly unlikely that the RNC will attempt to intimidate or suppress minority voters in the future if the Decree is vacated. The District Court did not abuse its discretion or err by considering the *Malone* finding that, in 2004, the RNC engaged in substantive and procedural violations of the Decree. Although the panel's decision was vacated as moot by this Court sitting en banc, that vacatur did not disturb the panel's factual determination that the RNC had violated the Decree. Furthermore, the District Court did not rely on *Malone's* preliminary injunction as precedent, but, instead, merely considered its finding of fact regarding the Decree violation as instructive regarding the RNC's level of compliance with the Decree.[FN27]

Furthermore, the RNC's position regarding *Malone* is contradictory. For purposes of determining RNC's compliance with the Decree, the RNC argues that the Court should not consider *Malone* in any way. However, for

purposes of determining from which point the eight-year Decree expiration date should begin to run, the RNC has mentioned that the 2004 *Malone* decision could be an appropriate starting point. Even if the RNC had not violated the Decree since 1987, that fact alone is not necessarily sufficient to justify vacating the Decree because compliance is the purpose of the Decree. *See BCTC*, 64 F.3d at 889 (declining to hold that "temporary compliance" is itself "sufficient to constitute the type of changed circumstances that warrant lifting of an injunction"). As the District Court noted, any past compliance might have been "because the Decree itself has deterred such behavior." *Democratic Nat'l Comm.*, 671 F.Supp.2d at 601.

***23** Additionally, the District Court did not abuse its discretion by finding that the RNC had not produced evidence demonstrating a lack of incentive for the RNC to engage in voter suppression and intimidation. The racial and ethnic background of this nation's political leadership, the RNC's leadership, and the electorate do not decrease the likelihood that the RNC will suppress minority voters such that prospective application of the Decree is inequitable. If the RNC does not hope to engage in conduct that would violate the Decree, it is puzzling that the RNC is pursuing vacatur so vigorously notwithstanding the District Court's significant modifications to the Decree.

The RNC's decision not to engage in normal poll-watch functions or obtain preclearance for voter fraud security programs does not allow us to assume past or future compliance. On the contrary, the RNC's refusal to engage in normal poll-watch functions or to obtain preclearance may be because the RNC, as it has argued, is not sure of the difference between normal poll-watch functions and voter fraud security programs. That the RNC has not engaged in a normal poll-watch function and has not presented a request for preclearance of a voter fraud security program that does not disproportionately target minority voters leaves open the possibility that the RNC, absent enforcement of the Decree, would not comply with the Decree terms in the future. *See BCTC*, 64 F.3d at 890 (noting that a party deciding "not to picket at all" does not "show that [the party] has in fact learned how to picket without treading on the prohibitions against secondary boycott contained both in the law and the various negotiated consent decrees").

In light of the District Court's modifications, the RNC does not point to any significant change that renders prospective application of the Decree inequitable. The District Court did not abuse its discretion by declining to vacate or modify the Decree because of *BCTC* factors.

IV. *CONCLUSION*

For the reasons set forth above, we will affirm the judgment of the District Court.

FN1. Judge Dickinson R. Debevoise, a United States District Judge, has presided over all district court proceedings regarding the Consent Decree at issue in this case, beginning with the 1981 lawsuit through the Motion to Vacate in 2009.

FN2. The RNC agreed that the RNC, its agents, servants, and employees would be bound by the Decree, "whether acting directly or indirectly through other party committees." (*Id.* at 402.)

FN3. The modifications state that

> the RNC shall not engage in, and shall not assist or participate in, any ballot security program unless the program (including the method and timing of any challenges resulting from the program) has been determined by this Court to comply with the provisions of the Consent Order and applicable law. Applications by the RNC for determination of ballot security programs by the Court shall be made following 20 days [sic] notice to the DNC ...
>
> (App. at 405.)

FN4. " '[C]ontributions subject to [the Federal Election Campaign Act's (FECA), 2 U.S.C. §§ 431–55] source, amount, and disclosure requirements' came to be known as 'hard money,' while '[p]olitical donations made in such a way as to avoid federal regulations or limits' came to be known as 'soft money.' " *Shays v. FEC*, 528 F.3d 914, 917 (D.C.Cir.2008) (quoting *Shays v. FEC*, 414 F.3d 76, 80 (D.C.Cir.2005) (" *Shays II* "); THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1652 (4th

Ed.2006)).

FN5. The RNC would have to spend "hard money" on any lawsuits because the "BCRA made a number of dramatic changes to campaign finance law ..., including barring national political parties from soliciting soft money." *Shays*, 528 F.3d at 918 (citing 2 U.S.C. § 441i(a)).

FN6. Although the RNC's motion requested that the Court vacate or modify the Decree, the RNC has not referenced any modifications, short of vacatur, that would make applying the Decree equitable in the RNC's view.

FN7. It is not clear from Appellant's brief whether the RNC raises this First Amendment argument under Rule 60(b)(5) or Rule 60(b)(6); however, we would reach the same conclusion under either rule because we do not find a First Amendment violation.

> We need not determine whether the District Court abused its discretion by holding that the Decree was not void due to its extension to private conduct and granting relief beyond that which the Court could order absent the Consent Decree because the RNC has not raised that issue on this appeal.

FN8. Although the District Court opinion did not specifically reference any *BCTC* factors as such, the opinion did consider factors relevant to the specific circumstances of this Consent Decree, including the *BCTC* considerations that the parties raised.

FN9. The District Court did not expressly state that the modifications it ordered were suitably tailored to the changes in circumstances, but the Court discussed in some detail how the modifications would address the specific workability concerns.

FN10. Furthermore, court orders can include limits on the ability of a party to speak, as occurs in confidentiality provisions regarding settlement agreements, and a party could bring an action for a court to enforce a private confidentiality agreement. *See Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 787–89 (3d Cir.1994).

FN11. *See Edwards v. Arizona*, 451 U.S. 477, 482, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981) (waiver of right to counsel must be voluntary, knowing, and intelligent); *Faretta v. California*, 422 U.S. 806, 835, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975) (same); *D.H. Overmyer Co. of Ohio v. FrickCo.*, 405 U.S. 174, 185–86, 92 S.Ct. 775, 31 L.Ed.2d 124, (1972) (waiver of due process rights must be voluntary, knowing, and intelligent); *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 145, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967) (waiver of First Amendment rights must be shown by clear and compelling evidence); *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938) (waiver requires "an intentional relinquishment or abandonment of a known right or privilege").

FN12. The only witness called by the RNC at the evidentiary hearing before the District Court was Thomas Josefiak, an election law expert who was appointed by President Ronald Reagan to serve as the Commissioner of the Federal Election Commission from 1985 until 1992. Josefiak testified that, since 1982, there has been a 41.6 percent increase in the number of registered voters classified as black and a 201 percent increase in the number of registered voters classified as Hispanic. The District Court discounted this increase based on the concomitant increase in the overall population of blacks and Hispanics. *Democratic Nat'l Comm.*, 671 F.Supp.2d at 598–99.

FN13. Michael Steele served as the first African–American chairman of the RNC from January 2009 until January 2011.

FN14. Even if the racial background of the nation's or RNC's leaders makes voter intimidation and suppression less likely, it is illogical to vacate the Decree due to the racial makeup of the administration of the United States or the RNC.

FN15. We need not determine whether the alleged changes in First Amendment law raised by the RNC render prospective application of the Decree inequitable because we find that the RNC waived any relevant First Amendment rights by consenting to the 1982 and 1987 Decrees.

FN16. Because the RNC's arguments regarding the BCRA center on the Decree's workability, the majority of our review of the District Court's opinion regarding the BCRA is included in the workability discussion infra.

FN17. In *Welker v. Clarke*, 239 F.3d 596 (3d Cir.2001), we noted that

> To achieve this purpose, the NVRA strictly limited removal of voters based on change of address and instead required that, for federal elections, states maintain accurate registration rolls by using reliable information from government agencies such as the Postal Service's change of address records. The NVRA went even further by also requiring the implementation of "fail-safe" voting procedures to ensure voters would not be removed from registration rolls due to clerical errors or the voter's own failure to re-register at a new address.
>
> *Id.* at 599 (citing 42 U.S.C. § 1973gg–6(b)(1)).

FN18. "HAVA requires that any individual affirming that he or she 'is a registered voter in the jurisdiction in which the individual desires to vote and that the individual is eligible to vote in an election for Federal office ... shall be permitted to cast a provisional ballot.' " *Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565, 574 (6th Cir.2004) (citing 42 U.S.C. § 15482(a)).

FN19. The RNC would have to spend "hard money" on any lawsuits because the "BCRA made a number of dramatic changes to campaign finance law ..., including barring national political parties from soliciting soft money." *Shays*, 528 F.3d at 918 (citing 2 U.S.C. § 441i(a)).

FN20. "Ballot security" is defined to include "any program aimed at combating voter fraud by preventing potential voters from registering to vote or casting a ballot." *Democratic Nat'l Comm.*, 671 F.Supp.2d at 622. The modification also includes a non-exhaustive list of ballot security programs.

FN21. "Normal poll-watch function" is defined as "stationing individuals at polling stations to observe the voting process and report irregularities unrelated to voter fraud to duly-appointed state officials." *Democratic Nat'l Comm.*, 671 F.Supp.2d at 622. The modification includes a non-exhaustive list of activities that do and do not fit into the Decree definition of normal poll-watch function.

FN22. The RNC suggested two to three days for preclearance at oral argument, but could not articulate a basis for such a modification other than it would be better than ten days.

FN23. For example, perhaps the RNC could obtain preclearance for a voter fraud security program that instructs its normal poll watchers that, if they see a person who they believe is voting more than once, they can report that potential fraud to poll workers.

FN24. The modification includes a non-exhaustive list of ballot security programs:

> the compilation of voter challenge lists by use of mailings or reviewing databases maintained by state agencies such as motor vehicle records, social security records, change of address forms, and voter lists assembled pursuant to the HAVA; the use of challengers to confront potential voters and verify their eligibility at the polls on either Election Day or a day on which they may take advantage of state early voting procedures; the recording by photographic or other means of voter likenesses or vehicles at any poling place; and the distribution of literature informing individuals at or near a polling place that voter

fraud is a crime or detailing the penalties under any state or federal statute for impermissibly casting a ballot.

Democratic Nat'l Comm., 671 F.Supp.2d at 622.

FN25. The modification also includes a non-exhaustive list of activities that do and do not fit into the Decree definition of normal poll-watch function:

[O]bservers may report any disturbance that they reasonably believe might deter eligible voters from casting their ballots, including malfunctioning voting machines, long lines, or understaffing at polling places. Such observers may not question voters about their credentials; impede or delay voters by asking for identification, videotape, photograph, or otherwise make visual records of voters or their vehicles; or issue literature outlining the fact that voter fraud is a crime or detailing the penalties under any state or federal statute for impermissibly casting a ballot.

Democratic Nat'l Comm., 671 F.Supp.2d at 622–23.

FN26. Neither party argued before this Court that the District Court abused its discretion by imposing a formerly nonexistent time limitation on the RNC's obligations under the Decree, thereby relieving the RNC of its burden to show a significant change of fact or law to secure release from those obligations. Thus, this issue is not before this Court and we, accordingly, do not decide it. The District Court decided to impose that time limitation based on a hypothetical situation that it speculated might well occur in the future. The District Court held as follows with respect to this matter:

The final consideration weighing in favor of modification involves the fact that the Consent Decree does not include a date on which the obligations it imposes on the RNC will terminate. In failing to include such an expiration date, the parties have created a situation in which the RNC is, at least nominally, bound by those obligations in perpetuity, regardless of whether it continues to engage in voter suppression efforts or has any incentive to do so. That situation is inherently inequitable. For example, if at any point in the future the RNC succeeds in attracting minority voters in such numbers that its candidates receive the majority of votes cast by those populations, it will have no incentive to engage in anti-fraud measures that have the effect of deterring those voters from casting their ballots. Under the Consent Decree as currently written, though, the RNC would be required to pre-clear any such measures with this Court, while the DNC would be free to implement ballot security programs without doing so. In an effort to avoid similar situations, the Civil Rights Division of the DOJ—the government entity charged with enforcing the VRA—imposes a time limit of eight years on its consent decrees, which may be extended for good cause.... The Court believes that such a provision is justified in this case.

Democratic Nat'l Comm., 671 F.Supp.2d at 621–22.

This Court draws attention to this issue only to make clear that we have not resolved it by implication or otherwise. It is at least doubtful that a district court could decide to impose a time limitation within the bounds of its appropriate discretion while simultaneously concluding that the RNC retained an incentive to violate the Consent Decree and had shown no other existing and relevant change of circumstance. Passage of time alone is not normally regarded as a significant change of fact. *Building and Const. Trades v. NLRB*, 64 F.3d 880, 889 (3d Cir.1995) ("[W]e are unwilling to hold, and BCTC cites no persuasive authority to the contrary, that the mere passage of time and temporary compliance are themselves sufficient to constitute the type of changed circumstances that warrant lifting an injunction."). Moreover, given that the obligations of a consent decree are necessarily subject to the limitations of Rule 60(b)(5) and terminable whenever prospective application would no longer be equitable, the District Court's characterization of the RNC's situation as "inherently inequitable" also seems questionable.

FN27. Because the District Court is not using the *Malone* judgment to "spawn[ ] any legal consequences" and the Court's consideration of the findings of fact has no impact on "relitigation of the issues between the

parties," *United States v. Munsingwear, Inc.*, 340 U.S. 36, 71 S.Ct. 104, 95 L.Ed. 36 (1950), is inapposite. *Id.* at 39–41, 71 S.Ct. 104 (holding that the practice for dealing with a judgment that "has become moot while on its way [to the Supreme Court] or pending [the Supreme Court's] decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss").

The RNC insists that the District Court's 2004 decision in the Malone proceeding has no "precedential effect." Here, however, the District Court did not give "precedential effect" to the judgment in another case. The issue of whether the RNC had violated the consent decree in Malone's situation was litigated before the District Court in this case and all of the evidence submitted by the parties with respect to that issue remains part of the record in this case. The Court referred to its factual finding of a consent decree violation in the Malone proceeding in response to the RNC's attempt to carry its burden by relying on the results in the enforcement litigation that had occurred since 1982. According to the RNC, the "slim record of enforcement success against the RNC demonstrates that it has strictly complied with the Consent Decree since 1987, and there is no evidence to suggest that its behavior will change if the Decree is vacated." RNC Proposed Conclusions of Law, App. at 1264. In this context, the Court did not err in referring to and relying upon its factual finding of a 2004 violation in the Malone proceeding. Contrary to the RNC's suggestion, it was clearly not surprised by the District Court's response to its argument. Evidence from the Malone proceeding was discussed by the witnesses at the evidentiary hearing and in the ensuing briefing of the parties. *See, e.g.*, App. at 1081–82, 1234–35.

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Mr. NADLER. I also ask unanimous consent to say that I have, since speaking earlier, read Mr. Eversole's prepared testimony, and in his prepared testimony he does reference the 2012 decision of the court, the Federal court in New York, so what I took to be his misleading testimony was—it was misleading but only by omission of what was in the written record. So I want to acknowledge that he was in his written testimony completely honest and complete.

Mr. EVERSOLE. Thank you.

Mr. FRANKS. Thank you, Mr. Nadler.

Without objection, all Members will have 5 legislative days to submit to the Chair additional written questions for the witnesses which we will forward and ask the witnesses to respond as promptly as they can so that their answers may be made part of the record.

Professor Weiser, we will be forwarding you questions from my office related to the claims of 11 percent of the people. We don't know if that includes incapacitated people, incarcerated people, former felons, those 60 percent who decide not to vote at all. So we will be forwarding that.

And without objection all Members will have 5 legislative days within which to submit any additional materials for inclusion in the record.

With that, again, I thank the witnesses sincerely for coming, thank the Members and observers, and this hearing is now adjourned.

[Whereupon, at 10:30 a.m., the Subcommittee was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

Material submitted by the Honorable Trent Franks, a Representative in Congress from the State of Arizona, and Chairman, Subcommittee on the Constitution

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Every Single One: The Politicized Hiring of Eric Holder's Education Section

Posted By J. Christian Adams On August 17, 2011 @ 12:00 am In Uncategorized | 67 Comments

Over the last two weeks, PJMedia has published a series of articles about the hiring practices of the Civil Rights Division at the Obama Justice Department. Today's installment relates to the Education Section: this Section has enormous power over issues such as race-based preferences in college scholarships, decades-old desegregation orders, and the federal response to racially motivated violence that plagues American schools.

Recently, the Obama administration concluded that school discipline is often racially discriminatory merely because black students are disciplined at rates higher than their overall percentage in the population. The division has launched a campaign that undermines basic American traditions of right and wrong by attacking school discipline [1]. When you read the radical backgrounds of lawyers in the Education Section below, you'll see why.

The PJMedia series has demonstrated that, rather incredibly, *every single one* of the career attorneys hired since Obama took office has a fringe leftist ideological bent and nearly all have overtly partisan pasts. Every single one. The left still doesn't get it: they brazenly think this is perfectly acceptable. They don't understand that attorneys who don't have a militant agenda are also capable of enforcing federal civil rights laws, even if they represented defendants. That's what good attorneys do, ethically. Acting Assistant Attorney General Loretta King rewrote hiring guidelines in 2009, resulting in hiring committee members being forced to toss any resume that did not describe a radical background.

King didn't believe that lawyers who represented defendants in civil rights cases also have expertise in the law. What they lacked, of course, was the correct ideological and partisan fervor. And so resume after resume hit the trash can, unless the applicant was a committed leftist.

With solid reporting that is gleaned in large measure from the resumes the Department of Justice released only after being nailed with a federal lawsuit under the Freedom of Information Act, each of PJMedia's articles has demonstrated with greater and greater clarity the hypocrisy of attacks on the Bush Civil Rights Division. The legacy media has, so far at least, ignored the stories. Just as was the case with the outrageous dismissal of the New Black Panther Party lawsuit. Indeed, predictable corners of the legacy media have served as government mouthpieces on this issue. The public won't be so easily hoodwinked.

PJMedia launched its series last week with a piece by Hans von Spakovsky on the Voting Section [2], which I elaborated on [3] the next day. These radicals will be enforcing election law in 2012. PJMedia Washington Bureau Chief Richard Pollock then followed with a remarkable piece on attorneys hired into the Civil Rights Division's immigration shop, a section formally known as the Office of Special Counsel for Immigration-Related Unfair Employment Practices [4]. One attorney there chained himself to a tree for days in a protest, and another was sanctioned $1.7 million by a judge in a prior stint at DOJ before being rehired. Von Spakovsky authored the latest segment [5], which focused on the Division's Special Litigation Section.

Eleven new attorneys have been hired into the Education Section since President Obama entered the White House and Eric Holder took office.

Anurima Bhargava: Ms. Bhargava was hired as the new chief of the Section after working for the previous six years at the NAACP Legal Defense and Education Fund. Although her days were likely busy there, she managed to find time to make a $250 contribution to Barack Obama's presidential campaign. She also produced the "Jazz for Obama" concert back in October 2008.

During her tenure at the NAACP LDF she litigated cases across the country seeking to defend and expand the use of racial preferences and racial quotas in public secondary schools and universities. One of the highlights of her work was her coordination of the filing of amicus briefs and other advocacy efforts in support of two Supreme Court cases [6] in which liberal coalitions insisted that

local schools be permitted to assign public students to different schools on the basis of race. Fortunately, the Supreme Court rejected this argument as unconstitutional.

In remarks to the United Nations Forum on Minority Issues (yes, such a waste of time and money really does exist) just before joining the Justice Department, Ms. Bhargava described how imperative it was for schools to promote "integration and social cohesion" by considering race, language, immigration status, and religion in placement decisions. Imagine what your communities would be like if courts actually permitted government bureaucrats to engage in such racial engineering.

One wonders if she has even read the Constitution. This woman is *running* the Education Section.

When it comes to the rights of non-traditional minorities, like whites, Ms. Bhargava's ideology of inclusion begins to crumble. Indeed, after the Bush Civil Rights Division negotiated a consent decree with Southern Illinois University [7] to end racially discriminatory paid fellowships for which white graduates were told they were not eligible based on their skin color, Ms. Bhargava publicly blasted [8] the decision as "hinder[ing] the legitimate efforts of colleges and universities to create equal educational opportunity."

And some deniers still think this Justice Department will enforce the law to protect all Americans from racial discrimination.

Shortly thereafter, she was ironically honored [9] for her aggressive battles to prevent state referendums (i.e., real democracy at work) opposing racial preferences. Once again, rights for me, but not for thee.

Her prior work experience includes a fellowship with the ACLU and service as the field director for the election campaign of ultra-liberal Democratic Congressman Steve Rothman of New Jersey. In addition, she remains a member [10] (along with the militant Lani Guinier) of the Advisory Board of the Center for Institutional and Social Change [11], whose must-see website is testament to the detached dribble of left-wing activism. The group states that "through a multi-level systems approach, [its] research develops the capacity to sustain and 'scale up' initiatives aimed at building the 'architecture of inclusion.'" It adds that its "collaborative projects develop frameworks, strategies, and roles designed to maximize the impact and influence of initiatives that advance full participation, innovative public problem solving, and institutional reimagination [sic!] — a set of linked goals we refer to as 'institutional citizenship.'"

Now Ms. Bhargava gets to impose that Orwellian "institutional citizenship" on the rest of us from her new perch in the Civil Rights Division.

Torey Cummings: Ms. Cummings joined the Education Section as a trial attorney from a large private practice law firm, where she performed significant pro bono work representing terrorist detainees [12] at Guantanamo Bay and death row inmates. This is a trend among new Holder DOJ employees. Never mind the fact every detainee can obtain a highly qualified federal public defender, these attorneys rushed to represent America's enemies for free. She previously worked as a staff attorney for Legal Services of Eastern Missouri and as a project assistant at the Wellesley College Centers for Women, where she was able to utilize her social work degree.

Tamica Daniel: Ms. Daniel comes to the Section only a year out of Georgetown's law school, where she was the diversity committee chair of the law review, volunteered with the ACLU's Innocence Project, and participated in the Institute for Public Representation Clinic. For those in the real world, diversity committees are groups set up to hector for race-based outcomes in hiring employees and student matters. It is an entity with close cousins in South Africa's apartheid regime and other dark eras in history.

While working on her law degree, she also attended Georgetown's Public Policy Institute and wrote her master's thesis on how race and income desegregation are responsible for minorities' low educational attainment in Seattle public schools. During one law school summer, she interned at the left-wing Washington Lawyers' Committee for Civil Rights and Urban Affairs under the direction of Joseph Rich [13], a partisan activist who formerly was the chief of the Civil Rights Division's Voting Section. She spent another summer interning at the liberal Poverty and Race Research Action Council [14], where she devoted most of her time providing research support for a paper on the constitutionality of race-conscious housing policies. She found time as well to author a law review article [15] arguing for greater use of disparate impact theories in fair housing litigation.

The Civil Rights Division's FOIA shop curiously redacted all of Ms. Daniel's "community service and

involvement" on her resume. In light of her employment experience, one can only imagine what she was up to in her spare time.

Amanda Downs: Ms. Downs joined the Section from the Maryland Public Defender's Office, where she worked since graduating law school. While a law student, she also interned at the Florida Immigrant Advocacy Center.

Her other activities on her resume were redacted by DOJ.

We do know, however, that she was the Division attorney who commenced a ridiculous lawsuit [16] last year against the Mohawk Central School District in New York on behalf of two transvestite students, one of whom liked to wear a pink wig and make-up and another who favored wigs and stiletto heels. When the male students were told to remove their distracting ensembles in light of the governing dress code, Ms. Downs and her colleagues stepped in, claiming that the school district had engaged in federal sex discrimination. Never mind that, as has been written before [17], the courts have flatly rejected the notion that laws banning discrimination based on gender also ban discrimination based on sexual orientation. For Ms. Downs and her new colleagues, legal precedent is a mere inconvenience. And therein lies the central danger in hiring militants instead of attorneys who will respect legal precedent.

The militants who have been hired seek to *move* the law. This DOJ won't hire people who simply seek to *enforce* the law.

Thomas Falkinburg: After spending ten years investigating purported civil rights violations at Department of Education's Office for Civil Rights — a notorious hotbed of liberal activism — Mr. Falkinburg transferred to the Justice Department's Education Section once President Obama took office. This wasn't the first time he sought to leave the Department of Education. He had earlier applied for an FBI Intelligence Analyst position but was upset because the salary he allegedly was offered didn't match his inflated Department of Education compensation. So what did the aggrieved left-wing bureaucrat do? He sued, of course.

He commenced a federal action in the Northern District of Georgia, claiming that the FBI had improperly revoked a supposed job offer after he complained about the salary terms. Proceeding without an attorney, he frivolously sought a writ of mandamus asking the court to order FBI Director Robert Mueller to appoint him as an Intelligence Analyst at GS-13, Step 5. Not amused by the legally silly request, the court granted [18] the government's motion to dismiss. Mr. Falkinburg wasted more of the court's resources with a motion for reconsideration, but it was promptly denied as well.

An attorney who considers a government job an entitlement? Perfect for the Civil Rights Division. But Eric Holder should be on alert if he dares withhold any of Mr. Falkinburg's civil service raises.

Melissa Michaud: Ms. Michaud was hired into the Education Section as part of Attorney General Eric Holder's Honors Program, which brings young attorneys straight to the Department of Justice from law school or judicial clerkships. And it is easy to see why. Ms. Michaud worked during law school for Legal Aid of North Carolina, was a member of the Carolina Public Interest Law Organization, served as the Projects Coordinator for the University of North Carolina Pro Bono Board [19], and interned at the EEOC. She also spent three years with Teach for America.

Nicholas Murphy: Mr. Murphy is another hire from Eric Holder's Honors Program at DOJ, fresh out of a federal judicial clerkship with a liberal Clinton appointee in Philadelphia. While a law student, Mr. Murphy interned at the ACLU's Voting Rights Project, where he focused on the organization's efforts to restore the voting rights of convicted felons. He also interned for the Legal Aid Society in Brooklyn and the Public Defender's Service in Washington, served as a research assistant at the general counsel's office at Teach for America, and volunteered [20] with the Prisoner's Legal Assistance Project. Meanwhile, his self-drafted personal statement [20] at his law school's alumni website highlighted his partisan political ambitions. Just what we need: another political activist bureaucrat biding his time in the federal civil service.

Kathleen Schleeter: Holder's Honors Program has also brought Ms. Schleeter to the Education Section. During law school, she worked as a Program Assistant for the National Women's Health Network [21], which identifies as its primary mission "ensuring that women have self-determination in all aspects of their reproductive and sexual health" (read: promoting abortions); indeed, the organization's executive director and policy director [22] are both former senior staffers at the National Abortion Rights Action League. Ms. Schleeter also served on the editorial board of the *Virginia Journal of Social Policy and the Law* and as president of the Public Interest Law Association.

Meagan Sidhu: Ms. Sidhu worked for approximately four years at a plaintiff's civil rights firm in Baltimore before joining the Education Section. During law school, she clerked for the ACLU of Maryland, interned at the Children's Defense Fund [23] (the aggressively liberal organization headed by Hillary Clinton pal Marian Wright Edelman), and participated in the AIDS and Child Welfare Clinic. Any school district targeted by Ms. Sidhu that thinks it is going to receive a fair and balanced investigation is kidding itself.

Joseph Wardenski: Like his new colleagues, Mr. Wardenski, a contributor to Barack Obama's 2008 presidential campaign, has a rich activist background that will serve him well in this administration's Civil Rights Division. Although he worked very briefly as an associate at a large law firm in New York, where he seemed to spend an extraordinary amount of time on pro bono criminal defense and voting rights matters, Mr. Wardenski cut his legal teeth as an intern at the NAACP LDF. There he helped research and draft memoranda designed to give convicted felons the right to vote and to ensure that public schools could racially engineer the assignments of students from one location to another. He previously interned as well at the Urban Justice Center [24], a left-wing advocacy organization that seeks to monitor and report on what it characterizes [25] as "economic human rights violations" in the United States.

On his resume, Mr. Wardenski proudly notes his service as president of the Princeton College Democrats, co-chair of "OUTLaw" (the lesbian-gay-bisexual-transgender association) at Northwestern University Law School, and education policy director for an uber-liberal Colorado politician (Jared Polis [26]) who is now a Democratic congressman and member of the Congressional Progressive Caucus. He also highlights the law review article [27] he authored in the *Journal of Criminal Law and Criminology* in which he argued that the Supreme Court's *Lawrence v. Texas* sodomy decision must be interpreted to include rights for teenage homosexuals. He does not, however, reference another public report [28] he drafted on behalf of a group called "Gay Men's Health Crisis" which criticized the FDA's prohibition on blood donations from certain at-risk homosexual groups.

Mr. Wardenski now spends much of his time as one of the Justice Department's representatives on the Steering Committee [29] of the Obama administration's "Federal Partners in Bullying Prevention" campaign. As both Peter Kirsanow [30] of the U.S. Commission on Civil Rights and Roger Clegg [31] of the Center for Equal Opportunity recently pointed out, the legal predicate for this federal response to bullying is extremely weak. But as we have seen time and again from Eric Holder's Justice Department, the law is often little more than a distraction.

Ryan Wilson: Rounding out the Education Section's new crop of attorneys is Mr. Wilson. Prior to joining the Civil Rights Division, he labored as a staff attorney for an organization called Advocates for Basic Legal Equality [32] in Ohio, which "promote[s] systemic change on behalf of individuals and groups of low-income people in the areas of civil rights and poverty law" by "seek[ing] to change policy, laws, and regulations at local and state levels." Before that, he was an attorney at Legal Aid of Western Ohio in its Homelessness Prevention Project.

During law school, he worked as a research fellow at the ultra-liberal Center for Civil Rights [33] and as a student attorney at the University of North Carolina Juvenile Justice Clinic. Meanwhile, in his undergraduate days [34], he was president of the University of North Carolina's chapter of the NAACP, a member of the Young Democrats, and a participant in the "Black Student Movement."

Just as is true of the new career attorneys hired into every other Section of the Civil Rights Division during the Obama administration, every single one of these new civil servants — without exception — is an undeniable liberal. Not a one is even *apolitical*, let alone *conservative*.

None of this is to suggest that liberals should be precluded from working in the Division. Indeed, the Bush administration hired attorneys all across the political spectrum, including some of the most fervent left-wing ideologues who now occupy the leadership positions in many of the Sections across the Division. At a certain point, though, the patently ridiculous claims by Eric Holder and his subordinates that no ideological litmus test is being employed in hiring are no longer going to pass the laugh test, even if they say so under oath before Congress, and even with their most ardent supporters in the media. Capitol Hill is going to take notice. Perhaps even the Inspector General's Office, too, although that office's ability to produce a politically balanced report is yet to be seen. But the days of Eric Holder being able to lie to the public with impunity are coming to an end.

Here's the good news. With the budget disaster facing the next (Republican) president, these recently hired radicals may not yet have vested. The administration can implement a reduction in force (RIF)

and walk the least senior lawyers right out the door.

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[1] by attacking school discipline: **http://www.washingtontimes.com/news/2010/oct/20/the-dangers-of-disparate-impact-policy/**
[2] Voting Section: **http://pjmedia.com/blog/every-single-one-the-politicized-hiring-of-eric-holder%e2%80%99s-voting-section/**
[3] elaborated on: **http://pjmedia.com/blog/reviewing-the-resumes-the-politicized-hiring-of-eric-holder%E2%80%99s-voting-section/**
[4] Office of Special Counsel for Immigration-Related Unfair Employment Practices: **http://pjmedia.com/blog/every-single-one-the-politicized-hiring-of-eric-holder%e2%80%99s-immigration-office/**
[5] latest segment: **http://pjmedia.com/blog/every-single-one-the-politicized-hiring-of-eric-holders-special-litigation-section/**
[6] two Supreme Court cases: **http://www.law.cornell.edu/supct/html/05-908.ZS.html**
[7] consent decree with Southern Illinois University: **http://www.justice.gov/crt/about/emp/documents/siucompl.pdf**
[8] blasted: **http://www.civilrights.org/equal-opportunity/education/under-pressure-from-justice-dept-southern-illinois-university-agrees-to-change-minority-fellowships.html**
[9] honored: **http://www.thedefendersonline.com/2009/07/13/ldf-wins-ballie-award-for-fighting-ballot-initiatives-against-affirmative-action/**
[10] remains a member: **http://www.changecenter.org/about-us/who-we-are**
[11] Center for Institutional and Social Change: **http://www.changecenter.org/**
[12] representing terrorist detainees: **http://en.wikipedia.org/wiki/Guantanamo_Bay_attorneys**
[13] Joseph Rich: **http://pjmedia.com/blog/enough-is-enough-joe-rich-an-uncivil-man-from-the-civil-rights-division/**
[14] Poverty and Race Research Action Council: **http://www.prrac.org/about.php**
[15] law review article: **http://www.georgetownlawjournal.com/issues/pdf/98-3/Daniel.PDF**
[16] lawsuit: **http://www.scribd.com/doc/25281326/Mohawk-Complaint**
[17] as has been written before: **http://www.nationalreview.com/articles/print/255994**
[18] granted: **http://protect.theinfo.org/pacer/ecf.gand/05511352372.pdf**
[19] Projects Coordinator for the University of North Carolina Pro Bono Board: **http://www.law.unc.edu/documents/publicservice/probono/annualreport2007-2008.pdf**
[20] volunteered: **http://www.law.upenn.edu/prospective/jd/profiles/murphy.html**
[21] National Women's Health Network: **http://nwhn.org/**
[22] organization's executive director and policy director: **http://nwhn.org/nwhn-staff**
[23] Children's Defense Fund: **http://www.childrensdefense.org/**
[24] Urban Justice Center: **http://www.urbanjustice.org/**
[25] what it characterizes: **http://www.urbanjustice.org/ujc/projects/human.html**
[26] Jared Polis: **http://en.wikipedia.org/wiki/Jared_Polis**
[27] law review article: **http://www.jstor.org/pss/3491406**
[28] public report: **http://www.gmhc.org/news-and-events/press-releases/antiquated-us-blood-donation-ban-against-gay-men-contributes-to-stigma-and-blood-shortages**
[29] Steering Committee: **http://www.findyouthinfo.gov/spotlight_FBIBPSC.shtml**
[30] Peter Kirsanow: **http://www.nationalreview.com/corner/267359/federal-response-bullying-public-schools-peter-kirsanow**
[31] Roger Clegg: **http://www.nationalreview.com/corner/267466/re-federal-response-bullying-public-schools-roger-clegg**
[32] Advocates for Basic Legal Equality: **http://www.lawolaw.org/**
[33] Center for Civil Rights: **http://www.law.unc.edu/centers/civilrights/default.aspx**
[34] in his undergraduate days: **http://www.linkedin.com/pub/ryan-wilson/23/1b4/66a**

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Every Single One: The Politicized Hiring of Eric Holder's Special Litigation Section

Posted By Hans A. von Spakovsky On August 16, 2011 @ 12:00 am In Uncategorized | 52 Comments

Last week, PJMedia published the first three of a series of articles highlighting the new career attorneys hired into the Department of Justice's Civil Rights Division. The first two articles focused on the Voting Section [1]; the third article focused on the Office of Special Counsel for Immigration-Related Unfair Employment Practices [2].

Based on the resumes that PJMedia finally extracted from DOJ following a lengthy Freedom of Information Act battle, these stories show the absurdity of the left's demagogic attacks on the Bush administration's hiring practices. They also illustrate the hyper-politicized environment that has become the hallmark of the Justice Department under Eric Holder's reign.

Today we feature the Division's Special Litigation Section.

This Section is charged with enforcing federal civil rights statutes in the context of institutionalized persons, law enforcement agencies, and abortion clinics. The Section's enforcement authority is supposed to be statutorily limited to situations involving a "pattern or practice" of unlawful or unconstitutional conduct by state or municipal government agencies. However, the attorneys in this unit enjoy incredibly broad discretion in deciding what investigations and cases to pursue, and their decisions often have significant financial (and political) consequences for their targets and taxpayers alike. Unfortunately, this power has been too often abused by the Section.

Anyone who doubts the havoc that renegade attorneys from the Special Litigation Section can inflict on municipal institutions need only read Heather MacDonald's extraordinary piece — "Targeting the Police: The Holder Justice Department Declares Open Season on Big City Police Departments" [3] — detailing the $100 million that the Los Angeles Police Department has been forced to incur as part of a draconian federal consent decree demanded by the Section's legal staff. Or one can examine the (fortunately failed) efforts by Section attorneys during the Clinton administration to intimidate the state of New Jersey into radically modifying its law enforcement practices based on bogus allegations of racial profiling by state troopers.

Incredibly, the Section's staff even tried to suppress [4] the report that completely debunked the allegations. It was a sad state of affairs that eventually caused the Bush administration to have to remove the then-chief of the Section and force the line attorney involved to find alternative employment.

Some municipalities are finally beginning to fight back since Holder took power. In the past, most simply rolled over and agreed to whatever face-saving terms they could negotiate, even when they had not violated the law. Some simply succumbed to political pressure. Others assumed — wrongly — that the Section's attorneys were apolitical and could be trusted to be fair and neutral in any investigation.

Reality is starting to set in, but there remains a long way to go. Any state or municipality that is even considering capitulating to the band of radicals occupying this Section owes it to itself to read this article. There have been 23 new career attorneys hired in the Section since the Obama administration came to office. Every single one has unequivocal liberal bona fides.

That's what I call a real "pattern or practice" of ideological bias.

Jonathan Smith: Following the rather ignominious departure [5] of the previous chief in 2010, the Civil Rights Division brought in Jonathan Smith to take the helm of the Special Litigation Section. And what a pick! Indeed, when it comes to liberal activists, Mr. Smith is right out of central casting. He served for eight years as executive director of the Legal Aid Society of the District of Columbia and spent the four years prior to that as the executive director of the Public Justice Center [6], an organization whose stated mission is "to enforce and expand the rights of people who suffer injustice because of their poverty or discrimination."

He also spent another nine years as a staff attorney and executive director of the D.C. Prisoners' Legal Services Project, advocating on behalf of criminals incarcerated in the nation's capital. For local police departments that find themselves the subject of investigations by Mr. Smith's shop, his biases will surely reinforce the notion that any expectation of neutrality in the Section's probes is a pipe dream.

Shelly Jackson: Ms. Jackson was hired as one of the new deputy chiefs. Like many of her new colleagues, Ms. Jackson made a contribution ($450) to Barack Obama's 2008 presidential campaign. Before arriving at Justice, she was an attorney and analyst in the Office for Civil Rights at both the Department of Education and the Department of Health & Human Services, two offices that are known to be hotbeds for liberal ideologues — conservatives need not apply. Ms. Jackson had an earlier stint with the Special Litigation Section during the Clinton administration, but in a theme common to many of the Division's new civil service hires she opted to leave just before President Bush came into office. Earlier in her career, Ms. Jackson also worked as a staff attorney at two liberal non-profit organizations: the Center for Law and Education and the Bazelon Center for Mental Health Law, which supported the nomination of Goodwin Liu, someone so extreme that he was filibustered in the Senate.

Christy Lopez: Ms. Lopez is another new deputy chief. She, too, gave $750 to Barack Obama during his 2008 run for office, and she contributed another $500 to Democratic Senator Michael Bennet from Colorado. It is difficult to fathom how Ms. Lopez can even pretend to be balanced and neutral in her new position. After all, until the moment she arrived at DOJ, she served on the ACLU of Maryland's Committee on Litigation and Legal Priorities. She also was vice president and a member of the Board of Directors of Casa de Maryland, a radical organization deeply hostile to immigration enforcement. As I have written [7] before:

> [Casa de Maryland] has encouraged illegal aliens not to speak with police officers or immigration agents; it has fought restrictions on illegal aliens' receiving driver's licenses; it has urged the Montgomery County (Md.) Police Department not to enforce federal fugitive warrants; it has advocated giving illegal aliens in-state tuition; and it has actively promulgated "day labor" sites, where illegal aliens and disreputable employers openly skirt federal prohibitions on hiring undocumented individuals.

On her resume, Ms. Lopez proudly references the paper she authored for the liberal American Constitution Society, entitled "The Problem with 'Contempt of Cop' Arrests." She also highlights the presentation she gave on "Flying While Brown" at the American-Arab Anti-Discrimination Committee's annual convention. She has made numerous media appearances alleging post 9/11 ethnic profiling. She is also a founding partner of Independent Assessment and Monitoring, which provided oversight of police departments and prisons. Given her overtly partisan and ideologically militant background, it is hard to understand how any law enforcement agency would agree to have her serve as a monitor. Perhaps they simply weren't aware of her activism when agreeing to her presence. One can only hope these institutions don't make a similar mistake in the future. Like Ms. Jackson (and so many others), Ms. Lopez also worked as a line attorney in the Special Litigation Section during the Clinton years, but just like Clinton's *political* appointees, departed immediately after the Bush administration arrived in the White House.

(Incidentally, although this article is about the *new hires* into the civil service ranks of the Special Litigation Section, it is worth noting that the four other deputy chiefs promoted by Eric Holder who now serve under Mr. Smith have almost equally impressive liberal track records. One (Julie Abbate) was arrested [8] at a World Bank protest, another (Mary Bohan) has made sizable contributions to the presidential campaigns of both Barack Obama and John Kerry, the third (Bo Tayloe) worked for the United Nations High Commissioner for Refugees, and the fourth (Judy Preston) is known by all as one of the biggest bleeding hearts in the Division. In short, anyone looking for even a hint of ideological balance in the Section's leadership will be sorely disappointed. Targets of the Section's enforcement efforts have been duly warned.)

Tiffany Austin: Ms. Austin is a new line attorney who joined the Section from private practice in Ohio. She did, however, spend time in Washington during law school, clerking for "Bread for the City," a liberal civil rights organization that describes itself [9] as the "front line agency serving Washington's poor." The recipient of an NAACP scholarship, she also served on the Executive Board of the Black Law Students Association at Notre Dame Law School.

The Justice Department conspicuously redacted a number of the other professional affiliations from her resume in its FOIA response, so there was likely some type of politically embarrassing information on Ms. Austin that DOJ did not want made public.

Deena Fox: Before arriving in the Section, Ms. Fox worked as a Fellow at the Bazelon Center for Mental Health Law. Prior to that, she worked for the Children's Rights Clinic at Legal Aid, clerked for the Public Defender's Service for the District of Columbia, interned at the New York Lawyers for the Public Interest, and was a Fellow at the New York City Urban Fellows Program. During law school, she served as editor-in-chief of a journal entitled *Review of Law & Social Change*, and volunteered for the New York State Bar Association's Special Committee on the Civil Rights Agenda.

Winsome Gayle: Ms. Gayle is a financial thoroughbred for the Democratic Party. FEC records reveal that she contributed nearly $5,600 to Obama in the 2008 campaign, and gave another $200 in 2009 to a very liberal (and ultimately unsuccessful) congressional Democratic candidate in Kansas, Raj Goyle. She worked as a staff attorney at the Public Defender's Service for the District of Columbia, interned at the ACLU in New York, and clerked for a liberal federal judge in Florida appointed by President Clinton.

How radical is Ms. Gayle? *After* arriving in the Civil Rights Division, she spoke on a panel [10] at American University Law School during which she openly criticized the prosecution of drug crimes! She claimed that "the enforcement of the drug laws tend to encourage racial profiling."

The fact that a current Justice employee would make such comments in a public forum is not only disturbing, but it shows just how extreme the Civil Rights Division has become. Incidentally, she applied [11] for a judgeship in the District of Columbia in 2010 but was fortunately passed over. Although her resume does evidence the kind of "putting empathy above the law" that this president prefers.

During law school, Ms. Gayle was a member of the Harvard Civil Liberties Union, Harvard Law School Lambda, the Harvard Black Law Students Association, and the *Harvard Civil Rights-Civil Liberties Law Review*. In fact, she continues to be the head of the Washington chapter [12] of the Harvard Gay and Lesbian Caucus. She also wrote her undergraduate thesis on "Consensual Sodomy Laws: The Place of Morality in Law Where Justice is Concerned."

Emily Gunston: Ms. Gunston arrived at Justice after working for nearly 10 years as a public defender in Contra Costa County, California. While a law student at Berkeley, she also interned at the Homeless Action Center. One can almost hear the hiring committee: "Check, and check."

Anika Gzifa: Ms. Gzifa also fits right in with the new crop of attorneys. Prior to joining the Civil Rights Division, she advocated for the release [13] of Guantanamo Bay detainee Omar Khadr, claiming that he was nothing more than a poor soldier. Khadr is a Canadian citizen who was taken into military custody during hostilities in Afghanistan and assigned to Gitmo, classified as an enemy combatant, and charged with murder, attempted murder, conspiracy, providing material support for terrorism, and spying. He is slated to be tried before a military commission. Ms. Gzifa signed on to a letter sent to President Obama pleading Khadr's innocence and urging his release. The administration was apparently unmoved, as was the D.C. Circuit and the Supreme Court, both of which have denied Mr. Khadr's request for relief.

Ms. Gzifa penned her plea on behalf of Khadr while working as a supervisory attorney at the Children's Law Center in Washington. She affiliated with that organization right out of law school, where she was a member of the Prison Legal Assistance Project and an editor of the *Harvard Civil Rights-Civil Liberties Law Review*.

Charles Hart: Mr. Hart comes to the Special Litigation after representing unions at a private law firm in New York. Prior to his time there, he represented criminal defendants at the Neighborhood Defender Service of Harlem. He also served as the coordinator for the Capital Research Project in North Carolina, where he performed research on death penalty cases in the state. During law school, he interned at the NAACP Legal Defense and Education Fund, the NYU Juvenile Rights Clinic, and the Juvenile Justice Project of Louisiana. And he was an editor of the *Review of Law and Social Change* journal. His resume just screams balance and neutrality, doesn't it?

Vincent Herman: Mr. Herman worked as a staff attorney at the Children's Law Center and the Juvenile Law Center before moving to the Civil Rights Division. While a law student, he clerked for the Public Defender's Service for the District of Columbia and served as an advocate at the Juvenile Rights Advocacy Project. He also previously worked as a coordinator of the AIDS Face-to-Face Program for HIV/AIDS Services at Catholic Charities of the East Bay in Oakland, Calif.

Michelle Jones: Another activist Democrat, Ms. Jones contributed at least $750 to President Obama's campaign during the 2008 election cycle. She was also a volunteer for the Election Protection

Project, which is sponsored by the NAACP, the Lawyers' Committee for Civil Rights Under Law, People for the American Way, and the National Bar Association. Ms. Jones also joined with a multitude of left-wing organizations in 2009 to organize a conference [14] at Howard University Law School on "Reaffirming the Role of School Integration in K-12 Public Education Policy."

Curiously, the Justice Department redacted her other activities from the resume it released, but you get the picture.

Alyssa Lareau: Ms. Lareau's resume contains all the requisite criteria to get hired by Holder's Civil Rights Division. She worked at the liberal Washington Lawyers' Committee for Civil Rights and Urban Affairs, interned at the National Women's Law Center (a hard-core left-wing organization that has lobbied for greater abortion rights, opposed all Republican Supreme Court nominations, and in recent years partnered with [15] the AFL-CIO and MoveOn.org to oppose Obama's supposed move to the center), and served as a Fellow at the Human Rights Campaign [16] (which advocates on behalf of the lesbian, gay, bisexual, and transgender community). She also volunteered for the ABA's Detention Standards Implementation Initiative [17], which has attacked the Departments of Justice and Homeland Security for not providing sufficiently luxurious detention facilities for illegal aliens. Her law review note at Georgetown, which she wrote while serving as a research assistant to the truly extreme Professor Chai Feldblum [18], was entitled "Who Decides: Genital Normalizing Surgery on Intersexed Infants."

Michelle Leung: Ms. Leung joined the Section after a brief stint at a San Francisco law firm, where it appears she spent most of her time working on pro bono matters, including a FOIA lawsuit [19] on behalf of the ACLU claiming that the Department of Homeland Security's detention of illegal aliens was somehow improper because some of the aliens hadn't committed criminal acts. Her view made sense considering that she had interned at the ACLU of Northern California for two years during law school at Berkeley. She also interned for the Public Defender's Office in San Francisco and the California Appellate Project, where she worked on death-row representation.

As an undergraduate at Stanford, Ms. Leung was a member of the Students of Color Coalition and wrote her senior thesis on "Multiracial Coalition Politics in California: Analyzing Propositions 187, 209, and 227." She also produced a documentary film and authored a related blog [20] entitled "Recycling Fear" in which she lamented the criticism of radical Islam after 9/11.

To quote the blog's description of the documentary:

> The late 90s saw a rise in the depiction of Muslims as America's newest enemy and Islam as the world's biggest threat to democracy. The growing perception of a Muslim threat crystallized on September 11, 2001. *Recycling Fear: The New American Enemy* examines the impact that manufactured national fear has on constitutionally protected rights and civil liberties. Through the stories of individuals accused of terrorism and the lawyers that defend them, the documentary seeks to explore the question whether or not such fear really moves us towards global security. In the course of answering this question, *Recycling Fear* documents various forms of discrimination against individuals who are Muslim and perceived to be Muslim.

Leung was quoted [21] in the Stanford Public Service Scholars Program 2005 annual report:

> [I want to use the] law as a social tool that can be used to advocate on behalf of minorities in our criminal justice system. Accepted social systems (academia, law) can be used in powerful ways to work towards social justice, even if this may not have been their originally designed purpose.

Now she will have an opportunity to put those activist desires into use with the heavy hand of the federal government.

Jennifer Mondino: After working at the Center for Reproductive Rights, an abortion rights group, Ms. Mondino apparently decided that her work would be easier if she had the enforcement machinery of the Department of Justice behind her. She previously served as a staff attorney at the Safe Horizon Domestic Violence Law Project in Brooklyn and an attorney in the Civil Rights Bureau of the New York State Attorney General's Office. On her resume, she proudly lists her volunteer activities with the Lawyers' Committee for Civil Rights Election Protection Campaign, the Legal Aid Society, the New York City Bar Refugee Assistance Project, the "Unite! Local 169 Fair Wages Campaign" (on behalf of Spanish-speaking green grocer employees), Bay Area Legal Aid, and Human Rights Watch. She also proudly touts her membership in the "National Campaign to Restore Civil Rights", whose website [22]

openly proclaims its real desire "to spread understanding of liberal ideas and advance progressive values."

Jack Morse: Mr. Morse comes to the Civil Rights Division straight out of law school, during which time he interned for the ACLU of Georgia's National Security/Immigrant Rights Project and for the Georgia Innocence Project. He also helped draft reports [23] for the ACLU suggesting that the "287(g) program" (which allows local law enforcement to participate in enforcement of federal immigration laws) contributes to racial profiling and should be eliminated. Anyone still confused by Mr. Morse's views might peruse his law review article [24] in which he argues that the federal government may not legitimately classify material support of terrorism as a war crime (!) and that the U.S. thus improperly tried Salim Hamdan (OBL's driver) by military commission. Mr. Morse must have a great relationship with new attorney Aaron Zisser (see below), who also has written favorably of Salim Hamdan. It's nice to know that there are so many advocates of Guantanamo Bay terrorists in the Special Litigation Section.

Marlysha Myrthil: Before getting hired, Ms. Myrthil enjoyed a very brief stint as a Fellow at a private law firm in Florida, where she worked exclusively on pro bono civil rights matters. Most of her cases seem to have involved litigation demanding improved educational programming for pre-trial detainees. Prior to that, she clerked for a liberal Clinton appointee on the Eleventh Circuit and interned at a Public Defender's Office in Indiana.

It was as an undergraduate at Barnard, however, where Ms. Myrthil really excelled. There, she was the president of the "Black Organization of Soul Sisters" (founded in 1968 as "an outgrowth of alienation and black nationalism") and a member [25] of the Barnard College Democrats. She wrote her senior thesis on "Fundamental Rights v. Autonomy: The Case for Welfare Rights in the United States." She also penned a newspaper editorial claiming that Columbia University — a bastion of political correctness and liberal bent — was filled with "pervasive racism." She criticized an apparently satirical cartoon as "exploiting the First Amendment" and demanded that university administrators take action. Apparently, it was a case of "free speech for me, but not for thee." She'll fit in nicely in Holder's Civil Rights Division.

Rashida Ogletree: The daughter of Obama pal and Harvard Law professor Charles Ogletree, Ms. Ogletree joined the Section after working as a staff attorney at the District of Columbia Public Defender's Office. Before that, she had interned at the Legal Action Center [26], which describes itself as "the only non-profit law and policy organization in the United States whose sole mission is to fight discrimination against people with histories of addiction, HIV/AIDS, or criminal records, and to advocate for sound public policies in these areas." She also participated in the Brennan Center for Public Policy Advocacy Clinic, where she worked on efforts to give voting rights to convicted felons. Leaving no activist stone unturned, she preceded those activities with internships at the Neighborhood Defender Service of Harlem and the EEOC, as well as a gig as the Education and Enforcement Coordinator for the Fair Housing Center of Greater Boston. And to top it all off, she served as an editor of the "progressive" *Review of Law and Social Change* at NYU Law School.

Sergio Perez: Mr. Perez is another attorney fresh out of law school. As of the date this article was drafted, he continued to boast on his Facebook page of his active role in Junta for Progressive Action [27], an organization that promotes the rights of illegal aliens in the United States. From the group's website:

> Junta has worked with Unidad Latina to promote rights for the undocumented, encouraging [a Connecticut mayor] to issue a municipal identity card. ... Immigrant rights groups, such as Fair Haven-based Junta for Progressive Action, are working with the city's police department to establish a policy that would forbid police from asking about the legal status of immigrants who are crime victims or turning over any such information to federal immigration authorities.

Mr. Perez also was the student director of Yale Law School's Legal Services for Immigrant Communities Clinic and the co-director of the school's Human Rights Project. He clerked one summer at a large law firm, but appears to have spent all of his time there working on a *habeas corpus* petition on behalf of a death-row inmate in Louisiana.

Upon arriving in the Civil Rights Division, Mr. Perez began working on the Special Litigation Section's investigation (or, as I have previously written [28] at length, harassment) of Sheriff Joe Arpaio and the Maricopa County (Ariz.) Detention Facility because of the Sheriff's participation in the federal 287(g) program. His team leader on the case is none other than Avner Shapiro [29], another ideological attorney whose wife is Deputy Assistant Attorney General Julie Fernandes, who has made

it clear to Voting Section employees that she does not believe in the race-neutral enforcement of civil rights laws. If Perez isn't already radicalized, he soon will be after working with Shapiro.

Catherine Pugh: When it comes to liberal activists, Ms. Pugh easily fits the bill. Arriving in the Section straight from the California Western School of Law, she appears to be on a long-term crusade to harass law enforcement and exact some sort of revenge for unspecified grievances. Upon winning a California Bar Foundation scholarship, she proclaimed [30]:

> I have worked in the legal industry as long as I have worked — most recently in prisons throughout the state — and I fully intend to apply my law degree to policing abuses of public trust.

The mission started as early as her undergraduate days at Howard University, where she wrote her senior thesis on "The Cumulative Effect of Race in Arrest, Charging, Trial, and Sentencing."

During law school, Pugh worked as a research assistant at the California Innocence Project and served as director of the Amity Foundation [31], which provides oversight for a new-age drug treatment center and analyzes data on the treatment of underrepresented populations. She also won a Weiner Scholarship [32], which is awarded to a student who "shows sensitivity and concern with human rights and the fair administration of justice."

(Amusingly, her law school did a write-up [32] on her in which it claimed that she "was chosen as one of four people in the nation to intern in the Civil Rights Division of the Department of Justice." This statement is preposterously false.)

Lori Rifkin: Ms. Rifkin's resume must have had the new "non-political" hiring committee in the Civil Rights Division salivating with excitement. She worked as an attorney at the Legal Aid Society Employment Law Center in San Francisco and a small plaintiff's firm in the same city litigating class action lawsuits on behalf of state prison inmates. She also had multiple stints of employment with the ACLU, serving as a staff attorney in Los Angeles and Hartford and an intern in New York. Although her activities covered the gamut there, she seemed to concentrate on prisoners' rights litigation and gay-lesbian-bisexual-transgender advocacy. In one of her more odd cases at the ACLU, she sued [33] the City of Santa Barbara, claiming that the city's decision to operate a homeless shelter only during the winter months violated the constitutional rights of the homeless.

Prior to her time with the ACLU, Ms. Rifkin clerked at the Southern Poverty Law Center, participated in the liberal Brennan Center for Public Policy Advocacy Clinic, and led a workshop at the Yale Law School Rebellious Lawyering Conference [34], where she protested the JAG Corps recruiting on the law school campus. She also authored a real page-turner of an article [35] in the *Journal of Lesbian Studies* entitled: "The Suit Suits Whom? Lesbian-Gender, Female Masculinity, and Women-in-Suits." She proudly notes on her resume that this article was co-published simultaneously in a book entitled *Femme/Butch: New Considerations of the Way We Want to Go*.

Michael Songer: Mr.Songer, a $200 contributor to the 2008 Obama presidential campaign, worked at a large Washington law firm. His resume highlights his pro bono work there on *Sossamon v. Texas* [36], which his firm lost in the Supreme Court. They argued unsuccessfully in *Sossamon* that states waived their sovereign immunity against private lawsuits filed by prison inmates seeking money damages merely because they accepted federal funds. During law school, he worked for the Capital Jury Project, where he conducted research against capital punishment. He also wrote a law review article [37] on "The Effect of Race, Gender, and Location on Prosecutorial Decisions to Seek the Death Penalty in South Carolina," in which he suggests that prosecutors seek the death penalty in a racially discriminatory manner.

Although his internship for former Democratic Senator Fritz Hollings is listed on his resume, the Civil Rights Division opted to redact the rest of his activities.

Samantha Trepel: It is easy to see why Ms. Trepel was hired. She comes fresh off two judicial clerkships, including one with Ninth Circuit Judge Sidney Thomas, one of the most liberal jurists in the country. During law school, she interned for the ACLU's Immigrants' Rights Project and the Children's Rights [38] organization, which was launched by the ACLU. She also served as co-chair of her law school's chapter of the American Constitution Society and helped organize the American Constitution Society's Reading Group on "Poverty & Opportunity," a so-called "progressive workshop."

Meanwhile, Ms. Trepel has wasted little time in inviting controversy since arriving in the Special Litigation Section. She launched an investigation [39] of Alamance County, North Carolina, claiming

that its use of the 287(g) program (by which local law enforcement can assist in the enforcement of federal immigration law) has led to improper racial profiling and discriminatory policing. But county commissioners accused her [40] of leaking her investigatory letters to the media before sending them to opposing counsel. If she did engage in such improper leaking, she would be in good company among attorneys in the Civil Rights Division who leaked confidential internal legal opinions over Georgia's voter ID law and the Texas congressional redistricting plan when those matters were being reviewed by the Division.

Aaron Zisser: Mr. Zisser joined the Special Litigation Section after working as a staff attorney at the Public Interest Law Center of Philadelphia, a branch of the Lawyers' Committee for Civil Rights. Before that, he was a fellow at "Human Rights First," where he traveled to Guantanamo Bay to observe the prosecution of Osama Bin Laden's driver, Salim Hamdan, before a military tribunal. He wrote a series of blog posts for the liberal American Constitution Society criticizing the prosecution of detainees and suggesting that such terrorists were being deprived of their rights (see here [41], here [42], here [43], and here [44]).

Before graduating to his criticism of U.S. terrorism policies, Mr. Zisser interned at the ACLU, the Southern Center for Human Rights, the Orleans Parish (La.) Indigent Defender Board, and the Santa Clara County (Calif.) Public Defender's Office. A proud member of the American Constitution Society, he also participated in Georgetown Law School's International Women's Human Rights Clinic, where he advocated greater reproductive rights (read: abortion) for women. It should thus come as no surprise that, soon after arriving in the Civil Rights Division, Mr. Zisser made it a top priority to enforce the Freedom of Access to Clinic Entrances Act (the "FACE Act") against an elderly pro-life advocate. The president of government watchdog Judicial Watch charged that the case was politically motivated and that the "complaint seems like it was written more by Planned Parenthood than discerning professional lawyers."

What these 23 new Special Litigation Section civil servants represent is a solidification of the already extreme liberalism that forms the core of that unit. And note that while there were numerous lawyers hired who worked at public defenders or for advocacy organizations for criminals and prisoners, not a single lawyer was hired with experience as a prosecutor or in law enforcement in a Section which has as one its main jobs investigating the practices of local police. Do local jurisdictions really think they will get a fair, nonpartisan, objective hearing from the lawyers in this Section?

None of this is an accident. Eric Holder and Thomas Perez (not to mention Barack Obama himself) astutely recognize that personnel is policy. Just as installing a Supreme Court nominee will help a president put his imprimatur on the law for decades, burrowing these ideologues into the career civil service of the Justice Department will help Democrats and liberals ensure that their policy views are well entrenched in the bureaucracy, regardless of who controls the White House in the years ahead.

No one is suggesting any of these individuals' activist backgrounds *disqualifies* them from working as attorneys in the Civil Rights Division. The point is that such liberal bona fides appear to be a *prerequisite* for employment in the Division — there is no other explanation for this. These resumes are an example of a legal doctrine that law students learn in their first year: *res ipsa loquitur* — "the thing speaks for itself."

The public must be reminded that, notwithstanding the breathless attacks from the liberal blogosphere, the fact remains that the Bush administration *never* engaged in this type of monolithic ideological hiring.

While a handful of ancient sarcastic emails have been thrown around to suggest some sort of nefarious conspiracy, the fact remains that individuals were hired from all across the political spectrum. Even in the Civil Rights Division sections that got so much press attention during the faux political scandals that Democrats on the Senate Judiciary Committee ginned up, dozens of liberals were hired and promoted in just the three-year time period that was the subject of those politically motivated probes.

Yet you find nary a token conservative among the Holder/Obama hires. Meanwhile, the press has gone suddenly silent. Where is the outrage now?

Perhaps in today's hyper-politicized environment, where legacy media institutions have devolved into little more than political platforms for outspoken "journalists" and producers, this is what we should come to expect. But put aside for a moment the fact that good reputations were sullied with attacks whose foundations were so weak that they crumble at the touch. The real concern is that, with the

Department of Justice, the stakes are incredibly high.

How can the public (not to mention state and local governmental institutions) have any confidence in a federal agency that is entirely dominated, from top to bottom, by the political and ideological supporters of the White House? In the past, Democrats would have counted on the media simply ignoring these political shenanigans. Fortunately, with the advent of new media, those days are over.

And PJMedia has more stories to tell. Stay tuned.

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[1] Voting Section: **http://pjmedia.com/blog/every-single-one-the-politicized-hiring-of-eric-holder%e2%80%99s-voting-section/**
[2] Office of Special Counsel for Immigration-Related Unfair Employment Practices: **http://pjmedia.com/blog/every-single-one-the-politicized-hiring-of-eric-holder%E2%80%99s-immigration-office/**
[3] "Targeting the Police: The Holder Justice Department Declares Open Season on Big City Police Departments": **http://www.weeklystandard.com/articles/targeting-police_536863.html**
[4] tried to suppress: **http://archive.frontpagemag.com/readArticle.aspx?ARTID=24656**
[5] ignominious departure: **http://abovethelaw.com/2010/03/shanetta-brown-cutlar-leaving-special-litigation-section/**
[6] Public Justice Center: **http://www.publicjusticecenter.org/about-us/index.cfm**
[7] written: **http://www.nationalreview.com/articles/229277/radicalizing-civil-rights/hans-von-spakovsky?page=2**
[8] arrested: **http://pjmedia.com../../../../tatler/2011/01/25/serving-two-masters-at-doj/**
[9] describes itself: **http://www.breadforthecity.org/about-2/**
[10] spoke on a panel: **http://media.wcl.american.edu/Mediasite/SilverlightPlayer/Default.aspx?peid=74558444-475e-40e7-ba99-489a614cbace**
[11] applied: **http://legaltimes.typepad.com/blt/2010/12/judicial-commission-seeks-comment-on-applicants-for-dc-court-of-appeals-vacancy.html**
[12] head of the Washington chapter: **http://hglc.org/chapters/index.html**
[13] advocated for the release: **http://www.docstoc.com/docs/14746773/January-12-2009-President-Elect-Barack-Obama-The-Hay-Adams-Hotel**
[14] organize a conference: **http://www.prrac.org/pdf/nov13schoolintegrationconfbrochure.pdf**
[15] partnered with: **http://thehill.com/business-a-lobbying/137907-liberal-groups-worry-obama-will-cut-deal-on-social-security**
[16] Human Rights Campaign: **http://www.hrc.org/about_us/what_we_do.asp**
[17] Detention Standards Implementation Initiative: **http://www.americanbar.org/groups/public_services/immigration/projects_initiatives/detention_standards_implementation_initiative.html**
[18] Professor Chai Feldblum: **http://www.wnd.com/?pageId=112003**
[19] FOIA lawsuit: **http://www.aclunc.org/news/press_releases/asset_upload_file643_7193.pdf**
[20] related blog: **http://recyclingfear.blogspot.com/**
[21] quoted: **http://studentaffairs.stanford.edu/sites/default/files/haas/files/PSSP_AlumBook_web.pdf**
[22] website: **http://www.rollbackcampaign.org/**
[23] reports: **http://www.acluga.org/287gReport.pdf**
[24] law review article: **https://litigation-essentials.lexisnexis.com/webcd/app?action=DocumentDisplay&crawlid=1&doctype=cite&docid=26+Ga.+St.+U.L.+Rev.+1061&srctype=smi&srcid=3B15&key=1befabaa7663033b3abc415349ffb4e5**
[25] member: **http://www.columbiaspectator.com/2002/01/30/democrats-republicans-rate-bush-s-speech**

[26] Legal Action Center: **http://lac.org/index.php/lac/category/about_us**
[27] Junta for Progressive Action: **http://www.juntainc.org/en/programs/**
[28] written: **http://www.nationalreview.com/articles/227816/pattern-and-practice/hans-von-spakovsky**
[29] Avner Shapiro: **http://www.nationalreview.com/articles/229277/radicalizing-civil-rights/hans-von-spakovsky?page=5**
[30] proclaimed: **http://www.cwsl.edu/main/default.asp?nav=news.asp&body=news/CalBarScholarships07.asp&banner=false**
[31] Amity Foundation: **http://www.amityfdn.org/About%20Amity/index.php**
[32] Weiner Scholarship: **http://www.cwsl.edu/main/default.asp?nav=pros_students.asp&body=pros_students/Pugh08.asp**
[33] sued: **http://yubanet.com/california/ACLU-SC-Sues-Upscale-Coastal-Resort-for-Treating-Disabled-Homeless-People-as-Outlaws_printer.php**
[34] Yale Law School Rebellious Lawyering Conference: **http://opac.yale.edu/news/article.aspx?id=5088**
[35] article: **http://www.tandfonline.com/doi/abs/10.1300/J155v06n02_20#preview**
[36] *Sossamon v. Texas*: **http://www.supremecourt.gov/opinions/10pdf/08-1438.pdf**
[37] law review article: **http://papers.ssrn.com/sol3/papers.cfm?abstract_id=922533**
[38] Children's Rights: **http://www.childrensrights.org/about/mission-and-methods/**
[39] launched an investigation: **http://www.thetimesnews.com/news/county-40868-requests-department.html**
[40] accused her: **http://www.timesnewshosting.com/docs/Albrightresponses.pdf**
[41] here: **http://www.acslaw.org/acsblog/node/12531**
[42] here: **http://www.acslaw.org/acsblog/node/12538**
[43] here: **http://www.acslaw.org/acsblog/node/12541**
[44] here: **http://www.acslaw.org/acsblog/node/12544**

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Every Single One: The Politicized Hiring of Eric Holder's Employment Section

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For the last two weeks, PJMedia has been publishing a series of articles on the radical attorneys who have been hired as career civil servants in the Justice Department's Civil Rights Division since President Obama took office. The reports reveal an unprecedented effort by Attorney General Eric Holder and his Civil Rights Division political leadership to stack the Division from top to bottom with a cadre of hard core, left-wing partisans. The ideological litmus test being employed is undeniable: conservatives and even apolitical lawyers need not apply. Only fervent liberals are welcome. And the proof is in the resumes — *every single* new attorney in the Division fits that description.

Today we turn to the Employment Litigation Section. This is the fifth section to be covered in PJM's series. Previous pieces focused on the Voting Section [1], the Office of Special Counsel for Immigration-Related Unfair Employment Practices [2], the Special Litigation Section [3], and the Education Section [4].

The Employment Section is primarily responsible for enforcing the anti-discrimination provisions applicable to state and local governments under Title VII of the Civil Rights Act of 1964. And Assistant Attorney General Thomas Perez has a downright disturbing agenda for the Section. Speaking to the liberal American Constitution Society, he promised [5] that his Division would pursue "disparate impact" litigation — where no proof of actual discrimination is required but mere disproportionate workforce representation — with vigor rarely before seen. He wasn't kidding. Indeed, the Division's aggressive efforts to defend and expand [6] the use of racial preferences in public sector hiring, promotions, and contracting ought to offend all Americans who believe in the promise of a just and colorblind society. Although politically correct terms like goals" and "timetables" are *de rigueur*, there is no hiding what is really being advocated here: racial quotas.

Meanwhile, the Section's enforcement of the laws against religious discrimination seems focused almost obsessively on the protection of Muslims to the exclusion of almost every other group. Some of the enforcement actions undertaken are so far outside the requirements of federal law that one might be excused for thinking that the Koran is as much a part of the Section's statutory toolbox as the U.S. Code. With the new crop of attorneys that have come on board, however, it is not difficult to see how this radicalized atmosphere has so thoroughly enveloped the Section.

Fifteen new career attorneys have been hired into the Section since Holder took the reins at DOJ. *Every single one* of these individuals is an unequivocal liberal. Many, moreover, have extraordinarily partisan backgrounds. In light of all this, the fact that the Bush Civil Rights Division — which hired career attorneys from all across the political spectrum — received such grief from the media and DOJ's internal watchdogs is almost laughable in its absurdity.

But once again, don't just take my word for it. Let the resumes speak for themselves:

Raheemah Abdulaleem: Ms. Abdulaleem is a sizable Democratic contributor, having given more than $1,400 to Barack Obama's 2008 presidential campaign. While working at a large law firm, she represented terrorists detained at Guantanamo Bay on a *pro bono* basis. That is not surprising given her role on the Board of Directors [7] of an organization called "Karamah — Muslim Women Lawyers for Human Rights."

She also previously served as pro bono staff counsel for the National Commission on the Voting Rights Act [8], which was established by the Lawyers' Committee for Civil Rights Under Law and other left-wing civil rights organizations to gather anecdotal evidence in support of the reauthorization of constitutionally dubious provisions of the Voting Rights Act. And she was a student attorney at the Harvard Legal Aid Bureau.

Ms. Abdulaleem has not abandoned her activist ways since arriving in the Employment Section. In fact, she was one of the Section's senior lawyers who recently commenced the lawsuit [9] against the Berkeley (Ill.) School District on behalf of a Muslim first-year teacher whose request to take a 3-week

hajj to Mecca in the middle of end-of-semester course reviews and final exams was denied. As I previously wrote [10], the lawsuit is entirely devoid of legal merit and appears to have been filed as nothing more than a sop to the Muslim groups that the Obama administration has actively courted. One can only imagine what kind of lawsuit she will dream up next.

Woody Anglade: Mr. Anglade joins the Section from the EEOC, where he worked as a senior trial attorney litigating cases against private employers under federal civil rights statutes. Previously, he served as chief of staff to Democratic Congressman Rob Andrews of New Jersey, to whom he continues to make political contributions. He also worked as the Democratic counsel on the House Education and Workforce Committee's Employer-Employee Relations Subcommittee, where he advised the 22 Democrats serving on the subcommittee.

Rachel Smith-Anglade: Ms. Smith-Anglade is the wife of new Section attorney Woody Anglade. The two worked together at the EEOC before coming to the Civil Rights Division. Although the Division conspicuously redacted parts of her resume, her political leanings are hardly in doubt. Indeed, her Facebook page [11] proudly lists First Lady Michelle Obama and Democratic Congressman Rob Andrews as leading interests and proclaims that she will be supporting Barack Obama in 2012.

Eric Bachman: Mr. Bachman spent the 10 years before coming to the Employment Section as an attorney at a plaintiff's law firm in Washington where he pursued civil rights class actions against major corporations. Before that, he worked as a staff attorney at the Jefferson County (Ky.) Public Defender's Office and as an intern at the NAACP Legal Defense and Education Fund. He also remains a member [12] of the Innocence Project of the National Capital Region. During law school, he served as an editor of the *Georgetown Journal on Fighting Poverty*.

Elizabeth Banaszak: Ms. Banaszak comes to the Section straight out of law school, but her left-wing ideological bona fides are already firmly intact. During law school, she clerked at the liberal Lawyers' Committee for Civil Rights Under Law, volunteered with the Employment Justice Center [13], and interned at the radically partisan National Partnership for Women & Families. This latter group, an advocacy organization headed by radical ideologues Debra Ness and Judith Lichtman [14], promotes abortion rights and opposes all Republican Supreme Court nominees. She also worked as a legislative assistant and field organizing assistant at the ACLU in Washington, where she focused on gay marriage and church/state issues. And she assisted with the research for a *Stanford Law Review* article [15] titled "Refugee Roulette: Disparities in Asylum Adjudication," which advocated increased grants of asylum to illegal aliens.

Trevor Blake: Mr. Blake contributed $250 to Barack Obama's 2008 presidential campaign and, in 2010, gave another $250 to the Democratic National Committee. During his law school days, he was an editor of the *Georgetown Journal of Gender and the Law*, a publication whose stated [16] "mission is to explore the impact of gender, sexuality, and race on both the theory and practice of law" and thereby "complement... a long tradition of feminist scholarship and advocacy at the [Georgetown] Law Center." His own contribution to the journal was an article [17] titled "You Get What You Pay For: A New Feminist Proposal for Allocating Marital Property Upon Divorce."

Alicia Johnson: Ms. Johnson recently commenced her second tour of duty in the Employment Section, having been hired the first time around in the final days of the Clinton administration. At the time, she was part of an influx of new radical attorneys brought on board by former Acting Assistant Attorney General Bill Yeomans in a mass hiring wave designed to fill open career slots in the Civil Rights Division with left-wing activists before President Bush entered the White House. She left in 2004, however, to join the greener pastures of the private law firm world, and showered substantial largesse — $5,600 according to FEC records — on Barack Obama's 2008 campaign in the process. During her first stint in the Division, she was widely considered to be one of the more partisan Democrats on staff. A review of her resume (even with the heavy redactions by the Justice Department's FOIA office) reveals how she developed this reputation.

During her law school days at Howard University, she was a member of the "*Social Justice Law Review*" and an intern at the District of Columbia Public Defender's Office. She also volunteered her time representing inmates incarcerated at the Lorton Correctional Facility who were charged with disciplinary infractions. Her focus on seeing everything through a racial prism seems to go back to her undergraduate days at Spelman College, where she wrote her senior thesis on "Color Complexes in the Dating Behavior of African-American College Students Attending Historically Black Colleges in Atlanta."

Amy Kurren: Ms. Kurren joined the Section as part of Attorney General Eric Holder's Honors Program only one year out of law school, and it is easy to understand why he found her such a good

ideological fit. She worked for two years at the ACLU of Northern California and interned one summer at the liberal Washington Lawyers' Committee for Civil Rights Under Law. She also interned at the Native Hawaiian Legal Corporation, where she advocated in favor of special land rights for native Hawaiians and sought to protect "the rights of incarcerated native Hawaiians to dance the hula and perform Hawaiian chants and rituals in privately owned prisons in Arizona." Good grief!

Her fun did not end there, though. Ms. Kurren also interned for the NAACP LDF, where she assisted the organization with its efforts to give voting rights to incarcerated felons (not just *released* felons, but *currently incarcerated* felons). Her resume further highlights her service as the Yale Law School's community chair of the American Constitution Society (which opposes interpreting the Constitution according to its original meaning) and her role as the minority recruitment chair for the Asian Law Students Association.

Louis Lopez: The very liberal Mr. Lopez is also on his second tour with the Employment Section, having previously been hired as a trial attorney during the Bush administration. (So much for the supposed conservative litmus test that the Bush Civil Rights Division was absurdly accused of following.) Like many of his colleagues, Mr. Lopez was a contributor to Barack Obama's 2008 presidential campaign. He also served as a Democratic political appointee at the EEOC during the Clinton Administration under Commissioner (and noted radical) Ida Castro.

He is a member [18] of both the Civil Rights Division's GLBT (gay-lesbian-bisexual-transgender) Working Group as well as the American Bar Association's Commission on Sexual Orientation and Gender Identity ("SOGI"), which describes itself [18] as one of four entities that together seek to further the ABA's commitment to diversity and inclusion. He also volunteers with the Employment Justice Center [13]. During law school, he worked for the Harvard Legal Aid Bureau, but his other activities have been conspicuously redacted from his resume.

Valerie Meyer: Ms. Meyer was a trial attorney and mediator for the EEOC before coming to the Employment Section. She previously worked as a law clerk for the non-profit Disability Rights Advocates [19] organization in Berkeley, California. She also participated in the Death Penalty Clinic while a law student at Berkeley, and served as editor-in-chief of the *Berkeley Journal of Gender, Law, and Justice*. Ms. Meyer was one of the Section's new attorneys who sued [20] the New Jersey Civil Service Commission under a dubious "disparate impact" theory claiming that the exam used to select police sergeants in the State was too difficult for blacks to pass. Faced with the prospect of years of costly litigation in an already cash-strapped environment, the State agreed to settle [21] earlier this month and to promote the applicants who flunked the exam the first time around. Let's hope this "victory" for DOJ doesn't endanger the safety of New Jersey's population; there is no question it discriminates against those who successfully passed the exam.

Aaron Schuham: Mr. Schuham is another newly hired deputy chief in the Employment Section, and easily rates as one of the more radical attorneys to join the Division during Eric Holder's reign. For seven years prior to coming to DOJ, Mr. Schuham worked as the legislative director for Americans United for Separation of Church and State [22], an organization that seeks to eradicate any vestige of faith or religion in the public sphere. The very idea that the Obama administration would put the former legislative director of this organization in charge of enforcing the prohibition against religious discrimination in the Civil Rights Act is offensive.

His presence also may explain the outrageous brief that the Obama administration just filed before the Supreme Court in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* – Schuham's name is listed on the brief [23] along with a number of other Justice lawyers. As Ed Whelan of the Ethics and Public Policy Center explains [24], Justice is taking the wildly expansive position that there should be no "ministerial exception" to employment discrimination laws. This contention is not only contrary to every federal court of appeals, all of which have uniformly recognized such an exception for religious institutions as "rooted in the First Amendment's guarantees of religious freedom," but it is even *more* hostile to the First Amendment than the amicus briefs filed in the case by Americans United for Separation of Church and State and the ACLU. These organizations must be overjoyed at Schuhams' influence at Justice.

As is true of several of the new hires, this is Mr. Schuham's second stint with the Employment Section. He previously worked there during the Clinton administration but left after enduring a year of the Bush presidency, apparently frustrated at the lack of overt activism that had been the hallmark of the Section under Attorney General Janet Reno. Indeed, his resume notes that he spent his first tour in the Section seeking to defend the constitutionality of racial preferences (quotas) in employment and federal contracting.

He also was a part of the Section's trial team on its now infamous disparate impact lawsuit against the New York City Board of Education, which argued that minority custodians had been discriminated against because of an entrance exam that they could not pass in the same proportion as whites. In an obviously politically motivated settlement, the city initially rolled over [25] and agreed to a consent decree that granted retroactive seniority to nearly 60 minority custodians. The only problem was that many of these individuals weren't victims at all; they *hadn't even taken the exam* but yet were displacing whites on the city's seniority list. A group of white custodians responded by intervening and convincing the Second Circuit [26] to throw out the consent decree. Once the Bush Civil Rights Division's leadership got wind of the Section's shoddy lawyering and political shenanigans, it ordered that the pleadings be modified and that relief no longer be sought on behalf of 32 of the original 60 "victims." It also removed the trial team (including Mr. Schuham) from the case and transferred the then-chief of the Section (who, incidentally, is now the head of the Division's Office of Special Counsel for Immigration-Related Unfair Employment Practices, and is responsible for much of the politicized hiring that PJM chronicled [2] two weeks ago) out of the Division. All of this infuriated Ted Kennedy at a Senate Judiciary Committee oversight hearing [27], but the Second Circuit recently upheld [28] the legitimacy of the decisions made by the Bush leadership.

And now the Division has warmly welcomed him back into a senior leadership position in the Employment Section. One cannot help but feel sorry for the states and municipalities he will now target.

Barbara Schwabauer: Ms. Schwabauer is another Honors Program hire, joining the Section fresh from Ohio State's Moritz College of Law. She is actually featured [29] in one of her law school's ads, describing how she is "a student committed to social justice." She penned a law review article [30] in the *Ohio State Law Journal* in which she claims that the criminal justice system is racist. Relying heavily on psycho-babble and what she calls "critical race theory and discursive analysis," she claims to "interrogate the narrative of Congress in enacting the" Emmitt Till Unsolved Civil Rights Crime Act. In effect, she argues that Congress actually perpetuated racism in the criminal justice system by the passage of the Act. A perfect fit for the Civil Rights Division.

Jennifer Swedish: Ms. Swedish comes to the Section from the liberal National Women's Law Center [31], where she worked as a Health Law Fellow concentrating on "regulatory changes to Title X Family Planning Program" (read: promoting abortion rights). She served a judicial clerkship with Martha Craig Daughtrey, an extremely liberal Clinton appointee on the Sixth Circuit who recently held that Michigan's ban on the use of race in public employment, contracting, and college admissions was unconstitutional. (Daughtrey actually claims — get this — that the Equal Protection doctrine *requires* race-based discrimination!) During law school, Swedish interned at the ACLU in its Reproductive Freedom Project and interned as well at Northwestern University's Center on Wrongful Convictions. Before entering law school, following her graduation from Brown University, she worked as a research assistant at the Guttmacher Institute [32], a pro-abortion organization, where she coordinated a nationwide "sociological survey" of more than 2,400 abortion providers.

Allan Townsend: Mr. Townsend arrived in the Section after working for eight years at a small firm in Portland, Maine, with a law practice "entirely focused on representing plaintiffs in employment cases." He is also a member of the left-wing National Employment Lawyers Association [33], whose website nicely details the exclusively liberal positions it takes on employment lawsuits, judicial nominations, legislation, arbitration, and other public policy.

Audrey Wiggins: Ms. Wiggins comes to the Section as one of the new deputy chiefs. She spent the previous eight years at the liberal Lawyers' Committee for Civil Rights Under Law where she headed its "employment discrimination project," managed its amicus program, and directed the organization's public policy efforts, including its fervent opposition to the nominations of Chief Justice John Roberts and Associate Justice Samuel Alito. Prior to that, she worked as an attorney-advisor at the U.S. Commission on Civil Rights (USCCR) under Mary Frances Berry. At the USCCR, Ms. Wiggins focused on voting and police practices and was one of the authors of a ridiculous report suggesting that President Bush "stole" the 2000 election in Florida.

In 2008, she testified before the House Judiciary Committee blasting [34] the Bush Civil Rights Division's Housing Section for not bringing enough disparate impact housing discrimination cases. Her testimony drips with activist language, raising considerable doubt that she possesses an ability to be fair and neutral in her work in the Employment Section.

The Most Transparent Administration in History [35] chose to redact parts of the "Education" section of

Ms. Wiggins' resume. One wonders what the administration thought was more politically embarrassing than what they left on the resume. No matter. We clearly know all we need to know about her already (although, by the way, federal law does *not* allow the government to redact information on a FOIA response just because it could be politically embarrassing).

For those of you keeping score at home, 71 career attorneys have so far been highlighted in this PJM series. Every one – *without exception* – has emphatically clear liberal and/or Democratic ties. Think of the odds of that occurring accidentally. It didn't. Or to put it in terms Thomas Perez can understand, it is an overwhelming disparate impact. Of course it is more than that, too. It is part of a deliberate plan to stock the Division for decades to come with left-wing ideologues who will perpetuate a liberal agenda, irrespective of who controls the levers of government in the White House.

Much of this politicized hiring, incidentally, was engineered by former Acting Assistant Attorney General Loretta King, the same individual responsible for directing the outrageous dismissal of the New Black Panther Party litigation [36]. As Christian Adams recently pointed [4] out, King rewrote the Division's hiring guidelines in early 2009, resulting in hiring committee members being forced to discard resumes from applicants who did not have prior employment with, or memberships in, left-wing civil rights organizations. King could not fathom that lawyers who are simply outstanding civil litigators or who, heaven forbid, have represented defendants in civil rights cases could be qualified to work in the Division. As Christian noted, "what they lacked, of course, was the correct ideological and partisan fervor." To add insult to injury, after screening out the resumes with insufficiently liberal credentials, King then also ordered [37] that applicants *not* be asked if they were willing to enforce the law in a race neutral manner. The results of these actions were inevitable. Hence, this PJM expose.

The public has already awakened to the mischief ongoing daily in this administration's Justice Department, and especially in its Civil Rights Division. Whatever reputation the Department might have once enjoyed for integrity, objectivity, and political neutrality, is shot. It can be restored, but not with this current crew. And we have more stories to tell.

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[1] Voting Section: **http://pjmedia.com/blog/every-single-one-the-politicized-hiring-of-eric-holder%e2%80%99s-voting-section/**
[2] Office of Special Counsel for Immigration-Related Unfair Employment Practices: **http://pjmedia.com/blog/every-single-one-the-politicized-hiring-of-eric-holder%e2%80%99s-immigration-office/**
[3] Special Litigation Section: **http://pjmedia.com/blog/every-single-one-the-politicized-hiring-of-eric-holders-special-litigation-section/?singlepage=true**
[4] Education Section: **http://pjmedia.com/blog/every-single-one-the-politicized-hiring-of-eric-holder%e2%80%99s-education-section/**
[5] promised: **http://www.justice.gov/crt/speeches/perez_acs_speech.pdf**
[6] defend and expand: **http://www.justice.gov/crt/about/app/briefs_aa.php**
[7] her role on the Board of Directors: **http://karamah.org/ABOUT/BoardofDirectors/RaheemahAbdulaleem.aspx**
[8] National Commission on the Voting Rights Act: **http://www2.ohchr.org/english/bodies/hrc/docs/ngos/lccr3.pdf**
[9] lawsuit: **http://www.justice.gov/crt/spec_topics/religiousdiscrimination/berekley_comp.pdf**
[10] wrote: **http://www.nationalreview.com/articles/255994/civil-rights-gone-wild-hans-von-spakovsky**
[11] Facebook page: **http://www.facebook.com/rachel.anglade**
[12] member: **http://www.wcqp.com/Bio/EricBachman.html**
[13] Employment Justice Center: **http://www.dcejc.org/**
[14] radical ideologues Debra Ness and Judith Lichtman: **http://www.nationalpartnership.org/site/PageServer?pagename=about_staff**
[15] *Stanford Law Review* article: **http://www.acslaw.org/files/RefugeeRoulette.pdf**

[16] stated: **http://www.law.georgetown.edu/journals/gender/**
[17] article: **https://litigation-essentials.lexisnexis.com/webcd /app?action=DocumentDisplay&crawlid=1&srctype=smi&srcid=3B15&doctype=cite& docid=4+Geo.+J.+Gender+%26+L.+889&key=19f61b45847e716d24e166f18e16be03**
[18] member: **http://www.americanbar.org/groups/sexual_orientation/about_us.html**
[19] Disability Rights Advocates: **http://www.dralegal.org/**
[20] sued: **http://www.nj.com/news/index.ssf/2010/01 /department_of_justice_lawsuit.html**
[21] agreed to settle: **http://www.nj.com/news/index.ssf/2011/08 /settlement_in_nj_sergeant_sele.html**
[22] Americans United for Separation of Church and State: **http://www.au.org/**
[23] the brief: **http://www.justice.gov/osg/briefs/2011/3mer/2mer/2010-0553.mer.aa.pdf**
[24] explains: **http://www.nationalreview.com/bench-memos/274792/obama-doj-picks- fight-against-religious-freedom-ed-whelan**
[25] initially rolled over: **http://www.cir-usa.org/cases/brennan_v_ashcroft.html**
[26] convincing the Second Circuit: **http://www.cir-usa.org/legal_docs /brennan_2ndCir_opinion.pdf**
[27] a Senate Judiciary Committee oversight hearing: **http://www.access.gpo.gov/congress /senate/pdf/107hrg/86453.pdf**
[28] upheld: **http://www.cir-usa.org/legal_docs/us_v_nyc_2dcir_op2.pdf**
[29] featured: **http://moritzlaw.osu.edu/studies/equality/index.php**
[30] law review article: **http://moritzlaw.osu.edu/lawjournal/issues/volume71/number3 /schwabauer.pdf**
[31] National Women's Law Center: **http://action.nwlc.org/site/PageServer**
[32] Guttmacher Institute: **http://www.guttmacher.org/**
[33] National Employment Lawyers Association: **http://www.nela.org/NELA/**
[34] blasting: **http://judiciary.house.gov/hearings/pdf/Wiggins080612.pdf**
[35] Most Transparent Administration in History: **http://www.justice.gov/opa/pr/2011/March /11-opa-321.html**
[36] directing the outrageous dismissal of the New Black Panther Party litigation: **http://www.washingtontimes.com/news/2009/jul/30/no-3-at-justice-okd-panther- reversal/**
[37] ordered: **http://dailycaller.com/2011/03/21/critics-contend-assistant-attorney-general- loretta-king-guided-more-by-racial-politics-than-the-law/**

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Every Single One: The Politicized Hiring of Eric Holder's Compliance Section

Posted By J. Christian Adams On August 26, 2011 @ 12:00 am In Uncategorized | 31 Comments

For several weeks, PJMedia has been publishing a series of articles on the ideological and partisan histories of attorney hires into the career civil service ranks of the Department of Justice's Civil Rights Division in the Obama administration. The articles have demonstrated the political and ideological litmus test being employed by those entrusted with hiring in the Division.

Every single new attorney hired has a history thick with left-wing activism.

Two previous pieces focused on the Voting Section [1], with additional segments on the Office of Special Counsel for Immigration-Related Unfair Employment Practices [2], the Special Litigation Section [3], the Education Section [4], and the Employment Litigation Section [5].

If the public had any idea just how politicized the Division has become under this administration, outrage would follow. I cover the policy ramifications of this ideological hiring frenzy in my forthcoming book *Injustice* [6]. For now, here are more details about the people involved.

Today's installment focuses on the new career attorneys hired into the Division's Federal Coordination and Compliance Section, which until recently was known as the Coordination and Review Section, or "COR" in DOJ nomenclature. COR badgers state and municipal governments who receive federal funds — federal gripes follow federal gold. They also serve as the watchdog over the behavior of other federal agencies. The stated mission [7] of COR is to "ensure that all federal agencies consistently and effectively enforce civil rights statutes and Executive Orders that prohibit discrimination in federally conducted and assisted programs and activities."

Most of the Section's resources are spent bullying educational institutions into complying with expansionist interpretations of Title IX, or coercing law enforcement agencies into providing expensive foreign language translation services. The Section during this administration has also managed to find time to demand [8] that municipalities permit Muslim women to wear headscarves in court. For reasons of political expediency, jurisdictions rarely challenge the legality of the Executive Orders enforced by the Section. If they did, however, the Section's work would decline precipitously.

Five new career attorneys have been hired into the Section since Holder took office. As is true of the new attorneys hired into every other section, there is not a single apolitical individual — let alone a conservative — in the bunch.

Non-liberals of course are free to apply; it's just that their resumes are summarily discarded.

Sources familiar with hiring committee practices have told me that resumes of qualified people lacking the correct ideological worldview were discarded by the infamous Loretta King, then the acting assistant attorney general. The contrast with the bipartisan and ideologically diverse hiring practices of the Bush administration is incredibly stark. Here's the proof:

Deanna Jang: Ms. Jang was recently hired as the new chief of the Section. She is a generous Democratic contributor, having given handsomely to the presidential campaigns of Barack Obama and John Kerry, the congressional reelection campaigns of ultra-liberals Donna Edwards (D-MD) and Mike Honda (D-CA), and to the left-wing political group America Coming Together.

Before arriving in the Civil Rights Division, she was the Policy Director of the Asian & Pacific Islander American Health Forum [9], which was a major supporter of Obamacare. She also worked as a Policy Analyst for the Center for Law & Social Policy [10], an organization which "advocates for policies that support its vision of an America in which poverty is rare, there is justice for all, and all people can participate equally." Before that, she served as a senior policy analyst at the Office for Civil Rights at the Department of Health & Human Services, a notorious hotbed of liberal activists.

Ms. Jang spent most of her career hopping from one left-wing advocacy group to another. She worked

as a staff attorney at the Asian Law Caucus [11], the San Francisco Neighborhood Legal Assistance Foundation, and the Asian Law Alliance [12]. She was a special assistant to the militantly liberal (former) Commissioner Yvonne Lee at the U.S. Commission on Civil Rights, and the chair of the National Immigration Project [13], which advocates on behalf of illegal aliens. A perfect fit for someone charged with enforcing regulatory mandates of dubious legal validity at the Department of Justice.

Laureen Dumadag Laglagaron: Ms. Laglagaron joined the Section from the Migration Policy Institute, where she managed a research project designed to marshal evidence against the government's so-called "287(g) program," which authorizes local law enforcement to assist federal authorities in enforcing our federal immigration laws. She previously worked at the ACLU in its Immigrant Rights Project and at the liberal Urban Institute in its Population Studies Center. She was named [14] by *Filipinas Magazine* to be one of the 100 Most Influential Filipina Women in America. The magazine described her as a "Filipino community and immigrant advocate."

Michael Mulé: A member [15] of the Latino Alliance, a Hispanic advocacy organization, Mr. Mulé arrived in the Section after having worked since law school graduation at the Empire Justice Center [16] in upstate New York. This organization describes itself as:

> A statewide, multi-issue, multi-strategy public interest law firm focused on changing the "systems" within which poor and low income families live. With a focus on poverty law, Empire Justice undertakes research and training, acts as an informational clearinghouse, and provides litigation backup to local legal services programs and community based organizations. As an advocacy organization, we engage in legislative and administrative advocacy on behalf of those impacted by poverty and discrimination. As a non-profit law firm, we provide legal assistance to those in need and undertake impact litigation in order to protect and defend the rights of disenfranchised New Yorkers.

Just another neutral Civil Rights Division attorney that employers can trust to treat them fairly and to conduct investigations in an objective and evenhanded manner. Or perhaps not.

Daria Neal: Ms. Neal joins the Section as a deputy chief after spending approximately six years as a senior counsel at the liberal Washington Lawyers' Committee for Civil Rights Under Law (WLCCR), where she focused primarily on the organization's Environmental Justice Project. Her blog posts [17] on behalf of the WLCCR while attending the United Nations Climate Change Summit in Copenhagen reveal an odd environmental militancy, and suggest that she likely spends much of her time channeling Al Gore. Just before her arrival at DOJ, she even authored a report [18] for the organization — "The Time is Now: Implementation of Environmental Justice Policy In the Obama Administration" — in which she advocated for such an extreme environmental regulatory policy that countless companies would be put out of business and unemployment would balloon if any politician dared consider it.

She also continues to impart her out-of-the-mainstream views to students at Howard Law School, where she teaches an "Environmental Justice Seminar" focusing on the "intersection between civil rights and environmental laws."

Kavitha Sreeharsha: Before joining the Civil Rights Division, Ms. Sreeharsha was a senior staff attorney at Legal Momentum, The Women's Legal Defense and Education Fund [19], a left-wing advocacy organization heavily funded by George Soros [20] that fights to make abortions easier. She also worked extensively on Barack Obama's 2008 presidential campaign, canvassing for him in Pennsylvania, North Carolina, and Virginia. In fact, she announced [21] with glee to the newsletter of her law school's civil justice clinic how much she had enjoyed campaigning for Obama and "working to turn Virginia blue." She even found time to serve as a steering committee member of "South Asians for Obama" in both the San Francisco Bay Area and Washington, D.C.

Prior to her time with Legal Momentum, Ms. Sreeharsha served as a staff attorney at Asian Pacific Islander Legal Outreach [22], another liberal advocacy group that has been a vocal proponent [23] of gay marriage and race-based assignment of students in public schools, and a vehement opponent [24] of the enforcement of federal immigration laws. The group's website suggests that deportation tends to separate families and destabilize communities. Might as well not enforce the law, then.

During law school, she interned for the liberal Lawyers' Committee for Civil Rights Under Law, Legal Services for Prisoners with Children [25] (a far-left organization whose website describes in depth the lobbying it undertakes on behalf of criminals), and Equal Rights Advocates [26] (a liberal pro-abortion

outfit that has spent substantial resources as of late trying to encourage the filing of dubious lawsuits against Wal-Mart).

In the previous segment [5] of this PJ Media series, Hans von Spakovsky introduced a running tally of the newly hired Civil Rights Division career attorneys who have been chronicled to date. We have so far covered the 76 career attorneys who have been hired into six of the Division's sections. A scoring update:

> Leftist lawyers hired: 76.
>
> Moderate, non-ideological, or conservative lawyers hired: 0.

All 76 have unequivocally liberal bona fides. Not a single one appears to have a conservative bone in his or her body. Not a single one even appears to be apolitical. It is truly extraordinary.

None of this is a mere coincidence. We are in the midst of a terribly struggling economy in which law firms have drastically cut back hiring and begun laying off countless associates and partners. Even the most prestigious white-shoe firms are thinning their herds. Reports from inside the Division suggest that some attorney vacancy announcements see close to 1,000 applications for one spot. Huge numbers of extremely bright attorneys are seeking refuge in the stability of government employment. Can anyone — other than the myopic partisans in the Civil Rights Division's current leadership — realistically suggest that conservatives are not part of this group?

Of course not. Yet they have been categorically blackballed from employment in the Division.

For those who have followed this series, you know that much of the culpability rests with former Acting Assistant Attorney Loretta King. As I pointed out [4] in a piece last week, King rewrote the hiring guidelines back in 2009, resulting in hiring committee members being forced to toss any resume that did not describe a radical background. She didn't believe that lawyers who represented defendants in civil rights cases also have expertise in the law. She didn't believe anyone who didn't work for a left-wing group deserved to work in the Civil Rights Division.

Apologists of this disgrace say DOJ only wanted people "with experience in civil rights law." That's called a pretext. Plenty of lawyers have experience defending civil rights cases. Plenty of lawyers who didn't work for left-wing groups have the willingness and dedication to enforce the law fairly.

The truth is that most of the "experience" this series has described is meaningless for a DOJ lawyer, except to do one thing: demonstrate their political and ideological allegiance with the Obama administration. Kavitha Sreeharsha's work promoting abortion won't have anything to do with litigating cases at DOJ. Daria Neal's nutty environmental advocacy won't help her win a case at DOJ. But it will give Eric Holder and DOJ political appointees comfort they are hiring fellow travelers who will try to move the law, who will work to aid the political aims of the administration.

It's almost amusing that, in this environment, the Department's internal watchdogs have suddenly gone silent. The liberal former Civil Rights Division attorney Tamara Kessler who spearheaded the Office of Professional Responsibility's review of the Bush administration's hiring practices must have a permanent smile etched on her face. Although she has largely been discredited after her draft report examining the legal memoranda prepared by top DOJ attorneys on "enhanced interrogation techniques" was publicly rebuked [27] by the Department's senior career official, the fact that her office stands mute while outright chicanery is being committed in the Holder Civil Rights Division is an undeniable stain on the Department.

Hopefully the ongoing inspector general investigation of politicization in the Holder Civil Rights Division will see fit to right the record. This country deserves better.

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[1] Voting Section: **http://pjmedia.com/blog/every-single-one-the-politicized-hiring-of-eric-holder%e2%80%99s-voting-section/**
[2] Office of Special Counsel for Immigration-Related Unfair Employment Practices:

http://pjmedia.com/blog/every-single-one-the-politicized-hiring-of-eric-holder%e2%80%99s-immigration-office/

[3] Special Litigation Section: **http://pjmedia.com/blog/every-single-one-the-politicized-hiring-of-eric-holders-special-litigation-section/?singlepage=true**

[4] Education Section: **http://pjmedia.com/blog/every-single-one-the-politicized-hiring-of-eric-holder%e2%80%99s-education-section/?singlepage=true**

[5] Employment Litigation Section: **http://pjmedia.com/blog/every-single-one-the-politicized-hiring-of-eric-holder%e2%80%99s-employment-section/?singlepage=true**

[6] *Injustice*: **http://www.amazon.com/Injustice-Exposing-Racial-Justice-Department/dp/1596982772**

[7] stated mission: **http://www.justice.gov/crt/about/cor/purpose.php**

[8] demand: **http://www.justice.gov/crt/about/cor/Georgialetter.pdf**

[9] Asian & Pacific Islander American Health Forum: **http://www.apiahf.org/policy-and-advocacy/action-alert-archive/make-calls-celebration-hcr**

[10] Center for Law & Social Policy: **http://www.clasp.org/advocacy_areas**

[11] Asian Law Caucus: **http://www.asianlawcaucus.org/**

[12] Asian Law Alliance: **http://www.asianlawalliance.org/**

[13] National Immigration Project: **http://www.nationalimmigrationproject.org/**

[14] named: **http://www.abs-cbnnews.com/pinoy-migration/05/17/08/women-substance**

[15] member: **http://www.law.uoregon.edu/career/docs/placement/082710.pdf**

[16] Empire Justice Center: **http://www.empirejustice.org/about-us/**

[17] blog posts: **http://www.lawyerscommittee.org/projects/environmental_justice/clips?id=0116**

[18] report: **http://www.lawyerscommittee.org/projects/environmental_justice/clips?id=0149**

[19] Legal Momentum, The Women's Legal Defense and Education Fund: **http://www.legalmomentum.org/**

[20] heavily funded by George Soros: **http://www.rhetoricalstatement.com/July_20th__2011.html**

[21] announced: **http://www.uchastings.edu/academics/clinical-programs/civil-justice-clinic/docs/cjc-s09-newsltr.pdf**

[22] Asian Pacific Islander Legal Outreach: **http://www.apilegaloutreach.org/**

[23] vocal proponent: **http://www.apilegaloutreach.org/downloads.html#amicus**

[24] vehement opponent: **http://www.apilegaloutreach.org/immigration.html**

[25] Legal Services for Prisoners with Children: **http://www.prisonerswithchildren.org/**

[26] Equal Rights Advocates: **http://www.equalrights.org/**

[27] publicly rebuked: **http://www.nationalreview.com/articles/257905/fix-justice-hans-von-spakovsky?page=2**

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Every Single One: The Politicized Hiring of Eric Holder's Housing Section

Posted By J. Christian Adams On August 30, 2011 @ 12:00 am In Uncategorized | 38 Comments

PJMedia's "Every Single One" series has been exposing the politicized hiring practices of the Department of Justice's Civil Rights Division under Attorney General Eric Holder. Obtained only after a bitter Freedom of Information Act lawsuit, the resumes discussed in the articles reveal a crusade to pack the Civil Rights Division with an ideologically and politically loyal core that will help advance a taxpayer-funded leftist agenda for years to come.

Today we turn to the Housing and Civil Enforcement Section, a litigation shop with enormous power over American businesses. This Section, which is headed by the infamous Steve Rosenbaum — the same individual who (along with Loretta King) ordered the dismissal of the New Black Panther Party lawsuit [1] — is responsible for enforcing the Fair Housing Act and the Equal Credit Opportunity Act, among others. The Section has an undercover operation designed to spy on American businesses to determine if racial discrimination is taking place. They also have a unit designed to ensure banks keep the spigot of mortgage loans open to borrowers with marginal credit.

If that sounds like behavior which contributed to the economic crisis, you're right. Assistant Attorney General for Civil Rights Thomas Perez [2] has promised [3] to unleash the Section's attorneys on communities across the country to pursue unprecedented numbers of discrimination lawsuits against mortgage lenders, apartment complexes, and even restaurants.

At this point in the series, it is little surprise that *every single one* of the new career attorneys hired into the Housing Section passed an ideological or political litmus test. The same is true, of course, with each of the other six sections that have been chronicled so far — the Voting Section [4], the Office of Special Counsel for Immigration-Related Unfair Employment Practices [5], the Special Litigation Section [6], the Education Section [7], the Employment Litigation Section [8], and the Coordination and Compliance and Section [9].

But this series is about more than skewed hiring practices. It is about more than broken Obama campaign promises to "restore" attorney hiring integrity at Justice — much more.

The series is also about a political culture that bears false witness without hesitation. The series exposes a culture so unmoored from objective standards that, in Washington, one side can charge a political opponent with behavior which they themselves intend to deploy in exponentially greater degree than the original charge, once they obtain political power — which they did in 2009.

Worse yet, the partisan rot the series has exposed is not confined to only federal government institutions. Journalists won awards repeating the Left's allegations about Bush administration hiring practices [10], but now defend the new administration.

More than mere hiring practices, the series is about elastic standards and foggy values in Washington. When, as we shall see today, 87 new DOJ lawyers are unambiguous leftists or partisan Democrats, and precisely zero are anything else, the former accusers have the audacity to argue such views are now part of the job description at DOJ.

Had an employer hired 87 whites and no minorities, this very same Justice Department would push aside that pre-textual curtain to search out a violation of federal law. When a government agency is populated, stem to stern, with people who obtained power, in some small part, by charging the prior administration with behavior they themselves would eventually adopt, Americans of every political stripe should care. When media institutions, not content to savor past prizes for attacking the prior administration, actually enlist as advance pickets for the new administration on the same issues, Americans should worry.

This series is about far more than partisan and ideological hiring practices at Obama's Justice Department. It is about a system that rewards falsehood, hypocrisy, and duplicity.

Eleven new career attorneys have been hired into the Housing Section. As described below, their backgrounds all have a common theme.

Eric Halperin: Mr. Halperin was hired as the Division's new special counsel for fair lending, a position in which he helps supervise the Housing Section. Although this is a leadership position in the front office, it is also a career slot, offering him all the protections of the federal civil service. This means he cannot be cut loose easily in 2013 absent a broad reduction in force. Before joining the Division, he was the director of the Washington office of the Center for Responsible Lending [11] ("CRL"), an advocacy organization funded by labor union SEIU and predatory lending kingpins Herbert and Marion Sandler. The organization coerces lenders to increase their underwriting in poor neighborhoods where borrowers are less likely to be able to pay back mortgages. Last year, Andrew Breitbart's Big Government media site undertook an exhaustive analysis of the shenanigans that CRL engages in, and discovered that while CRL is heavily focused on redistribution of wealth, it cares little about the financial safety and soundness of the banks it targets. The articles [12] are must-reads.

Prior to his work at CRL, Mr. Halperin interned at the NAACP Legal Defense and Education Fund, where he helped promote racial preferences in law enforcement hiring. Incidentally, the Democrat apple doesn't fall far from the tree. His father [13] was a political appointee (deputy assistant secretary of the Treasury for tax policy) under President Jimmy Carter.

Neta Borshansky: Ms. Borshansky came to the Civil Rights Division straight out of law school as part of the attorney general's Honors Program, and it's clear that Eric Holder liked what he saw. At UC-Davis Law School, Ms. Borshansky co-founded an activist group that takes trips around the nation. Her particular trip [14] was to New Orleans, where she and her fellow students volunteered at the Louisiana Capital Assistance Center, which advocates on behalf of convicted murderers facing the death penalty, and the New Orleans Workers' Center for Racial Justice/People's Organizing Committee, another militant left-wing organization. The California Bar Foundation awarded her [15] a "public interest scholarship" for "[dedicating] her time to issues of fair housing, disability rights, prisoner rights, and Hurricane Katrina disaster relief."

Lucy G. Carlson: Ms. Carlson contributed $500 to Barack Obama's 2008 presidential campaign before gaining her ticket into a career civil service position in the Civil Rights Division.

The Justice Department, however, conspicuously redacted nearly all of her community activities.

Jessica Crockett: Ms. Crockett joined the Section as part of the attorney general's Honors Program, fresh off a judicial clerkship with an extremely liberal federal judge (Solomon Oliver) in Cleveland, and only a year out of law school. While a student at Ohio State's law school, she was a leader of the Black Law Students Association and the coordinator of the Street Law Program.

She also wrote a ridiculous law review article [16] titled "Putting the Ball in a New Court: Using Restorative Justice as a Means to Punish NBA Players for the Commission of Violent Offenses," in which she argued that "rather than issuing blanket game suspensions for violent acts between players in the NBA, the NBA should institute a dispute resolution model that incorporates restorative justice in the form of victim-offender mediations and community impact panels."

Interestingly, racial separatism was nothing new to Ms. Crockett at Ohio State. As an undergraduate at Northwestern, she was part of the leadership of the Black Student Alliance at Northwestern, which affectionately referred to itself as "For Members Only."

Her community activities were also redacted from her resume.

Joel Flaxman: Mr. Flaxman, only a few years out of law school, is a contender for most radical ideologue hired into the Section. He is a financial contributor [17] to the Center for Constitutional Rights [18], a militantly left-wing organization that has aggressively advocated on behalf of terrorists detained at Guantanamo Bay, illegal aliens, racial preferences in hiring, abortionists, and a litany of other extremist liberal causes. He also served as a Public Interest Fellow at the liberal American Constitution Society.

During his time at Michigan Law School, he was a prolific writer on aggressively radical causes. He penned a bizarre article [19] in which he suggested that the U.S. Supreme Court should decline to hear a case anytime a state supreme court has overprotected individual liberties. Apparently, neither the state nor the public has a right to ensure that the Constitution is not enforced overly broadly. Heaven help us if that were true.

He also helped research a report titled "Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act [20]," which was intended to be used to bolster the constitutionality of the Voting Rights Act against subsequent constitutional attacks. But as the attorneys in an ongoing constitutional challenge to the VRA recently pointed out [21], the report is fundamentally flawed and grossly misleading. It appears that Mr. Flaxman never considered the fact that anyone might actually probe the data underlying his research. (Fun aside: the primary author of the report was none other than the Anna Baldwin [4] of "Queer Resistance Front" infamy from the Division's Voting Section, whom we have chronicled before.)

Beth Frank: Frank was a former ACLU intern. She also authored a law review note [22] in which she argued that women asserting sexual harassment claims — one of the primary legal elements of which is showing that the victim suffered severe emotional distress — should not have to turn over to the defense any psychiatric records that would undermine their claim. In other words, hide the ball in the name of political correctness and plaintiffs. While this position may have impressed her law school advisor, it did not prove persuasive to the federal judiciary. Legal luminary Judge Richard Posner of the Seventh Circuit flatly rejected [23] the argument as far too rigid and violative of the defendant's due process rights.

Mary Hahn: Ms. Hahn is an activist out of central casting. She arrived in the Section after having served as the director of the Fair Housing Project at the ultra-liberal Washington Lawyers' Committee for Civil Rights and Urban Affairs, where she worked alongside the infamous Joe Rich, an extreme partisan who once headed the Voting Section in the Civil Rights Division and whose unsavory behavior has been detailed before [24] here at PJMedia. Prior to that, she spent two years as a visiting lecturer at Yale Law School, where she filed a series of amicus briefs advocating on behalf of terrorists detained at Guantanamo Bay.

She also wrote another brief insisting that the indefinite detention of illegal aliens who come to the United States by fraudulent means but whose country of origin will not take them back is somehow unconstitutional. Her resume likewise boasts of her efforts at Yale to promote abortion access. On top all of this, she co-taught a course on "Balancing Civil Liberties and National Security After 9/11" with the radical leftist Harold Koh, whose bizarre trans-nationalism positions have been exhaustively chronicled [25] by Ed Whelan at *National Review*. Of course Koh spent most of the last two years influencing DOJ terror policy from his perch at the State Department.

Colleen Melody: Ms. Melody is another product of Attorney General Holder's Honors Program, joining the Section just a year out of law school. She spent a year as an extern at the Washington Defender Association Immigration Project, where she advocated on behalf of illegal aliens. After listening to Attorney Vince Warren describe how he provided legal representation to terrorists held at Guantanamo, Melody said [26]:

> There is nothing more inspiring to me than true stories of people standing up for what's right, even though they ended up standing alone. Mr. Warren and his colleagues worked on behalf of clients that literally had no one else, and their story of perseverance and incremental success was energizing and inspirational.

The terrorist clients could have had an experienced federal public defender represent them had activists not volunteered to do so. And Heaven knows what about their "incremental success" inspired her.

These are the views that *help* land a job in Eric Holder's Justice Department.

Ms. Melody also interned at the ACLU of Washington, the National Immigrant Justice Center, and the Integrity of Justice Project. The Bill and Melinda Gates Foundation even awarded her [27] one of its Public Service Law scholarships so that she could continue providing what she calls "public justice" without concern for money, sort of like the Civil Rights Division.

Coty Miller: Ms. Miller arrived in the Section after working for a law firm that focuses exclusively on plaintiffs' class action lawsuits. You know, the type in which tens of millions of dollars are taken from evil corporations so that the lawyers can recover millions in contingency fees and the "victims" can receive coupons for discounts on future purchases. She is a proud member of the Consumer Attorneys of California and the Consumer Attorneys of San Diego — both are lobbying shops for trial lawyers who team up with unions and radical environmental groups to oppose [28] tort reform and other sensible legislative measures. Her membership shouldn't be a surprise given her prominent role during law school on the *Georgetown Journal of Gender and the Law*, which as we have noted before

is a publication whose mission [29] is "to explore the impact of gender, sexuality, and race on both the theory and practice of law" and thereby "complement ... a long tradition of feminist scholarship and advocacy at the Law Center."

Daniel Mosteller: Mr. Mosteller is a major contributor to the Democratic Party and its candidates. According to FEC records, he gave $750 to Barack Obama's 2008 presidential campaign, contributed $200 to the Democratic Congressional Campaign Committee in 2010 and another $200 to the Democratic Senatorial Campaign Committee during the same year, coughed up $250 to Martha Coakley's unsuccessful Senate campaign in Massachusetts last year, and previously contributed $500 to John Edwards' presidential run in 2004. Before recently joining the Civil Rights Division, he worked as a litigation counsel for the Center for Responsible Lending, the same liberal housing advocacy organization that was the home of new special counsel Eric Halperin and is thus described above. He also previously clerked for an extremely liberal judge on the Ninth Circuit (Martha Berzon).

During law school, he interned at the increasingly radical Public Citizen Litigation Group [30] (which describes itself as "the countervailing force to corporate power"), as well as the Southern Center for Human Rights [31], an organization devoted to the representation of convicted killers on death row and other violent criminals.

Beth Pepper: Ms. Pepper is also a big Democratic contributor, including $800 to Obama's 2008 presidential run and another $250 to John Kerry's presidential campaign in 2004. Even while employed at the Justice Department, she continues to serve on the Board of Directors [32] of the Maryland Legal Aid Bureau. Earlier in her career, she worked as a staff attorney at the Bazelon Center for Mental Health Law, which advocates on behalf of the mentally disabled but also dabbles in politics to support leftist fringe judicial nominees like Goodwin Liu [33] (who was eventually filibustered because he was so radical) and to oppose conservative nominees such as Samuel Alito [34] and John Roberts [35].

There you have it. Eleven more career attorneys, each and every one of whom is an undeniable liberal.

As the authors of this series have noted repeatedly, there is nothing wrong with hiring liberals to work in the Division. But the numbers betray what's really happening.

We have so far covered the 87 career attorneys who have been hired into seven of the Division's sections. Here is a scoring update:

Leftist lawyers hired: 87.

Moderate, non-ideological, or conservative lawyers hired: 0.

How is this allowed to happen? Why, given the obsession with the hiring practices during the Bush administration, is there so far little concern being expressed on Capitol Hill? One can understand why the DOJ Office of Professional Responsibility would do nothing. That office is headed by, and filled with, attorneys expert in ensuring no criticism befalls Eric Holder.

But what about DOJ's inspector general? Perhaps that office will eventually be true to its jurisdictional mandate. Only time will tell.

A final note. These eleven attorneys will be managed by the infamous Steve Rosenbaum [36], the man who ordered the dismissal of New Black Panther voter intimidation case. Rosenbaum, it was revealed in a DOJ report, even wanted to dismiss the case against club-wielding Panther King Samir Shabazz, but was overruled by his superiors. Sources with direct knowledge of supervising Rosenbaum during the Bush administration describe a petty bureaucrat obsessed with hiring left-wing attorneys to advance an agenda. According to these DOJ sources, Rosenbaum "repeatedly sought approval to hire some of the most activist left-wing ideologues for career attorney slots in the Housing Section, only to be rebuffed by the political leadership. Yet when candidates with even a hint of conservatism were proposed, he threw a fit like a child whose prized toy was taken away from him. The irony was lost on no one. Eventually, a compromise was always worked out."

Steve Rosenbaum has his toys back, and America should be very concerned.

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[1] ordered the dismissal of the New Black Panther Party lawsuit: **http://www.washingtontimes.com/news/2010/jun/25/inside-the-black-panther-case-anger-ignorance-and-/**
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[5] Office of Special Counsel for Immigration-Related Unfair Employment Practices: **http://pjmedia.com/blog/every-single-one-the-politicized-hiring-of-eric-holder%e2%80%99s-immigration-office/**
[6] Special Litigation Section: **http://pjmedia.com/blog/every-single-one-the-politicized-hiring-of-eric-holders-special-litigation-section/?singlepage=true**
[7] Education Section: **http://pjmedia.com/blog/every-single-one-the-politicized-hiring-of-eric-holder%e2%80%99s-education-section/?singlepage=true**
[8] Employment Litigation Section: **http://pjmedia.com/blog/every-single-one-the-politicized-hiring-of-eric-holder%e2%80%99s-employment-section/?singlepage=true**
[9] Coordination and Compliance and Section: **http://pjmedia.com/blog/every-single-one-the-politicized-hiring-of-eric-holder%e2%80%99s-compliance-section/?singlepage=true**
[10] Journalists won awards repeating the Left's allegations about Bush administration hiring practices: **http://www.pulitzer.org/archives/7175**
[11] Center for Responsible Lending: **http://www.responsiblelending.org/**
[12] articles: **http://biggovernment.com/tag/center-for-responsible-lending/**
[13] father: **http://www.nytimes.com/1998/09/13/style/weddings-susannah-fox-eric-halperin.html**
[14] particular trip: **http://www.news.ucdavis.edu/search/news_detail.lasso?id=8092&title=Law%20Students%20to%20Help%20in%20New%20Orleans%20Restoration**
[15] awarded her: **http://www.calbarfoundation.org/programs/scholarships/lawschool/2008recipients.html**
[16] law review article: **http://moritzlaw.osu.edu/jdr/mayhew-hite/vol6iss3/index.html**
[17] financial contributor: **http://ccrjustice.org/files/CCR_Annual_Report_2008.pdf**
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[21] recently pointed out: **http://moritzlaw.osu.edu/electionlaw/litigation/documents/Shelby-Motion-12-13.pdf**
[22] law review note: **http://lawreview.wustl.edu/inprint/79-2/p639%20Frank.pdf**
[23] rejected: **http://caselaw.findlaw.com/us-7th-circuit/1397414.html**
[24] has been detailed before: **http://pjmedia.com/blog/enough-is-enough-joe-rich-an-uncivil-man-from-the-civil-rights-division/?singlepage=true**
[25] chronicled: **http://www.nationalreview.com/corner/180413/harold-kohs-constitutional-game/ed-whelan**
[26] said: **http://www.law.washington.edu/GatesScholar/Newsletter/Default.aspx?issue=20081119**
[27] awarded her: **http://www.law.washington.edu/GatesScholar/Scholars.aspx?YR=2006**
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[29] mission: **http://www.law.georgetown.edu/journals/gender/**
[30] Public Citizen Litigation Group: **http://www.citizen.org/Page.aspx?pid=2306**
[31] Southern Center for Human Rights: **http://www.schr.org/**
[32] Board of Directors: **http://www.mdlab.org/Board%20and%20senior%20management**
[33] Goodwin Liu: **http://www.bazelon.org/News-Publications/Press-Releases/11-19-10Goodwin-Liu-Support.aspx**
[34] Samuel Alito: **http://bazelon.org.gravitatehosting.com/LinkClick.aspx?fileticket=Ij5qh9cx-Z4%3D&tabid=328**

[35] John Roberts: **http://www.civilrights.org/judiciary/nominees/roberts/organizations-opposed.html**
[36] Steve Rosenbaum: **http://pjmedia.com../../../../tatler/files/2011/01/short-photo1.jpg**

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Material submitted by the Honorable Jerrold Nadler, a Representative in Congress from the State of New York, and Ranking Member, Subcommittee on the Constitution

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Written Testimony

By

Arturo Vargas, Executive Director
National Association of Latino Elected and Appointed Officials (NALEO) Educational Fund

Before

The United States House of Representatives Committee on the Judiciary
Subcommittee on the Constitution

At a Hearing Entitled

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

Washington, D.C.
April 18, 2012

Chairman Franks, Ranking Member Nadler, and members of the Subcommittee: thank you for the opportunity to submit this testimony on the importance of the right to vote for the Latino community and the nation.

We submit this testimony to express in the Congressional Record our concern about restrictive voting legislation being increasingly introduced and enacted by state legislatures. These measures erect unnecessary and unfair obstacles for qualified voters, and as implemented, have a significantly detrimental impact on the Latino vote. 2011 saw an unprecedented number of new restrictions placed on voting and voter registration at the state level. According to the Brennan Center for Justice at NYU School of Law, these new laws could negatively affect as many as five million eligible voters as they attempt to take part in 2012 elections[1], and a disproportionate number will be Latino. We ask Congress and this Subcommittee to be vigilant in examining the consequences of new state voting legislation, and to urge the Department of Justice to vigorously carry out its voting rights enforcement mission.

The National Association of Latino Elected and Appointed Officials (NALEO) Educational Fund is a non-profit, non-partisan organization that facilitates full Latino participation in the American political process, from citizenship to public service. Our constituency includes the more than 6,000 Latino elected and appointed officials nationwide. We fulfill our mission through programs that promote the civic integration of Latino immigrants into American society, provide technical assistance and skills development to the nation's Latino elected and appointed officials, and conduct research on issues relating to Latino political engagement and impact.

For several decades, the NALEO Educational Fund has been at the forefront of efforts to ensure that all of America's citizens become fully engaged in the democratic process, including the Latino community, which is the second-largest population group in the nation. Since 2000, nearly six million Latinos have become eligible to vote.[2] About 9.7 million Latinos voted in the 2008 Presidential election[3], and according to our projections, a record 12.2 million are expected

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[1] Wendy R. Weiser and Lawrence Norden, Brennan Center for Justice, *Voting Law Changes in 2012* 1 (Oct. 2011), *available at* http://www.brennancenter.org/content/resource/voting_law_changes_in_2012 [hereinafter 2012 Voting Law Changes].

[2] Mark Hugo Lopez and Paul Taylor, Pew Hispanic Center, *The 2010 Congressional Reapportionment and Latinos* Sec. I (Jan. 2011), *available at* http://www.pewhispanic.org/2011/01/05/the-2010-congressional-reapportionment-and-latinos/ [hereinafter "Pew Congressional Reapportionment"].

[3] Thom File and Sarah Crissey, U.S. Census Bureau, *P20-562: Voting and Registration in the November 2008 Election* 4, Table 2 (May 2010), *available at* http://www.census.gov/prod/2010pubs/p20-562.pdf.

to go to the polls this November.[4] In three states – California, New Mexico, and Texas – at least one in five voters will be Latino, with the Latino share of the electorate reaching 35% in New Mexico.[5] Latino youth and newly naturalized citizens add about 600,000 new people to the pool of eligible voters each year.[6] The Latino population will continue to gain steadily in size and political importance in the coming decades. By 2050, the Census Bureau estimates that nearly one in three U.S. residents will be Latino.[7]

Because it is so critical that our nation's growing Latino population have an active presence in our democratic process, our organization's work on voting and elections has incorporated a broad range of policy development and voter engagement efforts. The NALEO Educational Fund has extensive experience informing Latino voters of the importance of electoral participation through our outreach campaigns; mobilizing eligible Latinos to register and vote; and partnering with elections officials, the media, and community-based organizations to build integrated national and local Latino voter engagement programs. Since 2001, we have maintained a national bilingual voter information and protection hotline, *1-888-VE-Y-VOTA* (Go and Vote), and a comprehensive bilingual voter information website through which 25,000 individuals registered to vote in 2008 alone. Our non-partisan get-out-the-vote (GOTV) efforts have reached hundreds of thousands of infrequent and overlooked Latino voters, set new standards for campaign strategy and program evaluation, and reframed the dialogue around the engagement of low-propensity voters. In addition, our community-based initiatives have included voter forums in cities with significant and diverse Latino populations, voter registration and education activities at community events, and historic mass-media campaigns with programming across multiple national and local platforms. Combined, these activities have reached millions of Latino potential voters. In 2012, our organization will expand upon these efforts and launch other innovative programs as part of an unprecedented voter engagement program to provide vital information on all aspects of the electoral process from voter registration, to voter rights, to finding one's polling place on Election Day.

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[4] NALEO Educational Fund projection: for background see The 2012 Latino Vote, *at* http://www.naleo.org/latinovote.html.
[5] *Id.*
[6] Pew Congressional Reapportionment, *supra* note 2, at Sec. I.
[7] U.S. Census Bureau, *National Population Projections* Table 4 (2008), *available at* http://www.census.gov/population/www/projections/summarytables.html.

It is in the nation's best interest to fully engage our nation's growing Latino electorate in order to ensure the sustained strength of our participatory democracy. However, new voting and registration restrictions are having a particularly detrimental impact on Latinos for several reasons. States that have the most rapidly growing and the most numerous Latino populations are among those which are adopting the most restrictive measures. Two of the states currently experiencing the fastest Latino population growth, and two of the top three states with the largest Latino populace[8], are among the nine Southern states that have been among the most aggressive in considering measures that impose barriers to voting.[9] South Carolina and Alabama, which both enacted new voter ID requirements in 2011[10], experienced the most rapid growth in their Latino populations among all states from 2000 to 2010[11]. Texas, which also adopted a strict voter ID law in 2011[12], has the second-largest Latino population of any state[13]. Florida's Latino population is the third-largest[14] and its electorate is detrimentally affected by new restrictions on early voting periods and third-party voter registration[15].

In addition, new voting limitations impose requirements that Latinos are among the least likely of all potential voters to be able to meet. These new laws also target voting and registration opportunities that are in strong use in the Latino community. Many states have adopted mandates that voters show documents that confirm their identity at the polls. Latinos are less likely to have the documents required by such laws than most of their peers. Some states have moved to limit and eliminate early voting periods, which are particularly popular with Latino voters. Registering to vote has also become more difficult in many jurisdictions, in ways that have a particularly harsh impact on the Latino electorate. States have made it more difficult for third-party organizations to conduct registration drives, which in the past have attracted more

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[8] At least parts of each of these four states are subject to Section 5 of the Voting Rights Act (VRA), which mandates extra scrutiny of any state law changes in voting policy and procedure due to histories of discrimination surrounding elections.

[9] Jessica A. González, *CHCI White Paper: New State Voting Laws: A Barrier to the Latino Vote?* 3 (April 2012), *available at* http://www.chci.org/fellowships/page/2012-law-graduate-summit.

[10] *E.g.*, National Conference of State Legislatures, *Voter Identification Requirements: 2003 2011 Legislative Action* (April 12, 2012), *available at* http://www.ncsl.org/legislatures-elections/elections/voter-id.aspx [hereinafter NCSL Voter ID Overview].

[11] Sharon R. Ennis, Merarys Ríos-Vargas, Nora G. Albert, U.S. Census Bureau, *The Hispanic Population: 2010* 7-8 (May 2011), *available at* http://www.census.gov/prod/cen2010/briefs/c2010br-04.pdf.

[12] *E.g.*, NCSL Voter ID Overview, *supra* note 10.

[13] *E.g.*, NALEO Educational Fund, *2010 Census Profiles: United States* 3 (March 2011), *available at* http://www.naleo.org/downloads/US_Census_2010_Profile_fin03-11.pdf.

[14] *Id.*

[15] Florida House Bill 1355, Ch. 2011-40 Laws of Florida (2011).

Latino registrants relative to their share of the voting-age population than registrants of other races and ethnicities. Five states require would-be registrants to show documentary proof of citizenship, which Latino U.S. citizens lack in disproportionate numbers. These troubling trends, which we will describe in more detail below, demonstrate the importance of vigorous Congressional oversight and the Department of Justice's defense of the right to vote.

Barriers to Voting

Voter ID Mandates

The most common type of restrictive voting legislation advanced in 2011 and 2012 has been bills that require prospective voters to show government-issued photo ID at polls.[16] States that have adopted these measures, including Texas and South Carolina, require almost all voters to present one of a short list of government-issued photo IDs containing an expiration date.[17] But about 11% of all Americans currently lack state-issued photo IDs, and an even higher percentage – 16% – of Latinos do not have qualifying ID.[18] The more statistics that emerge, the more evidence we see that Latinos will be disproportionately stopped from voting by restrictive ID requirements: the Department of Justice recently denied preclearance to Texas's ID law on the strength of findings including that Texas Latinos were between 46.5% and 120% more likely than their counterparts to lack the necessary ID to vote.[19]

There is abundant additional evidence that Latinos nationwide disproportionately lack state-issued ID. Research by the Brennan Center, for example, has shown that citizens who are less wealthy and younger than the overall population tend to be at greatest risk of lacking access to current, accurate government ID.[20] According to data from the 2010 Census and the

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[16] In 2011 alone, 34 states introduced a variation of photo ID legislation that would have newly required ID or strengthened an existing ID requirement in order to vote. Eight states passed new ID requirements, and in another five, legislatures passed ID bills that were vetoed by governors. *E.g.*, NCSL Voter ID Overview, *supra* note 10. Momentum continues during 2012 sessions: 32 states have considered or are considering voter ID legislation this year. National Conference of State Legislatures, *Voter ID: 2012 Legislation* (April 19, 2012), *available at* http://www.ncsl.org/legislatures-elections/elections/voter-id-2012-legislation.aspx.

[17] *E.g.*, TEX. CODE ANN. § 63.0101 (West 2012); S.C. CODE ANN. § 7-13-710 (Law. Co-op. 2012).

[18] Brennan Center for Justice, *Citizens Without Proof: A Survey of Americans' Possession of Documentary Proof of Citizenship and Photo Identification* 3 (Nov. 2006), *available at* http://www.brennancenter.org/page/-/d/download_file_39242.pdf [hereinafter Without Proof].

[19] Letter from Thomas E. Perez, Assistant Attorney General for Civil Rights, to Keith Ingram, Director of Elections, Office of the Texas Secretary of State 3 (March 12, 2012), *available at* http://www.justice.gov/crt/about/vot/sec_5/pdfs/l_031212.pdf [hereinafter Perez Letter - Texas].

[20] Without Proof, *supra* note 18, at 3.

American Community Survey, Latinos are younger[21] and have lower income levels on average than other Americans[22]. Thus, they are among the demographic groups most likely to not possess the ID required for voting.

For Latinos without valid voter ID, obtaining identification poses another prospective barrier to the ballot box. Securing a new ID is not free or even possible at all for a number of voters in general, or for many Latino voters in particular. Even where states have taken steps to make free voting IDs available, citizens must present underlying documentation in order to obtain these IDs. This often includes documents that cost money, such as copies of birth and naturalization certificates, passports, and social security cards.[23] Even if prospective voters have the resources necessary to buy copies of documents that prove their eligibility for voter ID, they may be unable to obtain them. Many older Latino voters born at home, for example, did not have their births registered with states[24], and cannot satisfy requirements to obtain birth certificate alternatives[25]. Voters who are able to surmount all of these obstacles still encounter potentially prohibitive logistical challenges. In Texas, Latinos are about one third of the citizen voting-age population (CVAP), but more than 60% of all voting age citizens who live more than 20 miles from an ID-issuing state office.[26]

Moreover, restrictive voter ID laws are simply unnecessary because they do not address the extremely infrequent incidents of voting fraud that they are purportedly designed to combat. Checking IDs at polling places prevents only one potential misdeed – impersonating another

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[21] U.S. Census Bureau, *The Hispanic Population in the United States: 2010 Detailed Tables* Table 1 (June 2011), *available at* http://www.census.gov/population/www/socdemo/hispanic/cps2010.html.

[22] U.S. Census Bureau, *The 2012 Statistical Abstract: Table 697, Money Income of Families-Median Income by Race and Hispanic Origin in Current and Constant (2009) Dollars: 1990 to 2009* (Sept. 2011), *available at* http://www.census.gov/compendia/statab/cats/income_expenditures_poverty_wealth.html.

[23] For example, a certified copy of a Texas birth certificate costs $22, exclusive of mailing costs. Texas Department of State Health Services, *Certified Copy of a Birth Certificate* (Nov. 16, 2011), *available at* http://www.dshs.state.tx.us/vs/reqproc/certified_copy.shtm. Adult passports and passport cards cost from $30 to $165. U.S. Department of State, *Passport Fees* (Feb. 14, 2011), *available at* http://travel.state.gov/passport/fees/fees_837.html. Fees for such documents are generally never waivable.

[24] *See, e.g.*, Robert D. Grove, *Studies in the Completeness of Birth Registration; Part I, Completeness of Birth Registration in the United States, December 1, 1939, to March 31, 1940,* 17 Vital Statistics Special Reports 224 (April 20, 1943); Alice Hetzel, U.S. Department of Health and Human Services, *U.S. Vital Statistics System Major Activities and Developments, 1950-95* 59 (1997), *available at* http://www.cdc.gov/nchs/data/misc/usvss.pdf (documenting that states with large Spanish-speaking and Native American populations were many of the last jurisdictions to enter the Census Bureau's birth registration area).

[25] Arizona, for example, requires an applicant for a delayed birth certificate to submit an affidavit completed by a person with personal knowledge of the applicant's birth, who was at least ten years old at the time of the birth. Arizona Administrative Code § R9-19-207.

[26] Sundeep Iyer, Brennan Center for Justice, *Unfair Disparities in Voter ID* (Sept. 13, 2011), *available at* http://www.brennancenter.org/blog/archives/the_accessibility_of_texas_dlo_locations/.

registered voter. This behavior is so rare, however, that Americans are more likely to be struck by lightning than to have their votes stolen by imposters pretending to be someone else.[27] Tough anti-fraud laws already impose serious penalties[28] that effectively deter voter impersonation, which is, after all, an inefficient way to try to manipulate an election, garnering at most one additional vote for each act. Thus, restrictive voter ID requirements severely weaken our democracy without conferring any benefit to the jurisdictions that impose them.

Limited Early Voting

Early voting periods have expanded dramatically in many states over the past decade, and grown exponentially in popularity with a busy electorate in need of flexibility. By 2010, solid majorities of states were offering voters the options of no-fault absentee voting by mail and early in-person voting.[29] In 2004, 22.5% of ballots were cast before Election Day[30], and just four years later in 2008, 37% of all votes were cast early or by mail[31]. Latinos in particular have made increasing use of early voting periods, as 26.2% of Latinos voted early in 2010 compared to 20.9% in 2006.[32]

Increased access to early voting facilitates successful administration of elections, and the full enfranchisement of voters who might otherwise fall prey to issues such as schedules that prevent voting in person, long lines at polling places, and other potential barriers. Expanded options for voters ease the pressures on elections administrators that stem from managing the rush of voters who go to the polls on Election Day. Early voters also benefit from additional time to resolve issues that can prevent citizens from casting votes if first discovered on Election Day, such as those related to compliance with ID requirements and accuracy of registration data.

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[27] *E.g.*, Voting Rights Institute, *A Reversal in Progress: Restricting Voting Rights for Electoral Gain* 19 (Nov. 2011), *available at* http://www.democrats.org/pdf/vri/Reversal_in_Progress/.

[28] Voter impersonation in a federal election is punishable by five years in prison and a $10,000 fine. 18 U.S.C. § 1973i(c).

[29] Jan E. Leighley and Jonathan Nagler, Pew Center on the States, *The Effects of Non-Precinct Voting Reforms on Turnout, 1972-2008* 22, Table 1 (2009), *available at* http://www.pewcenteronthestates.org/uploadedFiles/wwwpewcenteronthestatesorg/Initiatives/MVW/Leighley_Nagler.pdf?n=8970; National Conference of State Legislatures, *Absentee and Early Voting* (July 22, 2011), *available at* http://www.ncsl.org/default.aspx?tabid=16604.

[30] Dr. Michael McDonald, United States Elections Project, *2008 Early Voting Statistics: 2004 % Early (Ass. Press)* (Nov. 4, 2008), *available at* http://elections.gmu.edu/early_vote_2008.html.

[31] R. Michael Alvarez, Stephen Ansolabehere, Adam Berinsky, Gabriel Lenz, Charles Stewart III, Thad Hall, *2008 Survey of the Performance of American Elections* 12 (2009), *available at* http://www.vote.caltech.edu/drupal/files/report/Final%20report20090218.pdf.

[32] Mark Hugo Lopez, *The Latino Electorate in 2010: More Voters, More Non-Voters* 9 (April 2011), *available at* http://www.pewhispanic.org/files/reports/141.pdf.

During the 2011 legislative session, however, a number of states sought to cut back on early voting periods. Florida was one of the states to pass such legislation.[33] In 2008, over 2.6 million votes were cast in Florida before Election Day, constituting more than one third of all votes in the state.[34] Of particular importance was the option of voting on the Sunday proceeding Election Day; in numerous congregations around the state on that day, religious and spiritual leaders urged members to go to the polls. As a result, 24% of those who voted on the Sunday before the election in 2008 were Latino, and among the state's early voters, Latinos were more likely to vote on that Sunday than other population groups.[35] Florida eliminated early voting on the Sunday before Election Day in 2012, however, which will disproportionately hinder voting by Latinos who found the Sunday voting option particularly attractive, or who voted because of the encouragement of a spiritual leader and the availability of Sunday voting.

Early voting periods were also reduced by legislation newly adopted in 2011 in Ohio, Georgia, Tennessee, and West Virginia.[36] Each of these states saw recent growth in both Latino population and percentage of all voters taking advantage of early voting.[37] As early voting opportunities decline, their reduction will impede the participation of these states' growing Latino electorates.

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[33] Florida House Bill 1355, Ch. 2011-40 Laws of Florida (2011).

[34] *See* Florida Division of Elections, County Absentee and Early Voting Reports, *available at* https://doe.dos.state.fl.us/fvracountyballotreports/FVRSAvailableFiles.aspx; Florida Division of Elections, Election Results: November 4, 2008 General Election, *available at* http://election.dos.state.fl.us/elections/resultsarchive/Index.asp?ElectionDate=11/4/2008.

[35] *New State Voting Laws II: Protecting the Right to Vote in the Sunshine State: Hearing Before the Subcomm. On the Constitution, Civil Rights and Human Rights of the Senate Comm. on the Judiciary*, 112th Cong. 8-10 (2012) (testimony of Prof. Michael C. Herron and Prof. Daniel A. Smith), *available at* http://www.judiciary.senate.gov/hearings/testimony.cfm?id=f14e6c2889a80b6b53be6d4e411ee3b0&wit_id=f14e6c2889a80b6b53be6d4e411ee3b0-0-9.

[36] 2012 Voting Law Changes, *supra* note 1, at 30.

[37] Dr. Michael McDonald, *2010 Early Voting* (Nov. 2, 2010), *available at* http://elections.gmu.edu/early_vote_2010.html (calculating that the percentage of voters casting early votes rose between 2006 and 2008 in each state: in Ohio, from 15.4% to 25.2%; in Georgia, from 18% to 53.1%; in Tennessee, from 47.4% to 59.2%; and in West Virginia, from 13.6% to 23.7%). At the same time, the Latino share of each state's population was increasing. Latinos were 1.9% of Ohioans in 2000, and 3.1% by 2010; 5.3% of Georgians in 2000 and 8.8% in 2010; 2.2% of Tennessee residents in 2000 and 4.6% by 2010; and 1.2% of West Virginians in 2010, up from .7% in 2000, based on U.S. Census Bureau data (at *State and County QuickFacts, available at* http://quickfacts.census.gov/qfd/index.html, and *American FactFinder, available at* http://factfinder2.census.gov/faces/nav/jsf/pages/searchresults.xhtml?refresh=t).

Barriers to Registration

Restrictions on Third-Party Registration Drives

Some states' legislators have, unfortunately, gone beyond simply making it more difficult to vote: recent changes in the law have also complicated the preliminary step of registering to vote for millions of Americans, especially Latinos. In recent years, Latinos have been among the groups of voters most likely to become registered through the efforts of a third-party organization. For example, in the 2010 election cycle, Latinos registered to vote were nearly twice as likely as white non-Hispanics to have completed forms at a registration drive.[38] Community registration drives diminish the hurdle posed by voter registration requirements, and in so doing, can be expected to have a positive effect on voter participation.[39]

Without compelling justification, states including Florida and Texas have recently imposed new restrictions on organizations and individuals seeking to facilitate the registration process.[40] These restrictions are projected to detract from otherwise-expected growth of the Latino electorate in states with sizable Latino populations. In Florida in 2010, 15.5% of new Latino registrants, compared to 8.6% of white voters, completed registrations with the assistance of a volunteer registrar.[41] In 2011, however, Florida instituted punitive measures against volunteers who fail to return registration forms to the state within 48 hours. An analysis by the New York Times found that after this law took effect, 81,471 fewer Floridians registered through voter registration drives than did during an equivalent period prior to the 2008 election.[42] It is likely that this shift has particularly affected Latino Floridians: registrations have fallen a

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[38] U.S. Census Bureau, *Voting and Registration in the Election of November 2010 – Detailed Tables, Method of Registration by Selected Characteristics* Table 12, *available at* http://www.census.gov/hhes/www/socdemo/voting/publications/p20/2010/tables.html.

[39] *Cf.* Maria da Silva, *Why Aren't Voters Registering*, Brennan Center for Justice Blog (Oct. 26, 2010), *available at* http://www.brennancenter.org/blog/archives/why_arent_voters_registering/ (noting that added restrictions on third-party voter registration are associated with a smaller electorate and diminished voter turnout).

[40] 2012 Voting Law Changes, *supra* note 1, at 21.

[41] Brennan Center for Justice, *New State Voting Laws II: Protecting the Right to Vote in the Sunshine State - Statement for the Record* (Jan. 27, 2012), *available at* http://www.brennancenter.org/content/resource/new_state_voting_laws_ii_protecting_the_right_to_vote_in_the_sunshine_state/ (citing the Census Bureau's Current Population Survey, Nov. 2010).

[42] Michael Cooper and Jo Craven McGinty, *Florida's New Election Law Blunts Voter Drives*, N.Y. TIMES at A1, March 28, 2012, *available at* http://www.nytimes.com/2012/03/28/us/restrictions-on-voter-registration-in-florida-have-groups-opting-out.html.

disproportionate 39%, for example, in Miami-Dade County[43], which has a population that is 65% Latino[44].

Proof of Citizenship Requirements

Laws requiring voters to show proof of citizenship at registration are yet another impediment to voting with an unfair impact on the Latino electorate. For instance, Arizona, which has a CVAP that is nearly 20% Latino[45], adopted a proof of citizenship requirement in 2004[46] which served as a model to four other states that have since followed in its footsteps. Evidence submitted in the course of litigation over this law showed that more than 31,550 Arizona voter registration applications were rejected for lack of proof of citizenship between January 2005 and fall 2007. Though 90% of those submitting rejected applications listed the United States as their place of birth, only about one third of these individuals were ultimately successful in registering.[47] Since they were largely native-born citizens, most or all of the remaining 20,000 voters did not fail to register because they were ineligible – instead, they simply lacked the time and resources to fulfill the proof of citizenship requirement, or were unable to obtain sufficient proof of nationality. Calls to our bilingual election assistance hotline, *1-888-VE-Y-VOTA*, and other inquiries received by our voter assistance teams have confirmed that Latino voters experience significant difficulties with restrictive registration schemes like Arizona's.

On April 17, 2012, the *en banc* 9th Circuit Court of Appeals ruled that Arizona's proof of citizenship requirement violates the National Voter Registration Act as the state law has been applied to election officials' acceptance of standard federal voter registration forms.[48] The decision is a positive first step towards the rejection of unnecessary and discriminatory citizenship confirmation procedures, but is controlling only in the nine Western states over which

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[43] *Id.*
[44] U.S. Census Bureau, *State & County QuickFacts: Miami-Dade County, Florida* (Jan. 31, 2012), *available at* http://quickfacts.census.gov/qfd/states/12/12086.html.
[45] U.S. Census Bureau, *Voting Age Population By Citizenship and Race: 2006-2010 American Community Survey 5 year estimates*, State Table, *available at* http://www.census.gov/rdo/data/voting_age_population_by_citizenship_and_race_cvap.html.
[46] ARIZ. REV. STAT. §§ 16-152(A)(23), 16-166 (2011).
[47] Gonzalez Plaintiffs' Proposed Findings of Fact No. 603, *Gonzalez v. Arizona*, No. CV 06-1268-PHX-ROS (D. Ariz., May 9, 2006).
[48] *Gonzalez et al. v. Arizona et al.*, No. 08-17094, slip op. at 4121 (9th Cir. April 17, 2012).

the 9th Circuit has jurisdiction, and does not affect the legal ability of states to require proof of citizenship to accompany state-created registration forms.

At present, surviving proof of citizenship mandates disproportionately impair the ability of eligible Latinos to register to vote. As is true with respect to possession of government-issued photo IDs, lower-income Americans are less likely to have access to valid proof of their citizenship, which cannot be obtained for free: copies of citizenship documents such as birth certificates, passports, and naturalization certificates carry costs ranging from $20[49] to $600[50]. Citizens with annual income of less than $25,000 are twice as likely not to have citizenship documentation[51], and 32% of Latino households earn less than $25,000, compared to 22% of white households[52]. Thus, these laws continue to place obstacles in the path of would-be voters that have a significantly detrimental effect on the Latino community.

Restrictions on registration do more to dissuade potential voters than to safeguard the integrity of elections. Concerted efforts over the past decade by the Department of Justice[53] and by Secretaries of State in Colorado and New Mexico[54] have failed to find proof of anything more than a small handful of cases of noncitizens voting, numbers which simply do not compare to the scale of the disenfranchisement observed in Arizona, where multiple elections have been held since a proof of citizenship mandate was instituted.

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[49] A copy of a birth certificate from Maricopa County, Arizona, for example, costs $20. Arizona Department of Health Services, *Office of Vital Records: Maricopa County Fee Schedule* (July 1, 2011), *available at* http://www.azdhs.gov/vitalrcd/Maricopa_fee_schedule.htm.

[50] An application to U.S. Citizenship and Immigration Services for a Certificate of Citizenship costs $600. U.S. Citizenship and Immigration Services, Department of Homeland Security, *N-600 Application for Certificate of Citizenship* (Feb. 29, 2012), *available at* http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=a936cac09aa5d010VgnVCM10000048f3d6a1RCRD&vgnextchannel=db029c7755cb9010VgnVCM10000045f3d6a1RCRD.

[51] Without Proof, *supra* note 18, at 2.

[52] U.S. Census Bureau, *Current Population Survey: 2010 Household Income* Table HINC-01 – White alone, Not Hispanic and Hispanic (any race) (Sept. 13, 2011), *available at* http://www.census.gov/hhes/www/cpstables/032011/hhinc/new01_000.htm.

[53] *E.g.*, Eric Lipton and Ian Urbina, *In 5-Year Effort, Scant Evidence of Voter Fraud*, N.Y. TIMES at A1, April 12, 2007, *available at* http://www.nytimes.com/2007/04/12/washington/12fraud.html?pagewanted=all.

[54] *E.g.*, Katie O'Connor and Jon Sherman, *Lions and Tigers and Fraud, Oh My! Secretary of State Kris Kobach Is at It Again* (June 14, 2011), *available at* http://www.huffingtonpost.com/katie-oconnor/lions-and-tigers-and-frau_b_876836.html; Keesha Gaskins, *Smoke and Mirrors: Alleged Non-Citizen Voting in NM and CO* (April 1, 2011), *available at* http://www.brennancenter.org/blog/archives/smoke_and_mirrors_alleged_non-citizen_voting_in_new_mexico_and_colorado/.

The Department of Justice's Work On Ensuring the Right to Vote

As the second-largest population group in the United States, and one of the fastest-growing, Latinos are the future of American democracy. Our strong political participation is central to the long-term success and prosperity of the nation. The threat posed by new state restrictions on voting rights illustrates the importance of the Department of Justice's intervention to protect racial and ethnic equity in elections.

Since 1965, the Voting Rights Act (VRA) has stood as a strong statement of our national commitment to ensuring broad and nondiscriminatory access to the ballot box. The VRA invests the Department of Justice with special protective responsibility, giving it a unique role in assessing voting changes in jurisdictions with a history of discrimination, as well as powers to investigate and bring suit to safeguard the ability of racial, ethnic, and language minorities to participate meaningfully in elections.

The Department has done an admirable job of fulfilling this mandate as states have pursued measures that impede the full civic participation of Latinos and other Americans. The NALEO Educational Fund applauds, in particular, the Department's recent efforts under its Section 5 authority to preserve the Latino vote in Texas and Florida. 2010 Census results showed an increase in Texas' population – 65% of it attributable to growth of the Latino community[55] – which helped the state gain four Congressional seats. A new district map proposed by the Texas legislature, however, would have failed to create even one new seat with a majority Latino constituency.[56] The Department of Justice's intervention ensured that this proposed map was not implemented without further consideration of its impact on the Latino electorate[57]; ultimately, a compromise interim map was approved by a Texas court that will create two new majority-Latino districts[58].

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[55] U.S. Census Bureau, *2010 Texas Population Tables* (Feb. 17, 2011), *available at* http://www2.census.gov/census_2010/01-Redistricting_File--PL_94-171/; *see also* NALEO Educational Fund, *2010 Census Profiles: Texas* 1 (Feb. 2011), *available at* http://www.naleo.org/downloads/TX_Census_2010_Profile_fin_02-11.pdf.

[56] *E.g.*, Press Release, Mexican American Legal Defense and Educational Fund, Texas Latino Redistricting Task Force Blasts Legislative Proposal for Congressional Map (May 31, 2011), *available at* http://www.maldef.org/news/releases/tx_redistrict/.

[57] *See generally* Defendants' Answer, *Texas v. United States*, No. 1:11-cv-1303 (RMC-TBG-BAII) (D. D.C. Sept. 19, 2011).

[58] *E.g.*, Press Release, Mexican American Legal Defense and Educational Fund, Latino Leaders Welcome Gains for Latino Voters in New Texas Redistricting Maps (March 1, 2012), *available at* http://www.maldef.org/news/releases/gains_voters_new_tx_redistricting/.

The Department of Justice was also instrumental in halting implementation of Texas's new photo ID law. The Department's careful study led to its determination that the state had not proven that the requirement would not abridge the right to vote of a disproportionate number of Latino Texans.[59] This decision, along with the agency's refusal to preclear South Carolina's similar voter ID law out of concern for its likely retrogressive impact on the African American vote in that state[60], have precipitated the closer examination of the impact of ID mandates that was needed as such laws have begun to be implemented, and hard evidence has emerged of their discriminatory effect.

In Florida as well, the Department of Justice is acting to ensure full investigation of the consequences of changes to voter registration procedures, early voting periods, and other voting practices for historically excluded groups. The agency has registered its opposition to a requested federal court approval of these changes[61], which target registration and voting opportunities used most heavily by Florida's Latino and African American voters.

The Department of Justice has been dedicated and consistent in its enforcement of the VRA's language assistance requirements. The ability of millions of Americans who are not yet fully proficient in English to vote knowledgeably rests upon faithful implementation and strong oversight of Section 203 of the VRA – in fact, there are now 19.2 million citizens of voting age, according to the Department of Justice, who are members of language minority communities and live in jurisdictions subject to Section 203.[62]

Unfortunately, experience has proven repeatedly that there continues to be a need for the Department of Justice to verify compliance with language assistance requirements. The agency's efforts in recent years have helped remedy failures to provide language assistance in several jurisdictions with significant Latino U.S. citizen populations that are not yet fully proficient in English, such as Cuyahoga County, OH; Alameda County, CA; and Colfax County, NE[63], where Latinos have gone from being 26% to 41% of the population in the past ten years[64].

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[59] Perez Letter – Texas, *supra* note 19, at 2.
[60] Letter from Thomas E. Perez, Assistant Attorney General for Civil Rights, to C. Havird Jones, Jr., Esq., Assistant Deputy Attorney General, State of South Carolina 2 (Dec. 23, 2011), *available at* http://www.justice.gov/crt/about/vot/sec_5/pdfs/l_122311.pdf.
[61] Joint Status Report at 14, *Florida v. United States*, No. 1:11-cv-1428-CKK-MG-ESII (D. D.C. March 2, 2012).
[62] THOMAS E. PEREZ, ADDRESS TO RUTGERS LAW VOTING SYMPOSIUM (April 13, 2012), *available at* http://www.justice.gov/crt/opa/pr/speeches/2012/crt-speech-1204131.html [hereinafter Perez Speech].
[63] Voting Section, Department of Justice, *Cases Raising Claims Under the Language Minority Provisions of the Voting Rights Act*, *available at* http://www.justice.gov/crt/about/vot/litigation/caselist.php.
[64] Perez Speech, *supra* note 62.

The Department of Justice does critical work both behind the scenes and in the public eye to ensure that elections policies do not impede the full participation of Latinos and other historically underrepresented groups in American democracy. Much of the agency's work results in expeditious, quiet resolutions of problematic practices that its investigations bring to the attention of responsive local and state officials.[65] The Department also encourages proactive and thoughtful law- and policy-making by expressing a strong public commitment to vigorous protection of the right to vote. High-profile speeches by Attorney General Eric Holder and Assistant Attorney General for Civil Rights Thomas Perez[66] have made clear that the agency prioritizes its mandate under the VRA to preserve our equality and democracy.

The NALEO Educational Fund concurs with Attorney General Holder's sentiment, that "we need election systems…that are more, not less, accessible to the citizens of this country."[67] This is all the more true because systems that diminish access to the ballot box have proven to have the greatest effect on the Latino electorate and other groups that have been targets in the past of racially- and ethnically-discriminatory laws. We continue to need oversight to ensure that elections reflect our national commitment to universal suffrage and fundamental equality. In this context, the Department of Justice's voting rights work is timely, essential, and effective.

Conclusion

Chairman Franks and Ranking Member Nadler, the success of the nation-building experiment undertaken more than 200 years ago by our founding fathers came from its foundation on the principle that we would be governed democratically through the vote. The franchise is so central to our national character that it is protected by more amendments to the Constitution than any other fundamental right.[68] At a time when economic recovery and

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[65] The Department publishes guidance to encourage voluntary compliance with the Voting Rights Act, for example, and frequently resolves cases with settlements and consent decrees instead of extended litigation. *See, e.g.*, Voting Section, Department of Justice, *Voting Rights Policy and Guidance, available at* http://www.justice.gov/crt/about/vot/Policy_Guidance.php; and *Recent Activities of the Voting Section, available at* http://www.justice.gov/crt/about/vot/whatsnew.php.

[66] *E.g.*, ERIC HOLDER, ADDRESS AT THE LYNDON BAINES JOHNSON LIBRARY & MUSEUM (Dec. 13, 2011), *available at* http://www.justice.gov/iso/opa/ag/speeches/2011/ag-speech-111213.html [hereinafter Holder Speech]; Perez Speech, *supra* note 62.

[67] Holder Speech, *supra* note 66.

[68] Amendments that protect the right to vote include (but are not limited to) the 15th, prohibiting race- or color-based discrimination in voting; the 19th, extending the franchise to women; the 23rd, which ensures that District of Columbia residents have the right to vote for President; the 24th, which bars poll taxes; and the 26th, which gives the right to vote to 18-20 year olds.

adaptation to a changing sociopolitical environment necessitate stronger civic participation than ever, our representatives in government should be doing all that they can to encourage Americans to vote. In spite of this, the right to vote is under attack throughout the country.

We stand ready to work with this Subcommittee, the Department of Justice, and election officials throughout the nation to help ensure that our democracy remains vital and responsive to the voices of all of its citizens. We urge Congress and this Subcommittee to conduct the necessary oversight of state efforts to impose barriers to voting, particularly those that disproportionately burden Latino voters, and to make clear your full support of the Department of Justice, its voter protection activities, and its crucial efforts to ensure nondiscrimination in American elections.

I thank the Chairman, the Ranking Member, and the Subcommittee once again for providing us with the opportunity to share our views on election administration and protection.

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STATEMENT OF
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THE LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS

"VOTING WRONGS: OVERSIGHT OF THE JUSTICE DEPARTMENT'S VOTING RIGHTS ENFORCEMENT"

HOUSE JUDICIARY SUBCOMMITTEE ON THE CONSTIUTION

APRIL 18, 2012

Chairman Franks, Ranking Member Nadler, and Members of the Subcommittee: I am Wade Henderson, President & CEO of The Leadership Conference on Civil and Human Rights. Thank you for the opportunity to submit testimony for the record regarding the Justice Department's enforcement of voting rights.

The Leadership Conference on Civil and Human Rights is a coalition charged by its diverse membership to promote and protect the civil and human rights of all persons in the United States. Founded in 1950 by A. Philip Randolph, Arnold Aronson, and Roy Wilkins, The Leadership Conference works in support of policies that further the goal of equality under law through legislative advocacy and public education. The Leadership Conference's more than 210 national organizations represent persons of color, women, children, organized labor, persons with disabilities, seniors, the LGBT community, and major religious groups.

The Leadership Conference is committed to building an America that is as good as its ideals – an America that affords everyone access to quality education, housing, health care, collective bargaining rights in the workplace, economic opportunity, and financial security. The right to vote is fundamental to the attainment and preservation of each of these rights. It is essential to our democracy – indeed it is the language of our democracy. A healthy and representative government should encourage citizens to participate in it, not construct barriers to such participation.

The Department of Justice is Working to Protect the Right to Vote

Under the leadership of Attorney General Eric Holder, the Justice Department is committed to enforcement of the nation's voting rights laws. The Justice Department is actively enforcing Section 5 of the Voting Rights Act, which Congress overwhelmingly reauthorized in 2006 with bipartisan support. While restrictive laws requiring photo ID, reducing early voting periods, and limiting community-based registration are spreading across the country, the Department of Justice is committed to reviewing those measures to ensure they do not violate federal law and do not have a discriminatory impact. The Justice Department used its enforcement authority to block South Carolina's ID law after the state's own data showed that minority voters were 20 percent more likely to lack acceptable government-issued identification.[1] Similarly, the

[1] Letter from Thomas E. Perez, Assistant Attorney General, U.S. Dep't. of Justice, to C. Havird Jones, South Carolina Assistant Deputy Attorney General, Dec. 23, 2011, *available at* http://brennan.3cdn.net/594b9cf4396be7ebc8_0pm6i2fx6.pdf.

Department objected to Texas' voter ID law after data showed that Hispanic voters were anywhere from 46.5 to 120 percent less likely to possess acceptable identification than non-Hispanic voters.[2]

Voter ID: A Solution in Search of a Problem

Across the country, states have been enacting photo ID and other restrictive measures under the guise of preventing voter fraud. Voter impersonation fraud—i.e. when voters show up at the polls and pretend to be someone they are not— is the only kind of voter fraud that voter ID laws might address. However, this kind of fraud simply does not exist at a significant level anywhere in this country. According to a recent report on voter fraud by the Brennan Center for Justice, "It is more likely that an individual will be struck by lightning than that he will impersonate another voter at the polls."[3] A recent analysis of data from all fifty states and the U.S. Department of Justice conducted by Barnard Professor Lorraine Minnite found that voter impersonation is exceptionally rare.[4] Only 24 people were convicted or plead guilty to illegal voting at the federal level between 2002 and 2005.[5] On the state level, there were 19 cases of voting by ineligible voters.[6] Of those, five were prohibited because of felony convictions, fourteen were not citizens, and five voted twice in the same election.[7] *None* of them were attempting to impersonate someone else. Furthermore, voter fraud, if it existed, is already illegal and punishable by jail time and fines.

Photo ID laws threaten, rather than protect, democracy in the United States. In addition to being an ineffective method of combating voter fraud, research shows that photo ID and other measures limiting access to the ballot have a disparate impact on certain communities. Changes to voting laws would prevent millions of Americans from executing their right to vote. These laws disproportionately affect African-American and Latino voters, Native communities, senior citizens, people with disabilities, low-income citizens, and young voters.[8] With respect to photo ID requirements, a 2006 survey conducted by the Brennan Center for Justice found that 11 percent of voting-age American citizens—more than 21 million people—do not have current, unexpired government-issued identification with a photograph.[9]

Even if states provide "free" voter ID cards, the costs of documents necessary to prove one's identity poses an additional barrier to voters obtaining the "free" ID cards. Although the necessary underlying documents vary from state to state, examples include: birth certificate, proof of residence, passport, Social Security card, naturalization papers, or marriage and divorce records if names have changed. All of these documents cost money, defeating the purpose of providing "free" voter ID cards. Seventeen states plus Puerto Rico and Guam place voters in a catch-22, where citizens are required to show a photo ID before receiving a copy of their birth certificate, which they need to get a photo ID in the first place.[10] The costs, including the hidden fees underlying "free" voter ID cards, have raised concerns about whether photo ID laws represent a modern-

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[2] Letter from Thomas E. Perez, Assistant Attorney General, Civil Rights Division, U.S. Dep't. of Justice, to Keith Ingram, Director of Elections, Office of the Texas Secretary of State, Mar. 12, 2012, *available at* http://brennan.3cdn.net/fe6a21493d7ec1aafc_vym6b91dt.pdf.

[3] Justin Levitt, "The Truth About Voter Fraud," The Brennan Center for Justice at New York University School of Law, 4, at http://www.truthaboutfraud.org/pdf/TruthAboutVoterFraud.pdf.

[4] Advancement Project, "What's Wrong With This Picture?," 4, http://www.advancementproject.org/sites/default/files/publications/Picture%20ID6%20low.pdf

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] Brennan Center for Justice at NYU School of Law, *Citizens Without Proof: A Survey of Americans' Possession of Documentary Proof of Citizenship and Photo Identification,* (Nov. 28, 2006), http://www.brennancenter.org/page/-/d/download_file_39242.pdf.

[9] *Id.*

[10] Advancement Project, "What's Wrong With This Picture?" at pg. 7. http://www.advancementproject.org/sites/default/files/publications/Picture%20ID6%20low.pdf

day poll tax. In *Weinschenk v. State*, the Missouri Supreme Court found that the state's photo ID law unconstitutionally disenfranchised voters due to the costs of obtaining a free voter ID card.[11]

Besides photo ID laws, states have passed other measures that suppress voter participation. More than a dozen states have introduced legislation requiring voters to provide proof of citizenship before registering to vote. At least sixteen states have introduced bills to restrict community-based registration drives and end popular Election Day and same-day registration drives. States have also introduced laws to reduce their early voting and absentee voting periods. And several states have erected barriers for citizens with past felony convictions to regain the franchise. Because of the likelihood that these measures will have a significant impact on communities of color, people with disabilities, older voters, and students, it is crucial that the Department of Justice investigate any such changes to ensure that they are implemented in a non-discriminatory way.

Rather than spending resources on restricting access to the ballot, the Attorney General has sought to ensure that the voting booth is open for all eligible voters. He has endorsed voter registration modernization as an effective and bipartisan solution. Voter registration modernization would increase the accuracy of the voter rolls at a lower cost and without disenfranchising millions of voters.

Conclusion

Protecting the integrity of elections on the federal, state, and local levels is critical to maintaining a healthy democracy. It is the duty of our policymakers to remove the barriers to participation for all eligible citizens, not to erect new ones under the guise of fixing a problem that doesn't actually exist. Removing barriers and investing in a uniform, simplified process for voting will eliminate unnecessary bureaucratic processes, save states money, save election officials time, and ensure that eligible citizens have access to the polls.

Requiring photo ID will only serve to exclude many Americans from participating in the important decisions that affect the entire country. Restrictive voting rights measures limit access to the ballot, particularly among minorities, persons with disabilities, seniors, and young people. I encourage the Subcommittee to steer the conversation away from discussing measures that would limit voter participation and move forward with a solution to modernize voter registration and election records. The Justice Department should continue to act within its jurisdiction to enforce the Voting Rights Act and other voting rights laws, and prevent states from implementing measures that would disproportionately disenfranchise voters.

Thank you for your leadership on this critical issue.

[11] *Weinschenk v. State*, 203 S.W.3d 201 (Mo. 2006).

Response to Post-Hearing Questions from Cleta Mitchell, Partner, Foley & Lardner

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June 5, 2012

Cleta Mitchell
Partner
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3000 K Street NW
Suite 600
Washington, DC 20007-5109

Dear Ms. Mitchell,

The Judiciary Committee's Subcommittee on the Constitution held a hearing on Voting Wrongs: Oversight of the Justice Department's Voting Rights Enforcement" on April 18, 2012. Thank you for your testimony.

Questions for the record have been submitted to the subcommittee within five legislative days of the hearing and are attached. We would appreciate a full and complete response as they will be included in the official hearing record.

Please submit your written answers to Sarah Vance at Sarah.Vance@mail.house.gov by June 19, 2012. If you have any further questions or concerns, please contact Dan Huff, Counsel of the Constitution Subcommittee, at Dan.Huff@mail.house.gov or (202) 225-2825.

Thank you again for your participation in the hearing.

Sincerely,

Trent Franks
Chairman
Constitution Subcommittee

Ms. Mitchell
June 5, 2012

Questions for the Record from Mr. Franks

1. The Democrat-invited witness, Ms. Weiser, claimed that 11% of the population do not have photo IDs to use for identification at the polls.
    a. Please cite sources supporting or refuting her claim.
    b. Does the 11% estimate include Americans who are not voting-age?
    c. What percentage of the American voting-age population is incarcerated or former felons and therefore ineligible to vote anyway?
    d. What percentage of Americans are medically incapacitated, and therefore unable to vote?
    e. What other categories of Americans are ineligible or unable to vote?
    f. Could these categories of ineligible / incapacitated voters account for the 11% of Americans do not have photo IDs?
    g. Does the 11% estimate take into account people who make up the 60% of voters who refuse to vote anyway (those who choose not to participate in federal elections)?
    h. Does Ms. Weiser's 11% estimate represent likely voters, or those who would not be impacted by voter ID requirements in any event?

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June 19, 2012

VIA E-MAIL

The Honorable Lamar Smith
Chairman
House Judiciary Committee
2138 Rayburn House Office Building
Washington, DC 20515

Re: Response to Questions from the Committee

Dear Chairman Smith:

I am in receipt of the questions from the House Judiciary Committee as a follow-up to my testimony before the Committee on April 18, 2012.

In response to your questions, I definitely challenge the statistics cited by Ms. Weiser of The Brennan Center in her testimony, in which she stated that eleven percent (11%) of the population do not have photo identification. The trial judge in the federal district court in *Crawford v. Marion County* (citations omitted) concluded that, despite the claims of the plaintiffs in that case, that a mere 1% of the population lacked photo identification sufficient to meet the legal requirements for voting. The trial court further found, which was affirmed by the United States Supreme Court, that this was an insufficient burden to offset the public's interest in voting and election integrity.

Further, I would direct the Committee's attention to my testimony regarding the experience of the State of Tennessee in March of this year in which fewer than .023% of the voters failed to produce photo identification in order to vote in the statewide primary election.

Finally, I am attaching to this letter two studies that further dispute the claims made in the Brennan Center's study regarding the percentage of adult citizens who do not have photo identification. These two reports include an article by Hans von Spakovsky published in National Review Online on October 13, 2011, entitled *"New Myths on Voter ID"* and a study published by the Heritage Foundation, also co-authored by Mr. von Spakovsky and Mr. Alex Ingram, entitled *"Without Proof: The Unpersuasive Case Against Voter Identification"*. I would respectfully request that both of these reports be included in the permanent record of the hearing.

Thank you for the opportunity to participate in the hearing on this important subject. Please contact me if I may be of further assistance to the Committee.

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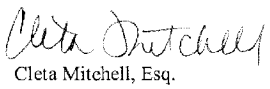
FOLEY & LARDNER LLP

Sincerely,



Cleta Mitchell, Esq.

Attachments

http://www.nationalreview.com/corner/279991/new-myths-voter-id-hans-von-spakovsky

New Myths on Voter ID

By Hans A. von Spakovsky
Posted on October 13, 2011 8:00 AM

Last weekend, both the *New York Times* and the *Washington Post* ran commentaries claiming that voter fraud is a myth. "There is almost no voting fraud in America," pronounced the *Post*'s October 9 editorial. Apparently the liberal commentariat spurns reading readily available case studies on election fraud, and well-researched books detailing fraud, including John Fund's *Stealing Elections* and Larry Sabato's *Dirty Little Secrets*.

The fraud denialists also must have missed the recent news coverage of the double voters in North Carolina and the fraudster in Tunica County, Miss. — a member of the NAACP's local executive committee — who was sentenced in April to five years in prison for voting in the names of ten voters, including four who were deceased. And the story of the former deputy chief of staff for Washington mayor Vincent Gray, who was forced to resign after news broke that she had voted illegally in the District of Columbia even though she was a Maryland resident. Perhaps they would like a copy of an order from a federal immigration court in Florida on a Cuban immigrant who came to the U.S. in April 2004 and promptly registered and voted in the November election.

But the papers go beyond denying even the existence of fraud. They also erroneously claim that new voter-ID laws and other reforms designed to protect the integrity of the democratic process are actually intended to suppress the votes of Democrats and minorities.

None of this is true, of course, and the "evidence" presented to support those allegations is nothing but smoke and mirrors. All claims about vote suppression and supposedly huge numbers of voters who don't have ID are based on a dubious study released a week ago by the Brennan Center, a partisan and unobjective advocacy organization.

The "report" by the Brennan Center, "Voting Law Changes in 2012," claims that 5 million voters will be disenfranchised due to the recent "wave" of election laws that have been implemented. That total is supposedly made up of:

1. 3.2 million voters who will be unable to vote because of voter-ID laws.

2. 240,000 voters who will be unable to vote because of laws requiring proof of citizenship to register to vote.

3. 202,000 voters registered in 2008 through voter-registration drives that have now been made extremely difficult or impossible under new laws.

4. 630,000 voters registered in 2008 through Election Day voter registration where it has now been repealed.

5. One to two million voters who voted in 2008 on days eliminated under new laws rolling back the time allowed for early voting prior to election day.

6. At least 100,000 disenfranchised felons who might have regained voting rights by 2012.

When deconstructing the total number, almost all of the supposed millions of voters affected are based on the 1st and 5th bullet points (3.2 million and 1 to 2 million), which are fallacious; and the merits of the rest of the "key" points don't hold up under close examination.

An analytic reader of the Brennan Center report can't help but wonder "Where's the beef?" Most of the 2011 report is based on an extrapolation of an earlier, even more questionable report released in 2006. I pointed out the numerous problems with that 2006 study in a recent National Review article:

About the only thing the Left has had to rely on for its hollow claims about photo ID is a flawed 2006 study — titled "Citizens without Proof" — by the Brennan Center at NYU's law school supposedly showing that millions of Americans who are eligible to vote lack photo ID. The Brennan Center has been vigorous in opposing almost every sensible voter reform, from voter ID to requiring proof of citizenship when registering to vote. This 2006 study is dubious in its methodology and especially suspect in its sweeping conclusions. It is based on a survey of only 987 "voting-age American citizens," although it contains no information on how it was determined whether a respondent was actually an American citizen entitled to vote, and might easily have included illegal and legal aliens, felons, and others who are ineligible. The survey then uses the responses of these 987 individuals to estimate, based on the 2000 Census, the number of Americans without valid documentation. Although the report says it was weighted to account for underrepresentation of race, it does not provide the methodology used.

By neglecting to ask whether respondents were actual or likely voters, registered voters, or even eligible voters, the study ignored the most relevant data: the number of eligible citizens who would have actually voted but could not because of voter-ID laws. All pollsters know that the only really accurate polls are of likely voters, not of the voting-age population. Surveys of registered voters have shown the exact opposite of the Brennan Center study: American University found that less than one-half of 1 percent of registered voters in Maryland, Indiana, and Mississippi lacked a government-issued ID. A 2006 survey of more than 36,000 voters found that only 23 people in the entire sample would be unable to vote because of an ID requirement.

Also, the Brennan Center survey didn't ask whether people had IDs; it asked whether IDs were

"readily available." And the question about citizenship documentation asked whether respondents had access "in a place where you can quickly find it if you had to show it tomorrow," even though elections are not scheduled on such a short-term basis. This was obviously intended to skew the results. The survey also failed to ask whether respondents had student IDs, which are acceptable under many state laws, or tribal IDs, which are acceptable in some states, including Georgia and Arizona. On one question, 14 percent of respondents were so confused that they said they had both a U.S. birth certificate and naturalization papers.

So there really is nothing behind the claim that 3.2 million voters will supposedly be unable to vote because of new voter-ID laws. This is especially true because these same types of claims were made in the federal lawsuits filed against voter-ID laws in Indiana and Georgia. Those lawsuits were dismissed because the plaintiffs were unable to produce a single individual, much less "millions" of voters, who would be unable to vote because of the requirement to show a photo ID. (Note: All of the states provide a free photo ID to anyone who can't afford one). As a Heritage study found, sharply higher turnout in the 2008 and 2010 elections in Georgia and Indiana proved that voter ID does not prevent Democrats or minorities from voting. Five years later, the disastrous results that the Brennan Center has been predicting since 2006 have never materialized.

Next, the Brennan Center claims that 240,000 voters will be unable to vote because of new laws in Georgia, Kansas, and Arizona that require proof of citizenship to register to vote. Again, there is no evidence to support their numbers, which are based on their flawed 2006 study. In upholding Arizona's proof of citizenship requirement in 2008, federal district court judge Roslyn Silver (a Clinton appointee) noted that the plaintiffs had "only produced one person . . . who is unable to register to vote due to" the new requirement and had produced no evidence that "the persons rejected are in fact eligible to register to vote."

Georgia recently sued the Holder Justice Department because of its delay and dilatory tactics in reviewing Georgia's proof-of-citizenship law under Section 5 of the Voting Rights Act. After the state filed suit, the Department immediately capitulated and precleared the law without objection because it was unable to produce a single scintilla of evidence that requiring proof of citizenship to vote was discriminatory or that any eligible U.S. citizens would be unable to vote.

The Brennan Center claims that 202,000 potential voters will be affected by new rules on voter-registration drives conducted by third-party organizations like ACORN. They base this number on voters who registered in 2008 through such drives. But again, there is no proof that voters will not simply register via one of the many other ways provided under the National Voter Registration Act or Motor Voter — such as registering at state DMVs, which is the way the vast majority of Americans register.

More important, the new rules imposed by states like Florida are, contrary to the Brennan Center's claims, intended to guarantee the enfranchisement of voters. For example, Florida will now require organizations to turn in voter-registration forms within 48 hours of their completion by voters. This is intended to stop the disenfranchisement that has occurred in past elections due to organizations like ACORN holding on to these forms past the registration deadlines. Election officials will tell you that they have received thousands of forms, some of them months old,

either on the eve of the registration deadline (making it very difficult to process them before the election) or past the deadline, which disenfranchises voters who thought they had gotten registered for an upcoming election.

Florida also now requires organizations to put an identification code for their organization on each registration form so election officials will know which organization screwed up a registration when it comes in incomplete. That was also caused in large part by the thousands of incomplete and fraudulent registration forms submitted by ACORN. I fail to understand how that requirement will keep people from registering to vote.

Next, the Brennan Center claims that 630,000 potential voters will be affected by the elimination of Election Day voter registration in states like Maine because that is how some voters registered in 2008. Again, there is no evidence that such individuals will not register prior to Election Day like all other voters. The Maine Heritage Policy Center just released a study concluding that Election Day registration "had no recognizable impact on voter turnout in Maine since its implementation in 1973. In fact, the three lowest turnout years since 1960 occurred after EDR was implemented." California voters defeated a 2002 referendum to implement Election Day registration 59 percent to 41 percent, and even such liberal newspapers as the *Los Angeles Times* and the *San Francisco Chronicle* warned against its implementation because of the potential for voter fraud.

The Brennan Center's figure of 1 to 2 million voters who will be affected because of new laws rolling back the time allowed for early voting also has no data to back it up. In fact, turnout data from prior elections show quite the opposite. Curtis Gans of American University has done a number of studies comparing turnout in early-voting states with turnout in other states. He found that turnout in national elections *increases* at a slower rate (or decreases at a *steeper* rate) in states with early voting, compared with states without early voting.

Gans speculates that early voting just provides greater convenience to individuals who would vote anyway on Election Day. Since campaigns spend the bulk of their money on get-out-the-vote efforts just before Election Day, that concentrated effort may not be as effective when it is spread out over a long period of time in states with early voting. So the claim that Florida's changing its early-voting period from 13 days to seven days, or Georgia from 45 days to 21 days, will decrease turnout is pure speculation by the Brennan Center. The evidence points to the contrary. Brennan assumes that a person who previously voted ten days before early voting ended will decline to vote between one and seven days before it ends. Transforming that faulty assumption into "disenfranchisement" is absurd. Even if the assumption were correct, the voter would have disenfranchised himself by choosing not to vote any time during a week-long period.

Finally, the Brennan Center claims that 100,000 felons will be unable to vote because of changes in state laws making it more difficult for felons to regain voting rights. States have a constitutional right under the Fourteenth Amendment to take away the right to vote from individuals for "participation in rebellion, or other crime." There is no constitutional barrier to Florida's requiring a five-year waiting period for felons before they can apply for restoration to prove they have learned their lesson, paid their debt to society, and successfully reintegrated themselves into civil society. The Brennan Center views this — and the fact that the five-year

period resets if a felon is rearrested — as a vicious violation of a felon's rights. The Center is entitled to its opinion, but opinions are not facts.

Some of the bias in the report is very telling, such as a passage on page 18 that says that the claims of Colorado secretary of state Scott Gessler and Kansas secretary of state Kris Kobach about finding noncitizens registered to vote have been "debunked." What do they cite for this debunking? Another questionable Brennan Center study that simply said that "without the underlying reports and methodologies . . . any conclusions cannot be fully supported or dismissed." It also relies on a statement from Rep. Charles Gonzalez (D., Texas), who attacked Gessler at a House Administration Committee hearing for being honest enough to state the limitations on his data, but didn't offer any evidence to refute Gessler's report. So a Democratic congressman's unsupported attacks are taken as both true and sufficient to counter the carefully described research of a Republican secretary of state. By the way, a credited contributor to the 2011 report is none other than Myrna Perez, President Obama's nominee to fill a *Democratic* seat as a commissioner on the U.S. Election Assistance Commission.

To judge from the number of reports citing its conclusions, the Brennan Center report is certainly a successful propaganda effort. However, neither the editorials of the *Washington Post* and the *New York Times* nor the Brennan Center report are empirically driven. Rather, they are myth-driven diatribes against common-sense election reform that the vast majority of the American people agree with, no matter what their race or political background. They are certainly not the devastating constraints on voters that the Brennan Center's report puffs them up to be.

— Mr. von Spakovsky is a senior legal fellow at the Heritage Foundation, a former FEC commissioner, and a former voting counsel at the Justice Department.

Legal Memorandum

Published by The Heritage Foundation

No. 72
August 24, 2011

Without Proof: The Unpersuasive Case Against Voter Identification

Hans A. von Spakovsky and Alex Ingram

Abstract: Citizens Without Proof, *a report on voter identification requirements produced by the Brennan Center at New York University's School of Law, is both dubious in its methodology and results and suspect in its sweeping conclusions. By eschewing many of the traditional scientific methods of data collection and analysis, the authors of the Brennan Center study appear to have pursued results that advance a particular political agenda rather than the truth about voter identification. Given that* Citizens Without Proof *is the study most frequently cited by opponents of voter identification requirements, its shortcomings cannot simply be dismissed—a tempting solution, given the study's dubious methodology. Rather, the conclusions drawn by the Brennan Center must be contrasted with other, legitimate studies—a process that will reveal the truth about voter identification requirements.*

The primary argument against voter identification requirements—that many Americans lack proper identification and would therefore be prevented from voting—is not supported by credible studies of voter turnout rates. In fact, the study most frequently cited by opponents of voter identification requirements—*Citizens Without Proof*, a report produced by the Brennan Center at New York University's School of Law[1]—is both dubious in its methodology and results and suspect in its sweeping conclusions.

By eschewing many of the traditional scientific methods of data collection and analysis, the authors of the Brennan Center study appear to have pursued

Talking Points

- A Brennan Center report on photo identification frequently cited by opponents of voter ID is both dubious in its methodology and results and suspect in its sweeping conclusions.
- The authors ignored the most relevant data by not surveying actual or likely voters, registered voters, or even eligible voters and failed to ask respondents about other types of eligible IDs.
- Other surveys of registered voters have found only a very small percentage of individuals who do not have photo IDs, and they can easily obtain free photo IDs under new state voter ID laws.
- Government data show that, by a very significant margin, more photo IDs have been issued than there are registered voters in the United States, and the experience of states in the polling place shows that photo ID is not an obstacle to voting by Americans of any racial or ethnic background.

This paper, in its entirety, can be found at:
http://report.heritage.org/lm0072

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results that advance a particular political agenda rather than the truth about voter identification. Such speculation is further fueled by the fact that legitimate studies of voter turnout rates in states with identification requirements demonstrate that such laws do not disenfranchise voters; indeed, Americans overwhelmingly support such requirements that increase the reliability and trustworthiness of our election system.[2]

Questionable Data Collection

The Brennan Center study suffers from sloppy—or perhaps purposefully misrepresented—data collection and biased questions. Based entirely on one survey of only 987 "voting age American citizens," the report contains no information on how the survey determined whether a respondent was actually an American citizen. The survey could have included illegal and legal aliens, two categories of individuals that are not allowed to vote.

The survey then uses the responses of these 987 individuals to estimate the number of Americans without valid documentation based on the 2000 Census calculations of citizen voting-age population. The Census figures, however, contain millions of U.S. residents who are ineligible to vote, thus contributing to the study's overestimation of voters without a government-issued identification.

By neglecting to ask whether respondents were actual or likely voters, registered voters, or even eligible to vote at all, the study ignores the most relevant data on this issue: the numbers of eligible citizens who would have voted but could not because of voter identification laws. All pollsters know that the only accurate surveys of how candidates are going to perform in an election are polls of likely voters, not the voting-age population. The Census counts many individuals in the voting-age population who are ineligible to vote, such as felons or permanent residents who are not U.S. citizens.

Election turnout data also reveal that significant numbers of Americans who may be eligible still do not vote for various personal reasons that have nothing to do with registration or voting rules and regulations. In fact, the largest group of nonvoters "are more affluent, better educated, and more involved in their communities or volunteer groups" than voters. They are just not interested in voting.[3]

Conducting a survey of registered or actual voters is so commonplace that the Brennan Center's failure to do so raises suspicions regarding the veracity of the study's conclusions.

Suspect Survey Questions

What have surveys of registered voters shown in contrast to the Brennan Center's study?

- An American University survey in Maryland, Indiana, and Mississippi found that less than one-half of 1 percent of registered voters lacked a government-issued ID. Therefore, the study correctly concluded that "a photo ID as a requirement of voting does not appear to be a serious problem in any of the states."[4]
- A 2006 survey of more than 36,000 voters found that only "23 people in the entire sample—less than one-tenth of one percent of reported voters" were unable to vote because of an ID requirement."[5]

Of course, every state that has passed a voter ID law has also ensured that the very small percentage

1. *Citizens Without Proof: A Survey of Americans' Possession of Documentary Proof of Citizenship and Photo Identification*, BRENNAN CENTER FOR JUSTICE (Nov. 2006), *available at* http://www.brennancenter.org/page/-/d/download_file_39242.pdf.
2. Several of these other studies are cited in Hans A. von Spakovsky, *Voter Photo Identification. Protecting the Security of Elections*, LEGAL MEMORANDUM NO. 70, HERITAGE FOUNDATION (July 13, 2011), *available at* http://www.heritage.org/Research/Reports/2011/07/Voter-Photo-Identification-Protecting-the-Security-of-Elections.
3. *See* Jack C. Doppelt and Ellen Shearer, *Nonvoters: America's No-Shows*, SAGE PUBLICATIONS 27–30 (1999).
4. *Voter IDs Are Not the Problem: A Survey of Three States*, CENTER FOR DEMOCRACY & ELECTION MANAGEMENT, AMERICAN UNIVERSITY 37 (Jan. 2008), *available at* http://www.american.edu/spa/cdem/upload/VoterIDFinalReport1-9-08.pdf.
5. Stephen Ansolabehere, *Ballot Bonanza*, SLATE, March 16, 2007.
6. GA. CODE ANN. § 21-2-417(a)(2) (2011).

of individuals who do not have a photo ID can easily obtain one for free if they cannot afford one.

The survey questions used in the Brennan Center's report are also suspect and appear to be designed to bolster the report's biased findings. For example, the survey did not ask respondents whether they had government-issued IDs, but instead asked whether respondents had "readily available identification." This is a confusing term that could have different meanings to different individuals. The question on proof of citizenship documentation then adds to this confusion by asking whether the respondent had access to such documentation as a U.S. birth certificate or naturalization papers "in a place where you can quickly find it if you had to show it tomorrow."

By neglecting to ask whether respondents were actual or likely voters, registered voters, or even eligible to vote at all, the Brennan Center study ignores the most relevant data on this issue: the numbers of eligible citizens who would have voted but could not because of voter identification laws.

By asking whether such ID could be found "quickly" or shown "tomorrow," the study seems to be trying to elicit a particular response: that those surveyed do not have ID. Consider, for example, citizens who keep their naturalization papers in a safety deposit box (as the parents of one of this paper's authors did). Such citizens might not be able to access the documents "tomorrow" even though they certainly possess ID.

The Brennan Center's decision to use a citizen's ability to find his or her ID "quickly" or by "tomorrow" is even stranger when considered in light of the fact that elections are generally scheduled far in advance; it would only be under extraordinarily exotic circumstances that a citizen would have to find his or her ID documentation "quickly" or have it "readily available" in order to vote.

Buried Footnotes

The study is further undermined by several footnotes buried in the report. *Citizens Without Proof* is most often cited for its claim that 25 percent of African–Americans of voting age (not registered voters, actual voters, or even eligible voters) supposedly do not have a photo ID. Footnote 1 of the report states, "the results of this survey were weighted to account for underrepresentation of race." However, the report does not provide the methodology used to determine how this factor was weighted, making it impossible to judge the accuracy of the footnote's claim.

Next, according to footnote 3, "135 respondents indicated that they had *both* a U.S. birth certificate and U.S. naturalization papers. This most likely indicates confusion on the part of the respondents." In other words, almost 14 percent of the respondents provided contradictory answers. This discrepancy, as is the case with footnote 1, is never addressed or explained in the paper outside of the footnote, thereby casting doubt on the reliability of the report's statistics.

Finally, footnote 4 states that "[t]he survey did not yield statistically significant results for differential rates of possession of citizenship documents by race, age, or other identified demographic factors." This finding seriously undermines the oft-repeated and false accusation that supporters of these ID laws are seeking either to disenfranchise minorities because they traditionally vote Democrat or to "suppress" the votes of certain groups.

Evidence Ignored

The Brennan Center report also ignores several other important factors. In Georgia, for example, student ID cards issued by the state college system are an acceptable form of identification for the state's voter ID law, thus making it even easier for students to vote.[6] In Kansas, any student ID card issued by "an accredited post secondary institution of education in the state of Kansas" is acceptable.[7] Additionally, Rhode Island will accept an ID card issued by any "United States educational institution."[8]

7. H.R. 2067 (Kan. 2011).
8. H. 5680 (R.I. 2011), *available at* http://sos.ri.gov/elections/voterid/.
9. GA. CODE ANN. § 21-2-417(a)(6) (2011); AZ. CODE § 16-152,A (2011).

Yet the authors of the Brennan Center study did not ask any of its participants whether they had a student ID card. They also did not ask whether those who were surveyed held a tribal ID card even though, in some states such as Arizona and Georgia, tribal IDs containing a photograph are acceptable for the purpose of voting.[9]

The survey questions used in the Brennan Center's report are suspect and appear to be designed to bolster the report's biased findings.

Military ID cards can also be used to satisfy voter ID requirements under most state laws. Active duty military personnel and reservists all possess a military ID with a photograph (Common Access Card, or CAC), and veterans have a similar ID card. In states like Georgia and Indiana, there are over 130,000 active members of the military who are eligible to vote using their CAC cards.[10] The Veterans Administration reports that there are about 22.7 million veterans age 17 and over in the U.S, each of whom would have an acceptable ID card under the voter ID laws in Georgia and Indiana, as well as the bills recently passed in Rhode Island and Kansas.[11]

The findings in *Citizens Without Proof* are inconsistent with the findings of more objective and unbiased research. For example, a recent article in *The Columbus Dispatch* reported that there are "about 28,000 more [photo IDs] than there are voting-age residents in the state."[12] Nor are these findings unique to Ohio.

Statistics from the U.S. Department of Transportation show that there are currently 205,781,457 valid driver's licenses issued by states across the country for individuals 18 years of age or older,[13] while the U.S. Election Assistance Commission cites 186,874,157 total registered voters.[14] That means there are almost 19 million *more* driver's licenses than registered voters nationwide. This number does not even include the additional 3 percent or 4 percent of individuals who, according to a Federal Election Commission study, have an identification card issued by state motor vehicle agencies in lieu of a driver's license.[15]

These statistics on driver's licenses and non–driver's license ID cards do not include the over 85 million passports issued by the federal government as reported by the U.S. Government Accountability Office.[16] These passports are acceptable forms of identification under state voter ID laws.

10. *See* IND. CODE § 3-5-2-40.5(b) (2011); GA. CODE ANN. § 21-2-417(a)(5). Georgia has 105,914 active duty military personnel. *See* http://usmilitary.about.com/library/milinfo/statefacts/blga.htm. Indiana has 28,477 active duty military personnel. *See U.S. Military Major Bases and Installations*, ABOUT.COM, http://usmilitary.about.com/library/milinfo/statefacts/blin.htm (last visited Aug. 16, 2011).

11. U.S. DEPARTMENT OF VETERANS AFFAIRS, VETERAN POPULATION PROJECTIONS: FY2000 TO FY2036, 2 (Dec. 2010), *available at* http://www.va.gov/vetdata/docs/quickfacts/Population-slideshow.pdf. *See* H. 5680 (R.I. 2011), Sec. 2; H.R. 2067 (Kan. 2011), Sec. 15.

12. *Ohio IDs Exceed Voter-Age Residents*, COLUMBUS DISPATCH, July 24, 2011.

13. U.S. DEP'T. OF TRANSPORTATION, FEDERAL HIGHWAY ADMINISTRATION, HIGHWAY STATISTICS 2009, *available at* www.fhwa.dot.gov/policyinformation/statistics/2009/dl22.cfm.

14. U.S. ELECTION ASSISTANCE COMMISSION, THE IMPACT OF THE NATIONAL VOTER REGISTRATION ACT OF 1993 ON THE ADMINISTRATION OF ELECTIONS FOR FEDERAL OFFICE 2009–1010, 5 (June 30, 2011), *available at* www.eac.gov/assets/1/Documents/2010%20NVRA%20FINAL%20REPORT.pdf.

15. FEDERAL ELECTION COMMISSION, THE IMPACT OF THE NATIONAL VOTER REGISTRATION ACT OF 1993 ON THE ADMINISTRATION OF ELECTIONS FOR FEDERAL OFFICE 1995–1996, 6 (Aug. 1995), *available at* http://www.eac.gov/assets/1/AssetManager/The%20Impact%20of%20the%20National%20Voter%20Registration%20Act%20on%20Federal%20Elections%201995-1996.pdf.

16. U.S. GOVERNMENT ACCOUNTABILITY OFFICE, COMPREHENSIVE STRATEGY NEEDED TO IMPROVE PASSPORT OPERATIONS 11 (July 2008), *available at* http://www.gao.gov/new.items/d08891.pdf.

17. GA. CODE ANN. § 21-2-417(a)(4) (2011).

The findings in* Citizens Without Proof *are inconsistent with the findings of more objective and unbiased research.

Furthermore, government employees—whether federal, state, or local and whether full-time or part-time—also have valid IDs. In Georgia, for example, the voter ID requirement can be met by a "valid employee identification card containing a photograph" issued by any entity of federal, state, or local government.[17] The same is true in Indiana.[18] Nationwide, there are another 22,632,381 people who work for public institutions, most of whom may have this type of ID.[19]

Conclusion

In the end, the Brennan Center report is clear in its intentions, fuzzy in its methodology, and wrong in its conclusions. Such doomsday predictions of widespread disfranchisement are increasingly being exposed as untrue as more legitimate research is performed and reported.

Claims that millions of would-be voters will be turned away on Election Day because of voter ID laws have been disproved in research, in the courtroom, and at the polling place. Studies like *Citizens Without Proof* are the last, desperate fits of a misguided resistance to the spread of common-sense voter ID reform.

—*Hans A. von Spakovsky is a Senior Legal Fellow in the Center for Legal & Judicial Studies at The Heritage Foundation, a former Commissioner on the Federal Election Commission, and former Counsel to the Assistant Attorney General for Civil Rights at the U.S. Department of Justice.* Alex Ingram *is a member of the Young Leaders Program at The Heritage Foundation.*

18. IND. CODE § 3-5-2-40.5(a)(4) (2011).

19. U.S. CENSUS BUREAU, 2009 ANNUAL SURVEY OF PUBLIC EMPLOYMENT AND PAYROLL, *available at* http://www.census.gov/govs/apes/.

Post-Hearing Questions submitted to M. Eric Eversole, Director, Military Voting Project

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June 5, 2012

Michael Eric Eversole
227 A Street NE
Washington, DC 20002

Dear Mr. Eversole,

The Judiciary Committee's Subcommittee on the Constitution held a hearing on Voting Wrongs: Oversight of the Justice Department's Voting Rights Enforcement" on April 18, 2012. Thank you for your testimony.

Questions for the record have been submitted to the subcommittee within five legislative days of the hearing and are attached. We would appreciate a full and complete response as they will be included in the official hearing record.

Please submit your written answers to Sarah Vance at Sarah.Vance@mail.house.gov by June 19, 2012. If you have any further questions or concerns, please contact Dan Huff, Counsel of the Constitution Subcommittee, at Dan.Huff@mail.house.gov or (202) 225-2825.

Thank you again for your participation in the hearing.

Sincerely,

Trent Franks
Chairman
Constitution Subcommittee

Mr. Eversole
June 5, 2012

Questions for the Record from Mr. Franks

1. The Democrat-invited witness, Ms. Weiser, claimed that 11% of the population do not have photo IDs to use for identification at the polls.
    a. Please cite sources supporting or refuting her claim.
    b. Does the 11% estimate include Americans who are not voting-age?
    c. What percentage of the American voting-age population is incarcerated or former felons and therefore ineligible to vote anyway?
    d. What percentage of Americans are medically incapacitated, and therefore unable to vote?
    e. What other categories of Americans are ineligible or unable to vote?
    f. Could these categories of ineligible / incapacitated voters account for the 11% of Americans do not have photo IDs?
    g. Does the 11% estimate take into account people who make up the 60% of voters who refuse to vote anyway (those who choose not to participate in federal elections)?
    h. Does Ms. Weiser's 11% estimate represent likely voters, or those who would not be impacted by voter ID requirements in any event?

Note

July 31, 2012: In reply to follow-up requests to respond to the post-hearing questions for the record, Mr. Eversole opted to decline to respond to these questions.

Response to Post-Hearing Questions from Wendy Weiser, Director of Democracy Program, New York University School of Law

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June 5, 2012

Wendy Weiser
Director, Democracy Program
Brennan Center for Justice
New York University School of Law
161 Avenue of the Americas, 12th Floor
New York, New York 10013

Dear Ms. Weiser,

The Judiciary Committee's Subcommittee on the Constitution held a hearing on Voting Wrongs: Oversight of the Justice Department's Voting Rights Enforcement" on April 18, 2012. Thank you for your testimony.

Questions for the record have been submitted to the subcommittee within five legislative days of the hearing and are attached. We would appreciate a full and complete response as they will be included in the official hearing record.

Please submit your written answers to Sarah Vance at Sarah.Vance@mail.house.gov by June 19, 2012. If you have any further questions or concerns, please contact Dan Huff, Counsel of the Constitution Subcommittee, at Dan.Huff@mail.house.gov or (202) 225-2825.

Thank you again for your participation in the hearing.

Sincerely,

Trent Franks
Chairman
Constitution Subcommittee

Ms. Weiser
June 5, 2012

Questions for the Record from Mr. Franks

1. Ms. Weiser, you claimed that 11% of the population do not have photo IDs to use for identification at the polls.
    a. Please cite sources supporting or refuting this claim.
    b. Does the 11% estimate include Americans who are not voting-age?
    c. What percentage of the American voting-age population is incarcerated or former felons and therefore ineligible to vote anyway?
    d. What percentage of Americans are medically incapacitated, and therefore unable to vote?
    e. What other categories of Americans are ineligible or unable to vote?
    f. Do the above mentioned categories of ineligible / incapacitated voters account for the 11% of Americans that you claim do not have photo IDs?
    g. Does the 11% estimate take into account people who make up the 60% of voters who refuse to vote anyway (those who choose not to participate in federal elections)?
    h. Does your 11% estimate represent likely voters, or those who would not be impacted by voter ID requirements in any event?

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Responses to Questions for the Record from Chairman Franks

Submitted by Wendy R. Weiser
Brennan Center for Justice at NYU School of Law

June 20, 2012

Ms. Weiser, you claimed that 11% of the population do not have photo IDs to use for identification at the polls.

a. Please cite sources supporting or refuting this claim.

The statistic I cited is based on a November 2006 study published by the Brennan Center for Justice.[1] That report, called *Citizens Without Proof*, documents the results of a national survey of 986 voting-age citizens conducted by the Opinion Research Corporation, a prominent independent research firm. One of the survey's central findings is that 11% of voting-age United States citizens do not have current government-issued photo IDs.[2] The survey also found that the rate of photo ID possession is significantly lower for certain populations. Specifically, it found that 15% of citizens earning $35,000 or less per year, 18% of citizens aged 18-24 years old, 18% of citizens 65 or older, and 25% of African-Americans lack current government-issued photo IDs.[3]

Since its publication, *Citizens Without Proof* has been widely cited by scholars, legal experts, and the media, and its findings have been widely accepted. Its principal findings have been repeatedly confirmed by multiple independent studies. For example:

- The 2001 Carter-Ford Commission on Election Reform found that between 6 and 11 percent of voting-age citizens lack driver's licenses or alternate state-issued photo IDs and that that approximately 8% of already-registered voters lack a driver's license.[4]
- A 2007 Indiana survey conducted by the Washington Institute for the Study of Ethnicity and Race found that roughly 13% of registered Indiana voters lack an Indiana driver's license or an alternate Indiana-issued photo ID.[5] It also found

[1] BRENNAN CTR. FOR JUSTICE, CITIZENS WITHOUT PROOF: A SURVEY OF AMERICANS' POSSESSION OF DOCUMENTARY PROOF OF CITIZENSHIP AND PHOTO IDENTIFICATION (2006), *available at* http://www.brennancenter.org/page/-/d/download_file_39242.pdf.
[2] *Id.* at 3.
[3] *Id.*
[4] THE NAT'L COMM'N ON FED. ELECTION REFORM, TO ASSURE PRIDE AND CONFIDENCE IN THE ELECTORAL PROCESS 30 (2001), *available at* http://f11.findlaw.com/news.findlaw.com/hdocs/docs/election2000/electionreformrpt0801.pdf.
[5] Matt A. Barreto, Stephen A. Nuño & Gabriel R. Sanchez, *The Disproportionate Impact of Indiana Voter ID Requirements on the Electorate* 18 tbl.1.1.b (Washington Inst. for the Study of Ethnicity and Race,

that 18.1% of registered African-American voters, 16% of voters over the age of 70, and 17.5% of voters earning less than $40,000 per year voters lacked a current driver's license or other state-issued ID.[6] Including both registered and eligible unregistered voters, the survey found that 16% of all eligible adults in the state did not have a valid driver's license or other government photo ID.[7]

- A 2009 paper found that 81.4% of all white citizen adults in Indiana had access to a driver's license, compared to only 55.2% of black citizen adults. It also found that over 17% of registered Indiana voters did not have photo IDs with names that matched their names on the voter file.[8]
- A 2007 report based on exit polls from the 2006 elections in California, New Mexico, and Washington State found that 12% of actual voters did not have a valid driver's license.[9] This study also found that minority voters were approximately 10% less likely to have a valid driver's license than white voters, and people over 65 were 6% less likely to have one.[10]
- A national survey conducted by prominent academics after the November 2008 election found that 95% of respondents claimed to have a driver's license, but that 16% of those respondents lacked a license that was both current and valid.[11]
- Data from the South Carolina State Election Commission gathered in 2010 indicated that about 7% of the state's registered voters lack a valid photo ID issued by the DMV.[12] In multiple counties, this rate exceeded 11%,[13] and 35.8% of the voters without photo identification were African American.[14]

Working Paper, Nov. 8, 2007), *available at* http://depts.washington.edu/uwiser/documents/Indiana_voter.pdf.

[6] *Id.* at 18 tbl.1.1.b.

[7] *Id.* at 19tbl.1.2.

[8] Matt A. Barreto, Stephen A. Nuño & Gabriel R. Sanchez, *The Disproportionate Impact of Indiana Voter ID Requirements on the Electorate New Evidence From Indiana*, PS: POLITICAL SCIENCE & POLITICS, 111, 112-113 tbl.2 (Jan. 2009), *available at* http://faculty.washington.edu/mbarreto/papers/PS_VoterID.pdf.

[9] Matt A. Barreto, Stephen A. Nuño & Gabriel R. Sanchez, *Voter ID Requirements and the Disenfranchisement of Latino, Black and Asian Voters*, 2007 AMERICAN POLITICAL SCIENCE ASS'N ANNUAL CONFERENCE 13, 15 (Sept. 1, 2007), *available at* http://faculty.washington.edu/mbarreto/research/Voter_ID_APSA.pdf.

[10] *Id.* at 16, 19.

[11] MICHAEL ALVAREZ ET AL., 2008 SURVEY OF THE PERFORMANCE OF AMERICAN ELECTIONS: FINAL REPORT 47 (2009), *available at* http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Election_reform/Final%2520report20090218.pdf.

[12] *See* Ltr. to T. Christian Herren, Chief, Voting Section, U.S. Department of Justice, from American Civil Liberties Union Foundation, Inc. et al., Exhibit A at 2 (Aug. 5, 2011), *available at* http://brennan.3cdn.net/9da6941214048cfc0a_rdm6yh3s5.pdf.

[13] *Id.*

[14] *Id.* at 2-3.

- A 2008 post-election survey conducted in 18 states found that 8% of registered voters did not have an up-to-date driver's license or other state-issued photo ID.[15]

I am aware of only one study that has come to a different conclusion. A 2007 survey of registered voters in Maryland, Indiana, and Mississippi conducted by the Center for Democracy and Election Management (CDEM) found that only 1.2% of registered voters in those states lacked a government-issued photo ID.[16] This three-state survey does not, in my view, undermine *Citizens Without Proof*. First, the three-state survey included only registered voters from three states, while *Citizens Without Proof* included registered and unregistered eligible voters from all states, and so differing results could be expected. Second and more importantly, the three-state survey is an outlier and has significant methodological flaws.[17] Contrary to common practice, the study did not adjust its survey sample for underrepresentation of minority and poorer populations. Because virtually every other survey has concluded that these populations disproportionately lack photo IDs, this is a major flaw that means the survey has little statistical value.[18]

The only source I am aware of that criticizes *Citizens Without Proof* is a paper by a well-known proponent of photo ID laws for voting, Hans von Spakovsky, and Alex Ingram of the Heritage Foundation.[19] In my view, the criticisms in that paper are completely baseless and reflect a misreading of the survey. My colleagues and I published a thorough response to that paper rebutting each of its criticisms and claims.[20]

b. Does the 11% estimate include Americans who are not voting-age?

No. *Citizens Without Proof* included only voting-age American citizens in its survey.[21] Similarly, the other surveys and reports referenced in response to question (a) above relied on pools of actual voters, registered voters, or voting-age American citizens. None of those studies included Americans under the age of 18.

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[15] LORRIE FRASURE ET AL., 2008 COMPARATIVE MULTI-RACIAL SURVEY TOPLINES 24 tbl.D21 (2008), *available at* http://cmpstudy.com/assets/CMPS-toplines.pdf.
[16] *See* ROBERT PASTOR ET AL., CTR. FOR DEMOCRACY AND ELECTION MGMT., AMERICAN UNIVERSITY, VOTER IDS ARE NOT THE PROBLEM: A SURVEY OF THREE STATES (2008), *available at* www.american.edu/ia/cdem/pdfs/VoterIDFinalReport1-9-08.pdf.
[17] *See* WENDY WEISER, KEESHA GASKINS & SUNDEEP IYER, "CITIZENS WITHOUT PROOF" STANDS STRONG: A RESPONSE TO VON SPAKOVSKY AND INGRAM, BRENNAN CENTER FOR JUSTICE (Sept. 8, 2011), at http://www.brennancenter.org/content/resource/citizens_without_proof_stands_strong/.
[18] *Id.*
[19] HANS A. VON SPAKOVSKY AND ALEX INGRAM, THE HERITAGE FOUND., WITHOUT PROOF: THE UNPERSUASIVE CASE AGAINST VOTER IDENTIFICATION (2011), *available at* http://www.insideronline.org/summary.cfm?id=15909.
[20] *See* Weiser et al., *supra* note 17.
[21] BRENNAN CTR. FOR JUSTICE, *supra* note 1, at 1.

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c. What percentage of the American voting-age population is incarcerated or former felons and therefore ineligible to vote anyway?

It is not the case that all Americans with past felony convictions or even all incarcerated Americans are ineligible to vote. Eligibility to vote after a criminal conviction varies significantly from state to state. Two states—Vermont and Maine—never disenfranchise citizens convicted of a crime, even while they are incarcerated. At the other end of the spectrum, four states—Florida, Iowa, Kentucky, and Virginia—permanently disenfranchise individuals convicted of felonies for life unless they apply for and receive individualized, discretionary clemency after completing a criminal sentence. The other 44 states fall somewhere in between and restore voting rights to those with prior criminal convictions in certain circumstances.[22]

Because state laws and conviction, incarceration, probation, and parole rates vary widely, it is difficult to determine the number of Americans currently disenfranchised as a result of criminal convictions. Scholars estimate that up to 5.3 million American citizens are denied the right to vote due to a criminal conviction in their past.[23] Up to 4 million of those Americans are not incarcerated, but rather live, work and raise families in our communities.[24] The leading scholars examining the numerical impact of felony disenfranchisement laws in the United States summarized the numbers as follows:

> [F]elon disenfranchisement laws account for over 5 million people in the United States who cannot vote (Manza & Uggen 2005). This is the largest group of disenfranchised adult American citizens (Keyssar 2000). Of the estimated 5.3 million disenfranchised felons in 2004, only 26%, or 1.4 million, were actually in prison or in jail. The rest were either living in their communities as felony probationers (1.3 million or 25% of the total), parolees (477,000 or 9%), or as *former* felons who reside in states in which they are

[22] *See generally* Brennan Center for Justice, *Criminal Disenfranchisement Laws Across the United States*, *available at* http://www.brennancenter.org/dynamic/subpages/download_file_48642.pdf.
[23] ERIKA WOOD, BRENNAN CTR. FOR JUSTICE, RESTORING THE RIGHT TO VOTE 2 (2009), *available at* *http://www.brennancenter.org/content/resource/restoring_the_right_to_vote/*; *see also* JEFF MANZA & CHRISTOPHER UGGEN, LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY 76 (2006). This number is difficult to ascertain precisely at any point in time due to the states' widely varying voting rights laws and the constantly fluctuating parole and probation populations of the 50 states. For example, thirteen states and the District of Columbia currently allow people on probation and parole to vote: Hawaii, Illinois, Indiana, Massachusetts, Michigan, Montana, New Hampshire, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island and Utah. Statistics on state corrections populations, by year, are available from the Bureau of Justice Statistics at the following link: http://bjs.ojp.usdoj.gov/content/glance/tables/corr2tab.cfm.
[24] *Id.*

> ineligible to vote (2 million, or 39%). Together, these disenfranchised citizens represent more than 2% of the voting age population....[25]

Citizens Without Proof did not capture any citizens who are currently incarcerated. While it may have captured some citizens who are disenfranchised due to a criminal conviction, that would not have had a significant impact on its findings, since less than 2% of voting-age Americans who are not incarcerated are disenfranchised, and since the disenfranchised population has other characteristics that make them less likely to be captured by telephone surveys. Several of the other surveys described in response to question (a) focused on registered or actual voters and thus were even less likely to have captured individuals rendered ineligible to vote because of a past criminal conviction.

d. What percentage of Americans are medically incapacitated, and therefore unable to vote?

Americans who are disabled, ill, or medically incapacitated are, in fact, eligible to vote and many do. Americans who have been found mentally incompetent to vote are ineligible to vote in a majority of states. Those Americans are highly unlikely to have been captured in any of the telephone surveys described in response to question (a).

The number of Americans disenfranchised because they are mentally incompetent is difficult to estimate but likely very small. According to the Bazelon Center for Mental Health Law and the National Disabilities Rights Network, 39 states disenfranchise individuals who have been found to be mentally incompetent to vote, typically by a court, and 11 states do not disenfranchise anyone because of mental disabilities.[26] One reporter estimated that in 2001, 1.2 million people had been found mentally incompetent and disenfranchised by a court.[27] That is less than 1% of the citizen voting-age population.

e. What other categories of Americans are ineligible or unable to vote?

There are no other categories of Americans who are categorically ineligible to vote, other than those under the age of 18, those who have been adjudicated mentally incompetent to vote in certain states, and those who have been disenfranchised because of criminal convictions in certain states.[28] Many other Americans may be unable to vote because of legal, administrative, or physical barriers to access to the franchise.

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[25] Christopher Uggen, Angela Behrens, and Jeff Manza, *Criminal Disenfranchisement*, ANNUAL REV. LAW SOC. SCI. 1:307–22 (2005), *available at* http://www.soc.umn.edu/~uggen/Uggen_Behrens_Manza_ARLSS_05.pdf

[26] BAZELON CENTER FOR MENTAL HEALTH LAW & NATIONAL DISABILITIES RIGHTS NETWORK, A GUIDE TO THE VOTING RIGHTS OF PEOPLE WITH MENTAL DISABILITIES 5-6 (2008).

[27] Michael Chandler & Jamie York, *Also Turned Away*, THE NATION (Nov. 24, 2003), *available at* http://www.thenation.com/article/also-turned-away#.

[28] This conclusion is based on an online search of state laws and organizational reports.

f. Do the above mentioned categories of ineligible/incapacitated voters account for the 11% of Americans that you claim do not have photo IDs?

No. As noted above, *Citizens Without Proof* and the other surveys described in response to question (a) did not include Americans under the age of 18 or incarcerated individuals. It is possible but highly unlikely that *Citizens Without Proof* captured a small number of individuals who may have been disenfranchised due to past criminal convictions or adjudications of mental incompetence. Together, those categories of Americans make up less than 3% of the citizen voting-age population—far less than the 11% of Americans found to lack government-issued photo IDs. And, since those populations have less access to telephones and are less likely to answer telephone surveys, they likely make up far less than 3% of the respondents in our survey or in any of the other surveys discussed in response to question (a).

g. Does the 11% estimate take into account people who make up the 60% of voters who refuse to vote anyway (those who choose not to participate in federal elections)?

Citizens Without Proof included all voting-age citizens, regardless of whether they had previously participated in a federal election. Some other studies described in response to question (a) did limit their scope to registered voters or to those who had participated in a particular election.

The United States does suffer from distressingly low voter participation rates. Overall, only 45.5% of voting-age citizens voted in the 2010 elections, and 64% voted in the 2008 elections, according to U.S. Census data.[29] I am not aware of a recent federal election in which a full 60% of eligible citizens did not participate.

Although between 36 and 55 percent of voting-age Americans did not participate in the most recent federal elections, that does not mean that those individuals have never before voted in federal elections and will not do so in the future. For example, according to exit poll research, more than 11% of the electorate voted for the first time in the 2004 election, and in 2008, more than 12% did.[30] Among black voters, 17% told researchers they voted for the first time in 2004, and in 2008, 19%. Among Latino voters, 22% told researchers they voted for the first time in 2004, and in 2008, 28%.[31] Many of these new

[29] U.S. CENSUS BUREAU, VOTING AND REGISTRATION IN THE ELECTION OF NOVEMBER 2008 1 (May 2010), at http://www.census.gov/prod/2010pubs/p20-562.pdf; U.S. Census Bureau, Voting and Registration in the Election of November 2010 detailed tables, Tbl. 1 (Oct. 2011), at http://www.census.gov/hhes/www/socdemo/voting/publications/p20/2010/tables.html.
[30] *See* LORRAINE C. MINNITE, FIRST-TIME VOTERS IN THE 2008 ELECTION, PROJECT VOTE (April 2011), at http://projectvote.org/images/publications/Reports%20on%20the%20Electorate/FINAL%20First-Time-Voters-in-2008-Election.pdf.
[31] *Id.*

voters were previously eligible individuals who did not participate in prior federal elections but were engaged in 2004 or 2008 to exercise their fundamental right to vote.

Even if an individual has not voted previously in a federal election, that does not mean that the individual may be barred from doing so in the future. It is my opinion that all eligible citizens should be entitled to exercise their fundamental right to vote without undue hardship regardless of whether they have voted in prior federal elections.

h. Does your 11% estimate represent likely voters, or those who would not be impacted by voter ID requirements in any event?

The 11% figure from *Citizens Without Proof* represents the number of voting-age American citizens who do not have government-issued photo ID, regardless of whether they are likely voters. Several of the other studies discussed in response to question (a) focus on registered or actual voters.

It is my opinion that all eligible citizens who do not have photo ID would be impacted by state law requirements that citizens show photo ID to vote because those citizens would lose the ability to participate in elections—and exercise their fundamental right to vote—should they choose to do so. In my opinion, the fact that a citizen may not have previously voted or may not vote frequently does not justify depriving her of the ability to vote in the future.

Response to Post-Hearing Questions from J. Christian Adams, Attorney, Election Law Center, PLLC

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June 5, 2012

J. Christian Adams
11 West Glendale
Alexandria, Virginia 22301

Dear Mr. Adams,

The Judiciary Committee's Subcommittee on the Constitution held a hearing on Voting Wrongs: Oversight of the Justice Department's Voting Rights Enforcement" on April 18, 2012. Thank you for your testimony.

Questions for the record have been submitted to the subcommittee within five legislative days of the hearing and are attached. We would appreciate a full and complete response as they will be included in the official hearing record.

Please submit your written answers to Sarah Vance at Sarah.Vance@mail.house.gov by June 19, 2012. If you have any further questions or concerns, please contact Dan Huff, Counsel of the Constitution Subcommittee, at Dan.Huff@mail.house.gov or (202) 225-2825.

Thank you again for your participation in the hearing.

Sincerely,

Trent Franks
Chairman
Constitution Subcommittee

Mr. Adams
June 5, 2012

Questions for the Record from Mr. Franks

1. The Democrat-invited witness, Ms. Weiser, claimed that 11% of the population do not have photo IDs to use for identification at the polls.
    a. Please cite sources supporting or refuting her claim.
    b. Does the 11% estimate include Americans who are not voting-age?
    c. What percentage of the American voting-age population is incarcerated or former felons and therefore ineligible to vote anyway?
    d. What percentage of Americans are medically incapacitated, and therefore unable to vote?
    e. What other categories of Americans are ineligible or unable to vote?
    f. Could these categories of ineligible / incapacitated voters account for the 11% of Americans do not have photo IDs?
    g. Does the 11% estimate take into account people who make up the 60% of voters who refuse to vote anyway (those who choose not to participate in federal elections)?
    h. Does Ms. Weiser's 11% estimate represent likely voters, or those who would not be impacted by voter ID requirements in any event?

Note

July 31, 2012: In reply to questions for the hearing record, Mr. Adams' responses would be identical to those of Ms. Mitchell's. Please refer to Ms. Mitchell's responses and the attachments submitted with her response.

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