Written Questions from Sen. Dick Durbin
Senate Rules Committee
June 20, 2007

Questions for Hans von Spakovsky (FEC Nominee)

1. At your nomination hearing, you defended the publication of your Publius article. I asked you if you had received written clearance to publish this article, but you sidestepped the question.

A. Did you receive any written clearance to publish this article? Please produce all written clearance or guidance you received from your supervisors or from Justice Department ethics officials regarding your Publius publication, including the Walter Dellinger opinion you cited at the hearing.

B. Please provide the names and titles of all Justice Department officials you consulted about your Publius article, indicating whether you told them you intended to publish the article using a pseudonym. If any of these officials raised concerns, please discuss the nature of their concerns.

Response: I provided a draft of the entire article to the Principal Deputy Assistant Attorney General, Sheldon Bradshaw, to review, and the draft included the name of the author, Publius. At Mr. Bradshaw's suggestion after he reviewed the article, we called the designated Civil Rights Division ethics officer for advice on the rules governing publication of a legal article in a law review. We were advised orally that any employee of DOJ could publish an article as long as the employee followed 5 C.F.R. §2635.703(a) and §2635.807(b). 5 C.F.R. §2635.703(a) prohibits the disclosure by a federal employee of "nonpublic information." Section 2635.807(b) requires that the employee "not use or permit the use of his official title or position to identify him in connection with his teaching, speaking or writing activity." Since there was no nonpublic information in the law review article and I did not use my title or provide any information that would lead the public to believe that the views expressed were "the views of the agency or the United States," I was in full compliance with the regulations and able to publish the article. I have no written documents related to this ethics issue. The legal opinion by Walter Dellinger is available at: http://www.usdoj.gov/olc/naausa.htm.

2. As Chairwoman Feinstein discussed at your nomination hearing, executive branch regulation 5 C.F.R. 2635.802 prohibits federal employees from engaging in conflicts of interest. The rule states: "An employee shall not engage in outside employment or any other outside activity that conflicts with his official duties.... Employees are cautioned that even though an outside activity may not be prohibited under this section, it may violate other principles or standards set forth in this part or require the employee to disqualify himself from participation in certain particular matters."

A. Why did you conceal your identity by writing the Publius article under a pseudonym? Did you feel you might violate 5 C.F.R. 2635.802 if you used your real name, since, at the time the article was published, you were reviewing the Georgia photo ID law and other sensitive voting rights matters?

B. Did you ever disqualify or recuse yourself from any matters during your service at the Justice Department? If so, please explain.

Response: I published this article under a pseudonym because I wanted to fully comply with §2635.807(b), and although I could have written the article under my name with a disclaimer, I did not want to engage in any action that could possibly lead anyone to conclude that the views expressed were "the views of the agency or the United States." In my law review article, I recommended very generally that voter identification requirements, in addition to other election procedures, be adopted to improve the integrity of elections from a public policy standpoint, similar to the same recommendation made by the Baker Carter Commission in September of 2005. *See* "Building Confidence in U.S. Elections," *Report of the Commission on Federal Election Reform*, p. 18-21. Congress itself imposed the first national voter identification requirement when it passed the Help America Vote Act of 2002. Section 303(b) of HAVA requires voters who register by mail and are voting for the first time to present certain identification documents. There is nothing remarkable about the views expressed in my article. Most of the lawyers with whom I worked at the Division also had strong opinions on how certain laws could be improved or changed, or how the applicable law should be enforced, and these opinions did not interfere with their ability to enforce the requirements of the law.

I have written on public policy issues related to voting and elections, including testifying before the Rules Committee in 2001 on this very issue. Writing on election and voting issues does not pose a conflict of interest under § 2635.802 or any applicable rule of professional conduct and did not interfere with my ability to objectively review the application of Section 5 to a specific statute. To borrow from a parallel situation, a judge is not required to recuse himself from a case simply because he has expressed views on the subject at issue, and there is ample legal precedent to that effect For example, the Sixth Circuit specifically held that a judge was not required to recuse himself in an eminent domain case simply because he had previously written a law review article on the general subject. *See Goodpasture v. Tennessee Valley Authority*, 434 F.2d 760, 765 (6th Cir. 1970) ("We hold that District Judge William E. Miller did not err in failing to recuse himself because of a law review article written by him entitled 'Federal and State Condemnation Proceedings – Procedure and Statutory Background.'"). *See also Laird v. Tatum*, 409 U.S. 824, 831 (1972) (memorandum of Justice Rehnquist) ("My impression is that none of the former Justices of this Court since 1911 have followed a practice of disqualifying themselves in cases involving points of law with respect to which they had expressed an opinion or formulated policy prior to ascending to the bench."); *Rosquist v. Soo Line R.R.*, 692 F.2d 1107 (7th Cir. 1982) ("Judge Grady had, in the past, written and spoken on the subject of contingent fees. He was not required, however, to recuse himself merely because

he holds and had expressed certain views on that general subject."); *U.S. v. Crowell*, 586 F.2d 1020, 1027 (4th Cir. 1978) ("The fact that the district judge had researched the problems in advance and was able to make an immediate ruling does not establish prejudgment."); *Lawton v. Tarr*, 327 F.Supp. 670, 673 (E.D.N.C. 1971) ("I do not believe that my strong aversion to the Vietnam War and my belief that it is the most tragic national mistake made in my lifetime will have the slightest effect or influence upon my judgment as to the time of termination of exposure under the selective service law. It is hornbook law that attitude or feeling a judge may entertain toward the subject matter of a case does not disqualify him.").

I completed writing the article and submitted it for publication before the Georgia matter was submitted to the Department. At the time I submitted the article for publication, there were no voter identification matters pending before the Department. Furthermore, the article dealt with proposed changes to election procedures, not civil rights statutes.

I did not recuse myself from any matters while I was employed by the Department.

3. At your nomination hearing, you stated that Justice Department employees must heed only two rules in order to publish an article: (1) "that you cannot reveal any confidential information," and (2) "that you cannot use your title such that anyone reading it would believe that this is the official position of the agency."

However, according to a written statement by Professor Michael Pitts – a former career attorney in the Voting Section who wrote a law review article in 2005 and submitted it to you for review – you did not apply this two-part standard to others. Professor Pitts wrote:

> "Hans [von Spakovsky] did not take kindly to the views expressed in the article. In particular, he took offense to the discussion of partisanship in Section 5. He sent me an e-mail and we had a phone conversation during which he expressed the view that I should not be allowed to publish the portion of the article discussing partisanship."

Professor Pitts indicates that you ultimately relented and permitted him to publish the full article, but he wrote that his experience provides another instance "in which Hans [von Spakovsky] appeared to want to suppress a voice of someone with whom he disagreed."

A. In light of your testimony to the Senate Rules Committee about the two rules for publication, why did you initially attempt to stop Professor Pitts from publishing a portion of his law review?

B. Did you ever attempt to stop any other career attorney in the Justice Department from publishing portions of any articles? If so, please explain.

Response: I did not attempt to prevent Mr. Pitts from publishing any article as best I can recall and had no authority to do so. I have not seen his written statement to which you refer, so I am at a disadvantage in addressing his criticisms, although I presume he is referring to an article

that was published in the Nebraska Law Review in 2005. I did have discussions with Michael Pitts regarding an article he was submitting for publication on the renewal of Section 5 of the Voting Rights Act. I did not "take offense" with anything he wrote, though I disagreed with certain positions he advanced and attempted to persuade him that his view that the administration of the Section 5 review process had been "partisan" was not supported by either facts or court decisions. This debate of issues was an attempt to change his mind, not to keep him from publishing the article. He was not persuaded and submitted his article for publication as drafted. I was certainly not offended by his doing so. Mr. Pitts' article met the requirements of the regulations and I never believed he "should not be allowed to publish" it. In Mr. Pitts' article, he specifically thanked me (along with six others) for my "helpful ideas and comments." *See* "Let's Not Call the Whole Thing Off Just Yet: A Response to Samuel Issacharoff's Suggestion to Scuttle Section 5 of the Voting Rights Act," Michael J. Pitts, 84 NEB. L. REV. 605 fn a1 (2005) ("Thanks to .... and Hans von Spakovsky for their helpful ideas and comments.").

I never attempted to stop any staff attorneys from publishing any article.

4. According to an article in the June 21, 2007 *Washington Post*, your Civil Rights Division supervisor, Bradley Schlozman, involuntarily transferred three attorneys out of the Division's Appellate Section because he wanted to "make room for good Americans." And at a June 5, 2007 hearing before the Senate Judiciary Committee, Mr. Schlozman admitted that he boasted of hiring conservatives and Republicans into the Division. The *Washington Post* article also indicates Mr. Schlozman ordered that cases be taken away from certain attorneys in the Appellate Section whom he believed were not "on our team," and the article says Mr. Schlozman, upon learning that an attorney in that section had voted for John McCain rather than George Bush, asked "Can we still trust her?"

A. Did you yourself ever make comments along these lines or tell anyone that you wanted to hire more conservatives and Republicans into the Civil Rights Division?

B. Do you believe it is appropriate to express doubts about the trustworthiness of an attorney based on whom they vote for in elections?

C. Did you or Mr. Schlozman ever seek to involuntarily transfer any attorneys in the Voting Section? If so, please explain.

D. Did you or Mr. Schlozman ever take cases away from, or otherwise take adverse actions against, any attorneys in the Voting Section? If so, please explain.

Response: I do not recall making any statements similar to the ones quoted above. I believe attorneys considered for employment at the Department of Justice should be judged based on their performance.

I did not transfer attorneys out of the Voting Section. I was a career Counsel and did not have the authority to hire or to transfer any employees. I also had no responsibility for the Appellate Section and was not involved in any personnel matters involving that Section. Nor did I make final decisions on who was hired in the Division or the Voting Section. I was not aware of the voting history of staff that I worked with in the Division, and I do not recall being involved in any discussions related to the transfer of attorneys in the Voting Section. My only concern was that the Division and the Voting Section hire experienced and well-qualified lawyers. I do not recall if Mr. Schlozman had any Voting Section personnel transferred.

I did not take any cases "away" from specific attorneys or take any other adverse actions against staff attorneys. With regard to Mr. Schlozman taking "adverse" actions against employees, I recall that a written reprimand was issued against at least one employee in the Voting Section. As far as I know, this reprimand was completely unrelated to any views of the employee. I am not aware of any other "adverse" actions taken by Mr. Schlozman against Voting Section attorneys.

5. In an August 18, 2005 email that has been made public, you warned the Election Assistance Commission not to award a contract to Moritz law school at Ohio State University because one of the researchers there had written skeptical comments about photo ID requirements. You wrote:

> "The point is the strongly held, pre-existing notions about both provisional balloting and voter identification espoused by the Associate Director of Moritz's election law program and his advocacy on these issues. This raises serious concerns about the propriety of Moritz being provided with federal tax dollars to conduct non-partisan and impartial research into such a sensitive and high profile area of election law."

In light of your own strongly held, pre-existing notions about voter identification, couldn't your own words be used to describe yourself?

Response: I respectfully disagree with that characterization. Regarding the email sent to the U.S. Election Assistance Commission, I was not "warning" the Commission of anything. The contract had already been awarded. I was concerned that the empirical research and subsequent analysis would not be valid given the prior categorical statements of the researcher that voter identification laws were discriminatory, and therefore the EAC's mission would be compromised. . The issue was not the researchers' ability to evaluate the laws, but rather their objectivity in designing the study and collecting and analyzing data. Under the HAVA statute, the duty of the Board of Advisors to the EAC is to provide the EAC Commissioners with advice on the work being done by the agency. I thought it was incumbent that as a member of the Advisory Board, I share my concerns that researchers be objective in their work. I believe that action was entirely appropriate and good advice. My concern over the research is distinct from a lawyer's ability to apply a specific law to a set of specific facts regardless of personal views, something inherent in a lawyer's training and experience. My role as an attorney advising the

senior leadership did not implicate the same concerns.

6. At your nomination hearing, I asked you about the Justice Department's August 2005 decision to pre-clear the Georgia photo ID law, which you agreed with and defended. I asked you about the discriminatory impact the Georgia photo ID law would have on minority voters. You testified: "The racial data in the data that the DMV sent showed that of the individuals who had photo IDs, a slightly higher percentage of them were African American than the percentage of African Americans in the voting age population in the State."

However, according to the career staff's 51-page Section 5 Recommendation Memorandum – which can be accessed on the *Washington Post* website – 26.5% of the voting age population in Georgia is African American (see page 2), while only 17.7% of photo ID holders are African American (see page 14). This data contradicts your testimony.

Do you stand by your testimony? If so, please explain why, and please submit to the Senate Rules Committee the data and analysis you relied on in making this assertion.

Response: As I recall, the memorandum that was leaked to the *Washington Post* was a preliminary draft that did not contain all of the data and analysis conducted by the Voting Section and all of the attorneys assigned to this review, particularly the portions that supported preclearance. I have not worked at the Division for more than a year and a half, and I do not have access to the Section 5 review or any of the data and investigative reports contained in the file. Therefore, I am not in a position to supply specific data to the Committee. It is my understanding that there was a complete and thorough review of all of the information and data submitted by the State of Georgia, including four sets of data received from the state on driver's licenses, before the Voting Section Chief completed his review and made his recommendation to the Front Office of the Civil Rights Division. I was not a member of the team of lawyers in the Voting Section that was doing the basic investigation and analysis, so I did not review every document or all of the data submitted to the Voting Section. My job was to review and analyze the final memorandum sent to the Front Office by the Voting Section Chief on the Georgia identification law and provide my recommendation to the senior leadership of the Division.

As the Assistant Attorney General of the Office of Legislative Affairs, William Moschella, explained in a letter to Senator Christopher Bond dated October 7, 2005, about the Georgia voter identification submission, the data received by the Division showed the following:

- Almost 6.5 million Georgians possessed identification from the Department of Motor Vehicles ("DMV") acceptable under the state statute– more than the Census total projected voting age population of Georgia when ineligible individuals such as noncitizens and prisoners are subtracted.
- Thus, there were 2 million more issued state DMV identification cards then there were registered voters.
- The racial composition of the DMV data indicated that 28% were African American, a percentage slightly higher than the African-American percentage of the voting age

population in Georgia.

- Information from the state university system, which issues identification cards to all students that are acceptable under the law, showed that the number of African-American students enrolled and thus possessing acceptable identification was slightly higher than the percentage of African-American students in the voting age population.
- Census data showed that about 14.3% of whites and 19.4% of African-American Georgians worked for governments at the local, state or federal level; therefore, a higher percentage of African-Americans than whites would have access to acceptable government-issued employee identification cards.
- Individuals who were unable to afford an identification card could receive one without paying a fee and the state had a mobile licensing program traveling to counties without licensing offices.
- No identification card was needed to vote by absentee ballot.

Mr. Moschella's letter also cites other factors that were taken into account by the Division in making its decision. Applying the applicable retrogression standard under Section 5, as interpreted by the Supreme Court, the Section Chief concluded that the State of Georgia had met its burden and that no objection was warranted.

7. At your nomination hearing, you cited one other piece of data to justify your belief that the Georgia photo ID law was not discriminatory. You testified: "The data received from the Board of Regents of the State of Georgia – and college IDs were also an acceptable ID – showed that a slightly higher percentage of African American students were enrolled in the State colleges than in the voting age population."

This assertion is also contradicted by the data set forth in the career staff's Section 5 Recommendation Memorandum. According to data discussed in the memorandum, your testimony is true only if no one other than blacks and whites were enrolled in Georgia state universities in 2005. (See page 17 of the memorandum.) If other minority college students were factored into the analysis, the percent of black college students would be well below the percent of blacks in the voting age population. In any event, the Section 5 Recommendation Memorandum concluded that college ID data were incomplete because they did not include information about students at Georgia private schools.

In this light, do you concede that your testimony to the Senate Rules Committee was misleading and inaccurate? If not, please provide the data and analysis that supports your testimony on this point.

Response: My testimony was neither misleading nor inaccurate. Please see my prior response that provides information on this issue.

8. At your nomination hearing, I asked if you were aware in 2005 of a University of Wisconsin study that showed that over 50% of African Americans and Hispanics did not have a valid

driver's license. You testified: "Senator, we weren't looking at the Wisconsin study. What we were looking at was the data submitted by the State of Georgia."

Your testimony is once again contradicted by the career staff's Section 5 Recommendation Memorandum, which discusses the Wisconsin study on pages 26-27 in a section entitled "Analogous Wisconsin Study." The memorandum explained that the Georgia DMV and population data were deficient and "of a quality far below what we are accustomed to using in the Voting Section," and therefore looked at an analogous state where the data were more robust. The memorandum explained that the Wisconsin study found that 24% of the African-American voting age population lives in a household without a car, compared to 8% for whites, and stated: "This is nearly the same ratio as the disparity among black and white vehicle access in Georgia households."

Do you concede that your testimony about the Wisconsin study was misleading and inaccurate?

Response: My testimony was neither misleading nor inaccurate. I have not worked at the Division for more than a year and a half, and I do not have access to the Section 5 review or any of the data and investigative reports contained in the file. I was not a member of the team of lawyers in the Voting Section that was doing the basic investigation and analysis, so I did not review every single document or all of the data submitted to the Voting Section. I do not recall looking at the Wisconsin study. I do not recall what information about the Wisconsin study, if any, was in the final memorandum submitted by the Voting Section chief to the Office of the Assistant Attorney General. Given this, I have no opinion as to the validity of comparing information from Wisconsin to Georgia.

My job was to review and analyze the final memorandum sent to the Front Office by the Voting Section Chief on the Georgia identification law and provide my recommendation to the senior leadership of the Division based on that review – I carried out my assignment. The memorandum that was leaked to the *Washington Post* was a preliminary draft that did not contain all of the data and analysis conducted by the Voting Section and all of the attorneys assigned to this review.

9. The Section 5 Recommendation Memorandum in the Georgia photo ID case concluded:

> "While no single piece of data confirms that blacks will [be] disparately impacted compared to whites, the totality of the evidence points to that conclusion.... Census data reflects that blacks lack access to vehicles at roughly four to five times the rate of whites. Other publicly available data reflects that blacks are less likely to have passports, employer ID, and other forms of acceptable photo identification compared to whites, and greater access to some of the forms of non-photo identification that are repealed."

A. Did you disagree with this conclusion in August 2005? If not, why did you favor pre-clearing the Georgia photo ID law? If so, what was the basis of

your disagreement?

B. Prior to your decision to support pre-clearing the Georgia photo ID law in August 2005, did you ever read the career review team's Section 5 Recommendation Memorandum in the Georgia photo ID case? If so, why did you disregard their analysis on so many issues?

Response: To the extent this question asks for or assumes what my legal advice was regarding this matter, I cannot answer based on my ethical and professional obligations as a lawyer to protect the attorney-client relationship. I cannot answer questions regarding the contents of privileged communications. In the course of my duties I reviewed the final memorandum submitted to the Office of the Assistant Attorney General by the Chief of the Voting Section. For further information on the Georgia submission, please see my answer to Question 6.

10. According to a January 23, 2006 *Washington Post* article, the Justice Department pre-cleared the Georgia photo ID law on August 26, 2005, even though the State of Georgia had just provided the Department with new data that same day. The new data, according to the article, reinforced the view of the career staff that the Georgia law would have a discriminatory effect on minority voters.

Indeed, in a March 2007 study entitled "Worth a Thousand Words?: An Analysis of Georgia's Voter Identification Statute," two University of Georgia political scientists examined this data from the State of Georgia and concluded: "Registered voters are significantly less likely to possess a driver's license if they are black, Hispanic, or other minorities and if they are older."

It is troubling that the new data was not adequately reviewed by the Justice Department before it pre-cleared the Georgia photo ID law. According to the January 23, 2006 *Washington Post* article, the Justice Department could have taken up to 60 additional days to review the new data and render an opinion.

A. Why was the new data submitted on August 26, 2005 not allowed to be fully and properly analyzed by the career review team before the Justice Department made a determination on whether or not to pre-clear the Georgia photo ID law?

B. In light of the March 2007 study by the University of Georgia political scientists, do you acknowledge that the Justice Department made a mistake in not taking more time to study the new data? If not, why not?

C. You testified at your hearing that the final decision to pre-clear the Georgia photo ID law in August 2005 was made by the Principal Deputy. Was that Bradley Schlozman? If not, who was it?

Response: Please see my answer to Question 6. It is my understanding that there was a complete and thorough review of all of the information and data submitted by the State of Georgia, including four sets of data received from the state on driver's licenses, before the Voting Section Chief completed his review and made his recommendation to the Front Office of the Civil Rights Division. I have not analyzed the methodological basis for the study by the University of Georgia professors; that study was obviously not available at the time of the Division's review, so I have no opinion as to its validity or whether it reveals information that would have been relevant two years ago The Acting Assistant Attorney General at the time was the Principal Deputy Assistant Attorney General, Bradley Schlozman, and he made the final decision.

11. At your nomination hearing, you testified that the Voting Section chief, John Tanner, recommended pre-clearance of the Georgia photo ID law despite the nearly unanimous recommendation from the career review team to object to the law.

A. Prior to Mr. Tanner's recommendation, did you have any conversations with him in which you indicated a belief that the Georgia law should be pre-cleared? If so, please indicate what you told him.

B. How many other times in Justice Department history has the Voting Section chief overruled the recommendation of a career review team in a statewide Section 5 review?

Response: This inquiry asks about internal communications between lawyers at the Division and its investigative process; such communications are confidential and privileged communications and I am barred by the professional code of conduct from divulging those communications. However, I can say that I certainly did not "dictate" what the results of the Voting Section's review should be in any case.

I have no information on how many times the Chief of the Voting Section has made a recommendation contrary to the staff attorneys.

12. In a written response sent to the Senate Judiciary Committee in February 2006, Deputy Attorney General Paul McNulty wrote that the Georgia photo ID law "was precleared after a careful analysis that lasted several months and took into account all of the relevant factors, including the most recent data available from the State of Georgia on the issuance of state photo identification and driver's license cards."

A. Do you acknowledge that Mr. McNulty's statement was misleading and inaccurate?

B. What role did you play in briefing Mr. McNulty on pre-clearance of the Georgia photo ID law? If you were not involved in briefing Mr. McNulty on this matter, who was?

Response: I have not reviewed Mr. McNulty's testimony; however, I believe it was entirely accurate and truthful when he said the law "was precleared after a careful analysis that lasted several months and took into account all of the relevant factors, including the most recent data available from the State of Georgia on the issuance of state photo identification and driver's license cards." I was no longer employed at the Department of Justice in February 2006 and I did not brief Mr. McNulty on the preclearance of the Georgia law.

13. In a letter sent to the Senate Rules Committee in opposition to your nomination, six House members from Georgia wrote that "during his tenure as FEC commissioner, Mr. von Spakovsky has continued to advocate for strict photo identification requirements in other states."

Please describe all efforts you have made during your tenure on the FEC to advocate for photo ID requirements. Please also explain whether or not these efforts were made in your official capacity as an FEC commissioner.

Response: I have taken no actions in my official capacity as an FEC Commissioner on behalf of the Agency to advocate for stricter photo identification requirements. I did publish an article for the Federalist Society in my personal capacity on "The Effect of Voter Identification Requirements on Minority Voter Turnout," in *Engage*, Volume 8, Issue 1, February 2007. A copy of this article has already been provided to the Rules Committee. I do not know specifically to what actions the writers refer.

14. Section 2 of the Voting Rights Act is one of the most important federal civil rights provisions ever passed by Congress. The Justice Department under this Administration has been criticized for its failure to safeguard the rights of African Americans under Section 2.

A. **Other than the 2001 lawsuits against Charleston County, South Carolina and Crockett County, Tennessee – both of which were authorized during the Clinton Administration – how many complaints did the Justice Department file under Section 2 of the Voting Rights Act to vindicate the rights of African Americans, during your five-year tenure there?**

B. **According to a June 18, 2007 *McClatchy* article, the former career Voting Section chief, Joseph Rich, indicated that you blocked or delayed three Section 2 lawsuits from going forward that sought to vindicate the voting rights of African Americans in jurisdictions in Missouri, Georgia, and South Carolina. Why did you block these lawsuits?**

Response: Information on cases filed and litigated by the Voting Section of the Civil Rights Division on behalf of African-Americans is available on the web page of the Voting Section at the Department of Justice website, at http://www.usdoj.gov/crt/voting/litigation/caselist.htm, as well as in prior responses sent to Congress by Assistant Attorney General Wan Kim following his appearance before the Senate

Judiciary Committee on November 16, 2006, and Attorney General Alberto Gonzales, following his appearance before the House Judiciary Committee on April 6, 2006. The cases include:

- **U.S. v. Crockett County, Tennessee** – "The United States alleged in its complaint that the method of electing the county's board of commissioners violated Section 2 of the Voting Rights Act because it diluted the voting strength of African American voters. This case was resolved with the filing of a consent decree, filed simultaneously with the complaint." http://www.usdoj.gov/crt/voting/litigation/recent_sec2.htm#crockett.
- **U.S. v. Charleston County, South Carolina** – This case was filed under Section 2 of the Voting Rights Act ("VRA") just before the current Administration took office (January 17, 2001) and was successfully litigated by the current Administration through the Fourth Circuit Court of Appeals. "The United States alleged in its complaint that the at-large method of electing members of the Charleston County Commission violated Section 2 of the Voting Rights Act by diluting the voting strength of African American voters. Prior to the beginning of trial, the court issued a ruling for the United States on its motion for partial summary judgment that the residential patterns within the county were such that a council district could be drawn in which minority voters would be a majority of the population and that African American voters were politically cohesive. Following trial, the court issued an opinion finding the county's method of election violated Section 2. The United States Court of Appeals for the Fourth Circuit affirmed the trial court's opinion. The opinion of the court of appeals is reported at 365 F.3d 341 (4th Cir. 2004)...The county appealed the decision to the United States Supreme Court, and a certiorari was denied on November 29, 2004." http://www.usdoj.gov/crt/voting/litigation/recent_sec2.htm#charleston.
- **U.S. v. City of Euclid, Ohio** - Investigation in this matter was approved while I was at the Division, although suit was not filed until after I left. "On July 10, the Department filed a complaint against the City of Euclid, Ohio under Section 2 of the Voting Rights Act. The complaint alleges that the mixed at-large/ward system of electing the city council dilutes the voting strength of African-American citizens. In the course of the investigation, it was found that while African-Americans compose nearly 30% of Euclid's electorate, and although there have been eight recent African-American candidacies for the Euclid City Council, not a single African-American candidate has ever been elected to that body. Further, in seven recent elections for Euclid City Council, African-Americans voted cohesively and white voters voted sufficiently as a bloc to defeat the African-American voters' candidates of choice." http://www.usdoj.gov/crt/voting/litigation/recent_sec2.htm#euclid.

- **U.S. v. Miami-Dade County, Florida** – Filed under Section 208 of the VRA, this was the first case ever filed by the Justice Department on behalf of Haitian-Americans. http://www.usdoj.gov/crt/voting/litigation/caselist.htm.

- There were two other recommendations made by the Chief of the Voting Section to file vote dilution cases under Section 2 of the VRA on behalf of African-Americans in two jurisdictions. Both recommendations were approved by the Assistant Attorney General. Information about these two matters has been previously provided to Congress by the Attorney General.

With regard to Section 2, the Division also filed or litigated enforcement actions on behalf of Native American, Hispanic, Chinese, White, and Vietnamese voters while I was at the Division. In *United States v. Blaine County*, the Division successfully defended the constitutionality of Section 2 before the Ninth Circuit Court of Appeals. 363 F.3d 897 (9th Cir. 2004).

The assertion that I personally "blocked" certain matters or investigations is categorically untrue. I reviewed every recommendation that was sent to the Division's Front Office by the Voting Section and provided my advice to the senior leadership on each recommendation. Final decisions on such matters were *always* made by the Assistant Attorney General or his Deputies. While the vast majority of recommendations from the Voting Section were approved, a small percentage were rejected when senior leadership concluded that the applicable legal standards were not met. However, I cannot provide information about any specific law enforcement investigations because such information is privileged and confidential. However, for comparison purposes, from 2001 to 2005, when I left the Division, a total of 29 lawsuits had been filed to enforce the voting rights laws for which the Division has responsibility; only 27 were filed in the last five years of the Clinton Administration, from 1996-2000. These 29 lawsuits do not include a number of other matters that were remedied through out-of-court settlements without the necessity of filing suit. As I recall, this included at least one Section 2 matter, two NVRA matters, and a HAVA matter.

15. A June 18, 2007 letter sent to the Senate Rules Committee by seven former career Voting Section employees states: "Nor did he mention an important policy change concerning approval of Section 2 investigations. Until Mr. von Spakovsky came to the front office, the Section chief had authority to approve such investigations, but at about the same time as his arrival in the front office in 2003, the policy was changed, requiring Mr. von Spakovsky's approval for all such investigations."

A. Why was this change to longstanding policy made? Did you concur with the decision to change this policy?

B. To the best of your knowledge, is this policy change still in effect? If not, when and why was the policy changed back?

Response: I am not aware of any change in policy. It was my understanding that the approval of the Assistant Attorney General of the Civil Rights Division was needed for all matters involving investigations, filing of lawsuits or amicus briefs, sending out federal observers to monitor elections, and other actions involving the Division. The assertion that I was the individual approving or disapproving investigations is completely false; such decisions were

made by the senior leadership of the Division, the Assistant Attorney General or the Principal Deputy Assistant Attorney General acting on his behalf. I certainly communicated the decisions of the Assistant Attorney General or his Deputy to the Voting Section. I do not know if any change was made after I left the Division.

16. A December 10, 2005 article in the *Washington Post* entitled "Staff Opinions Banned In Voting Rights Cases" reported that the Civil Rights Division changed another longstanding policy and began prohibiting career staff in the Voting Section from making written recommendations in Section 5 review cases.

According to the article: "The policy was implemented in the Georgia case, said a Justice employee who, like others interviewed, spoke on condition of anonymity because of fears of retaliation. A staff memo urged rejecting the state's plan to require photo identification at the polls because it would harm black voters. But under the new policy, the recommendation was stripped out of that document and was not forwarded to higher officials in the Civil Rights Division."

A. What role did you play in the decision to change this longstanding policy? Did you concur with the decision to change the policy? Did the policy cover only Section 5 matters, or all matters handled by the Voting Section?

B. Why was this longstanding policy changed? Is the new policy banning recommendations from career staff still in place?

Response: I am not aware of any change in policy. It was the job of the Chief of the Section to take into account and consider the analysis and opinions of all of the staff working on a particular matter and then provide a recommendation to senior staff. I do not know if any changes have been made since I left the Division.

17. You testified that you were not a decision-maker in the DOJ Civil Rights Division and that you merely made recommendations to the Assistant Attorney General for Civil Rights or to a Deputy Assistant Attorney General. This statement has been contradicted by the seven former career attorneys who have written to the Senate Rules Committee. They maintain you were the Justice Department's "point person" on voting issues and the "de facto Voting Section chief."

A. Please list all instances in which you made a recommendation to your supervisors and the recommendation was rejected, and indicate the nature of your recommendation.

B. Since 2001, have you ever talked to or had written contact with any officials in the White House, Republican National Committee, or state Republican Party organizations, about any voting rights cases, investigations, or matters that were pending before the Justice Department? If so, please provide

detailed information about each conversation or contact.

Response: I cannot account for the seven former career attorneys' characterization of me, but I certainly do not agree with it.

Pursuant to Rule 1.6 of the Model Rules of Professional Conduct of the American Bar Association and applicable rules of the states in which I am licensed to practice law, I am not able to reveal information regarding the contents of the legal advice and recommendations I provided while employed at the Department of Justice due to attorney-client privilege. Violating the confidentiality requirements of the professional code of conduct that regulates my profession or attorney-client privilege by revealing such legal communications could subject me to possible disciplinary action, including disbarment.

I do not recall having any conversations or written communications with the White House, the Republican National Committee, or state Republican Party organizations about any cases or investigations that were pending before the Division. However, since I am no longer an employee at the Department of Justice, I do not have access to the files of the Civil Rights Division or any of the thousands of communications I received during my work there. I must point out that the Division receives thousands of complaints each year alleging possible violations of the law, including sometimes complaints from local, state and national political party organizations about specific incidents. It is certainly possible that the Division received a complaint from a particular political party about an alleged violation of the law that I reviewed. The Division also often received comments from the public about specific Section 5 submissions that were before the Division for review. These comments were sometimes sent directly to the Voting Section; at other times, such comments were sent to the Office of the Assistant Attorney General. It is certainly possible that the Division may have received such public comments from political party organizations about a particular Section 5 review, but I do not recall any specific examples.

I made presentations explaining the requirements of federal voting rights laws, such as the Help America Vote Act and the Voting Rights Act, at a number of conferences of election officials and state legislators. I may have spoken to officials at those conferences who also held posts with their respective state party political organizations, but I do not recall any specific conversations with any individuals who identified themselves as representing a political party.

I was interviewed by the White House when I was being considered for the Federal Election Commission, but there was no discussion of any matters pending before the Justice Department.

18. The Election Assistance Commission (EAC), on whose board of advisors you once served, recently made controversial decisions to whitewash the findings of a bipartisan team of election law experts who found there was little evidence of voter fraud in the United States, and to reject the findings of another report finding that voter ID laws reduce minority voter turnout.

Did you ever talk to or have any written contact with EAC members or EAC staff regarding these two decisions? If so, please provide detailed information about each conversation or contact.

Response: As a member of the Board of Advisors of the Election Assistance Commission, I sent emails to the four Commissioners of the EAC, their general counsel, and elected leadership of the Board of Advisors, about the awarding of research grants. I was concerned that the empirical research and subsequent analysis would lack validity given the prior categorical statements of the researcher that voter identification laws were always discriminatory. The issue was not the researchers' ability to evaluate the laws, but rather their objectivity in designing the study and collecting and analyzing data. Under the HAVA statute, the duty of the Board of Advisors to the EAC is to provide the EAC Commissioners with advice on the work being done by the agency. I thought it was incumbent on me, as a member of the Board, to share my concerns that researchers be objective in their work. I believe that action was entirely appropriate and good advice. My concerns were related to social science research, which is entirely distinct from a lawyer's ability to apply a specific law to a set of specific facts regardless of his personal views, something inherent in a lawyer's training and experience. At their request, I also sent copies of my paper on the effects of voter identification requirements, a study by John Lott, and another study by two professors in Missouri on the same subject to two of the EAC commissioners and the general counsel. I also had a discussion with Commissioner Caroline Hunter about other individuals who might be interested in doing research on this topic. I was no longer on any EAC's Board of Advisors when the reports were considered by the EAC.

19.. According to numerous press reports, Attorney General Ashcroft set up a voter fraud training initiative in which Justice Department officials urged U.S. Attorneys offices to investigate and file voter fraud cases. Attorney General Gonzales has continued this initiative.

A. What role did you play in establishing this training initiative?

B. Did you ever have contact with a U.S. Attorney or Assistant U.S. Attorney to discuss voter fraud cases? If so, please explain.

Response: I had no involvement in the establishment of this initiative. In 2003, I was asked to coordinate the Civil Rights Division's responsibility in the annual training program set up as a result of this initiative. The annual training program, called the Ballot Access and Voting Integrity Symposium, was held each year in Washington, D.C. The invited attendees were all of the Assistant United States Attorneys ("AUSA's") in the 93 offices of United States Attorneys ("USA's") who were responsible for election matters in their respective district offices, as well as all of the attorneys in the Voting Section of the Civil Rights Division. Responsibility for organizing this training conference was shared between the Civil Rights Division and the Public Integrity Section of the Criminal Division.

At the Department of Justice, the Civil Rights Division is tasked with enforcing ballot

access through the Voting Rights Act ("VRA"), the National Voter Registration Act ("NVRA"), the Help America Vote Act ("HAVA"), and the Uniformed and Overseas Citizens Absentee Voting Act ("UOCAVA"). The Public Integrity Section of the Criminal Division is tasked with enforcing criminal prosecution of voter fraud, election crimes, and criminal violation of the Federal Election Campaign Act. This was always a two-day conference, with one day devoted to training the attendees on the requirements of the VRA, NVRA, HAVA, and UOCAVA. I was responsible for organizing the presentations for that specific training. The presenters included me and a number of other lawyers from the Voting Section, including the Chief of the Section. The Chief of the Public Integrity Section of the Criminal Division was responsible for organizing the second day of training on voter fraud, election crimes and campaign finance violations. In conjunction with the Chief of the Public Integrity Section and a committee of other lawyers, I helped organized the 2003, 2004, and 2005 symposiums.

Through my participation in the symposiums, I met and talked with a number of Assistant United States Attorneys and United States Attorneys. I also occasionally spoke with AUSA's in the course of filing suit under one of the four laws the Civil Rights Division is responsible for enforcing, as it was standard procedure to have the local United States Attorney or one of his or her Assistants sign the pleadings as local counsel. Assistant United States Attorneys would also sometimes call the Division to pass on information or complaints they had received about possible violations of the VRA, NVRA, HAVA or UOCAVA. When I received such information, I forwarded it to the Voting Section. I do not recall specific discussions with AUSA's about voter fraud cases; the Civil Rights Division was not responsible for the prosecution of such cases. The AUSA's would have contacted the Public Integrity Section over those cases. There were occasionally cases where there were potential violations of both the voting rights laws and the criminal election crime statutes. On such matters, the Civil Rights Division would coordinate with the Public Integrity Section to make sure that the separate investigations and prosecutions did not interfere with each other. Any specific conversations with particular AUSA's or USA's about such law enforcement investigations are privileged and confidential communications.

20. According to a September 20, 2004 article in the *New Yorker* magazine, you are a member of the Federalist Society.

A. Please indicate how long you have been a member of the Federalist Society, why you became a member, and what, if any, leadership roles you have played in the organization. Please also list articles you have written and speeches you have made for this organization.

B. According to the Federalist Society's mission statement: "Law schools and the legal profession are currently strongly dominated by a form of orthodox liberal ideology which advocates a centralized and uniform society." Do you agree with this statement? Please explain.

C. List all professional, business, fraternal, scholarly, civil, charitable, or other

organizations, boards, or committees to which you belong, or to which you have belonged, or in which you have significantly participated, since graduation from law school. Provide dates of membership or participation, and indicate any offices you held.

Response: I have been a member of the Federalist Society since some time in the early 1990's; I do not recall the exact date that I joined. I have not held any leadership posts in the organization. As I indicated in the response to Question 16 of the Senate Rules Committee questionnaire, I have written three articles for the Federalist Society:

The Effect of Identification Requirements on Minority Voter Turnout, The Federalist Society, September, 2006;
The Help America Vote Act of 2002: A Statutory Primer, The Federalist Society, June, 2005; and
Voting by Military Personnel and Overseas Citizens, The Federalist Society, January, 2005.

The article on the effect of voter identification was presented at a panel discussion with EAC Commissioner Ray Martinez on September 13, 2006. I have given no other speeches or presentations to the Federalist Society.

I did not draft the mission statement of the Federalist Society, nor do I believe that fidelity to that statement is required for membership. In my experience, there are law professors throughout the United States with widely different ideologies and views of the law and the Constitution. I joined the Society not to subscribe to any particular view of the law, but because it provides a forum where lawyers can discuss and debate both sides of important constitutional and legal issues. Chapters of the Federalist Society regularly present panel discussions featuring voices from both sides of an issue; I find such meetings to be both intellectually challenging and interesting.

As I indicated in the response to Question 13 of the Senate Rules Committee questionnaire, I have been a member of the following organizations:

Date	Organization	Office Held
1984-present	American Bar Association	member
1984-present	Tennessee Supreme Court (state bar)	member
1985-present	State Bar of Georgia	member; Chair, Elections Committee (1989-91)
1986-199?	Atlanta Bar Association	member
1998-2001	Georgia Public Policy Foundation	Board of Advisors
5/01-11/01	International Law Society	Board of Directors
199?-present	Federalist Society	member
1996-2001	Georgia Election Officials Association	member
199?-2001	IACREOT	member
1996-2001	Voting Integrity Project	Board of Advisors
1996-2001	Sandy Springs Historic Community Foundation	Board of Trustees

2001-2001	Sandy Springs Revitalization	Board of Directors
1996-2001	Sandy Springs Civic Roundtable	President (1996-97) and Asst. Treasurer and Board of Trustees (1997-2001)
1996-2001	Underwood Hills/Long Island Estates Neighborhood Association	President (1998)
2002-present	Vienna Aquatic Club	member
1999-2001	Sandy Springs Toastmasters	member
1994-2001	Georgia Council for International Visitors	member

I am a 1996 graduate of Leadership Sandy Springs, and a 1997 graduate of the Coverdell Leadership Institute, leadership training programs in Atlanta, Georgia.

Although not a member of either organization, I was asked to serve on the Voting Standards Committee of the Institute of Electrical and Electronics Engineers (IEEE) and on the Election and Voter Service Technical Committee of the Organization for the Advancement of Structured Information Standards (OASIS), 2002 to 2005.

21. According to press reports, you had an extensive political background before going to work at the Justice Department.

A. List any public offices you have held, including the terms of service and whether such positions were elected or appointed. Please also state any unsuccessful candidacies you have had for elective office or unsuccessful nominations for appointed office.

B. List all memberships and offices held in and services rendered to any political party or election committee, regardless of whether you received compensation. If you have ever held a position or played a role in a political campaign, please identify the particulars of the campaign, including the candidate, dates of the campaign, and your title and responsibilities.

C. According to the September 20, 2004 article in the *New Yorker* magazine, you worked on the Bush-Cheney campaign recount effort in Florida in 2000. Please describe your duties and activities on the Bush-Cheney recount effort and indicate how much time you spent performing them.

Response: I have never been elected to any public office and have never been a candidate for public office. As I indicated in the response to Question 14 of the Senate Rules Committee questionnaire, I was appointed to the following public boards:

2003-2005 U.S. Election Assistance Commission, Board of Advisors

1996-2001	Fulton County Board of Registration and Elections
1997-1999	Fulton County Parks Advisory Board
8/01-11/01	Fulton County Public-Private Housing Board

As I indicated in the response to Question 15 of the Senate Rule Committee questionnaire, I participated in the following political organizations or campaigns as a volunteer (I have never had a paid position in any political campaign or organization):

2004-present	Republican National Lawyers Association	member
1992-2001	Fulton County Republican Party	member; Chairman (1999-2001)
199?-2001	Georgia Republican Party	member; state committee (1999-2001)
1996-1997	6th District Republican Committee	2nd Vice Chairman
2000	Bush for President	volunteer
1999-2001	Good Government for Georgia Committee	general counsel
1996	5th District Republican Committee	alt. delegate to Republican Convention
1996	Phil Gramm for President	volunteer
1996	Bob Dole for President	volunteer
2000	Matt Mattingly for Senate	volunteer
1998	Mike Bowers for Governor	volunteer
1995-1997	43rd Georgia House District Republican Committee	1st Vice Chairman

My only involvement with the Bush-Cheney recount in 2000 was as a volunteer observer. I went to Florida twice to act as an observer watching the recount of punch card ballots. The first time, I went to Palm Beach County sometime in November and spent two days watching employees of the county recount ballots. The second trip as a volunteer observer was in December to a county north of Jacksonville (I do not recall which county it was). However, before the recount could begin in that county, the proceedings were halted because of the decision of the U.S. Supreme Court in *Bush v. Gore*.