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**U.S. House Committee on the Judiciary
Subcommittee of the Constitution, Civil Rights, and Civil Liberties
&
U.S. House Committee on House Administration
Subcommittee on Elections**

**Joint Oversight Hearing on the
Federal, State and Local Efforts to Prepare for the General 2008
Election**

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

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

I currently serve as the Co-Director of LDF's Political Participation Group. Prior to joining LDF, I served for several years in the Civil Rights Division of the U.S. Department of Justice, handling matters arising under the Voting Rights Act of 1965 and other federal voting rights statutes. I have also coordinated a number of federal observer monitoring efforts in various jurisdictions around the country. On behalf of LDF, I submit the following written testimony to offer our observations regarding the efforts that must be made now to prepare for the upcoming November general election. My testimony will focus, in large part, on the substantial role that the Department of Justice must play in both the weeks leading up to November 4th and on Election Day itself.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

makes the chilling effect that these prosecutors can have inside the polls clear.⁵ Nevertheless, the Voting Section of the Civil Rights Division actively solicits and recruits criminal prosecutors and deploys them to polling sites around the country.

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

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

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

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

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

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

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

of places around the country, it is widely anticipated that there will be correspondingly high rates of turnout and participation on November 4th. High rates of turnout may result in long lines as seen during both the 2000 and 2004 presidential elections in places such as St. Louis, Missouri and Cleveland, Ohio.⁸ The risk of long lines may be particularly stark in high-density urban areas with significant numbers of newly registered minority voters. Where these problems bear more heavily on minority voters, there is a role for the Department to play to prevent a disparate impact on the minority community.

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

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

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

The National Voter Registration Act (NVRA) was passed, in large part, to increase electoral participation by making registration opportunities widely available and accessible. Despite this central objective of the NVRA, in recent years, the Department has chosen to focus its efforts on the voter registration list maintenance rules in the NVRA and, as a result, a number of states have aggressively moved to purge voters from their rolls.⁹ Now is the time for the Department to refocus its efforts on the core goals of

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

⁹ See Gerry Hebert, *FEC Nominee Hans von Spakovsky: A Repeat Offender*, Campaign Legal Center (June 12, 2007) (observing that in January 2005, former DOJ attorney Hans von Spakovsky used the NVRA to launch an anti-voter initiative demanding that officials in Alabama, Georgia, Indiana, Maine, Missouri, New Jersey and New York purge their voter rolls – practice

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

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

Finally, the Department should find ways to complement its statutory enforcement responsibilities by using its leverage to encourage state and local officials to both comply with the mandates of the NVRA while also making efforts that go above and beyond that statute to reach historically disenfranchised populations. In the State of Alabama, a local activist (Rev. Kenneth Glasgow) recently initiated a non-partisan voter registration drive aimed at reaching eligible but not-yet-registered voters inside of local jails.¹⁰ Although the registration drive was initially supported by Alabama Prison Commissioner Richard Allen, the drive was terminated after receiving complaints from the State's Republican Party leadership.¹¹ To the extent that these eligible voters, a disproportionate number of whom are African-American, may already encounter significant barriers in their efforts to register and vote, voter registration drives such as these should be encouraged. Beyond the scope of its statutory responsibilities, the Department should encourage states and localities to identify ways to reach historically disenfranchised voters in their respective jurisdictions.

that disproportionately burdens minority voters), *available at* http://www.clcblog.org/blog_item-133.html. Von Spakovsky's efforts were often carried out through the issuance of Opinion Letters urging jurisdictions to take a particular course of action. In certain instances, these Objection Letters misstated the law and imposed unreasonable requirements on jurisdictions. Where appropriate, the Department should move to retract these Opinion Letters.

¹⁰ Associated Press, *State GOP pressure ends state prison voter registration*, (September 19, 2008), *available at* http://www.dothaneagle.com/dea/news/local/article/state_gop_pressure_ends_state_prison_voter_registration/37199/

¹¹ *Id.*

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

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

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

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

VI. The Department Should Actively Investigate Allegations Concerning Voter Intimidation and Racial Suppression Tactics Pursuant to its Authority Under Section 11(b) of the Voting Rights Act

Intimidating acts preceding an election can create an atmosphere that discourages voters, particularly minority voters, from freely participating in the political process. Often, the acts of intimidation take place in the context of close elections between

minority and non-minority candidates or in areas of the country where minority voters are poised to exercise a greater degree of political power as a result of population growth. During recent elections, there have been significant incidents of voter intimidation directed against African-American, Latino, and Asian-American voters. These incidents, occurring in contests at the local, state and federal levels, include cross-burnings; the distribution of misinformation regarding the rules and requirements for voting; deceptive practices aimed at locking targeted voters out of the process; materials aimed at discouraging participation among non-English speakers; and private citizens holding themselves out as law enforcement with the purpose of intimidating voters.¹² These actions make clear that voter intimidation continues to shape the political reality in many covered jurisdictions and stands a tool used to impede minority voters' access to the polls. Accordingly, it is important that the Department use its arsenal of existing laws to reach those who use violence, the threat of violence, or intimidation to suppress the rights of minority voters.

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

Section 11(b) of the Voting Rights Act is another statute which bars conduct deemed intimidating, threatening or coercive to voters. Specifically, Section 11(b) states that "no person [...] shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for voting or attempting to vote." Section 11(b) is an important statutory tool available to the Department that can and should be used to address ongoing acts of voter intimidation, particularly those acts that have a racial dimension. Even one or two high-profile prosecutions under this statute would send an important deterrence signal nationwide. Notwithstanding the statutory authorization, since the Act's initial passage in 1965, the Justice Department has brought litigation to enforce Section 11(b) in only three instances.¹³

The Department's litigation in *United States v. Ike Brown, et al.*, 494 F.Supp.2d 440 (S.D. Miss. 2007), represents the first time that the Department has brought a suit under the Voting Rights Act on behalf of white voters. Notably, it also represents one of

¹² See NAACP LDF and MALDEF Uncover Significant Voter Intimidation Attempts During Recent 2006 Election Cycle (November 2006), *available at* http://www.naacpldf.org/content/pdf/barriers_to_voting/Voter_Intimidation_Statement_MALDEF_LDF.pdf

¹³ Cf. *U.S. v. McLeod*, 385 F.2d 734, 741 (5th Cir. 1967) (trial court erred in failing to find that acts of county officials in arresting and prosecuting various persons intimidated and coerced prospective black voters in violation of Section 11(b) of the Act).

the only instances in which the Department has moved to use Section 11(b) to reach an act of alleged voter intimidation. The Department argued that a Black voter's publication of a list of ostensibly ineligible white voters amounted to an act of racial intimidation. The court rejected the Department's Section 11(b) claim. In a particularly poignant section of the court's opinion, presiding Judge Tom S. Lee acknowledged the ongoing problem of vote discrimination in Mississippi and suggested that the Department may very well be unresponsive to the concerns of minority voters. In particular, Judge Lee observed that "[t]he court does not doubt that similar discrimination against blacks continues to occur throughout this state, perhaps routinely."¹⁴ The Judge also noted that "it may be true, though the court makes no judgment about this, that the Justice Department has not been responsive, or fully responsive, to complaints by black voters."¹⁵ These judicial observations suggest that the Department must take more seriously and conduct more thorough investigations into allegations of voter intimidation against minority voters.

Recent allegations that a political party in Macomb County, Michigan, intends to use foreclosure lists to challenge voters' eligibility at the polls certainly presents a basis for the Department to now invoke its Section 11(b) investigatory powers.¹⁶ The use of foreclosure lists for this purpose is of questionable value as such lists are likely to include persons who still occupy their homes and persons who may have moved but still reside within the boundaries of their assigned precinct location. Additionally, in the State of Michigan alone, it is estimated that over 60 percent of persons who have been victimized by sub-prime loans (the loans most likely to go into default) are African-American. These numbers mirror national trends which show that African Americans and other racial minorities are more likely to find themselves entangled in the national foreclosure crisis. Thus, it would appear that this scheme is one that could have a pronounced racial effect, and may very well have been devised for a racially discriminatory purpose. An aggressive investigation by the Department now could help determine whether the claims are prosecutable under federal civil rights statutes and help prevent any racially-targeted voter suppression tactics that might otherwise unfold in Macomb County on Election Day. Moreover, an investigation accompanied by aggressive outreach to local officials and well-timed publicity reminding the public of the Department's ability to investigate and prosecute racially-driven voter suppression tactics could help discourage and deter similar schemes that might otherwise emerge in the face of the Department's silence.

Conclusion

The 2000 and 2004 presidential elections were both marred by problems ranging from voter suppression, intimidation, long lines and other issues that were particularly stark in minority communities. As a result, the public's confidence in the electoral process has been significantly undermined. The Department of Justice must now take a

¹⁴ *United States v. Ike Brown, et al.*, 494 F.Supp.2d 440 at 486.

¹⁵ *Id.*

¹⁶ See Eartha Jane Melzer, *Lose Your House, Lose Your Vote: Michigan Republicans Plan to Foreclose African American Voters*, Michigan Messenger (September 10, 2008), available at <http://www.michiganmessenger.com/4076/lose-your-house-lose-your-vote>

dramatically different approach to help ensure that states are prepared for the November 2008 election. Ensuring that federal observers are deployed to those regions where there are allegations regarding attempts to limit minority voters' access to the polls; terminating the use of criminal prosecutors as poll monitors; developing a plan for emergency Election Day litigation; aggressively enforcing the voter intimidation prohibitions of the Voting Rights Act; ensuring that states are processing registration applications in a timely manner; and effective enforcement of Section 5 to capture eleventh hour voting changes that may discriminate against minority voters are some of the specific steps that the Department should now take to help restore the public's faith and confidence in the way that we conduct elections in our country.