

**STATEMENT OF
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**BEFORE THE SUBCOMMITTEE ON THE CONSTITUTION,
CIVIL RIGHTS AND CIVIL LIBERTIES
COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES**

AND

**THE SUBCOMMITTEE ON ELECTIONS
COMMITTEE ON HOUSE ADMINISTRATION
UNITED STATES HOUSE OF REPRESENTATIVES**

JOINT OVERSIGHT HEARING

**“FEDERAL, STATE AND LOCAL EFFORTS TO PREPARE
FOR THE 2008 GENERAL ELECTION”**

**VOTING SECTION OF THE CIVIL RIGHTS DIVISION
UNITED STATES DEPARTMENT OF JUSTICE**

PRESENTED SEPTEMBER 24, 2008

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I am honored to participate in this Joint Oversight Hearing before the Subcommittees to review the plans of the Civil Rights Division's Voting Section in preparation for the 2008 Presidential election.

I was fortunate to serve as the director of the litigation program in the Voting Section of the Civil Rights Division for more than ten years. In my final position in the Department, as Acting Deputy Assistant Attorney General for Civil Rights, I supervised the work of the Voting Section.

I also experienced both enforcement of, and compliance with, the voting rights laws of our country from a state perspective. After leaving the Department in 1997, I served as Deputy Attorney General for the State of Florida. We endured tumultuous issues in Florida with the Presidential election in 2000. Based on that experience, however, we were the first state to enact meaningful voting rights reforms that, in many respects, became a model for the federal Help America Vote Act of 2002 (HAVA). My role in Florida included handling the litigation that ensued in 2000. I directed the State's compliance with Section 5, compliance with the National Voter Registration Act of 1993 (NVRA), and coordination with the Department of Justice over election monitoring.

States have the primary authority for conducting and monitoring elections. The heart of the Department's authority to monitor elections arises from the Voting Rights Act of 1965, which has been amended and extended several times, most recently with the reauthorization and amendments enacted in 2006. The Voting Rights Act was an aggressive response to egregious conduct designed to prevent Black citizens in many areas of our country from participating in the electoral process. It later was amended to address other issues and protect other minority groups, but the design of the original Act was to address race discrimination. The remedial provisions, including the preclearance requirements of Section 5, and the examiner and election observer provisions of Section 6 and 8, were a major intrusion on states' rights that were justified only because of the severe discrimination that led to the enactment.

It is important to emphasize that the sole legal authority for the Department to enter polling places to observe the electoral process arises from the Voting Rights Act, and that authority may be exercised only if the Department has reason to believe that there may be a denial or abridgement of the right to vote **on account of race or color or in contravention of the protections afforded to language minority groups.**

The Voting Rights Act is recognized as the most successful civil rights law enacted by Congress. It led to immediate changes in southern states with dramatic increases in registration of Black citizens. Continued enforcement made the right to vote more meaningful with the development of standards to ensure that votes are properly tabulated and that election structures do not deny minority groups a fair opportunity to participate in the political process and elect candidates of their choice to office.

The change has been remarkable. State governments, which originally were the target of the Act's remedial provisions, now embrace the Act and are major contributors to the protection of the right to vote. At the same time, the battle for equality is not complete, as recognized by the 2006 enactment. In some respects, the issues facing enforcement officials may have changed,

but the structure for addressing the issues remains intact and can be used to continue to effectuate meaningful reform.

The egregious problems that led to the Voting Rights Act are not ancient history. The Act has been in place for only 43 years. Many thousands of Black Americans who will appear at the polls this fall lived through the open suppression and intimidation (and even murders of family and friends) merely because they wanted to vote. That suppression and intimidation was carried out under the color of law, often by law enforcement officials. Even younger Black voters know of the treatment that their elder relatives received.

All of us react to statements and actions in the context of our own life experiences, and it is understandable that Black citizens might react differently to voting related conduct by state and federal officials than would others who have not shared their life experiences. For example, on election day in 2000, law enforcement officers in North Florida set up a driver's license check point in the vicinity of a precinct with a large Black population. The officers may not even have known it was election day, but the conduct caused and spread great fear in the Black community that Blacks were being targeted by law enforcement because they desired to vote. Close coordination between the Civil Rights Division and the Florida Attorney General's office led to a prompt termination of the police checkpoint. Unfortunately, we cannot say that we were able to respond promptly enough to prevent people from returning home out of fear without casting a ballot.¹

Discrimination can be effectuated in subtle ways. For example, a lack of effort to inform newly registered minority voters as to where they should go to vote can preclude them from participation. The problem is exacerbated by the provisional ballot standards of the Help America Vote Act, by which states can require voters to appear at the proper precinct, even to vote for president. When Florida sought Section 5 preclearance of its election reform legislation following the 2000 election, the Department granted preclearance only on the condition that a provisional ballot would not be offered until the voter had been advised of his or her proper precinct and given an opportunity to cast a valid ballot.

As we approach the 2008 Presidential election, the success of the Voting Rights Act is even more obvious. For the first time in the Nation's history, a Black person is the Presidential nominee of one of the two major political parties. Such a result was unthinkable as of 1965. The other major party has nominated a woman for the position of Vice President. Although the Voting Rights Act was not designed to address gender discrimination, the Act's success in tearing down barriers to fair electoral participation obviously contributed to the historically remarkable choice presented to voters this year.

¹ As another example, an older Black American reading an advertisement for housing that describes a neighborhood as "restrictive" might have a different reaction than a White person, or even a younger Black person. That is because older Black Americans lived through the time when the word "restrictive" commonly was used to convey the message that Blacks were not welcomed.

But this achievement also may prove to be the greatest test yet of the Act's ability to address the remaining discrimination in voting, as well as the resolve and ability of the Department of Justice to ensure a fair and non-discriminatory election.

It reasonably can be expected that the 2008 Presidential election will cause the largest turnout of Black voters in the Nation's history. Many of these voters will be elderly, or voting for the first time, or voting after an extended absence from the political process, or otherwise unfamiliar with the voting process.

Of course, such voters will be free to vote for the candidate of their choice. But prognosticators likely will project that an overwhelming majority will support the Black candidate. It is quite common in elections for some persons to attempt to dissuade other persons from voting if it seems likely that they will support an opposing candidate. The present circumstances, however, make Black voters particularly susceptible to voter suppression efforts this year. The mere color of their skin might provide the standard for suppression targeting.

Persons seeking to suppress the vote of Blacks may claim that they are motivated by partisan politics rather than any racial animus, and that may be true. But racial animus is not a necessary element of a violation of the Voting Rights Act. The crucial issue is whether persons are targeted "on account of race or color." This election presents serious risk that prospective voters may be targeted for suppression "on account of race or color" which, in turn, raises grave concerns under the Voting Rights Act.²

It may be difficult to predict what schemes will be attempted this year, but the role of the Department is to carefully study the issues and prepare to address whatever arises. The goal should be to resolve problems prior to election day. An enduring lesson from the 2000 election in Florida is that equal protection violations are much more difficult to repair in a Presidential election than in any other type of election, and may, in some circumstances, be irreparable. **Presidential elections simply are not re-run, even if significant problems are identified.** Thus, the challenge is to prevent the violations from even occurring.

The career women and men of the Voting Section are very familiar with preparation for the monitoring of elections, and I am confident that they will carry out their duties in a professional and thoughtful manner. I offer the following thoughts as to what might be particularly important this year.

² A lawsuit recently filed in federal court in Michigan alleges a scheme to challenge the voting qualifications of persons who have faced a home foreclosure. *Duane Maletski et al. v. Macomb County Republican Party*, Case No. 3:2008cv13982 (E.D. Mich). It is alleged that the foreclosure victims are targeted out of a belief that they likely will vote for an opposing candidate. The legal claim rests on constitutional principles rather than the Voting Rights Act. But a September 18, 2008 letter from twenty-three members of Congress to the Attorney General describes the racial composition of the group of persons who have been subject to foreclosure, thus suggesting that race may be a basis for predicting the candidate for whom the foreclosure victims would vote. This type of proof invokes the protections of the Voting Rights Act. Again, racial animus is not a necessary element of such a claim.

- The key to the avoidance of problems is study, analysis and investigations well in advance of the election. Again, a Presidential election presents unique remedial issues and thus the focus should be on problem-avoidance, rather than merely Department presence to evaluate problems arising on election day. **Potential problems must be identified and resolved prior to election day.**
- Coordination with state and local election officials, as well as state attorneys general and minority community representatives, is important.
- The Section 5 program, as well as HAVA and NVRA enforcement, are important contributors to fair elections. Problems often arise as a result of changes in polling places, or simply because voters do not know where to vote. Through Section 5 enforcement and coordination with election officials in all states, the Department can evaluate whether voters have been informed properly as to where to vote. HAVA and NVRA enforcement can ensure proper registration opportunities as well as the maintenance of accurate voter roles. Ballot layouts should be reviewed carefully to avoid a discriminatory effect.
- In this regard, the Department should not rely merely on the opportunity of a voter to cast a provisional ballot. Provisional balloting has proven to be an illusory promise for many voters since states may provide that the vote will be counted only if the voter was properly registered and complied with all other requirements. A voter may be registered properly, but simply appeared at the wrong precinct to vote; thus the vote may not be counted. It is important for election officials to take effective efforts to tell voters where they need to go to vote. If election officials merely hand a provisional ballot to a person appearing at the wrong precinct, they are, in effect, denying the right to vote. The Department can act to prevent such easily avoidable disenfranchisement.
- The Department has expanded its election monitoring to jurisdictions not covered by the special provisions of the Act. This frequently is done by means of "attorney coverage." In these circumstances, Department officials do not have the authority of law to enter a polling place, but often are permitted to do so. The program is positive and allows the opportunity to promote compliance throughout the country. The factors below should be considered in the course of implementing the program.
- The Department **must** avoid both the reality and perception that political considerations are impacting its election monitoring program. This may present a difficult challenge in light of widespread publicity regarding the politicization of the Department and the Civil Rights Division. Black citizens of the South have regularly relied on the Department to protect their voting rights. But with recent publicity and the expansion of the monitoring program to the entire country, the Department faces great challenges. If the persons that the Act is designed to protect do not trust the Department, the very presence of Department officials can cause more problems than they solve.

- The **number** of persons assigned to monitor the election is not the factor by which the Department's performance should be evaluated. Significantly more important than mere numbers are the standards that are applied to selecting jurisdictions and precincts for monitoring and the operational plans for what is to be accomplished in the program. Again, the sole legal authority arises from the Voting Rights Act, and that same legal standard should be used in selecting jurisdictions for "attorney coverage," *i.e.*, a reasonable basis to believe that the coverage is necessary to avert a denial or abridgment of the right to vote on account of race, color or language minority status. A subsequent report that no problems were observed might mean that the program was successful, or it might mean there was no need for the monitoring in the first place.
- The perception of a political basis for decisions of the Department can be avoided by reliance on the career, non-political staff to effectuate the program. The Department should have memoranda that describe the reasons for selection of states, counties, and cities for election monitoring, and such decisions should be made solely on the basis of the legal standard described above.
- The Department needs to balance carefully its program to prevent voter fraud with its efforts to enforce the Voting Rights Act. During my tenure in the Department, the government refrained from announcing election-related criminal charges shortly before an election out of concern that it might improperly influence the results of an election. For example, announcement of an indictment of persons for allegedly improperly registering voters might deter others from voting even if they are registered properly. The view of the Department, at least in the past, was that the indictment could be held until after the day of the election. It is unclear whether the Department continues that policy.
- In the circumstances that we face today, the assignment of personnel is crucial. Personnel from the Civil Rights Division can be expected to have the most credibility with minority groups. Use of personnel from the Criminal Division and the United States Attorney offices may be necessary from a criminal law enforcement perspective, but the Department should consider whether such visible use has a countervailing impact of discouraging minorities from voting. Again, it is important to evaluate this in the context of the life experience of the voters – law enforcement was regularly used to suppress minority voting. In this regard, the Department also should be mindful of the language it employs in press releases and other communications to advise the public that "federal investigators" may be present at polling places on election day. The wrong wording could have an unintended suppressive effect on protected communities for the reasons stated here.
- Enforcement of civil rights laws is a specialty, requiring legal talent, an understanding of the methods by which discrimination can be effectuated and the continued impact of egregious past discrimination. It is difficult to master this area in a short time.

- This election provides an opportunity to gather information on the impact of voter ID laws that have been implemented in many states. The Indiana law withstood a facial constitutional challenge in *Crawford v. Marion County Election Board*. But the laws remain controversial because of a suspected discriminatory impact on minorities. The impact of the new laws should be monitored carefully.
- The Department should continue its aggressive program to ensure that language minority groups are afforded a meaningful opportunity to cast a ballot.

In conclusion, I again emphasize that this election represents both the overwhelming success of the Voting Rights Act and the problems that remain. I wish the Department much success in achieving a fair, non-discriminatory election.

I would be pleased to answer any questions that the members of the Subcommittees might have.