U.S. COMMISSION ON CIVIL RIGHTS

BRIEFING

FRIDAY, JUNE 6, 2008

The meeting convened in Room 540 at 624 Ninth Street, N.W., Washington, D.C. at 9:30 a.m., Abigail Thernstrom, Vice Chairman, presiding.

PRESENT:

ABIGAIL THERNSTROM, Vice Chairman
TODD GAZIANO, Commissioner
GAIL L. HERIOT, Commissioner
PETER N. KIRSANOW, Commissioner (via telephone)
ARLEN D. MELENDEZ, Commissioner
MICHAEL YAKI, Commissioner

MARTIN DANNENFELSER, Staff Director

STAFF PRESENT:

DAVID BLACKWOOD, General Counsel
CHRISTOPHER BYRNES, Chief, Programs Coordination Unit
DEMITRIA DEAS
PAMELA A. DUNSTON, Chief, Admin. Services and Clearinghouse Division
SAMUEL ENNIS (Intern)
DANIELLE GALLEN (Intern)
ROBERT LERNER, Assistant Staff Director for OCRE
EMMA MONROIG, Solicitor
LENORE OSTROWSKY
CANDYCE PHOENA (Intern)
ANDREW SCHWARTZ (Intern)
KIMBERLY TOLHURST
AUDREY WRIGHT
COMMISSIONER ASSISTANTS PRESENT:

TIM FAY
DOMINIQUE LUDVIGSON
RICHARD SCHMECHEL
KIMBERLY SCHULD

PANELISTS:

CHRISTOPHER COATES
WILLIAM WELCH
DANIEL TOKAJI
HANS A. VON SPAKOVSKY
PAUL F. HANCOCK
ROGER CLEGG
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IV. Adjourn Briefing
9:40 a.m.

VICE CHAIR THERNSTROM: I am going to call the meeting to order and I assume Commissioner Heriot -- who is here now, I would like to say will join us immediately.

I. Introductory Remarks by the Vice Chairman

Good morning. I'm Abigail Thernstrom, the Vice Chair of the U.S. Commission on Civil Rights. And on behalf of the Commission, I welcome everyone to this briefing on the Justice Department's efforts to monitor voting rights enforcement for the 2008 Presidential Election.

This project is designed to examine the extent of adequacy of the Justice Department's preparation to monitor the coming Presidential Election for voting irregularities, including wrongful deprivation of the right to vote and voter fraud.

There will be two panels for this briefing and before I introduce the first panel, let me say that the record will be open until Monday, July 7th, 2008. All interested parties are invited to submit comments and materials for the record. Public comments may be mailed to the U.S. Commission on Civil Rights, Office of Civil Rights Evaluation, Room 740,
For our first panel, we welcome two officials from the Justice Department, Christopher Coates, Chief of the Voting Rights Section of the Civil Rights Division and William Welch, Chief of the Public Integrity Section of the Criminal Division, both of whom will discuss the Department of Justice's plans to monitor the 2008 Presidential Election.

Christopher Coates, as I just said is chief of the Voting Rights Section, Civil Rights Division. This section is responsible for the enforcement of statutory provisions designed to safeguard the right to vote of citizens including racial and language minorities, disabled and illiterate persons, overseas citizens, and military personnel.

Mr. Coates first went to the Voting Section in 1996 as a trial attorney. He was named Acting Chief of the Voting Section in December 2007, and subsequently attained the position of Section Chief. While at the Department he has participated in a number of high profile voting rights cases and is the recipient of the Civil Rights Division 2007 Walter Barnett Memorial Award for excellency in advocacy.

William Welch, a second speaker on this
first panel is Chief of the Public Integrity Section of the Criminal Division. The Elections Crime Branch of the Public Integrity Section of the Criminal Division supervises the Justice Department's nationwide response to voter fraud, campaign financing offenses, and other election crimes. Mr. Welch was appointed Chief of the Public Integrity Section in March 2007. Prior to joining this division, he was an Assistant U.S. Attorney, first in Reno, Nevada, and then in the District of Massachusetts.

As a federal prosecutor for more than 16 years, Mr. Welch has tried approximately 50 trials and successfully led teams of investigators in a variety of cases.

Can you come to the table and then please swear or affirm that the information you are providing is true and accurate to the best of your knowledge and belief.

(Whereupon, the witnesses were sworn.)

MR. WELCH: I do affirm.

VICE CHAIR THERNSTROM: Thank you very much. I welcome you on behalf of the Commission and I'll call you according to the order you've been given for the record and ask that you please speak into your microphones so that Commissioners participating by
phone, that is actually a single Commissioner, Commissioner Kirsanow, can hear your presentation fully. So --

COMMISSIONER YAKI: Mr. Welch, I think your microphone will be hidden by your coat. If you could put it on the outside or on your tie would probably be the best.

VICE CHAIR THERNSTROM: Mr. Coates, thank you very much.

II. Speakers' Presentations

MR. COATES: Thank you. Before I make a short opening statement, I would like to introduce three members of my staff who are here. Rebecca Wertz, who is my Principal Deputy Chief, a 24-year veteran of the Voters Section; Chris Herren, acting Principal Deputy Chief, a 15-year veteran of the Voting Section; and Tim Mellett, Acting Chief of the Section Five Unit Voting Section, a 12-year veteran.

VICE CHAIR THERNSTROM: We welcome the presence of all of you and thank you for coming.

MR. COATES: Thank you, Madam Chairman, and Members of the Civil Rights Commission. It is an honor and pleasure to appear before you to represent the Department of Justice and the dedicated professionals of the Voting Section of the Civil
Rights Division. I am honored to serve the people of the United States as Chief of the Voting Section. I've been actively involved in voting rights litigation since 1976, as a staff attorney for the Voter Rights Project of the American Civil Liberties Union during the period '76 to '85, as an attorney in private practice in Millersville, Georgia, who regularly represented minority voters in voting cases during the period '85 to '96, and as attorney with the Voting Section since 1996.

I am pleased to report that the Voting Section, the Civil Rights Division, remains diligent in protecting voting rights. I would like to share with you some of the highlights of our work done in preparation for the 2008 Presidential Election.

As the Commission knows, the Department strongly supported the recent reauthorization of the Voting Rights Act. The Civil Rights Division vigorously defended the statute's constitutionality in the Federal Court here in the District of Columbia which resulted in last Friday's ruling in the Northwest Austin case. That decision upheld the constitutionality of Section 5 of the Voting Rights Act as a valid exercise of congressional authority to enforce the protections of the 15th Amendment.
The Voting Section is proud of the part it is playing in defense of this important voting rights statute.

In addition, we have had meaningful success recently in all of the voting statutes that we enforce. In the last two years, the Voting Section has brought a successful conclusion to six cases in the Federal District Courts filed over the anti-discrimination provisions of Section 2 of the Voting Rights Act. In a case brought by the Voting Section arising in Osceola County, Florida, the Court ruled at the at large method of election for the County Commission there diluted minority voting strength, and in that case, Hispanic voting strength.

In another case brought by the section arising in Euclid, Ohio, the Federal Court ruled that the at large seats in the City Council diluted African-American voting strength.

In Port Chester, New York, the Voting Section brought a suit challenging at large elections of the City Council and the Federal Court ruled there as well that Hispanic voter strength was being diluted in violation of Section 2.

In Noxubee County, Mississippi, the Voting Section brought a suit against local officials alleging that those officials had intentionally
discriminated against white voters and candidates preferred by white voters in violation of Section 2.

In 2007, the District Court in the Noxubee case ruled in favor of the Department and in doing so upheld the principle that Section 2 is a race neutral prohibition against discrimination in voting regardless of the race of the perpetrator or the race of the victim.

This year, the Voting Section has already filed and resolved two cases brought under Section 2 of the Voting Rights Act. In Georgetown County, South Carolina, we successfully challenged the at large method of election for the School Board on grounds that it diluted African-American voting strength.

And in Oceola County, Florida, we successfully challenged a District Plan for the School Board there that contained no majority Hispanic districts and diluted Hispanic voting strength.

The Voting Section has also been active in bringing lawsuits to enforce Section 208 of the Voting Rights Act. As the Commission knows, Section 208 assures all voters who need assistance in marking ballots that they have the right to choose a person they trust to provide assistance. During the past seven years, we have brought 9 of the 11 suits ever
brought by the Department under Section 208, including the first case, to protect the rights of Haitian Americans.

We are presently in negotiations now with another jurisdiction concerning what the Voting Section believes to be evidence of violations of Section 208 concerning citizens of Puerto Rican ancestry. Suits brought over 208 are important in combatting attempts to suppress the right to vote. All those cases were brought under Section of the Language Minority provisions of 203 and under Section 11B of the Voting Rights Act.

The Voting Section remains committed to enforcing the language minority requirements of the Voting Rights Act as well. During the past seven years, the Civil Rights Division has brought more cases under the language minority provisions, 27 in total, than in all other years combined since 1965. These include the first ever cases on behalf of Korean, Vietnamese and Filipino persons.

We are presently involved in negotiations in a language minority case and have a number of other jurisdictions under active investigation concerning whether those jurisdictions are in violation of the language minority provisions.

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In addition, since the 2004 Presidential Election, the Voting Section has investigated and resolved by consent decree or settlement agreement ten cases that involved claims under the Help America Vote Act; four cases involved were closed under the Uniformed and Overseas Citizens Absentee Voting Act; and seven cases under the National Voter Registration Act. These statutes provide important safeguards that guarantee to all Americans access to the ballot and the Voting Section has given and will continue to give high priority to the enforcement of these federal laws.

Finally, the Department is preparing for the 2008 elections. As we have in the past, we will implement a comprehensive election day program to ensure access to the ballot. As in previous years, we will coordinate the deployment of hundreds of federal government employees in counties, cities, and towns across the country to ensure access to the polls as required by federal law. In identifying the locations, the Civil Rights Division and the Voting Section will seek out the views of many organizations including civil rights organizations that advocate on behalf of minority voters and voters with disabilities as well as abuse of state and local officials and
other interested citizens.

The Division looks forward to continue to work close and cooperatively with these officials and with the civil rights groups as well as other interested parties in an effort to protect the rights of all Americans in future elections including the 2008 Presidential Election. I look forward to your questions that you may want to ask me.

Thank you very much for your time.

MR. WELCH: Good morning, Madam Chairperson and Members of the Commission. As noted, my name is William Welch, and I serve as Chief of the Public Integrity Section. It is a pleasure and honor to appear before you to discuss the role of the Criminal Division in the Public Integrity Section in these upcoming elections.

I probably serve the approximately 29 trial attorneys and 13 support staff who comprise the Public Integrity Section as their Chief. Prior to becoming Chief, I was the Deputy Chief of the Section, beginning in August of 2006. Before that, from 1995 to August of 2006, I worked as an Assistant U.S. Attorney in the District of Massachusetts where I led the U.S. Attorneys' Public Corruption Initiative in Springfield, Massachusetts. Our investigations
included those relating to election crime in fraud.

As noted, prior to that, I served as an Assistant U.S. Attorney in Reno, Nevada.

The Public Integrity Section's law enforcement responsibilities concerning elections are confined to all federal election crimes other than those involving civil rights violations which are handled by the Voting Rights Section in the Civil Rights Division. The majority of election crimes that we prosecute involve election or ballot fraud such as vote buying or ballot stuffing and campaign financing crimes.

Under longstanding Department procedures dating back to 1976 when this section was created, the section is responsible for assisting in the Department's nationwide oversight of the handling of election crime investigations and prosecutions filed in United States Attorneys' field offices throughout the country.

I am proud to serve with two senior trial attorneys who discharge this supervisory responsibility who comprise the Election Crimes Branch, one of whom has spent over 38 years overseeing election crime offenses, the other whom has done so for over 30 years. These two individuals are two of...
the most dedicated, nonpartisan professionals I have encountered within the Criminal Division.

The Criminal Division's oversight of election crime matters is designed to ensure that the Department's nationwide effort to combat election fraud and other election-related offenses, are consistent, impartial, uniform, and effective. The Public Integrity Section does not have formal approval authority over the investigation and prosecution of election crimes, rather we serve in a mandatory consultative capacity to the United States Attorney's Offices throughout the country. We provide advice and guidance to the field on the handling of election crime investigations and prosecutions based on the extensive experience of the section prosecutors in our office.

Consultation by way of our section is required in the event that a U.S. Attorney's Office wants to open a whole field investigation or a Grand Jury investigation into election fraud matters. And similarly, consultation is required with respect to charging decisions.

On the rare occasion that there is disagreement between the advice and guidance given by our section, the disagreement is resolved by the head
of the Criminal Division as well as by the Deputy Attorney General.

The Criminal Division of the Public Integrity Section and the Department's federal prosecutors in the field complement the role of the Civil Rights Division in election matters. The Civil Rights Division is responsible for protecting the right to vote, while the Criminal Division's Public Integrity Section and other Department prosecutors throughout the country seek to protect the value of each person's vote by prosecuting those who corrupt the elections.

In short, the Civil Rights Division has a more proactive role while the Criminal Division takes a more reactive role in the hearing of election crime matters. It is our hope and belief that the Department's election crime prosecutions deter at least some election fraud and thus enhance the integrity of future elections.

In 2002, the Attorney General established a Ballot Access and Voting Integrity Initiative to spearhead the Department's efforts to combat election fraud and civil rights violations involving voting. And to further those goals, the initiative requires annual training of federal prosecutors in the areas of...
voter fraud and voting rights and coordinates with state law enforcement and election officials before federal general elections. And since the initiative began, the Department has charged 148 persons with election fraud offenses and convicted 111 defendants. Non-citizens have been convicted of voting-related offenses in Florida, Colorado, North Carolina, and Oregon. Vote buying schemes have been successfully prosecuted in Illinois, Kentucky, and North Carolina. And persons have been convicted for multiple voting in Kansas and South Dakota.

I thank you for the opportunity to provide the Commission with information about the Criminal Division's role in its Public Integrity Section's efforts to combat election fraud and I look forward to answering any questions that you may have.

Thank you.

III. Questions by Commissioners and Staff Director

VICE CHAIR THERNSTROM: Thank you, Mr. Welch, very much. I thank both of you. And we now open it to questions, comments. From Commissioner Yaki, we have the first question.

COMMISSIONER YAKI: Yes, thank you very much, Madam Chair. Thank you very much for having this briefing on short notice. This is one that I
called in contemplating sort of what we as a Commission should be doing with regard to the upcoming 2008 elections. I think most of my questions will probably aimed at Mr. Coates, so Mr. Coates, if there are members of your staff who you wish to bring up to supplement any answer, please feel free to do so.

The first question I have goes with -- deals mainly more with the preparation for the 2008 election. I commend you for all the great work that you've done with Section 2, Section 5 and 208, lawsuits that you've been bringing. I really want to sort of focus -- the purpose of this hearing really was to see what you were doing with regard to getting ready for November 2008.

I think it's any news to anyone that obviously what the Department does in this election will be very important and I think it's no surprise to anyone that because of past controversies in the last two Presidential Elections that we hope that that past has not prolonged further discussions after the fact. So proactively in determining, for example, the criteria that you use to assign election observers and monitors, what is it that the Department is reviewing in terms of making those decisions and what kind of consultation processes are you involved in?

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MR. COATES: Thanks for that question. First, in terms of what type of activities, might calls a need for a federal presence at the polls and the locations where monitors should be sent. We are in active consultation with civil rights organizations to determine both the type of problems that they anticipate and the locations that they may occur. My staff and I have met with representatives of civil rights organizations in April of this year concerning their concerns about whether or not jurisdictions are complying with Section 7 of the National Voter Registration Act and in May, my staff and I met with 19 members of civil rights organizations across the country and heard from them their concerns about upcoming 2008 elections and what type of activities they're concerned about and we welcomed at that time input from those representatives about jurisdictions that they feel will need federal monitoring at the time of the Presidential Election.

I am also in the process along with other members of the Civil Rights Division of meeting with staffers from the House and Senate. We had a meeting in April of this year, talking about various matters including the monitoring that the Department intends to do at the time of the 2008 election. We will have
another meeting with those staffers from the House and Senate in either June or July, as I understand it, and then another meeting some time in the early fall where those types of issues will be discussed.

I am also in constant contact with state and local officials. I made a presentation to the National Association of Secretaries of State in January of this year, along with Mr. Herren, and in April of this year, I attended a couple workshops put on by the National Association of State Legislators here in Washington and had an opportunity to meet with various persons to hear their concerns. Those are some of the major things that we're doing in terms of gathering information that will help us focus on how many monitors we need and where those monitors need to be sent.

On a daily basis, in our enforcement activities under Section 2 and 203 and 208, we're in contact persons who have made complaints about the violations of federal law in their own individual jurisdictions and we hear from them as well. And we're also, of course, in contact with people who are not members of organizations who may not have made complaints about violations of federal law, but just want to communicate their concern. So those are the
type of things that we have done to try to gather as much information as we can to make the best decisions for November.

COMMISSIONER YAKI: That's very commendable. Having gathered that information though, then what goes into the ranking, prioritization system, how do you then decide to choose we're going to send one hundred election observers to Louisiana or to California or to New York or what have you? What is it that in the end, how do you determine how you're going to allocate those resources, number one. And number two, do you have sufficient resources to allocate? In other words, is there at some point in your decision making that you say well, it's a choice between Ohio and New Mexico or Colorado and South Dakota, we only have X number of people left that we can send out. Or -- I want to know if there's a limitation on your ability to respond as the second part, but the first one, how do you choose where you're going to send people?

MR. COATES: I'll respond to the second, the resource question first?

COMMISSIONER YAKI: Sure.

MR. COATES: There is no limitation. The resources that will be available. But what has been
communicated to me, my understanding is that what we're supposed to do is to tell the Division what numbers we think are necessary to attempt to ensure that federal law is complied with at the time of the federal election and those resources would be made available.

At the time of the 2004 Presidential Election, not in 2004 Fiscal Year or Calendar Year, but just on election day, we have over 800 people in the field. Those would include federal observers under the Voting Rights Act that are under the direct supervision of the Office of Personnel Management and employees of the Department of Justice who work as monitors. Whether that number in 2008 will be necessary, it is too early to tell, but whether we exceed that 800 or come below the 800 will be based upon a determination as to what we feel is necessary to get the job done.

Now there is a number and again, I emphasize that I have -- no one has communicated to me that there would be any restriction either with regards to funds or with regards to the number of observers that we might request.

COMMISSIONER YAKI: Okay. How do you pick where you send them?
MR. COATES: The criteria that we would use would be multi-faceted. First, we would try to determine when we receive complaints in a pre-election survey or interviews, we will try to determine whether or not the concerns that have been expressed are meritorious. We will talk with state and local officials and other persons in the community, to determine whether or not there is a reasonable need or belief that improper and illegal activity will occur on election day. And then we make a determination as to whether or not federal observers, the presence of federal observers would be likely to stop that type of activity at the polls.

If we make the determination that it would have that deterring effect, then certainly that would weigh in favor of sending federal observers or monitors to that location.

Another criteria that we have used in the past is that in local elections involving minority candidates and white candidates, many times that kind of black, white, Hispanic, anglo contests will create antagonisms, frictions, tensions in a community and we would weigh that kind of evidence to determine whether or not observers or monitors would be sent.

Another --
COMMISSIONER YAKI: Just as an interruption then, given the fact that the presidential nomination will be contested between an African American and a white American, does that in and of itself make you think that you're going to be needing more of that kind of activity? If you're already seeing that on a local level, you make these kind of determinations. If on the national ticket that indeed is going to be the case, does that send any signals, alarm bells, or extra heightened warning about what we're going to be needing to do for 2008?

MR. COATES: I'm not prepared at this time to conclude that we would need more observers than we did in 2004, because the presidential race will be one involving an African American person and a white person, but we should be mindful of the fact that there have been jurisdictions in the past where bi-racial contests have caused some frictions and tensions, be mindful of that and that will be something that we will be looking at along with other factors in making determinations about what we should do in 2008.

Now another consideration is the consent decrees that we have particularly in the language minority cases. In those cases, there are consent decrees that we have particularly in the language minority cases.
decrees that require that the people working at the polls that saw them be bilingual poll workers so as to assist persons of limited English proficiency, when they come to the polls so that they're able to negotiate the electoral process in a meaningful way. And we will be doing some monitoring in that regard to make sure that jurisdictions that have promised in consent decrees filed in the Federal Court or in settlement agreements with us that those provisions for bilingual workers will be honored.

Another consideration --

COMMISSIONER YAKI: Just a quick interruption.

MR. COATES: Yes, sir.

COMMISSIONER YAKI: In ensuring that that happens, do we send observers who may be conversant in the languages involved so that they can speak to a voter to determine whether or not that person who allegedly speaks Tagalog, Chinese, Russian, what have you, really does speak it coherently and in a literate way that can help someone fill out a ballot?

MR. COATES: Yes, sir. And that's the exact approach that we use. The best observer to observe whether or not the minority language provisions of Section 203 are being complied with and
Another consideration in jurisdictions of that kind would be that there have been individuals who have misbehaved in the past, who have racist
the terms of a consent decree are being complied with is to have a speaker there, a monitor there, who speaks the minority language. And that's really the
criteria that we use in terms of choosing people to go do election coverage. There are a number of people who are bilingual who are attorneys and other employees for the Department and we use that resource regularly to meet just the need that you have identified.

Another criteria will be whether or not the jurisdiction has a past history of bad behavior at the polls that might deny the right to vote to any citizen including the type of activity that would be aimed at minority voters, minority language voters. And the reason that we're going to look at that is that many times where that has occurred there has been a failure of poll officials to take adequate action, to tell people who are using racial slurs or treating voters at the polls insensitively that they have to stop that. Some of these people may be reassigned to the polls and therefore we want to make sure that that same pattern of misconduct does not repeat itself.

Another consideration in jurisdictions of that kind would be that there have been individuals who have misbehaved in the past, who have racist
attitudes and who may have been at the polls in 1996 and therefore they show up in 2008, so if you have a jurisdiction that has had bad actors, private citizens at the polls who have participated in acts that would be potentially in violation of the Voting Rights Act or election officials who have not done their jobs in making sure that that type of activity does not occur, then those factors would weigh in favor of some coverage in 2008.

So those are the types of considerations that we consider in choosing where to send our monitors and federal observers.

VICE CHAIR THERNSTROM: Mr. Melendez -- I was going to say, can we let other people get in here?

COMMISSIONER YAKI: Yes.

VICE CHAIR THERNSTROM: Commissioner Melendez?

COMMISSIONER MELENDEZ: Yes, thank you both for being here this morning. Just finishing up on the criteria for sending monitors. Will expecting a closeness of a given election be a factor whether monitors are sent or not a factor?

MR. COATES: If it's a highly contentious election where the election is probably going to be very, very close and therefore -- if the wrongdoing at
the polls might make a difference in the outcome of elections, then certainly the anticipated closeness of an election would be something that we would consider and would weigh in favor of that being a jurisdiction that might need a federal presence.

Clearly, in terms of bad conduct at the polls, it's much more likely that that conduct is going to occur where there is a hotly contested race than one where a candidate is not opposed.

COMMISSIONER MELENDEZ: Thank you. Mr. Welch, let me ask you a question. I understand that prior to 2006 it was the Public Integrity Section's position that they would not open public investigations or issue indictments immediately prior to elections. The rationale seemed to be that the Department must be extremely careful to avoid influencing elections.

I understand that the policy was changed in 2006 and indictments were sought in Missouri just prior to the election. Can you please explain more fully how and why this policy shift occurred and what your intentions are for this fall?

MR. WELCH: First of all, there has been no policy shift. I believe that your question may arise from some confusion about the wording that
With respect to, I believe the charge that you're referring to that occurred in 2006, that charge in and of itself did not impact the manner by which votes were cast and counted which is the underlying policy rationale behind the noninterference policy. In other words, that case involved false voter existence previously and what is now an outdated election crimes book, commonly known as the Red Book versus the most recently revised book, commonly known as the Green Book.

What transpired between the publication of the Red Book in 1995 and the publication of the Green Book in 2007 is that it was seen as outdated, the language was seen as confusing, and the goal of drafting the Green Book was to make it more reader friendly, to encourage more consultation from the field so that at a minimum, we could at least provide more advice and possibly develop more cases in the area of election crime.

But the underlying policy, meaning the noninterference policy that the Criminal Division has, has not changed. And we continue to remain cautious during the period immediately preceding the election with respect to engaging in overt, investigative techniques as well as bringing charges.

With respect to, I believe the charge that you're referring to that occurred in 2006, that charge
registration cards that had not made their way into the registration stream and the information was brought to our attention by the entity that was deemed as the victims of the false registration scheme. And so because these were false registration cards, no voters needed to be interviewed. It was seen as not being in contradiction to the policy that we had.

COMMISSIONER MELENDEZ: Just one quick question. As I understand it, there used to be a policy or a practice that the Criminal Division would prioritize investigation of voting crimes that involved conspiracies, large schemes, or other group wrongdoings. Has there been a shift in the Division where it's monitoring and investigating criminal conduct in voting by individuals rather than these larger schemes or groups?

MR. WELCH: I would say no. I think it's important to know that there's never been a per se ban against prosecuting individual voter cases. That once going back to the older election crimes handbook that our section had published, there in fact was a provision that permitted the prosecution of individual voters to seek cooperation in building cases against larger schemes that you're referencing.

Between '95 and 2007, not only was there
the 2002 initiative of the Attorney General, but I think our collective experience also began to show that by not doing individual voter cases and by not giving more discretion to field prosecutors, to see whether or not individual voter cases may lead to larger schemes. We could have been missing those opportunities to build those types of cases.

And so I think in the end we sort of view election crimes as crimes that don't leave bodies on the street, if you will. They don't have identifiable victims. They don't have identifiable property infractions and so when we run against individual voter cases, we're never sure whether or not that case is a stepping stone to a bigger case. So we leave it now more to the discretion of the field, again, knowing that they'll be seeking our advice and guidance and being able to at least ensure or try to ensure uniformity in the prosecution of these cases.

VICE CHAIR THERNSTROM: Commissioner Gaziano.

COMMISSIONER GAZIANO: A few questions to start out with for each of you, first, I think to Mr. Coates.

I've seen some Department testimony from others I think in Civil Rights Division regarding what
looks to me to be a pretty large increase in the number of monitors that the Federal Government employs over the Presidential Elections, '96 through 2004. Just for our record, do you remember some of those numbers or are you able to give us a kind of ballpark figure? This relates in part to your answer to Commissioner Yaki on the resource allocation.

MR. COATES: Yes, sir. Well, part of that, the figures are set out in the final statement that are filed with the Commission, but --

COMMISSIONER GAZIANO: For the CSpan audience it would help if you repeat some of that.

MR. COATES: In 2002, 2004, and 2006, the Department used -- it's my understanding -- a greater number of monitors and federal observers than had been used in the past. An example of that would be calendar year 2004, a record of 1463 federal observers and 533 Department personnel were sent to monitor 163 elections in 106 jurisdictions and in 29 states. Now this compares the number 1463 compares with 640 federal observers that were used during the year 2000 and the 553 Department personnel who were sent to monitor elections would compare with 110 Department personnel deployed during the 2000 year.

So we are sending more people than --
COMMISSIONER GAZIANO: That's a dramatic increase.

MR. COATES: It is a dramatic increase, and we feel that it is necessary because of complaints that we have received on behalf of large numbers of groups of voters. Many state and local officials have told us that a federal presence at the polls has a deterring effect upon problems that arise there and we're mindful of those problems if they potentially involve a violation of federal law. We're not authorized to monitor an election or to ask for federal observers if state law violations are anticipated, but federal law violations and for us, the violations of the civil violations of the Voting Rights Act and the other federal statutes that we enforce. And we intend in 2008 to continue the same philosophy. We're not out to set records or simply rely on numbers, but we're out to use the number of people that will be necessary to ensure fair elections in 2008.

COMMISSIONER GAZIANO: Sure, and if I just -- just to fill in a few of the other gaps, in the 2006 election you had more than the 2002 congressional election. I think 2006, you had even more than 2004. Is that not the case?
COMMISSIONER GAZIANO: Thank you. And if I could just ask one or two questions of Mr. Welch. I'm intrigued whenever there's these fraud scandals that are uncovered, prosecuted. It's usually some

MR. COATES: In 2006, we -- I don't think that we used quite as many in 2006, but in 2006, we used -- well --

COMMISSIONER GAZIANO: Certainly more than in 2002.

MR. COATES: In 2006, we sent over 1500 federal personnel to monitor elections, so we did exceed the 2004 number by a few dozen and that 1500 federal personnel who monitored elections in 2006 would double the number sent out in 2000.

COMMISSIONER GAZIANO: And so given -- I'm going to put your answer to I think to Commissioner Yaki in a little bit of context. If you all concluded in your section that you needed 25 percent more, your understanding is that there's no limit to the number that the Department could send to the different jurisdictions?

MR. COATES: That's right. Nor have my supervisors ever articulated to me that there is some limit and that you cannot ask for more than 2500 or 3000 regardless of the type of complaints you receive.

COMMISSIONER GAZIANO: Thank you. And if
MR. WELCH: Unfortunately, I don't think I have the information available about each one of the cases, but I agree that as a general rule, many election fraud cases, including many public corruption cases are led by small, innocuous tips that lead to larger cases. The example I use although not an election fraud example, is the conviction of Governor Ryan. Many people forget that the incident that ultimately led to Governor Ryan being investigated and convicted was because a single commercial driver who had paid $500 for a fraudulent commercial license had hit a van filled with a family and it was the public outrage behind that event that three years later led to the cumulation of evidence that ultimately caused the conviction of Governor Ryan. That is an example of how one small event leads to a larger chain that may uncover a fraud or corruption scheme, whether you call it election fraud or public corruption.
COMMISSIONER GAZIANO: Sure. And given that there are very long prison sentences and other consequences to an elected official which may be even more serious than a prison sentence like losing their job, let me just pause there. What does federal law provide? What's the range of prison sentences for certain intentional fraud crimes?

MR. WELCH: Generally, they're driven by the guidelines and the ranges can be anywhere from probation to 18 to maybe 24 months in jail, much of it, for example, in dealing with false registration cases will depend upon the number of false registrations that an individual may perpetrate. But by way of example, one of the individuals who engaged in the false registration in the Missouri case from 2006 received an 18-month prison sentence and that was an individual who had submitted a number of false registrations to local elected officials and at least that Federal Judge deemed his conduct sufficiently worthy to give him 18 months in jail which was a much harsher sentence sometimes than elected officials convicted of other corruption crimes.

COMMISSIONER GAZIANO: Sure, and my last point or question if it amounts to one is that given the prison sentences and other consequences, you
assume that most of these people who engage in this think they can get away with it and do you have any idea, guess, as to how many of these schemes don't go -- don't come to light?

MR. WELCH: I think it's really impossible for me to do that. I can say that one of the inherent difficulties in prosecuting election fraud schemes, whether individual voter cases or larger cases is that generally you have two forms of participants, one who is culpable and therefore more than likely not willing to report the crime; and the other would be the unwitting, unknowing dupe such as, for example, a deceased individual who is still on the rolls, the college student --

COMMISSIONER YAKI: Definitely unknowing.

MR. WELCH: The college student who has moved away for the semester, but nonetheless someone votes in that person's name, a military service officer who is away in Iraq, but nonetheless, someone is voting in that person's name. So it is extremely difficult to quantify or even estimate what the scope or the degree of the problem is.

COMMISSIONER GAZIANO: Thank you. That's why I thank you and the Division's vigilance in investigating these matters. They're not necessarily
Mr. Coates, I was -- this is more perhaps in the way of a comment than it is a question. I was a little bothered by your description, partly historical here, of what the Voting Section has been engaged in in terms of defending Section 5. You say,
for instance, in the first place you haven't been entirely successful. I mean the LULAC v. Perry, yes, in one district you won, but basically the Supreme Court threw out that staff attorney's memo, threw out the reasoning of the staff attorney's memo that made -- that got considerable publicity as in opposition to the political appointments. But in a statement you say the Department is currently vigorously defending the statute's constitutionality in Federal Court here in the District of Columbia and you refer, of course to the Northwest Austin Municipal Utility District Number One, v. Mukasey and pleased that the three-Judge Panel and I would say very predictably given the panel that the plaintiff's drew, agreed with the Justice Department's position. But it seems to me very much an open question whether if that decision is appealed and of course that decision as far as I know hasn't been made whether to appeal it or not, but if it's appealed to the Supreme Court, it's far from clear that the Supreme Court is going to agree with the three-Judge Panel in that Court.

And indeed, it seems to me that you have really whitewashed the vigorous debate that went on in the summer of 2006 over the continuing constitutionality of the pre-clearance provision, its

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congruence in proportionality to the current threats to voting rights given the degree of racial change. Section 5, after all, was emergency, an emergency provision in 1965, and that emergency has long passed.

And there was a vigorous debate not in Congress because of obvious political reasons, Members of Congress would prefer not to debate a civil rights issue, but certainly within the academic community that focusing on voting rights, there were many questions about whether the straight reauthorization and indeed, the strengthening of in some ways by overturning a key Supreme Court decision, but the renewal of Section 5 as if America had not changed was constitutionally legitimate and would survive a constitutional challenge. These were very distinguished scholars within the academic community, all voting rights experts, who are extremely nervous about this case that's coming, if it's appealed, that is on the horizon.

And so it does seem to me that your implication here is look folks, we are just doing a splendid job here, enforcing a morally clear law which was, of course, morally clear in 1965, but is now a bit complicated. And the complexity, of course, has grown with the fact that we do have a standard bearer.
for the Democratic nomination, that is African-
American. I mean it does seem to me a little more
nuanced discussion of Section 5 today, I at least
personally would have liked to have heard. And of
course there are other -- there's another extremely
important case coming down the pike, Strickland also.
So that's really more of a comment than a question.

For Mr. Welch, I have -- I do have a
couple of questions. I would like -- you have --

MR. COATES: Madam Chairman, may I respond?

VICE CHAIR THERNSTROM: Absolutely.

MR. COATES: If I created the impression
that I thought that the issue concerning the
constitutionality of Section 5 in the 2006
reauthorization is just a simple issue that everybody
had to agree on, I apologize. I did not mean to
create that impression. I think that the people of
good will can disagree about whether or not Section 5
needs to be continued or whether or not its time has
passed. And I don't attack the good faith of anyone
who has taken the opposite position.

I'm willing to point out to the Commission
that the Civil Rights Division had been busy in
defending the constitutionality of Section 5

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particularly in light of the fact that there have been
so many claims in the recent years that the Civil
Rights Division is not doing its job or not doing
anything to protect the rights of minority voters.
There is nothing in my opinion today that is more
essential to the enforcement of the voting rights of
minority voters in the United States than the
continuation of the Section 5 pre-clearance
requirements. And we have been busy in that case.
We're very, very happy with the District Court
opinion. We will be involved in the case if it's
appealed to the Supreme Court.

It was in that light of pride that we --

VICE CHAIR THERNSTROM: I see.

MR. COATES: -- of winning that decision
and because we think that that shows that the
criticism that we don't do anything for minority
rights is simply not true, that I pointed it out.

I am very proud to work for the
Administration and President Bush who signed the 2006
law and we are committed to the defense of the
constitutionality of the 2006 reauthorization and that
is another reason that I mentioned in the opening
statement.

As I mentioned, I've been involved in
VICE CHAIR THERNSTROM: Well, I very much appreciate that response, but it seems to me and tell voting rights since 1976. A good portion of that has been in the South, but since working with the Department I have had an opportunity to go to other states outside of the South and particularly to the covered jurisdiction and I have no problems in advocating the constitutionality of the reauthorization of the Act because it is my firm belief that if Section 5 were to be terminated, that would have a dramatic and serious impact on the voting rights of minority people throughout the covered jurisdictions. There will be backsliding, I fear, if Section 5 is taken away. And I say that from the experience of suing a number of local officials in various parts of the country. So I respectfully submit that even though this is not the America of 1965, there's no question about that. There has been great progress made and minorities have a substantially greater access to the political process than they did at the time of the Act.

I think that the prophylactic measures of Section 5 play an important role and I am proud to play a part and our section is proud to play a part in the constitutional defense of it.

VICE CHAIR THERNSTROM: Well, I very much appreciate that response, but it seems to me and tell
COMMISSIONER YAKI: I'm speaking, Madam Chair. And that -- I mean first of all, it's not at this point exactly germane to the question you're asking Mr. Coates. Mr. Coates wanted to respond and now I'm responding back so he has some context for what's going on here. And this Commission, despite the overwhelming majority of Congress acting several weeks later, chose not to endorse despite the sense of
Commissioners Melendez and myself, the reauthorization
of the temporary sections of the Voting Rights Act.

I think it's unfair to say to our witness
that his views are those of an outside agency when I
think he's clearly expressed that these are the views
of the actions taken by the Voting Rights Section
which I assume was approved by people further up than
him, all the way to the Attorney General to this
President of this United States.

VICE CHAIR THERNSTROM: Commissioner Yaki,
I'm a little astonished that you have such little
faith in our witness that you don't think he can
answer a question. I was simply responding --

COMMISSIONER YAKI: I just felt that
question was an unfairly loaded gun.

VICE CHAIR THERNSTROM: It wasn't a loaded
gun. I'm simply --

COMMISSIONER YAKI: Hold on for a second.
I think it may be unfair to say that basically you're
giving the views of the ACLU. And I just want to say
yes, it is unfair. If you choose not to answer it, I
don't care.

VICE CHAIR THERNSTROM: I don't either.
That last statement stands. Either Mr. Coates can
answer it or he can choose not to answer it.
(Simultaneous speakers.)

COMMISSIONER YAKI: We can go up and down

VICE CHAIR THERNSTROM: I understand you
can name all the acronyms of the mainstream civil
rights groups. I understand that perfectly.

Mr. Coates, you do not have to answer my
comment. I was simply responding to what I heard you
say and I would be delighted to hear that I misheard,
always delighted to hear that I have misheard. But I
didn't really think you needed help from somebody else
in defending yourself.

MR. COATES: Madam Chairman, I'll be glad
to respond to your question. On the issue of the
constitutionality of Section 5, reauthorized Section
5, is that on that particular issue, the
Administration, through its defense and various other
civil rights groups, including the ACLU, have a
similar view. The arguments are not the same, but
they have a similar view that Section 5 reauthorized
is constitutional, that it's a constitutionally valid
exercise of congressional power to enforce the
protections of the Fifteenth Amendment, but my
articulating that here today is not articulating the
view of the ACLU, articulating the view of the present
Justice Department.

VICE CHAIR THERNSTROM: Thank you very much.

Mr. Welch, let me just ask you a couple of questions. One, how large a problem is noncitizen voting in your view?

MR. WELCH: I really cannot give you an estimate of either how small or how large it is. It simply is an unquantifiable figure as far as we're concerned.

VICE CHAIR THERNSTROM: Right, but a problem, not a problem? A problem you're concerned about, not concerned about?

MR. WELCH: I think we're concerned any violation of any of the statutes that we enforce. So I mean we treat that particular statutory infraction like we would anyone else.

VICE CHAIR THERNSTROM: And in terms of -- and I may have missed whether you already answered this and forgive me if I did. My attention for a few minutes wandered, but have you given us specific examples of voting fraud that you have prosecuted and can we get a handle on the dimensions of this problem?

I mean it seems to me in terms of the literature on both the political left and political
right and those in between that one of the problems here is a lack -- I'm a data person -- one of the problems here has been a lack of really solid data on the dimensions of the voter fraud problem. And I wondered what, in your prosecutorial role, you have seen prosecuted and what's your sense is of how large the problem is and if one is trying to quantify it, how does one do so?

MR. WELCH: Well, as far as the first question which is the number of cases that we have prosecuted, I just want to clarify that the majority of bulk of the election fraud crime cases that get prosecuted get prosecuted by the U.S. Attorney's offices throughout the field. So our resources, by and large, are largely in the consultative capacity sentence.

Occasionally, our trial attorneys will go out and prosecute a case. I think the most recent one we did was a vote-buying case in January of '06 down in Alabama. With respect to the size and degree and scope of the problem, I think I go back to my earlier answer which is that I don't think that anyone can quantify the problem through simply looking at criminal convictions and trying to equate the scope of the problem with the number of convictions. And I use
MR. WELCH:  I don't disagree with you at all.  It's a laudable goal.  It's just, unfortunately, I don't think I could help you in that regard.

VICE CHAIR THERNSTROM:  Right.

MR. WELCH:  So that's why I think it's just very difficult, for example, to rely on criminal convictions to quantify the problem.  As far as data collection, I think it's really out of my purview.  I don't know that I could assist you in that.

VICE CHAIR THERNSTROM:  I mean on a personal note here, I'll reiterate what I just said.  I find it very frustrating in the conversations about voter fraud, big problem, little problem, well, I like numbers and it's just -- I just have never been able to figure out a way of getting a handle on exactly how to pin down or how -- a route to both sides standing on the same factual ground and then you can argue over the interpretation.

MR. WELCH:  I don't disagree with you at all.  It's a laudable goal.  It's just, unfortunately, I don't think I could help you in that regard.
MR. COATES: The way that Voter ID may play a part of coverage would be that, for example, if there was evidence that indicated that an ID requirement that is enforceable under state law had been enforced in a racially discriminatory fashion or an ethnically discriminatory fashion so that only Hispanic voters or only African American voters had been asked for ID and no white voters had been asked, then that would be the kind of activity that -- an intentional discriminatory activity in the enforcement of state law.

VICE CHAIR THERNSTROM: Right, right.

MR. WELCH: Because I lack the impetus in that area.

VICE CHAIR THERNSTROM: Fair enough.

Thank you very much.

Commissioner Kirsanow, are you still on the phone? Do you have questions?

COMMISSIONER KIRSANOW: I'm still here.

Thank you very much, Madam Chairman.

I do have two questions. One is to Mr. Coates, a very quick question. Although the Voting Section is not charged with enforcement of state law is the Section's approach to the 2008 election nonetheless affected at all by the Supreme Court's recent decision upholding the Indiana Voter ID law?

MR. COATES: The way that Voter ID may play a part of coverage would be that, for example, if there was evidence that indicated that an ID requirement that is enforceable under state law had been enforced in a racially discriminatory fashion or an ethnically discriminatory fashion so that only Hispanic voters or only African American voters had been asked for ID and no white voters had been asked, then that would be the kind of activity that -- an intentional discriminatory activity in the enforcement of state law.
COMMISSIONER KIRSANOW: Thank you. Also, and this could be directed either Mr. Welch or Mr. Coates, I'm wondering if there's any role to play by either the Voting Section or Criminal Division related to the issue of multiple registrations or registration in multiple districts. I think as I recall during congressional testimony you related to reauthorization of a state law requirement that would weigh in favor, perhaps of some federal presence at the polls to make sure that that kind of discriminatory enforcement does not occur, because the enforcement of any state law requirement in the case that you asked about, the ID requirement, the enforcement of that requirement in the discriminatory fashion could have a deterring effect upon minority voters' inclinations to participation in elections and that does raise a question under the Voting Rights Act. So that's how the decision -- there are predictions by people that the fact that the Indiana case found that ID requirements are facially constitutional may encourage other legislatures in other states to enact such requirements. And if there is an indication that they were not going to be enforced in a racially fair manner, then that would be a factor that we would consider.
of the Voting Rights Act. There was testimony that there are hundreds of thousands of individuals registered in multiple jurisdictions, 140,000 Floridians, for example, are registered in either New York or New Jersey and about 60,000 Kentucky residents are registered also in Tennessee. Is there anything that is done to make sure that multiple registrations don't evolve into an opportunity for fraud?

MR. WELCH: Well, this is William Welch speaking. You are correct that multiple registration can be an issue, due to for example, the winter birds from New York who end up migrating to Florida in the winter. We view multiple registrations through the same sort of criminal lens as we would any other registration scheme which is there an underlying intent to defraud and very often people simply don't understand or make a mistake and register in two different districts.

And so, for example, from a criminal perspective, that would be something that we would take into consideration and most likely because the intent is not one to defraud. It would not be something that we would criminally pursue. But we would certainly look at multiple registrations if it was part of a larger scheme to defraud, the right to
vote, or even on an individual basis where it was shown to be consistent with someone trying to defraud the system.

MR. COATES: This is Chris Coates, and from a civil point of view, multiple registrations is a problem that arises under the National Voter Registration Act and the purge requirements under Section 8. Many times jurisdictions that have persons who are not legally entitled to vote in their jurisdiction are on the voter registration list because people who have died and also people who have moved away and registered in other places still have their name on the old place of residency. This creates a potential that should a person fraudulently vote using the name of the person who has moved and that's the reason that we have brought cases under Section 8 of the AVRA in an attempt to address this type of problem.

COMMISSIONER KIRSANOW: Thank you, gentlemen.

VICE CHAIR THERNSTROM: I believe that Commissioner Yaki has a very brief question, he's promised me, and then I would like to turn to the Staff Director who also has questions.

COMMISSIONER YAKI: I'm still formulating
my question, so why don't you go to the Staff Director.

VICE CHAIR THERNSTROM: Okay.

STAFF DIRECTOR DANNENFELSER: A question for Mr. Coates. You talked earlier about outreach to different groups and so on. Have you done any outreach to the national or state political parties in terms of them identifying any patterns of voter suppression or voter fraud, their concerns about possible patterns?

MR. COATES: We have not.

STAFF DIRECTOR DANNENFELSER: Is that something that you're precluded from doing or have you made a policy decision not to?

MR. COATES: We are not precluded from doing that. We have not done so during the primary campaign. If either national political party or any national political party wanted to provide us information that pertained to their concerns about jurisdictions in which there might be violations of federal law at the time of the general election, we would certainly be receptive to receiving that information and consider it in our deliberations.

STAFF DIRECTOR DANNENFELSER: And I guess just one other. Does any of your monitoring
VICE CHAIR THERNSTROM: Excuse me, Commissioner Melendez, just for the reporter, I don't think I said this is Commissioner Melendez.

MR. COATES: Yes, sir. On a number of our monitorings, persons from the Department of Justice go to the campuses and to the vote counts, whether they're held on the night of the election or they canvass to the extreme jurisdictions for a couple of days and go to a canvass a couple of days later. If circumstances indicate that there might be activities of an irregular nature that would draw into question federal law and that we need to be there to collect the information that occurs.

STAFF DIRECTOR DANNENFELSER: Thank you.

VICE CHAIR THERNSTROM: I believe Commissioner Yaki --

COMMISSIONER YAKI: Go ahead.

COMMISSIONER MELENDEZ: Thank you again. I have another question. This has to do with some of the areas having to do with Native American citizens. As you know, there have been many reports of language access, intimidation and other problems --

VICE CHAIR THERNSTROM: Excuse me,
The language there is predominantly Yupik.

COMMISSIONER MELENDEZ: Okay.

VICE CHAIR THERNSTROM: Go ahead.

COMMISSIONER MELENDEZ: But anyway, I wanted to talk about and I was very pleased to learn this past week that the Department of Justice and observers to five counties in South Dakota and two in New Mexico also the State of Alaska is a real concern as far as being such a vast area and a number of Native Americans and Alaskan Natives that live there.

There's been an issue of lack of polling places and smaller villages and the failure to provide translation and language assistance to those unable to read, but almost very little has been done. Just an example, a preliminary injunction was filed by the ACLU and a Native American Rights Fund just last month against the State of Alaska to enforce compliance with Section 203 and 208 of the Voting Rights Act by providing materials and assistance in the Yupik language to residents of the Bethel census area. Over 85 percent of the 16,000 people there are American Indian and Alaska Natives and it is one of the three county-level jurisdiction in the United States where a majority speak American Indian or Alaska Native language at home.

The language there is predominantly Yupik.

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The illiteracy rate among those with limited English proficiency is over 20 percent, yet the state has continued to provide only notices and voter registration materials and basically disregarded the native community in its voter registration drives and failed to provide qualified translators at the ballot box.

Although this case is just one of the examples what is suffered by Alaska natives, so could you two tell me what your monitoring plans are for Alaska and what, if any, steps you are planing to ensure compliance with language and voter assistance required by the Voting Rights Act in Alaska primarily, but also in South Dakota and New Mexico.

MR. COATES: Yes, to all three states, we have not made final determinations as to where -- we're not in a position to making final determinations as to whether or not we would send monitors to any of the states, but you are correct in noting that this Tuesday, called Primary Election Day, we had monitors in several counties in South Dakota that have substantial Native American populations.

Pending before us now, under Section 5, pre-clearance, is the Alaska language program and we have received information both from the state and from
representatives of Native American people in Alaska on that pending issue and so we're in the process of receiving information from the various parties.

I can't tell you, as I sit here right now, as to whether or not we intend to send monitors to South Dakota to the general election, to send monitors to New Mexico or Alaska at the time of the general election.

COMMISSIONER MELENDEZ: And just concluding, does the Voting Rights Section intend to intervene in this legislation or take other steps to ensure compliance by the State of Alaska?

MR. COATES: The only way that we would intervene is if after a thorough investigation, if we determine that the language minority program that has been submitted to the state should be objected to under Section 5 because of discriminatory purpose for discriminatory effect under the reauthorized statute, then we would interpose objection. If we find to the contrary, then we would pre-clear, but that would -- that is the way in which that matter is before us now.

COMMISSIONER MELENDEZ: Thank you.

MR. COATES: You're welcome.

VICE CHAIR THERNSTROM: I have two very fast questions myself. Oh, you have a question.
COMMISSIONER HERIOT: I have a very quick question and that was just brought up by Commissioner Melendez, this question.

How many different languages have election officials across the country have been required to provide ballot information in? How many different languages?

MR. COATES: Under Section 203, I think there are five languages that are covered. There can arise other situations where intentional discrimination against a group that may speak an uncovered language, for example, that would involve intentional discrimination under the prohibitions of Section 2 of the Act.

COMMISSIONER HERIOT: How many languages have been involved in that section?

MR. COATES: Well, I can give you some examples. I can't give you a total number, but the situation that I speak about is that for example, there are a number of jurisdictions where there are a number of Korean Americans living, but they're not sufficient numbers of Korean Americans in the jurisdiction to trigger the protections of Section 203 of the Voting Rights Act.

VICE CHAIR THERNSTROM: Or French
Canadians, for instance, who might speak French, primarily.

VICE CHAIR THERNSTROM: All right, well, let me just ask two quick questions. Again, to Mr. Coates, I had forgotten that -- my ears pricked up on this. You talked about the existence today more than Canadians, for instance, who might speak French, primarily.

VICE CHAIR THERNSTROM: All right, well, let me just ask two quick questions. Again, to Mr. Coates, I had forgotten that -- my ears pricked up on this. You talked about the existence today more than
four decades after the passage of the Voting Rights Act still of racist poll workers and other Southern officials dealing with elections.

I wondered, that's a very powerful word, racist. And I just wondered what constitutes evidence of actual racism and then -- you used -- you referred to bad conduct and I just wondered specifically what either of those terms meant.

MR. COATES: Madam Chairman, I didn't mean to limit it to just Southern officials because the misconduct that has been reported to the Voting Section and seen by some of our election monitors have occurred in jurisdictions in the South and outside of the South. But the use of racial slurs and racial comments directed at Asian voters, directed at Native American voters, would be the type of conduct that I would characterize as being racist.

VICE CHAIR THERNSTROM: A poll worker might say what, tell me what?

COMMISSIONER YAKI: Do we need to --

VICE CHAIR THERNSTROM: Yes, I want to -- I am very concerned about the use of -- charges of racism in this country which too frequently made against a racially complicated situation.

COMMISSIONER YAKI: Can we stipulate that
MR. COATES: We have an employee in the Voting Section who has a Hispanic surname and when he was recently on election coverage in a Northern state, one of the poll officials mentioned the fact that he had a Hispanic surname and asked if he came from a family of criminals.

VICE CHAIR THERNSTROM: Well, wait a minute --

COMMISSIONER YAKI: -- certain words that are not --

VICE CHAIR THERNSTROM: I'm sorry, I don't know what a racially charged -- yes, that covers a lot of territory. I would like to know what the Justice Department considers racist. That is a -- I mean racism --

MR. COATES: I'll be glad to give you an example.

VICE CHAIR THERNSTROM: Sure.

MR. COATES: We have an employee in the Voting Section who has a Hispanic surname and when he was recently on election coverage in a Northern state, one of the poll officials mentioned the fact that he had a Hispanic surname and asked if he came from a family of criminals.
VICE CHAIR THERNSTROM: Yes.

MR. COATES: That she knew nothing about him other than the fact that his last name was of an Hispanic surname.

VICE CHAIR THERNSTROM: Right, good example, proving my point that Mr. Coates can answer questions for himself.

(Laughter.)

Doesn't need any protection by Commissioner Yaki.

MR. COATES: I think that all of us could agree that presupposing criminal activity on the basis of --

VICE CHAIR THERNSTROM: Absolutely.

MR. COATES: Of a surname is an inappropriate behavior of poll officials and so I have no hesitancy in labeling that type of activity as being racist.

VICE CHAIR THERNSTROM: Fair enough. I agree with you.

Commissioner Yaki, do you have a question of your own?

COMMISSIONER YAKI: Well, I enjoyed interrupting yours, but --

(Laughter.)
I'm waiting for something off of my blackberry to come up.

Keep on going.

VICE CHAIR THERNSTROM: No --

COMMISSIONER YAKI: Commissioner Gaziano had a question.

VICE CHAIR THERNSTROM: Oh, I see. I'm sorry.

COMMISSIONER GAZIANO: If you don't mind --

VICE CHAIR THERNSTROM: Absolutely, I'm sorry.

COMMISSIONER GAZIANO: Since, of course, we've established and I think logically that it's very difficult to quantify the range of the amount of fraud, it might be a little easier to identify intimidation because there you have a real victim, so that's why the difficulties you've explained in your testimony, Mr. Welch, is identifying the amount of fraud.

I'd like to at least just right on the record some potential motives so that we know maybe where you all have to look. I think some Americans were surprised at the extent of fraud that's been covered or at least concern over fraud in primaries
COMMISSIONER GAZIANO: That amazes me. It amazes me how many people are involved in some of these schemes once the tip of the iceberg is uncovered or the rest of the iceberg is uncovered by the tip I

because it's assumed by some Americans that partisan advantage, either racial animus and partisan advantage are the only two motives for fraud.

In my review in some of the five cases that's -- it's often -- the motive is more likely the promise of a job. Is that not the case in some of these machine error fraud schemes?

MR. WELCH: It can be a variety of motives, just as you're identifying. It can be the promise of a job. It can be the promise of advancement within a machine. It can be turnout in votes. It can be the promise of contracts in the sense of if you know that a particular individual who you're trying to get into office gets into office and they pay you back through forms of corruption. So very often election fraud, election crime and corruption matters overlap to a substantial degree.

COMMISSIONER GAZIANO: And some of the lower level participants might be willing to risk a federal jail sentence for $100?

MR. WELCH: That's correct. I mean --

COMMISSIONER GAZIANO: That amazes me. It amazes me how many people are involved in some of these schemes once the tip of the iceberg is uncovered or the rest of the iceberg is uncovered by the tip I
MR. WELCH: That's right. I mean I think the amount of the financial remuneration that goes to an individual whose vote is going to be bought is offset by the promise of future reward. And so they're willing to pay or willing to assume the risk of getting caught, believing that it's negligible in order to advance either their own or someone else's self interest in the future.

COMMISSIONER GAZIANO: And other than racial, potential racial animus, what -- why would there be -- these factors come into play, but isn't there a personal preference for one candidate over another in a primary? There's some concern that between Clinton and Obama in certain of the primaries, there was concern by one of the camp to the other that -- isn't each party one big happy family?

The voters are willing to engage in fraud to advance one candidate over the other.

MR. WELCH: I'm not quite clear what your question is. I think the question is either within a primary itself, meaning simply it's one party's interest at stake. I think all the things that we've been talking about still come into play and they can be, for example, one trying to ensure the personal
preference for a particular candidate wins out and in order to do that, they engage in a vote-buying scheme or things of that nature. I think the parallels that we're talking about are also seen in campaign finance where you see campaign finance violations to advance perhaps one candidate over the other even within the primary itself.

COMMISSIONER GAZIANO: Right. And the last question is there can be some -- there may not be a particular goal of a certain person engaging in voting in multiple states to get a job, but they really believe that X candidate is better than Y candidate even within their own party.

MR. WELCH: That's certainly possible, correct.

COMMISSIONER GAZIANO: Thank you.

VICE CHAIR THERNSTROM: You got --

COMMISSIONER YAKI: Not a question. I wanted a fact. One comment on Commissioner Gaziano's remarks brings me to -- reminds me of a certain radio commentator who was urging people in Ohio under the Ohio format to swear their fealty to the other party simply for the chance of voting in that particular primary election which was found by people to be in a sense free speech and not voter fraud, although I find
MR. COATES: We make the recommendation as
to what jurisdictions we should have monitors and
observers in and the numbers and that goes up my chain
of command to the Assistant Attorney General for Civil
Rights and I think that's where the final decision is
made. It may go higher than that, but I think that it's made finally by the division.

COMMISSIONER YAKI: Now in terms of the people that you send out, some are Justice Department employees --

MR. COATES: Yes.

COMMISSIONER YAKI: Some are attorneys from different divisions within Justice. What kind of training is involved? Specifically, at least anecdotally, I'm saying this anecdotally, so I'm sorry there's not lots of data on this --

VICE CHAIR THERNSTROM: It's not a data question.

COMMISSIONER YAKI: But anecdotally there have been some instances where individuals from the criminal prosecutor's offices of Justice go out as monitors and some people have found them to be as intimidating, if not more intimidating, than the people who allegedly they're supposed to try to keep in check, simply because I don't know, maybe they wear the dark suits and flash a badge or what have you. But is there any training that goes on --

COMMISSIONER GAZIANO: Let the record reflect Commissioner Yaki is wearing a dark suit.

VICE CHAIR THERNSTROM: I was about to say...
The observers who are primarily monitored and directed by OPM supervisors, but we work closely with them so the duration for those days of monitoring.

COMMISSIONER YAKI: Actually, today I'm just wearing a sports coat and slacks, so it's not a suit, just to correct the record.

But is there any truth in saying we want you to be there, we don't want you to sort of be a heavy fed presence or maybe you want to be? What is it that goes into that training so when they're out there they're doing their job and not unintentionally you know scaring away potential new voters who are going who are these guys who look like they're guys who carry guns and badges and what have you?

MR. COATES: First of all, I'd like to point out to you the training is done by us, by people in the Voting Section. It's not done by the Criminal Division. And during the monitoring, people who work for the Department, even though they may come from the Housing Section or may come from a local U.S. Attorney's office, some of those people do civil cases. Some do criminal cases. They work under the direction of people from the Civil Rights Division during the time that they're monitoring elections.

The observers who are primarily monitored and directed by OPM supervisors, but we work closely with them so the duration for those days of monitoring.
is something that's done by the Civil Rights Division.
The training that is done instructs people about the
nature of their job, the nature under the Voting
Rights Act of monitors and observers is to go out and
observe, to collect information. It is not to
intervene. It is not to walk up and to tell the
election -- the poll worker in a particular place that
he or she is not following state law or that he or she
is not following federal law. It's to collect
information about the fact that violations are
occurring.

On election day what we train our people
to do is that if you see violations occurring that can
be corrected, have a close contact with local
officials, either local or state officials, contact
them and let them know, for example, that there's some
woman in a polling place in Sugarloaf, Mississippi who
is not allowing people to ask for assistance, but is
grabbing them by the arm when they come in and forcing
assistance upon them. Contact local officials and let
them know that that kind of inappropriate behavior is
-going on so that corrective action, hopefully, can be
taken by the locals. But what the observer is there
to do is to gather than information so we can make a
determination at a later date as to whether or not a
federal violation has occurred and whether or not litigation needs to be filed.

COMMISSIONER YAKI: Does a monitor --

VICE CHAIR THERNSTROM: Michael? We've got a problem of four participants in the next panel and --

COMMISSIONER YAKI: This will be quick.

VICE CHAIR THERNSTROM: The clock is really ticking here.

COMMISSIONER YAKI: I understand. Quickly. Is there a difference between a monitor and an observer in terms of the interaction with election law officials at the local level?

MR. COATES: No. The difference is the observers, the observers can enter the polling place that's provided for under the Voting Rights Act. Monitors are Justice Department employees. Many times they enter, but only with the permission of state and local officials. They do not -- people from -- the few people from the U.S. Attorney's office who have served as federal monitors, they do not wear firearms. They do not hold themselves out to be prosecutors, and even though some persons in some organizations have raised the complaint that a few prosecutors have been used is that we have never received complaints.
from individual voters, minority or otherwise, so that
because the local AUSA from the U.S. Attorney's Office
in Macon was then at the polls that people felt
intimidated and did not vote.

COMMISSIONER YAKI: I just want to say one
final statement. In the wake of Indiana, there are
still states who have not enacted a Voter ID law, yet
in report after report in 2002, 2004, 2006, a lot of
election officials nevertheless decided on their own
absent any law to create their own sort of voter ID.
I would just ask that as you prepare for the 2008
elections you keep that in mind because there may be
some people who believe that simply because the
Supreme Court came down on Indiana the way it did that
will somehow give carte blanche to voter ID checks
even in jurisdictions where there is no state law
mandating that.

VICE CHAIR THERNSTROM: And can we leave
it there with my apologies for not permitting an
answer to that.

COMMISSIONER YAKI: Yes.

VICE CHAIR THERNSTROM: But I'm really
classified our four panelists for the next panel and I
thank you so much and the reason that it's gone on so
long is because you brought this rich testimony to
this briefing and I appreciate your coming and what are very busy, professional days, I'm sure.

Thank you so much.

MR. COATES: Thank you very much for taking the time to hear us.

VICE CHAIR THERNSTROM: Do we need a break at all or can we go right into the next -- you're ready to roll? Everybody is ready to roll? Good.

COMMISSIONER YAKI: I was here at 9:30.

VICE CHAIR THERNSTROM: You get some kind of gold stars and those of us who were not ready to roll get some kind of what? Demerits.

(Pause.)

VICE CHAIR THERNSTROM: Pete, you're still there?

COMMISSIONER KIRSANOW: I'm here.

VICE CHAIR THERNSTROM: Good. Thank you for sticking with us on this.

(Pause.)

VICE CHAIR THERNSTROM: The next panel is four voting rights experts and I'm going with everybody's permission to change the rules here a little bit. I understand that Professor Tokaji has a plane to catch and what I would like to do is to allow him to make his statement and then have questions
addressed to him before we go on and the fact that he's been held up is, of course, entirely our fault here because we had a lot of people who don't really sit silently by in these briefings.

Anyway, first let me run through who we've got as these panelists and then they can begin. I'll need to swear them in.

Daniel Tokaji who is going to go first, is an Associate Professor of Law at the Moritz College of Law at Ohio State University; Associate Director of the website, Election Law at Moritz. It's an invaluable resource, I should say for those of us who try to follow the developments in election administration law. So it's very much appreciated.

Professor Tokaji has written extensively on voting rights issues, contributes regularly to a website called Equal Vote which provides analysis and commentary on election reform and voting rights issues with special attention to the rights of racial and ethnic minorities, nonspeaking voters, non-English speaking voters, and people with disabilities. He serves on the Board of the ACLU of Ohio.

Hans A. von Spakovsky served as a member of the Federal Election Commission and as counsel to the Assistant Attorney General for Civil Rights where...
he specialized in voting and election issues, including the enforcement of the Voting Rights Act and Help America Vote Act. He has written extensively on voting rights.

Paul Hancock is currently a partner in the Miami office of Kirkpatrick & Lockhard Preston Gates. He previously served for more than 20 years in the Civil Rights Division. While at DOJ he directed the Voting Rights Litigation Program and in addition he served as the State Deputy Attorney General for South Florida and argued *Gore v. Bush* before the Florida Supreme Court and the U.S. Supreme Court.

Last, but not least, Roger Clegg is the President and General Counsel of the Center for Equal Opportunity. He served in the Justice Department in a variety of positions including as Deputy Assistant Attorney General in both the Civil Rights Division and the Environment and Natural Resources Division. He also served as an Assistant to the Solicitor General, Associate Deputy Attorney General, and Acting Assistant Attorney General in the Office of Legal Policy. He has appeared as a panelist before this Commission on several occasions.

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There can be no disputing the fact that the United States Department of Justice has a vital role to play in ensuring that the fundamental right to vote is protected. There will inevitably be some reasonable disagreements, I expect, on this panel on how best to serve this overarching objective, but whatever those disagreements, I hope we can agree that an integral part of the Department of Justice's historic mission is to insure that all eligible voters are permitted to exercise their right to vote on equal terms with other citizens.

MR. TOKAJI: Thank you so much, Madam Chair, and I very much appreciate your efforts to move things along.

My name is Daniel Tokaji, and I am Associate Professor of Law at the Ohio State University's Moritz College of Law. My research and scholarship, as was just mentioned, focuses primarily on matters of voting rights and election administration, and I'm very honored and appreciate the opportunity to appear before you today.

There can be no disputing the fact that the United States Department of Justice has a vital role to play in ensuring that the fundamental right to vote is protected. There will inevitably be some reasonable disagreements, I expect, on this panel on how best to serve this overarching objective, but whatever those disagreements, I hope we can agree that an integral part of the Department of Justice's historic mission is to insure that all eligible voters are permitted to exercise their right to vote on equal terms with other citizens.
It is especially important that the Department of Justice ensure that eligible voters aren't denied their right to full and fair participation in elections based on race, ethnicity, poverty, language proficiency or disability.

The remarks that follow summarize my views on the appropriate role of the department when it comes to the enforcement of voting rights in the 2008 election season, and I'll be giving a somewhat more abbreviated version of the longer written testimony that I have provided for you. I will first discuss areas that in my opinion ought to be high priorities. Those include making sure that voter registration opportunities, language assistance, and disability access are provided to all voters as required by federal law.

Next I will discuss the type of activities that I would respectfully suggest the department avoid so as to ensure both the appearance and the reality of nonpartisanship in this election season.

There are many ways in which the department can promote voting rights, but I'm going to focus on three, registration, language assistance, and disability access, in my testimony today.

First, voter registration, and this is the
The department is, of course, empowered to

point on which I will most extensively focus. One of

the most important areas of voting rights activity in

this year's election, in my view, are the procedures

that state and local jurisdictions follow in

registering voters and in maintaining voting rolls.

The importance of this area is a result of several

factors, including the Help America Vote Act of 2002,

evidence regarding compliance and noncompliance with

the National Voter Registration Act of 1993, sometimes

known as “Motor Voter,” and state laws that have been

enacted in recent years.

Although election administration,

including voter registration is mostly a state and

local matter, as we mentioned earlier, there are some

important federal legal requirements in place designed

to ensure that all eligible voters have a fair

opportunity to participate in elections. A

cornerstone of these requirements is the National

Voter Registration Act, or as I'll refer to it here

NVRA, which requires to voter registration for federal

elections be made available at state motor vehicle

agencies, as well as at state offices providing public

assistance services and services to people with

disabilities.

The department is, of course, empowered to
bring civil actions in federal court to enforce the NVRA’s requirements.

Unfortunately, we do have evidence of noncompliance and less than full compliance with the requirements of the National Voter Registration Act, especially when it comes to making registration opportunities available at public assistance offices. The number of voter registration applications from public assistance offices has declined precipitously in the past ten years, despite the fact that somewhere around 40 percent of voting age citizens from low income households remain unregistered.

Survey evidence suggests that registration opportunities are not being made available as required by the NVRA. Put simply, there is evidence that a disproportionate number of poor Americans are not being registered as required by the law, and yet I would emphasize that it appears that the Department of Justice has done relatively little in recent years to make sure that registration opportunities are made available at public assistance offices as federal law requires, at least until very recently.

On my survey of the department's Website, as I was flying in this morning, I found one case having to do with making registration available at
public assistance agencies from Tennessee. That case was actually filed, I believe, in 2002, has been quite successful in increasing registration, but in my opinion there hasn't been enough focus on making sure that that aspect of the NVRA is complied with.

Another priority is to make sure that voters' names are not wrongly removed from or omitted from state voter registration lists. This is not merely a theoretical problem. A study that was conducted by Cal Tech-MIT Voting Technology Project in 2001 after the 2000 election found that this was probably the greatest source of lost votes, that is, registration mix-ups, accounting for some 1.5 to three million voters affected.

Evidence that this is a continuing problem was partly in the high number of provisional ballots that are being cast, and provisional ballots are cast, among other reasons, where a voter's name doesn't show up on the registration list, just like the fact the voter believes that he or she has registered. This is particularly a problem in my own state of Ohio, based on data I've just recently received.

No eligible voter should be denied the right to vote, to have that vote counted due to a faulty registration list.
The NVRA, as well as HAVA, impose important limitations on voters being purged or otherwise having their names wrongly removed from voting rolls, that includes a limitation on removal within 90 days of an election that I discuss is somewhat greater detail in my written testimony.

Here, again, there's reason to worry that the requirements of federal law are not being complied with, and I'll just refer you all to the evidence that I cite in my written testimony, in the interest of time.

A second area of concern is language assistance, and I was here during the first panel. I know this has been discussed. There's one additional point that I just want to emphasize. The language assistance requirements of the Voting Rights Act, Sections 203 and 4(f)(4), don't just require bilingual ballots. In fact, I'm not even sure that's the most important thing they require.

They also require registration and oral assistance to be provided, and I say this is particularly important in light of evidence regarding a registration gap, especially facing Asian Americans, Native Americans, and Latino voters.

Third and finally, disability access.
This is a group that, I fear, are sometimes the forgotten and stepchildren of voting rights law, the last group to get full and equal access to the franchise. The requirements of both the ADA, HAVA, and other federal laws have to do with this, and I think the bottom line here is it's just hard to know very much because the data and the information, going back to something you alluded to earlier, Dr. Thernstrom, is just so poor on this, and I think we need better monitoring and better information gathering in this area especially.

Finally, because I've seen the yellow light is on, let me say something in regard to some of the allegations that have emerged in the past couple of years regarding the so-called politicization of the Justice Department. Many commentators, including a number of former DOJ professionals have alleged that the department's actions, particularly in the area of voting rights, were driven by partisan interests rather than the rights of voters.

I emphasize that it is not my purpose here today to rehash those allegations, but I would emphasize this: There is no question that the department's reputation has been tarnished by the revelations that have emerged in the past year or so.
For this reason, it is vitally important in this current election season that the department be especially careful to avoid even the appearance of partisanship in the discharge of its responsibilities, and I would emphasize especially when it gets very close to the election.

The focus of DOJ's efforts should be on expanding access for all voters including racial minorities, language minorities, poor people, and people with disabilities rather than on taking actions that could chill registration and participation or that might be perceived as advancing partisan interests.

Thank you.

VICE CHAIR THERNSTROM: Well, thank you, and as I said, I'd like to let you get liberated in time for your plane. If you have time --

MR. TOKAJI: I do have time.

VICE CHAIR THERNSTROM: -- of course, stick around, but let us have people ask questions of you at this point.

MR. TOKAJI: Thank you, Madam Chair.

So Commissioner Gaziano.

COMMISSIONER GAZIANO: Yes. Thank you, Professor, for testifying.
MR. TOKAJI: Let me say this. I don't to ask you about, and that is the supposed evidence you've mentioned for the failure to enforce the Voter Registration Act with regard to welfare offices. It is certainly not surprising after President Clinton signed the welfare reform into law that the welfare rolls have declined dramatically, and my colleague at the Heritage Foundation, David Muhlhausen, among others, has done very careful studies, rather than just sort of anecdotal surveys, and found that the decline in the number of registrations at public assistance offices mirrors almost exactly the decline in the number of people being offered in this.

Are you aware of David Muhlhausen's testimony before Congress?

MR. TOKAJI: I am aware of it. I can't say that I've read that testimony, but let me respond as follows.

COMMISSIONER GAZIANO: Just before I do that, have you read the subsequent, more complete study that he's published?

MR. TOKAJI: No, but I'd like to see --

COMMISSIONER GAZIANO: Well, I'm going to enter it into the record and encourage you to do so.

MR. TOKAJI: Let me say this. I don't
doubt that at least a part of the decrease, the significant decrease in registrations coming from public assistance agencies is attributable to that, but there is survey evidence showing that voters are not being offered the opportunity, and I would emphasize a couple of points.

In cases where there actually have been efforts to make sure there's compliance, as in Tennessee, which I mentioned earlier, and one other state in which private groups got together, that is, North Carolina, we have seen a significant increase in voter registration coming from public assistance agencies.

That suggests to me that if we actually enforced the provisions of the NVRA, we will see a desperately needed increase in voter registration among poorer voters.

COMMISSIONER GAZIANO: Okay, and by the way, if there is some sort of systematic failure to comply with this act, I suppose the theory would be that it is both the state public assistance agencies, the social workers who really don't want to register these people, and the federal officials then turning a blind eye, would not be the way if the federal law is not being --
MR. TOKAJI: Yes. I mean, I think often the state secretary of states will take the position that it is not our job to do it. County welfare agencies, unless there's pressure to be put upon them, have not much of an incentive to do so, and it would be the Department of Justice logically that would be applying that pressure.

But for the most part in the past several years, at least until relatively recently, that has not happened.

COMMISSIONER GAZIANO: Well, I will be glad to look into your research further. I'm still somewhat perplexed that the mirror drop, responding to the mirror drop in welfare suggests a different conclusion than you have reached.

MR. TOKAJI: Well, even if your statement of the evidence is correct, I wouldn't draw that inference, and you and I may just respectfully disagree --

COMMISSIONER GAZIANO: Sure.

MR. TOKAJI: -- with each other on that point.

I would also note a recent study which came out after I had written my testimony on Friday or just last week from electiononline.org, which I'll
submit into the record as well.

COMMISSIONER GAZIANO: Thank you.

VICE CHAIR THERNSTROM: You are saying that social workers, surely their bias is towards getting people, the clients they serve, getting them registered to vote. Am I wrong on that?

MR. TOKAJI: Well, let me try to look at it from their perspective. We're both speculating here about --

VICE CHAIR THERNSTROM: Right.

MR. TOKAJI: -- you can't get into the minds of somebody.

VICE CHAIR THERNSTROM: Right.

MR. TOKAJI: But these are people with a lot of other tasks, and if nobody is telling them this is something you have to do, you know, they may be anxious to get on to the next client. Again, this is just speculation, but it's not difficult for me to understand, Dr. Thernstrom, from the perspective of the busy welfare worker why they might not have a strong incentive to put this on their list of things to do with these clients.

VICE CHAIR THERNSTROM: Other questions?

Yes, Commissioner -- oh, Commissioner Kirsanow, you are from Ohio yourself. Would you like to come in
here at all?

COMMISSIONER KIRSANOW: Not at this point.

Thank you very much.

VICE CHAIR THERNSTROM: Okay.

Commissioner Melendez.

COMMISSIONER MELENDEZ: Yes. Thank you, again, for being here.

Since you were here during the first panel, I wonder what your opinion is of the care for allocating monitors that Mr. Coates mentioned, and would you prioritize operations of these sources differently than what he said?

MR. TOKAJI: Let me make a couple of points on monitors. The first is that there's a limit to what monitors can do. I think they're necessary, but what I tried to emphasize in my testimony today is just sending monitors on election day is not going to get the job done. This has to begin weeks, months in advance, which is why I'm glad we're having this hearing in June rather than in October.

The second point is that I think there are some dueling considerations here in terms of resource allocation. I mean, you know, I think there are resource allocation decisions that have to be made, but on the one hand, it may well be the case as was
mentioned earlier that in jurisdictions that are swing states, like my own State of Ohio, are more likely to have voting rights violations; that there will be an increased incentive for people to engage in tactics, like so called voter caging or intimidation or giving false information about, you know, where you're supposed to vote or the date on which you're supposed to vote.

At the same time, I think the reality is in swing states like mine, like Ohio, the parties, the political parties, advocacy groups are going to be paying much closer attention to what's going on, and let's face it. They have a stronger incentive if they believe there's a violation of the NVRA or HAVA or the Voting Rights Act to litigate in Ohio than they do in some state that's not in play.

So from that perspective, it may be more appropriate actually, just taking that one factor into consideration, for the department to focus on less high profile states. So as I say, there are dueling considerations here.

VICE CHAIR THERNSTROM: I have a question. I have a few questions, but let me just start with this. During your testimony here, you referred to the high number of provisional ballots in some states, and
in Ohio, for example, the percentage of voters casting provisional ballots actually increased.

What's the problem? I ask this. What is the problem with provisional ballots? That is, their purpose is obviously to make sure that at the end of the day voters who are properly registered, eligible to vote are not disfranchised.

You've obviously got a problem with provisional votes.

MR. TOKAJI: Yes. Let me say, first of all, certainly being able to cast a provisional ballot is better than not being able to cast any ballot at all, and you know, I think that the provision of HAVA requiring provisional ballots for voters who don't have proper ID or who appear at polls and find out, in fact -- that was a good provision of law, one that I'm thankful was enacted.

The problem, if you've got a bad registration system that results in a lot of people casting provisional ballots is, I guess I'd say, twofold. Let me make it threefold actually.

First of all, there's a risk that some of those voters' votes won't be counted, and we have widely varying rates of counting provisional ballots not only among states, but within states, presenting
an equal protection problem, I think under Bush versus Gore. People's provisional ballots are being treated differently from jurisdiction to jurisdiction.

VICE CHAIR THERNSTROM: And they're not counted because of incompetence? Why aren't they counting them?

MR. TOKAJI: It's really hard to say, and like I said earlier, I tend to be data driven, and the data here is not as good as I would like it to be. My suspicion is it's probably due to different practices among jurisdictions within a state. There may not be clear rules for ascertaining which provisional ballots should count and which shouldn't.

Second, the second problem with a large number of provisional ballots, obviously it creates a big headache and consumes a lot of resources of state and local election officials.

Third, and this may be more important leading up to the 2008 elections, it increases the likelihood of a litigated election. If you've got more provisional ballots, just as if you have more over votes or under votes, it gives the parties more things to fight over after the election.

You know, we can all remember Palm Beach County 2000. I think the last thing we want to see is
officials in, let's say, Franklin County, Ohio, where I live, going through every provisional ballot, you know, trying to figure out whether it should be counted, analogous to what happened eight years ago.

So it increases the likelihood -- it increases the margin of litigation and, therefore, the likelihood of post election disputes, which I think we'd all like to avoid if we can.

VICE CHAIR THERNSTROM: What is the magnitude of the problem here? I mean, when you've got a bad provisional ballot, what percentage of the ballots are we talking about that could be, you know, provisional? Are we talking about, you know, one percent or less of all ballots?

MR. TOKAJI: It varies considerably from state to state.

VICE CHAIR THERNSTROM: A larger number?

MR. TOKAJI: My state is at the higher end, and let me give you some time-line statistics. In the November 2004 election in Ohio, it was as I recall 2.7 percent. By 2006 it was 3.1 percent. In this primary election, based on information I've just received from the Ohio Secretary of State's Office, which is in my testimony, it's 3.4 percent.

So you know, a significant number of
I don't want to suggest that it's all database problems, but having said that, I think there are some database problems which the Brennan Center report that I refer to in my testimony documents. You...
MR. TOKAJI: Yes. I've been thinking about that a lot, Dr. Thernstrom, and you know, there are different states that have different ways of doing registration which can substantially reduce reliance on provisional ballots. At one end of the spectrum is

VICE CHAIR THERNSTROM: Right.

MR. TOKAJI: -- you can have voters erroneously stricken because they're registered in one place or their registration has Ben, but their motor vehicle registration says Benjamin or there's a transposition of first and last name or there's a problem with a hyphenated name.

VICE CHAIR THERNSTROM: And related to this now, and I'll let other people speak, I mean, is there related to this a failure on the part of voters to re-register, let's say, after moving to a new address and is there a failure of information given to voters such that we don't run into the problems?

Are there actions that can be taken so that -- obvious actions that can be taken -- so that we don't end up with three-plus percent of provisional ballots in a State like Ohio?

MR. TOKAJI: Yes. I've been thinking about that a lot, Dr. Thernstrom, and you know, there are different states that have different ways of doing registration which can substantially reduce reliance on provisional ballots. At one end of the spectrum is
Election Day registration, and you know, I know there are a variety of different views on Election Day registration. I happen to be a supporter of them. One of the big advantages that it has in States like Minnesota, Wisconsin is it reduces reliance on provisional ballots.

Short of that, other states have what Dr. Michael McDonald, a political scientist, refers to as portable voter registration, where you can transfer your registration on Election Day by going to your new polling place. That can also in some instances reduce these errors from occurring.

He's got a forthcoming paper on that subject that I would be happy to provide as well after today's hearing.

VICE CHAIR THERNSTROM: Good. Other people, questions. Commissioner Kirsanow, are you still in that swing state of yours where there's undoubtedly going to be 1,000 voting rights lawyers gathered on both parties, gathered on Election Day?

COMMISSIONER KIRSANOW: I'm moving to Montana.

(Laughter.)

VICE CHAIR THERNSTROM: Good move. It's prettier, for one thing. Okay. You don't have an
I know that in San Francisco you could with very little effort get behind the desk to see what was going on with the ballot counting that was going on, which goes to the issue of how do you treat provisionals, how do you treat damaged ballots,
COMMISSIONER YAKI: And the fact that if spoiled ballots, those sorts of things. And I was just wondering what your take is on the fact that so much of the determinations are being made right there at the local level by a person who only does this maybe once every four years, not probably up to date with every development and election law that's gone on.

Do you have any comments on that?

MR. TOKAJI: Yes. I mean, I have a comment on it, which is basically to agree with your recognition of a problem without having a real simple solution to it. One of the things that I've written about is what's sometimes called the hyper decentralization of the American election system. We don't just have one election system or even 50. We've got thousands and thousands of election systems in this country. You know, most of the responsibilities are foisted upon local election officials who I understand often don't have the resources they need to do their jobs as well as they would like to. I get that, and I --

COMMISSIONER YAKI: And I mean not even resources. I think dream.

MR. TOKAJI: Yes.

COMMISSIONER YAKI: And the fact that if
you have a person who may be elected or appointed by 
an elected official, I just make this as an 
observation comment. I think that one of the major 
reasons for the -- and this goes on both sides, 
Democrat and Republicans -- I think you can see the 
sees of the so-called Brooks Brothers riot in Miami 
pretty much anywhere else in the country because of 
the ease of access that people have inside the sanctum 
of the Registrar's Office because of close 
relationships, friendships, what have you, that give 
people really unprecedented access to national 
decisions that are being made.

MR. TOKAJI: Well, I think it's integral 
that at least the balloting, and that includes 
electronic voting machines, that the sanctity of those 
be maintained rigorously, that there be chains of 
custody.

Going back to something that I think is 
implicit in your remark and was certainly a part of 
your original question, you know, we rely very heavily 
on volunteer poll workers, who are there just one day, 
and God love them, our system depends upon them. We 
don't have enough of them. We don't have enough of 
them who are capable of doing the job, to be honest.

You know, I say that not to slight any of

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the hard working poll workers who our system depends upon, but our election laws have gotten so complex that you almost have to be a lawyer to understand them.

So since I know this is going on C-SPAN, let me just say this. For those out there wondering what they can do to make our elections better, and I hope we can all agree on this regardless of our party, something everyone can do is volunteer to be a poll worker in your community. I know that county Registrars and Boards of Election throughout the country will thank you for it.

VICE CHAIR THERNSTROM: Thank you very, very much.

Anybody else?

(No response.)

VICE CHAIR THERNSTROM: Well, we will move on. Professor Tokaji, please stay around as long as you feel like it.

MR. TOKAJI: I'll stay for a few more minutes. Thank you. Take care.

VICE CHAIR THERNSTROM: Hans von Spakovsky.

MR. VON SPAKOVSKY: Thank you, Madam Chairman.
The subject of this hearing is the Department of Justice plans for the November election. I, frankly, think that the outstanding record of the division during this administration shows that it's well prepared to monitor compliance with and enforce the four federal voting rights statutes it has responsibility for, that is, the Voting Rights Act, the National Voter Registration Act, the Help America...
Now, when you consider that the Voting Section only has about 85 lawyers and support staff, you realize that's quite an achievement. The only reason that we were able to do that was because we instituted an in-house training program, and we recruited division-wide trying to get people in that

I also was going to say some complementary things about the new Chief of the Voting Section, who has just become the Chief, but you all saw him here this morning. He's an outstanding lawyer. He's probably the most experienced trial lawyer not just in the Voting Section, but in the entire Civil Rights Division, and I, frankly, think under his leadership and that of the other deputies he brought with him, they're going to do a very good job.

They have pointed out that in 2002 and 2004, when I was at the division, we broke historical records in the number of federal observers and staff that we sent out: 2002, 829 observers and staff; 2004, if you actually consider both the general election and the primaries, we sent out almost 1,500 federal observers and 533 staff.

Now, when you consider that the Voting Section only has about 85 lawyers and support staff, you realize that's quite an achievement. The only reason that we were able to do that was because we instituted an in-house training program, and we recruited division-wide trying to get people in that
had not done this before.

We also installed for the 2002-2004 elections, frankly, a new 800 number and a new telephone system because GAO had done a study and had criticized the department and division for the 2000 election over its handling of the huge volume of complaints it had gotten in. We put in the new telephone system, and we set up a triage system using lawyers and paralegals that would determine the most serious complaints that needed immediate attention Election Day.

We also put in the first Web-based complaint system. I assume that all of these improvements will be in place with this November election.

We also, along with the Criminal Division, mobilized not only our division but also the Public Integrity Section, the 93 U.S. Attorney's Offices, and the FBI so that on Election Day, they would have agents and lawyers available in all of the field offices and in Washington at telephones ready to answer any complaints that came in from voters, and we trained them so they would know who it should be referred to.

So, for example, if the FBI got a
This administration has also filed more telephone call about an issue that was not a criminal lawsuit to enforce the National Voter Registration issue, but was a civil rights issue, they would know to immediately call the section and forward it to us and vice versa.

Frankly, the division, despite a lot of misplaced criticism, has a terrific enforcement record over the past eight years, and I have no doubt they will investigate and litigate any unremedied cases they see. As Chris Coates said, and I know Dan Tokaji has indicated his concern over Section 203, well, when this administration came to office, there had only been about a dozen cases filed to enforce Section 203, the language minority provisions. I think that the last count I saw this administration has filed 27, more than double what had been filed in the prior history of the act, including the first 203 cases on behalf of, for example, Filipino Americans, Vietnamese Americans.

Section 208, the right to assistance on Election Day, is a very important provision of the Voting Rights Act during elections. Well, 90 percent of the suits filed to enforce that provision have been during this administration.

This administration has also filed more lawsuits to enforce the National Voter Registration
Act than any prior administration. That's very important because that ensures that individuals who apply to register will become registered to vote, and each state will properly maintain the voter registration list.

They filed close to a dozen Help America Vote Act suits to enforce not just the provisional balloting requirements in some counties and states that were not providing provisional ballots, but also they went after states who were not putting in the statewide voter registration database. They were required to do so, and doing it in time for the federal elections, and that database was designed by Congress to solve some of the registration problems that Dan Tokaji was talking about.

They also filed numerous cases under the Voting Rights Act under Section 2.

One of the biggest problems I see in the upcoming election is the fact that our overseas military voters remain one of the largest groups of disenfranchised voters that there is. That's because they're still voting by a 100 year old method of paper absentee ballots, and it can take more than 30 days for a requested ballot to wind its way through the mail from election centers here overseas to a combat
I do think the department does need to look at one problem that it has not dealt with, and that is the failure of certain states, such as Ohio, soldier in Iraq. If the combat soldier immediately votes and sends it back, the chances are in more than half of the cases the ballots don't make it back in time.

That's why it's extremely important that the department set up, as they did in the 2004 election in cooperation with DoD a survey system that monitors through E-mail and otherwise what is going on in the 3,000 counties across the country who are responsible for sending out absentee ballots. Time is very short when we find out, when Justice finds out that a state or a county hasn't sent out their absentee ballots at least 30 days before the election. They have got to be ready to go to court immediately.

We had to do that in 2004 in Georgia and Pennsylvania when we discovered counties had not sent out their absentee ballots. In those cases we obtained court orders that were the broadest relief the department had ever gotten, including transmittal of the ballots overseas by fax and E-mail, return by overnight express mail at the state's expense and extensive notice to the voters.

I do think the department does need to look at one problem that it has not dealt with, and that is the failure of certain states, such as Ohio,
South Dakota, and Iowa to comply with 42 USC §15483. That's the part of the Help America Vote Act that added a citizenship question to the voter registration form.

The statutory language is very clear. Registration can't be completed unless the citizenship question is answered in the affirmative by the applicant. These states are accepting voter registration forms and registering voters even when the citizenship question has not been answered. That's a direct violation of federal law, and it needs to be remedied by the Justice Department.

There's also another problem with states. Maryland is one that does this. A number of states provide driver's licenses to illegal aliens. Most states provide driver's licenses to legal aliens who are here with permission of the government. Because many of the DMVs automatically offer voter registration with any individual who is getting a driver's license, they are not differentiating that they are offering voter registration opportunity to people who are not citizens.

A final thing that needs to be done is they need to check to make sure that all of the states have their statewide voter registration databases up
and running, in full compliance with HAVA. There's some indication that Illinois may not have a fully compliant system.

There was a recent study in Connecticut finding that almost 9,000 deceased people were still on the rolls. That indicates that they are not complying with Section 303 of HAVA which requires these new statewide databases to be coordinated with state agency records on death.

In conclusion, I do think DOJ is well prepared overall to handle any issues that may arise during the November election. I do think that some of these HAVA and NVRA compliance issues need to be surveyed and reviewed by the division.

They also, both divisions, criminal and civil rights need to complete their training and preparations this summer to insure that they have the resources, the equipment, and the personnel ready on election day for any problems that may occur.

I am confident that under the leadership of both divisions that they'll be able to do that.

Thank you.

VICE CHAIR THERNSTROM: Thank you very much.

Obviously we're waiting until all three of
your give your testimony for questions addressed to the three of you.

Paul Hancock.

MR. HANCOCK: Thank you, Doctor.

Members of the Commission, I submitted a written statement. I would ask that it be made part of the record of this proceeding.

My --

VICE CHAIR THERNSTROM: All written statements are a part of the record I assure you.

MR. HANCOCK: The views that I expressed here are based on my long experience in the Civil Rights Division of Department of Justice, including in the Voting Section for many years and supervising the work of the Voting Section.

I also have a perspective as a former state Deputy Attorney General, and that we in Florida, where we lived through some dramatic times in the 2000 election system, and then we had to come up with a remedy. So I was involved with not only the litigation, but also the remedial provisions that we had to enact, and then had to get the clearance under Section 5 of the Voting Rights Act.

I agree that there is certainly room for principal debate as to the continuing need for certain
provisions of the Voting Rights Act, but there's not much room for debate as to what caused the act to be enacted in the first place. Blacks in this country faced the very sorry history of the most severe discrimination anyone could imagine. They were subject to discriminatory tester devices as a precondition to voting. If they attempted to register to vote, they were harassed. They were beaten. They were murdered.

That's not ancient history. Many African Americans who will appear to vote this year were subject to that conduct, and unfortunately it wasn't just blacks in the South. Native Americans have also a very severe history of discrimination in voting.

And it wasn't just citizens who were imposing unfair conditions in harassing and intimidating and murdering blacks. It was state public officials, including law enforcement officials.

So while we've made great achievements since that time, the plan for the future needs to be carried out in the context of what people experience. We all view conduct based on our own life experience. I give you one example of the 2000 election in Florida where we got reports that police officers had set up a roadblock south of Tallahassee in north
Florida to check people's driver's license and registration.

That spread great fear through the black community that this was an effort -- it was near a black polling place, and the fear was that people began to report that they were being targeted because they were -- the only reason they were being targeted is because they were on the way to the polls to vote.

Now, somebody without the experience of north Florida blacks might say that was a silly reaction, but for those who lived through what happened earlier, it was not a silly reaction. It spread such great fear that reports were made to the Department of Justice. They were conveyed to me in the Attorney General's Office. We were able to stop it, and I must say that our investigation showed that Officer Bubba may not even know there was an election that day, but the point was that their conduct, although innocuous to them, could have deterred many people from voting.

We stopped it early. Whether people were deterred from voting I can't say, but that is just an example of what we consider going forward here. The Voting Rights Act has had remarkable success, and it's remarkable that you're having this hearing today when
That's a reality. It's not system.

That's a reality. So what do we do to prepare for this election? I mean I, for one, do not think that the most important statistic is the number of -- and just yesterday it was informed that the presumptive nominee of one of our parties is going to be an African American. That itself shows the remarkable success of this law.

At the same time, it presents some really serious issues for this next election. I mean, we can expect to have the largest African American turnout in the history of our country. I don't think it's unreasonable to expect that, nor is it unreasonable to expect that a large number in presenting to the voters will be people who haven't voted in a long time. Maybe they've never voted, African Americans who have never voted. They're going to come out in force. They might have stayed away from the polls for a long time. They might be elderly. They might not be as informed of the election process as others.

So what do we do? And also it's not going to be a secret as to who their candidate of choice is, which means that if somebody wants to suppress the vote, they can target people for suppression just by the color of their skin.

That's a reality. It's not system.

That's a reality. So what do we do to prepare for this election? I mean I, for one, do not think that the most important statistic is the number of -- and
That's the sole reason, the only reason in law that Department of Justice officials through the Office of Personnel Management can enter a polling place to observe the election, is to look for race

There were a number of interrelated provisions to the Voting Rights Act of '65. First, it threw out the discriminatory tested device. I know you know this, Dr. Thernstrom, but bear with me a moment. It threw out discriminatory tester devices that were used. It allowed federal officials to enter southern states and other specially designated states to actually list people for registration purposes, in other words, registered voters, and it provided -- and this is the crucial point for purpose of today -- it allowed the federal government in those cases where counties were designed for examiners, as they were called, to send in federal observers to observe the election process for the sole purpose, sole purpose of determining whether people would be denied their right to vote on account of race, color, or later amended to mean language minority status.

That's the sole reason, the only reason in...
discrimination. That's all, nothing else.

Also, Section 5 was a prophylactic provision to make sure that new discriminatory devices weren't enacted.

Now, what do we do here? What does it mean to prepare for this election? Well, I will offer a number of suggestions to you, some of which have been discussed today, and I'll try to address some of the issues that have been raised.

First of all, this is a presidential election. It's different than any other election. The lesson from Florida is that we don't rerun presidential elections. So it's not important just to have observers that are to find out what problems might exist. Mr. Coats talked about the observer program that they gather information. They go back, and they study it, and they see whether the Department of Justice should bring a lawsuit.

Well, the presidential election is over, and the problems they find that might affect the presidential election are not going to be used to remedy that election. In a mayoral election, perhaps we could rerun the election if there were serious problems that affected the outcome of the election, but the election we learned from Bush v. Gore is we
With this election it's going to be very important that local election officials do the little things right. That is, they let people know where they should go to vote. One of the biggest problems don't rerun presidential elections, and the problems, even if they're valid, even if they're valid, we don't have time to fix them sometimes after the election is held.

The lesson is we've got to do this in advance. We try to avoid these problems, stop them from occurring. Now, how do we do this? Well, it requires advanced planning. It requires a lot of advanced planning. The department needs to work with state and local election officials to coordinate with advocacy groups, to coordinate with state officials, to coordinate with anyone who has any insight in the electoral process to try and predict what the problems might be.

Other imports, I agree. We talked about HAVA, NVRA. Those are important enforcement tools, and they can be used in an actual election to make sure that we have accurate registration lists, to make sure that people are going to be allowed to put when they are put on the list properly, and at the polls the lists are cleaned properly.

With this election it's going to be very important that local election officials do the little things right. That is, they let people know where
we have in elections is that people don't know whether they should go to vote. Polling places are changed and people don't get advanced notice of the polling places. It's going to be crucial this year when we have so many people who aren't as experienced in the electoral process. How are they going to know where to go? Are they going to know the procedures that they need to follow to vote?

And, Dr. Thernstrom, you talked about provisional balloting. My major concern about this is that a provisional ballot only counts if the person is otherwise properly registered and otherwise complies with the law. If they appear at the wrong polling place mainly because they didn't get proper notice or they didn't know where to go to vote, I'm not blaming anyone for it. Let's just say they appear. They're properly registered. They just went to the wrong school house. If they are given a provision ballot without being directed to the right polling place, their vote isn't going to count.

Now, we can debate the wisdom of that from a public policy purpose because what difference does it make in the role for President where you go to vote, but that is the law. That is the requirement of most states. I would say that it's very important to
the department. In fact, when we got clearance of the election reform legislation that had a provisional ballot that had that requirement, the Department of Justice would not preclude agreement from the state that before they did a provisional ballot, they would first find where the voter should be voting and direct them to the proper precinct.

That should be done in every state, and it's a serious, serious problem because if we get long lines on Election Day and election officials are busy, it's very easy to hand people a provisional ballot. "I don't see your name on the list. Here's a provisional ballot. If you're properly registered, it's going to count."

So that's my major concern with provisional balloting. I wish we had it done differently, and I wish we would consider ways. If someone is properly registered and they want to vote for President, count their vote, but under the present law, it's not going to happen.

So it's very important that the department work with election officials in advance to make sure it's done right, and it's nothing that's going to be corrected on Election Day.

I mentioned that the only reason in law
for sending observers in is denial of a person of the
right to vote on account of race or language minority
status, and they can only be sent to jurisdictions
that are subject to the special provisions of the
Voting Rights Act. That's all.

Now, the department has expanded this
program by using attorney coverage and also with the
consent of some states, the states have allowed
department officials to enter the polling place even
though they're not authorized by law to do so. That's
positive, but I say to you I'm not overly impressed by
the number of observers that are sent out. I think
sometimes this program has been misused to give a
stamp of federal approval on an election.

The design should be identifying areas
where there might be a problem and sending people in
to address those problems, and it can't be political.
This can't even have the appearance of politics.
That's going to be tough in this election because it's
going to be so obvious who the people are lining up to
vote for, at least African Americans.

So it has to be done in a professional
manner, and I suggest that the department should, as
it used to do in the past and maybe still does, there
should be detailed memoranda prepared explaining the
weaker justification for sending people to those areas, not just that a state official wanted us there. That doesn't mean a thing to me. The point is have you done the research necessary to determine whether there might be a denial or abridgement of the right to vote on account of race or national origin, and if that's the case, use it.

And I think that, again, I'd say that -- okay. I will wrap it up -- and I would say also that it's crucial who's sent out here. The expansion of this program beyond its original intent might have some benefit, but it also has a lot of risk because when you're sending civil rights lawyers out, that's one thing. If you're sending lawyers from the Criminal Division or other areas of the Department of Justice, they don't have the background in civil rights. They don't have the understanding. They're perceived to be law enforcement officials that can have the same countervailing effect that we just don't want to have.

And I would say on voter ID issue, that was for the racial challenge, but there's still great concern in the minority community what the impact of that is going to be, and this election provides an opportunity to gather information about that.
Observers are going to be in the polling place. It won't be hard to keep information about people that are turned away, and then we'll know the racial impact of this. You'll have your data that you need to do your studies.

To sum it up, I think we really have an awfully great challenge this year. It's going to be an historic election, and it's going to have the largest African American turnout we've ever experienced, and the challenge is going to be to make sure these people are treated fairly and without regard to race. That, in my view, rests primarily with the Department of Justice, but they've got a lot of work cut out for them that they need to begin doing now.

Thank you.

VICE CHAIR THERNSTROM: Well, I think all of us would agree with what you just said. Historic election, and we absolutely need to make sure that people are casting ballots and their ballots are counted.

MR. HANCOCK: That we count them. That's right.

VICE CHAIR THERNSTROM: So I can't imagine there's any disagreement on the Commission on that.
MR. CLEGG: Thank you, Madam VICE CHAIR, for the opportunity to testify today before the Commission.

My name is Roger Clegg, and I'm President and General Counsel of the Center for Equal Opportunity, which is a nonprofit research and educational organization that is based in Falls Church, Virginia. Our Chairman is Linda Chavez, and our focus is on public policy issues that involve race and ethnicity, such as civil rights, bilingual education, and immigration and assimilation.

I should also note that I was a deputy in the U.S. Department of Justice's Civil Rights Division for four years, from 1987 to 1991, part of the time when Paul was there also. We worked together.

Law enforcement agencies have two tasks with respect to voting: making sure that legitimate voters are not kept from voting and making sure that fraudulent voters are kept from voting. Both tasks are important.

I won't say that they are equally important since most Americans are offended more when they read about a person denied the right to vote who shouldn't be than when they read about someone
illegally voting.

On the other hand, this is not quite the usual criminal law situation where we can blithely assert that it is better to let ten guilty men go free than imprison one innocent one. After all, when someone votes illegally, he cancels out the vote of a lawful voter. So arithmetically, if not psychologically, the impact is the same as if that lawful voter had been turned away from the polls.

Those who have been kept from voting in recent memory, both lawfully and unlawfully, have disproportionately included members of groups that have tended to vote Democratic. On the other hand, my sense is that illegal voters have also tended to vote Democratic.

Consequently, Democrats are happy to insist that nobody should be hindered from getting to the polls, even if this means that some illegal voters get to the polls as well. From the Democrats’ perspective, it is win-win.

I would add in this regard that probably Democrats would, by and large, want to define illegal voters more narrowly. I've noted, for instance, that the left is more likely to favor letting criminals, non-citizens, the mentally competent and the mentally...
Conversely, we would expect Republicans to object if the department, especially in a Democratic administration, were to focus on ensuring voter access while turning a blind eye to voter fraud and illegal voting. And, indeed, I have some recollection that this happened to a degree in the Clinton administration.
Let me conclude, Madam VICE CHAIR, by saying that in addition to these legitimate roles, it's also important for the Justice Department to do no harm -- and I wanted just to add here that unfortunately two of the statutes that the Justice Department has responsibility for enforcing do cause harm. We've talked about Section 203 of the Voting Rights Act this morning, which requires ballots to be
printed in foreign languages. (And by the way, it's not just four foreign languages or five foreign languages that these ballots have to be printed in. Those are just the basic ethnic categories. For instance, “Asian” is one category, but there is more than one language spoken in Asia. So there's a requirement that ballots be printed in Mandarin and Japanese and Korean and Vietnamese, and so forth and so on. The same thing for Native American ballots.)

I think that Section 203 balkanizes the country. It diverts resources that could be spent elsewhere -- that have to be spent now on printing foreign-language ballots that could be spent on improving polling opportunities -- and it also increases the likelihood of voter fraud.

Likewise, and you referred to this, Commissioner Thernstrom, I think that Section 5 for all of the good that it has done in the past also creates significant harm these days by encouraging racial gerrymandering, which I think is a serious loss to our society.

Well, as I say, I view those as ways that the department unfortunately is adding to voting problems rather than counteracting them.

Thank you for the opportunity to testify.

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today, Madam VICE CHAIR, and I look forward to any questions you and the other Commissioners may have.

VICE CHAIR THERNSTROM: And I will open the floor for questions.

VICE CHAIR THERNSTROM: I want to say one thing before I do, that I actually very much regret that at the beginning of this meeting I failed to say that whatever party you feel affiliated with and will eventually and whatever candidate you will eventually vote for in November, I for one, as somebody who is not a Democrat, nevertheless, I for one very much celebrate the fact that we do have a historic turning point here and the first African American as the candidate of a major party with obviously a good chance of ending up in the White House.

And it does say something, it seems to me, very good about this country and how far we've come. So I wanted to interject that.

Anyway, questions from the Commissioners?
Yes.

COMMISSIONER GAZIANO: No one else as eager as I am to begin, but let me continue one line of questioning regarding the assistance for those registrations that were part of the National Voter Registration Act and HAVA. I'm not sure I understand
completely the interplay between those, but one of the concerns that's been expressed, and I think I'll direct this primarily to Mr. von Spakovsky, and maybe other panelists have a thought as you happen to hear it, is that some states have adopted a policy of not asking people seeking public assistance whether they're U.S. citizens or not.

In particular, because they do not want to discourage non-citizens from seeking public assistance, and yet there is a requirement to encourage them to register, and the anecdotal evidence that I have is that someone involved in the foster care process was encouraged every time he entered an office in California or Ohio whether he was registered so that there is no failure of the social workers and others involved in encouraging that.

But if a non-citizen is asked, there is a concern that some are fearful not to register and indicating that they're non-citizens. Is there a concern that you have regarding states that don't ask for any evidence of citizenship that they're ever registering those who aren't eligible to vote?

MR. VON SPAKOFSKY: Thank you, Commissioner Gaziano.

Yes, I do have a concern about that. It's
very clear based upon my experience and not just at Justice, but discussions with lots of local officials, and just Tuesday I was down in Georgia speaking to the Georgia Election Officials Association, that they have a tremendous fear of being charged with claims of discrimination or otherwise if they differentiate, for example, in DMVs and not automatically offer voter registration to everyone who comes in.

And in fact, when I was at the Justice Department, we received a call at one point from a delegate in Maryland who had found out that the Maryland DMV was, in fact, doing exactly that. Even when someone applied for getting a driver's license and the DMV officials knew they were not a citizen, they were automatically offering them the right to register to vote, and the delegate was very upset about this, and when he asked people why they're doing that, they said, "Well, we have to do this under the NRVA."

And the result was that we, the Justice Department, sent a letter to the delegate explaining that, no, the NVRA does require you to offer voter registration when people are applying for a license, but not if they're not U.S. citizens.

But, for example, I don't think the DMV in

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Maryland has changed that procedure, and I think there are other states that are doing the same thing.

COMMISSIONER GAZIANO: So in your view, should the federal legislation be changed to insure that states are more careful to distinguish between those who are eligible to vote?

MR. VON SPAKOVSKY: I actually don't think it's a matter of legislation. There's four federal statutes, criminal statutes that govern the fact that non-citizens are not allowed to register and not allowed to vote. I think, frankly, it just needs -- one of my recommendations is the Justice Department ought to contact and do a survey of the 50 states and make sure and ask them, "Do you have procedures and rules in place in your DMVs to make sure that if someone is applying for a license and they are not a U.S. citizen, whether they're a legal citizen or not, your DMV clerks are not automatically providing them the opportunity to register to vote?"

And I think they would very quickly be able to find out what the regulations or rules and procedures are in all of the states and which states are not doing that.

COMMISSIONER GAZIANO: Well, I share your concern about the DMVs, and there are certainly some
who are not legal citizens who still when applying for
driver's licenses would want to not indicate that they
are citizens who are concerned about that, but aren't
there some states who have an affirmative policy not
to ask for citizenship in public assistance offices?

And if so, then how can they have a system
of not encouraging them to vote?

MR. VON SPAKOVSKY: I believe that is
correct.

COMMISSIONER GAZIANO: If I could be
permitted to ask one other line of questioning, Mr.
Clegg, on the Section 203 language minority ballot
issue, I also have a concern with how the federal
government determines the number of foreign language
speakers, the non-English proficient is the standard,
to then know whether to require the local government.

They use, as I understand it, Census data
in part to do that; is that correct?

MR. CLEGG: That's my understanding, and
I'm going to --

MR. HANCOCK: Yes, that's right. They use
Census data to do it.

COMMISSIONER GAZIANO: And I've read some
congressional testimony and maybe the current panel
doesn't know that unless there's four levels on the
MR. HANCOCK: Right.

COMMISSIONER GAZIANO: Unless you are the completely proficient, the federal government counts that as not English language proficient; isn't that right?

MR. HANCOCK: I think that, yes, I think that as I recall anyone who says they speak English well, less well or not at all is counted in the count, and I think that's based on the Census Bureau's determination that people who report back are in need of assistance. I mean, that's their academic determination.

COMMISSIONER GAZIANO: That's ridiculous, that someone who speaks English well and is a U.S. citizen --

MR. HANCOCK: No, I'm not saying well, no.

COMMISSIONER GAZIANO: Unless it's the highest level.

MR. HANCOCK: Right.
COMMISSIONER GAZIANO: The highest level is proficient, very well. Then the next level is, yes, speaks it pretty well, and if you're not a native or an English speaker, most people I mention wouldn't be so egotistical to claim that they speak it perfectly, but if it's anything less than perfect fluency, that's counted as a non-proficient English speaker.

MR. HANCOCK: No, not perfect fluency. That's not the standard, but you're correct that --

COMMISSIONER GAZIANO: It's not the highest level.

MR. HANCOCK: Yes, if it's not.

COMMISSIONER GAZIANO: And the second level is that they do speak it pretty well.

MR. HANCOCK: That's their reporting, and you'd have to talk to the experts at the Census Bureau as to why they do that. That's certainly a valid issue. I say to you that you incorporate that. That's how the department does it, yes, and how they do it and why they do it, you'd have to talk to them. I think the standard, the concern is that people have a tendency to over report their speaking ability, and the Census Bureau believes that that is the accurate way of determining the people that need assistance in
COMMISSIONER YAKI: I'm going to respond to that because, first of all, living in a city where we have ballots in multiple languages and dealing with American citizens who I would say speak English fairly order to vote effectively.

You know, I can't substantiate that. I can just tell you that that's the decision that was made, and you certainly can talk to the people who made it.

COMMISSIONER GAZIANO: I understand, and that's something I'd like to look into more. I understand part of it is regulatory, and it's an interpretation of the statute, and it's an interpretation of the statute that to me seems patently unreasonable, and we really ought to be concerned about those small number of U.S. citizens who can't speak English sufficiently well to understand a ballot, but if we are jiggering the statistics to create a problem that doesn't really exist and requiring these jurisdictions to print ballots in ten different languages, and then that exacerbates the problem of sending them overseas, that's a waste of resources, but it also potentially leads to other more serious problems.

Thank you.

COMMISSIONER YAKI: I'm going to respond to that because, first of all, living in a city where we have ballots in multiple languages and dealing with
well, I can tell you with a great deal of certainty, but there is a big difference between the ability to speak English in a way that you can communicate and read it in a ballot book and understand the arguments, the ballot arguments, the other things that are in there. Trying to understand a ballot initiative is a totally different level than saying I can pretty much discourse my way through the day.

So I think it's presumptuous to say that just because someone may say on a form they can speak English fairly well or generally well, that that translates into the ability to parse through a very dense ballot book, which I think all of us find procedurally challenging anyway when we get it, especially in California where we have initiatives that spring up by the boat load.

So I would say that, you know, you just can't draw generalizations on this. And, by the way, I would also note as an ironic fact that this Commission held hearings with individuals advocating that we do away with those sorts of questions and identifications in the census which, of course, would never lead us to, as I said at the time, more important for the Voting Rights Act and made no impression on those speakers at all.

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I just wanted to interject that fact.

MR. HANCOCK: I would add also that the department's regulations enforcing 203 allow jurisdictions to target assistance to people who need it. So they keep records as they observe elections. One of the things the department does is keep records of the number of people that come in and require assistance.

So if you have an area that might on the census data show a certain percentage of people of a different national origin, for example, like Koreans, if it turns out that they don't need assistance at the polls by past history, then the department's interpretation of the act is there's not much the jurisdiction has to do.

The big burden in elections as to language minorities is providing oil assistance. As Roger says, when you have so many different languages, it's a tough time recruiting sufficient poll workers who can effectively provide all assistance at polls. That's the major challenge.

COMMISSIONER GAZIANO: Some work needs to be done in deciding what languages to print the ballots in.

MR. HANCOCK: Yes. The coverage formula
does have an impact there. I mean, that's the law we have now, and as we talk about preparing for this election, that's the law that's going to be in place. So what we've been focusing on here is talking about what we need to do to get ready for this election.

COMMISSIONER GAZIANO:  Right, and I'm suggesting that if you want to concentrate the resources where they're really needed, we need to examine whether the way one language or non-English language proficient citizens live it, and these are citizens. You've got to come up with a realistic, accurate way of doing that.

MR. HANCOCK:  I agree as a former state official that it presents problems on the state and particularly it presents problems, and I think targeting is really a key to this, and I say to you again I think that the biggest problem is recruiting sufficiently qualified people, and to be translators and assistants it's not only that you speak the language at issue, but you speak English well, as well.

So it's hard to recruit people, and if you don't target, you have a tendency to spread your resources. You have a limited number of people who are qualified to do this, and if you don't target,
you're spreading your resources too thinly and you might not provide assistance to the people who need it because they're going to be concentrated in certain areas, and you don't really know, and as you say, because the coverage formula is maybe over inclusive to some extent, that it might include some people who aren't going to need assistance when they come to the polls.

What election officials need to do and when they run an effective program, they're researching their own data to target the precincts where the people who are going to come are going to need assistance, and that's where you concentrate your people who are qualified to give assistance.

As a state official, again, it's by no means an easy program.

MR. CLEGG: If I could just make one comment, supporting your line of questioning, Commissioner. I remember reading the four classifications myself and being torn about whether I would check box three or box four, and then learning that, well, had I checked box three I would have counted toward minority status.

COMMISSIONER GAZIANO: Why would an eloquent person like you, Roger, hesitate?
MR. CLEGG: Well, I make that point not because I'm so clearly eloquent in English, but because I'm so clearly not otherwise conversant. I mean, as poor as my English is, it is my only language.

(Laughter.)

COMMISSIONER HERIOT: Exactly my experience when I looked at this question, but I think the first category, I looked at the bottom first and I thought, you know, "Should I pick C or B." You know, it wasn't C, but the top category as native speaker. So that made it easy. I had no excuse, but nevertheless, I had the same thought that you had. Not too many people can really honestly say that they are very, very fluent in English.

COMMISSIONER GAZIANO: Particularly if English is not their first language. You know, that's not like you're bragging, and I can see a lot of people saying, "Well, I'm not going to say I speak it very"--

VICE CHAIR THERNSTROM: I don't know why that. I had no problem answering the question of whether I speak English, and I would like to say for the record that, Commissioner Yaki, your comments are always taken seriously by this Commission. You made a
statement a few minutes ago saying nobody listened to you, nobody took you -- something like that.

COMMISSIONER YAKI: No, I never said that.

VICE CHAIR THERNSTROM: What did you say exactly?

COMMISSIONER YAKI: I have no idea.

(Laughter.)

COMMISSIONER YAKI: This is where I would check the box that says I have no idea. The spirit somehow moves me and it goes from there.

VICE CHAIR THERNSTROM: Okay. Other questions for this panel?

COMMISSIONER KIRSANOW: Madam Chair.

VICE CHAIR THERNSTROM: Yes.

COMMISSIONER KIRSANOW: Kirsanow here. I've got two questions, one for Mr. Spakovsky.

VICE CHAIR THERNSTROM: Could you speak up a little bit?

COMMISSIONER KIRSANOW: Yes, ma'am. Two questions. Can you hear me? Hello.

VICE CHAIR THERNSTROM: I can hear you. Can everybody else hear you? Yes. The answer is yes. The court reporter can't hear you. Shout.

COMMISSIONER KIRSANOW: Two questions, one
for Mr. Spakovsky. You highlighted the issue of --

VICE CHAIR THERNSTROM: Hold on, Pete. Hold on. We're going to try to do something about the volume here. One second.

(Pause in proceedings to adjust speaker volume.)

COMMISSIONER KIRSANOW: Mr. Spakovsky, you have raised the issue of the military ballots. In the 2000 presidential election, they were at issue because of the close nature of the vote, for example, in Florida, where I believe there are approximately 5,000 overseas military ballots, and now we've got many more overseas ballots that will be involved in this election.

Are there any jurisdictions that we failed to identify that have particular problems with processing overseas ballots in a timely fashion?

MR. VON SPAKOFSKY: As of today, no, I can't say. All I can tell you is the past problems that the Justice Department had to deal with. As I said, in 2004, both Georgia and Pennsylvania did not get their ballots out on time. I think in the 2002 elections if I remember correctly, I think it was Texas and Oklahoma that had problems.

There are efforts being made by a couple
of places to try to improve this. The new Secretary of State in Alabama, Beth Chapman, has formed a task force to try to figure out a way to improve this.

There's actually a very unique and very interesting project being done by Okaloosa County, Florida. The Election Director there, someone I've known for many years, comes from a military family. She is very concerned about this. She actually is sending Okaloosa County election officials to three overseas bases about two weeks before the election in November, one in Japan, one in Germany, the third one I don't recall where, and they are going to set up actually an early voting site so that military voters and their families, rather than having to wait for and depend on an absentee ballot to be mailed to them from the States, they are going to be able to go to this early voting site. They have a vendor that is going to have a computer with the ballots from that county, and once they are checked and shown to be on the voter registration list, they are going to be able to vote overseas so that there's no problem with delays in getting the ballot back.

And that actually is a very interesting project, one that if it works I think will show great promise for the future to try to fix this problem.
MR. VON SPAKOVSKY: I should know that, Commissioner, and I'm sorry. It's like the Military Voting Protection Act. I believe that's the name of it. It's Kevin McCarthy who is, I believe, the minority chairman of the Elections Subcommittee of the

COMMISSIONER KIRSANOW: Do you know what the status of that bill is and what the -- I'm sure you probably don't know the numbers, but is there a name associated with the bill?

MR. VON SPAKOVSKY: I should know that,
MR. VON SPAKOVSKY: Well, the answer to that, Commissioner, is that Congress actually appropriated the money, and there is a special office at the Department of Defense. When UOCAVA, which is the federal law that was passed in 1986, the President had to designate a particular office to administer this new law, and so he designated the Department of Defense, and they set up a special office called the House Administration Committee. I don't know what the status of the bill is.

VICE CHAIR THERNSTROM: Well, certainly we can have somebody here track that down. I, frankly, don't understand this whole issue, and it got my teeth grinding over it. I mean, okay. You've got this one county who is sending some machines for early voting to Germany and wherever else you named, but we have got soldiers in Najaf and Fallujah. I mean what is the matter with the Department of Defense or is it really completely outside their capacity to respond to this problem that they cannot make sure that people who are putting their lives on the line for this country cannot vote by machine?

They send E-mails all the time. What is the fundamental problem here? It just boggles my mind.

MR. VON SPAKOVSKY: Well, the answer to that, Commissioner, is that Congress actually appropriated the money, and there is a special office at the Department of Defense. When UOCAVA, which is the federal law that was passed in 1986, the President had to designate a particular office to administer this new law, and so he designated the Department of Defense, and they set up a special office called the
And the EAC has not done that. I have no idea where they are on trying to come up with Federal Voting Assistance Program Office, and they administer this law not just for American military personnel, but for overseas civilians also.

In the 2004 election, they had gotten the money and they designed and were setting up an Internet voting system for overseas Americans, and they were in the testing stages. I'm not quite sure how far they had got advanced, and they asked ten computer scientists to review the system as it had been designed and was being built and four of those computer scientists wrote a very devastating report attacking the system saying that the security risks of this Internet voting system were such that it should not be used, and because of that, the Department of Defense canceled it.

When Congress passed the Help America Vote Act, I think part of the law was a provision that said that they want the Department of Defense to try to do this again, set up a program like this, but they can't do it until and unless the U.S. Election Assistance Commission, which is the federal agency that was established by HAVA, comes up with and sets up standards for this kind of voting system.

And the EAC has not done that. I have no idea where they are on trying to come up with
MR. HANCOCK: The traditional problem that arises is the states don't get their ballots done on time. I mean, the federal law only allows you to vote for federal offices.

VICE CHAIR THERNSTROM: Even though there's obviously all sorts of communication between the military and Iraq, let's say, or Afghanistan and --

COMMISSIONER YAKI: Yes, but there's also a presumption that some of it is not as secure as they think it should be.

MR. HANCOCK: Let me answer your question more about the problems that cause this because I've dealt with it over the years.

VICE CHAIR THERNSTROM: Okay.

MR. HANCOCK: I was living in Florida in 2000 as well.

VICE CHAIR THERNSTROM: Right.

MR. HANCOCK: The traditional problem that arises is the states don't get their ballots done on time. I mean, the federal law only allows you to vote for federal offices.
VICE CHAIR THERNSTROM: Right.

MR. HANCOCK: It doesn't cover others, but most states want to send the whole ballot to the men and women in the military, and within the problems there might be a ballot challenge, for example. There are contests that just aren't resolved.

One of the problems we had in Florida was that if there was a runoff primary, it was too close to the general election, that this didn't give enough time. So state officials, voting officials faced real problems in getting their ballot done.

I've never experienced any invidious conduct where they don't want the men and women of the military to --

VICE CHAIR THERNSTROM: No, I'm sure.

MR. HANCOCK: -- practical problems, and the Defense Department kind of talks about it, has been all over this in trying to come up with remedies. The problem has been though that because of issues they face, they don't get the ballot in the mail sufficiently in advance of the election. Most states require that it has to be back in the hands of election officials by the time the polls close on Election Day to be counted.

So that was always the issue that was
faced. As Hans says, the Justice Department as an election approaches regularly faces these kinds of crises when they come up, that someone in such-and-such a state didn't get their ballots out in time.

The remedies, the one that became well known with the Florida election in 2000, because Florida was subject to a suit by Department of Justice in the '70s over this issue, and the remedy that was reached was that the state would count ballots so long as they were cast by the day of the election and received by election officials within ten days after the date of the election.

So there was security that it was cast by the time the polls closed. In the Defense Department, I was there at the time, and in the department we coordinated closely with them. Their view was that they could get the ballots back in that time period, and that was, as the department has filed these cases over the years, that's kind of been a similar remedy.

And the ten days, you know, you had to get the election over at some time, but in ten days you weren't going to certify the results in that time period anyhow. So that's the issue. That's the problem, and it would be good if there were some more automated solutions that would solve it, but it has
been caused by just real practical problems that
election officials face.

VICE CHAIR THERNSTROM: Not all
provisional ballots are counted by the Election Day.
Is that not correct?

MR. HANCOCK: They're back. They're back
in the hands of the --

VICE CHAIR THERNSTROM: They're back in
their hands, yes, but in terms of the actual
counting --

MR. HANCOCK: That's right. There's time
after the election in which -- and that was the reason
for the settlement, was that everybody agreed there
was some time there where they could get the ballots
back and still count them and count them as valid.

VICE CHAIR THERNSTROM: Do other people
have questions? I don't want to hog the microphone
here.

COMMISSIONER KIRSANOW: Just one more,
Madam Chairman.

VICE CHAIR THERNSTROM: Yes.

COMMISSIONER KIRSANOW: This goes to Mr.
Clegg's speech made reference to the use of the two
provisions very often as a means of racial
gerrymandering. Given that we've got the candidate
for the presidency who is black that received a
majority of the white vote in a number of states,
Washington, Oregon, Iowa, you name it, to what extent
does this affect the rationale undergirding the
temporary provisions of the Voting Rights Act
pertaining to the dilution of minority voting?

MR. CLEGG: Well, I think that, more broadly the recent election data -- and I testified about this when the Voting Rights Act was up for reauthorization a couple of years ago -- do undermine the argument that we need a Section 5 anymore. Notwithstanding my testimony, the Voting Rights Act and Section 5 were rather overwhelmingly re-passed, and so I have not had occasion to look at the most recent data to see if that further undermines the need for Section 5.

But I certainly take your point. Of course, you need to look not just at states, but to draw distinctions between the states that are covered by Section 5 and the states that aren't covered by Section 5. So, to be fair, I note that most of the states that you named where Obama got a majority of white voters were not covered jurisdictions. So that wouldn't necessarily show that Section 5 isn't still needed.
But I think that the data even before this year tended to show that the empirical case for Section 5 is no longer persuasive.

VICE CHAIR THERNSTROM: You're talking about levels of black registration and turnout in states like Georgia?

MR. CLEGGB: Well, I think the point that Commissioner Kirsanow was making was racially polarized voting as well.

VICE CHAIR THERNSTROM: Right. Well, that all depends on how you define it, of course.

MR. CLEGGB: Right.

VICE CHAIR THERNSTROM: Other questions? I have one myself, but I'd like other people to have a chance obviously.

Yes, Commissioner Melendez.

COMMISSIONER MELENDEZ: Yes, Mr. Hancock.

I think you suggested that the Justice Department made detailed memoranda about why they are sending monitors and observers into a particular place. Could you say more about the past practice regarding this?

And is the criteria for sending out monitors usually made public? And are they always the same criteria, such as Mr. Coates described this morning?
MR. HANCOCK: Well, I think it has been blended, Commissioner, as they've expanded the program. Historically they always prepared memoranda describing the reason for sending. They had to do it for designating -- first of all, under the act, you had to designate a county for examiners before you could send in observers, and you had to base that on allegations of discrimination on the basis of race. That was the only way you could designate a county.

So historically they have prepared memos. I don't know what they're doing now because this has been such a broad program of just I don't mean to say willy-nilly. They have some reason for doing it, but I'm not one who's impressed by the number of observers or the number of places they're going.

My concern is what's the reason for their going there, and I think the department has to, and I have great respect for the men and women of the Voting Section. They're my friends. A lot of them have gone to work with me, but the leaders who were here today were there when I was there, and they're very fine people, and they do their job without regard to politics.

But unfortunately there has been a perception that politics enters into this, and that
needs to be dispelled, and I think it can be dispelled by relying more on the men and women of the section to make the decisions and having them justify their decisions with recent bases that are justified in the law.

That is, we're going there because we have a recent basis to believe that our presence might -- because we have reason to suspect that there might be a denial of the right to vote on account of race or language minority status if we don't go. That's got to be the reason. That's the only reason.

So there is just not -- and I agree with Roger and his testimony that we have to get over this conflict between those that want to prevent both fraud and those that want to protect the right to vote, and I'm not going to propose to -- we all agree that you should be a citizen before you vote, and we ought to make sure that people are citizens before they vote.

But you've got to do that in a way that doesn't otherwise interfere with people who are legitimately registered and do it in a way that is going to suppress their coming to the polls, and even the person who was from the Criminal Section who was here today told a very good story. The perception of that is you don't go out and announce before the...
You get rid of politics by saying we have
an election that we've cracked down on a voter
registration drive that we think was fraudulent or
somewhat fraudulent because you then send a message
there that perhaps people will hear that everyone who
was registered was registered improperly, and they
weren't.

So the approach in the department has been
to address those issues, but to try and keep them
separate from the Voting Rights Act issues. You know,
enforce criminal law, but don't do it in a way that
interferes with the designs of the Voting Rights Act.
They both can be done. You can do both.

But as far as your question, again, I
think that if the department focuses on -- and I
express to you again the difference in a presidential
election. You've got to do it before the election.
You can't rely on observers to solve the problems in a
presidential election. It isn't going to happen. You
might get a basis for bringing a lawsuit later, but
you're not going to stop the problem. You've got to
do it in advance, and when you are going to have
observers go to a county, you know, let's have a
justified basis for it.

You get rid of politics by saying we have
a memorandum that explains our reasoning, and our
reasoning is a reasoning that is authorized by law, and if you have that, I don't think anyone can disagree with the actions of the department.

MR. VON SPAKOVSKY: Can I say something about this?

VICE CHAIR THERNSTROM: Sure.

MR. VON SPAKOVSKY: I mean, there's a strawman being raised here which is just completely untrue. Okay? I was in the Justice Department for four years, and there have been no changes in the procedure. There was a detailed memorandum produced every time a recommendation came up from the Voting Section to send either federal observers or to send staff to a particular area to do an investigation, and that has not changed. There is no willy-nilly assignment. There were detailed memoranda.

As I'm sure Paul knows, there's a detailed internal memorandum, for example, when we were sending observers, which are governed by very specific provisions that had to be signed off on by the Attorney General, and those procedures have not changed in any way.

MR. HANCOCK: Well, my concern, again, is -- and this is a criticism of the program even when I was there. I don't think the observer program, the
validity of it, should be judged by how many people were sent out or whether or not they found problems. I mean, you can send people to every polling place in the country if you wanted to and then report back that we didn't find problems in 98 percent of them because we were there. You know, that's one answer, that problems were averted because we were there.

Another answer is you didn't need to have them there in the first place, and I think with this election that's coming up and with the perception of the department today and the perception of the role that law enforcement has played in effectuating discrimination against minorities historically, not now, but historically, that it's very crucial for the department to balance all of these issues and assign people where they think there's a valid reason for suspecting there might be a problem, and hopefully they will avert that problem, but if we can all agree that they went there because there was a real concern that if they went there there was going to be a problem, that's the design of this program. That's the design of the program from 1965 on. That's the reason it was put in the act.

VICE CHAIR THERNSTROM: Roger, you had something to say on this?
MR. CLEGG: Well, I just wanted to make one point about the distinction between political appointees and career appointees. You know, I was both at different points in my career at the Justice Department, and I have to take issue with Paul when he suggests that part of the solution is to make sure that decisions are committed to career folks rather than political folks.

I mean this is a democracy, and the executive branch, is controlled by the President, and ultimately has to be run in a way that is part of the administration. That is not to say that political appointees should be allowed to make decisions based on, small-p, political grounds, but I think that ultimately they do have the authority and that's the way it has to work.

I also think that there's a suggestion frequently that career people in the Justice Department are these white lab coat professionals who are completely disinterested when it comes to partisan politics -- and that is not true. Frequently they're at least as partisan in their sympathies as political appointees are.

And, conversely, there's frequently a suggestion that political leadership and political
appointees in the department are political hacks and don't know anything about civil rights law and are just making decisions based on, small-p political grounds -- and that's not true. That's not true either.

MR. HANCOCK: I'm going to backslide a little bit from what I said before in light of what Roger said because I agree with him to a large extent. I don't mean to say that political appointees should be out of this process entirely, and when Roger was there and Brad Reynolds was the Assistant Attorney General in the Reagan years, I was in the Voting Section, and we debated strongly the position the department should take in voting cases, where we should send examiners, what cases we should file. Those were the days where regularly, based on the facts and the law, it never was a suggestion that politics was entering into that.

And there were disagreements. I think the government, in higher levels of government, people who are in that position are in that position so they can debate issues on which there's room for principle disagreement. If there weren't room for principle disagreement they wouldn't be needed. If it was all easy they wouldn't be needed.
And yet the Department of Justice in pre-clearance of that didn't want to hear any of that. They didn't want to hear the political effect of it.
MR. HANCOCK: Well, I worked very closely with Brad at the time. I've never sensed that it was done for political reasons. In fact, I'm proud of

VICE CHAIR THERNSTROM: But also political gerrymandering is not covered by the 14th Amendment or at least by any standards that the Court has been able to articulate.

MR. HANCOCK: Yes, that's right. That's exactly right.

VICE CHAIR THERNSTROM: But, you know, there's a statement here I don't understand that you made. I mean a political or just simply professional and not political on the part of people, for instance, like Brad Reynolds, who was, of course, a Republican appointee but had very much in mind, it seems to me, and his record in the Justice Department had very much in mind the degree to which the racially gerrymandered districts benefitted Republicans.

MR. HANCOCK: Well, I worked very closely with Brad at the time. I've never sensed that it was done for political reasons. In fact, I'm proud of
what we achieved during those years in enforcing the Voting Rights Act. Brad was always concerned about the issue. I don't know if he went to Mississippi with us when Reverend Jackson invited us down to Mississippi to tour the Delta and talk to people about their experiences. I mean, Brad Reynolds rolled up his sleeves and got into the issues and made decisions based on the law.

It was controversial at the time, as you recall. It was the time of *Bolden v. City of Mobile* and the change in Section 2 and the legislation about Section 2. So there was a lot of controversy, but again, I say that my recollection based on my own participation is that it was always very principled debates, and believe me, I didn't always win. I mean, my side was not always adopted, but I came away with a respect for the process that I hoped would continue throughout the history of the Civil Rights Division.

VICE CHAIR THERNSTROM: Well, but as you know, for instance, the record in *Miller*, I mean, that was the depiction of a Justice Department way outside the law, way outside pre-clearance law, imposing racial quotas in terms of legislative districting.

Well, this is a longer discussion, and I don't want to take up other people's time. I had one
other question for Roger, but, Commissioner Yaki, have you got a question?

COMMISIONER YAKI: No, no. I just had a statement at the end, but go ahead.

VICE CHAIR THERNSTROM: I just want to go back to the question a minute of the bilingual ballots. Is there any relationship between printing ballots in multiple languages and the risk of fraud?

And I ask that just in total ignorance.

MR. CLEGG: Well, I think the answer is, yes, there is. I give particulars on that in the testimony that I delivered to the Congress on the reauthorization of Section 203, and I think it's also in the law review article that the Georgetown Journal of Law and Public Policy printed. As I recall, one of the things that I cited was a Justice Department report on non-citizen voting.

I think a lot of Americans don't understand why we are printing ballots in foreign languages. They know that in order to become a U.S. citizen you're supposed to be able to speak English and they know that you're not supposed to be voting unless you're a U.S. citizen. So it would seem to follow that if you don't speak English, you shouldn't be voting, and that if you're making it easier for
people who don't speak English to vote, that you're going to be at least indirectly facilitating ballot fraud.

Now, it's not a complete syllogism because we do have citizens who are not fluent in English. Sometimes they were born here, but never learned to speak English very well. That doesn't happen very much, and the fact that it happens at all is a separate problem that's very disturbing, but I think sometimes it does happen.

The other thing that happens is that you are allowed to become a citizen, I think, if you're relatively senior; I think the sense is that, well, you know, if you've been here a long time and you're 70 or 80 years old and you still don't speak English, we're going to give you a break and we're going to let you vote anyhow even though you can't speak English.

But I don't think that that happens very much, and there are other ways to accommodate individuals like that rather than requiring the jurisdiction to go through this whole rigmarole and print thousands of ballots in foreign languages.

But a short answer to your question is yes.

VICE CHAIR THERNSTROM: Commissioner Yaki,
MR. HANCOCK: In my view, in the context of the current law, what needs to be done is serious attention being given in getting people to the right

I need to close this out, obviously, but do you have a question?

COMMISSIONER YAKI: Commissioner Melendez.

COMMISSIONER MELENDEZ: Well, I just wanted to say that, you know, as far as the language, going back to that last one, you know, those people probably never will speak English fluently, but that bothered more citizens than anybody in this country. I just wanted to state that for the record.

But my question has to do with any recommendations as far as the provisional ballot type thing. It seems that because everything is left to the states and it seems that's where we're going to have a lot of the problems, do you think that there's anything that can be done further, maybe federal, some way that something can be streamlined, the state's procedure in provision ballots as time frames and those things could basically help us streamline or unify it to come on one page rather than the problems we'll see when you kind of leave it up to the states?

I just wonder what you thought along those lines.

MR. HANCOCK: In my view, in the context of the current law, what needs to be done is serious attention being given in getting people to the right
But to make this work in the present precinct. That's the key, and now with the advent of computerized voter lists that they're supposed to have now, they should have records at the polling place for every registered voter so that whoever comes in and they're not shown on the list of registered voters for that polling place, the election official can easily look up where they should be and direct them to that place so the vote could count.

The danger is that they would just hand them a provisional ballot and that ballot won't count. So I mean, we can talk about changing the law, but with this present law, that's what needs to be done, and the problem you have is that sometimes election officials say, "Well, we'll have an open phone line so that you can call the main office and find out where they should be."

Well, on Election Day those people are busy. The phones are jammed. They don't get through. Sometimes they don't have a complete list of all the registered voters in the city. In large jurisdictions like the City of New York, it's a tremendous problem because of the size of the electorate, but in small jurisdictions it might be a problem because they don't have the resources to have the list.
context of the present law, we need to have an
accurate list at the polling place of every person who
is registered and where they should be voting, and if
they show up and they're not at the right spot, they
ought to be directed to the right spot so that their
vote is counted.

VICE CHAIR THERNSTROM: So we should call
it quits, but, Commissioner Yaki, you do have
something you want to say.

COMMISSIONER YAKI: Yes, I just wanted to
thank the rest of the Commission for allowing me to
hold this briefing in June. I mean, I could say a lot
of things, but I think what we're trying to do here is
get beyond the partisanship issue of who's trying to
be registered here or there or what have you. I think
most importantly is that certain offhand -- I don't
think casual, but offhand -- remark, and I don't mean
"offhand" in terms of intent, but just the way it was
said about how in determining prioritization within
the Department of Justice that there's some
consideration that goes to whether or not there is
essentially a candidacy between an African American
and a white candidate and how that affects their
decisions about how they prioritize their use of
election monitors or what have you.
I would just say that of all elections in the history of this country, if there's any election for which the '65 Voting Rights Act and its reauthorization cannot fail us in any way, shape or form is this election. If there is any doubt, if there is any issue of barriers to voting by African Americans in this country in this election, this nation will have extremely difficulties dealing with that in its aftermath.

And in some ways I wish the order of this had been reversed. I wish you had been first and then Justice had been here to hear afterwards, but this is really meant for the Justice Department. This election more than any other is one where if you're going to prioritize, if you're going to put resources up, if you're going to make sure you absolutely get it right to the nth degree, this is it because this is the true test of whether or not the '65 Act is going to work the way it's supposed to be.

COMMISSIONER GAZIANO:  Madam Chair, one brief comment.

By the same token, false claims of disenfranchisement on the basis of race will also have a similar caustic effect. So I trust your comments and I know your comments were in good faith with
regard to the Justice Department, but there is also an unfortunate history of crying wolf.

COMMISSIONER YAKI: I'm not saying that. I'm saying the integrity of this election more than any other is at stake. It's interesting. When you're talking about crying wolf, one of the crying wolf that people keep on citing was the example of that police officer in northern Florida. This is the first time I have actually heard that actually although maybe not related to the vote itself, there was some kind of action at that time that may have had some kind of, as you said, because of the history, some kind of a chilling.

We don't know whether or not, but the fact of the matter is that, you know, false whatever, we've got to get it right. Democrat, Republican, liberal, conservative, left right, independent, whatever, we have got to get it right this time.

VICE CHAIR THERNSTROM: I want to second that thought because Paul Hancock earlier said we've got to make sure to avert -- something like we've got to make sure to avert problems. I would also add we must act to avert perceived problems.

COMMISSIONER YAKI: Exactly.

VICE CHAIR THERNSTROM: And that is, I
think, Michael Yaki's point, and I completely agree with what you just said.

COMMISSIONER YAKI: Thank you.

VICE CHAIR THERNSTROM: On that note, I want to thank all of you very, very much. It is extremely interesting to me, obviously, but I think to everybody and this has been a wonderful panel. Thank you so much for coming.

MR. HANCOCK: Thank you. Nice to see you again.

VICE CHAIR THERNSTROM: Nice to see you, Paul.

(Whereupon, the Commission Briefing went off the record at 1:20 p.m.)