



September 23, 2008

Chairman Jerrold Nadler
Ranking Member Trent Franks
Subcommittee on Constitution, Civil Rights, and Civil Liberties
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

AMERICAN CIVIL
LIBERTIES UNION
WASHINGTON
LEGISLATIVE OFFICE
915 15th STREET, NW, 6TH FL
WASHINGTON, DC 20005
T/202.544.1681
F/202.546.0738
WWW.ACLU.ORG

Chairwoman Zoe Lofgren
Ranking Member Kevin McCarthy
Subcommittee on Elections
Committee on House Administration
U.S. House of Representatives
Washington, D.C. 20515

Caroline Fredrickson
DIRECTOR

NATIONAL OFFICE
125 BROAD STREET, 18TH FL.
NEW YORK, NY 10004-2400
T/212.549.2500

OFFICERS AND DIRECTORS
NADINE STROSSEN
PRESIDENT

ANTHONY D. ROMERO
EXECUTIVE DIRECTOR

RICHARD ZACKS
TREASURER

Dear Chairpersons Nadler and Lofgren and Ranking Members Franks and McCarthy:

On behalf of the American Civil Liberties Union (ACLU), and its hundreds of thousands of members, activists and fifty-four affiliates nationwide, we applaud the Judiciary and House Administration Committees for holding this oversight hearing of the Department of Justice (DOJ), Civil Rights Division's preparation for the 2008 general election. We welcome this opportunity to submit these comments regarding the appropriate role of DOJ in the upcoming November 2008 elections.

Historic Role of the Voting Section, Civil Rights Division

The Voting Section of DOJ's Civil Rights Division has a vital role to play in ensuring that the fundamental right to vote is protected and that all eligible voters are permitted to exercise their right to vote. The Voting Section was created to protect minorities from voting discrimination and to ensure their participation in all aspects of the political process. It is especially important that the Voting Section fulfill its historic role of ensuring that no voter is denied the right to vote based on race, ethnicity, disability, or language proficiency.

Unfortunately, recent revelations of partisan bias in the decision making of the Voting Section seriously undermine voting rights enforcement in this

country and breed a lack of confidence and trust in the Voting Section.¹ Partisan bias has undermined the Voting Section's effectiveness and has called into question, the Voting Section's decisions about what to investigate, what kind of cases to bring, and where and why to assign federal monitors. For example, by 2002, the Voting Section shifted its focus from enforcing the voting rights of minorities and election protection efforts to partisan enforcement of election laws.² Evidencing this shift, this administration has litigated on behalf of white voters in the southern town of Noxubee, Mississippi, shifted its focus away from minority voter suppression and dilution cases, and supported restrictive voter ID laws, which disproportionately impact minority, elderly, and low-income voters. In addition to this change in priorities, the 2004 election raised problems unchecked by federal election officials – improper voter purges, misuse of provisional ballots, and overly aggressive poll watchers.³

Recently, Attorney General Mukasey told voting rights advocates that there was no greater priority in the next two months for DOJ than to ensure a smooth election in November. To keep this promise and to protect the fundamental right to vote, DOJ must be prepared prior to Election Day with a comprehensive plan. We, therefore, applaud this congressional oversight of DOJ's preparations for the 2008 elections. Oversight is critical to restoring public trust and confidence in the Voting Section and ensuring that the nation's voting laws are fairly and adequately enforced. The following discussion describes areas requiring renewed vigilance by DOJ:

Registration Applications

This election season, citizens are registering to vote in extremely high numbers. Minority and young voters have demonstrated an enthusiasm to participate in what will prove to be one of the most historic elections for our nation. Facing the possibility of an unprecedented administrative challenge for some jurisdictions, DOJ must be vigilant in ensuring that states are in compliance with voting rights statutes.

In 2004, DOJ received many complaints from people who said they were registered to vote, but had not appeared on the voter lists.⁴ Frequently, these people were newly registered voters, whose applications had not been processed.⁵ It is the responsibility of state election officials to ensure that the counties are processing voter registration applications in a timely matter. However, armed with the knowledge of problems from earlier elections, DOJ should make certain those jurisdictions are in compliance with the law and provide oversight to ensure that applications are being properly and timely processed. Election officials' failure to process applications, resolve eligibility prior to rejection of applications, or clear backlogged applications of new voters, especially when they are more likely to be minority and young voters, could disfranchise many voters this November.

¹ See *Oversight Hearing on the Voting Section of the Civil Rights Division of the U.S. Department of Justice Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 110th Cong. 3 (Oct. 30, 2007) (statement of Laughlin McDonald, Director, ACLU Voting Rights Project).

² *Lessons Learned in the 2004 Presidential Election: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on Judiciary*, 110th Cong. 2 (July 24, 2008) (Statement of Gilda R. Daniels, Asst. Professor, Univ. of Baltimore School of Law) [hereinafter Daniels Written Testimony].

³ *Id.*

⁴ *Id.* at 3.

⁵ *Id.*

Purging of Voter Rolls

The Help America Vote Act (HAVA) requires that every state have a computerized statewide voter registration list. The National Voter Registration Act (NVRA) imposes important limitations on purging or otherwise removing names from the voter rolls improperly, including a restriction against purging within 90 days of an election. While modest purging of voter lists may be necessary in some instances, for example, to ensure that deceased individuals are no longer registered to vote, properly registered voters are too often purged from voter rolls inappropriately, frequently based on political motives or faulty data. For example, the ACLU, ACLU of Michigan and Advancement Project filed a federal lawsuit last week challenging two statewide voter purge programs that could potentially disfranchise hundreds of thousands of Michigan voters in advance of the November 2008 presidential election.

Rather than joining the ACLU and other groups in efforts to ensure that states like Michigan are in compliance with federal law regarding purging, under the current administration, DOJ has increased its focus on prosecutions that aim to purge states' voter rolls.⁶ Even though overly aggressive purges wrongly exclude eligible voters, DOJ continues to prioritize combating the "specter of voter fraud," even at the expense of disfranchising voters.⁷ For example, DOJ recently threatened to sue ten states to purge their voter rolls before the 2008 election.⁸ The goal of HAVA is to assist voters and the goal of the NVRA is to increase the number of eligible voters. Instead of aggressively pursuing these goals, the Voting Section appears focused on the opposite: concentrating its enforcement on strong-arming states to conduct sweeping purges of their voters' rolls. Making purging a priority of voting rights enforcement is simply contrary to the core mission of the Voting Section.

Training Poll Workers/Election Officials

Although HAVA does not require poll worker training, the Act requires states to indicate how they plan to train and educate poll officials. Unfortunately, untrained poll workers mishandle complications that inevitably arise on Election Day. These workers may arbitrarily enforce voting requirements or discriminatorily turn eligible voters away from the polls. Making matters worse, poll workers too often turn away eligible voters without informing them of their rights or of alternative means of voting.

Particularly with periodic changes to the laws and the emerging administrative hurdles, such as the proper distribution of provisional ballots, the legal requirements of requesting voter IDs, the influx of newly registered young and minority voters, and accessibility issues relating to disabled voters, poll workers and election officials must be properly trained to avoid disfranchising eligible voters. DOJ must be doing all it can within its authority to assist state and local officials in preparing poll workers for these predictable contingencies on Election Day.

⁶ *Hearing on Protecting the Right to Vote: Oversight of the Department of Justice's Preparations for the 2008 General Election Before the S. Comm. on the Judiciary*, 110th Cong. 8 (Sept. 9, 2008) (Statement of J. Gerald Hebert, Executive Director & Director of Litigation, The Campaign Legal Center) [hereinafter Hebert Senate Written Testimony]; see also, e.g., *Lessons Learned in the 2004 Presidential Election: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on Judiciary*, 110th Cong. 16 (July 24, 2008) (Statement of Daniel P. Tokaji, Associate Prof. of Law, Ohio State Univ., Moritz College of Law).

⁷ Hebert Senate Written Testimony, *supra* note 6, at 15.

⁸ Daniels Written Testimony, *supra* note 2, at 3. (citing Editorial, *What Congress Should Do*, N.Y. TIMES, Oct. 24, 2004; Stephen Roosevelt, *Bush Administration Orchestrating Massive Voter Purge Before 2008 Election*, Veteransforcommonsense.org (July 17, 2007)).

Government Issued Photo IDs

Recent studies have found no evidence to support claims that in-person voter fraud is a threat to the integrity of elections.⁹ Yet, DOJ supports restrictive voter ID laws, despite their disfranchising impact on eligible voters who lack government-issued photo identification. While the ACLU supports efforts to curtail fraudulent election practices – when and where they exist – voter ID laws are merely a “solution” in search of a problem. Elected officials should be seeking ways to encourage more voters, not inventing excuses to deny voters the ability to cast their ballots.

Although the Supreme Court has found that some forms of photo IDs can be constitutional, the ACLU continues to be concerned that voter ID laws cause an undue burden for poor, minority, disabled, student, and elderly voters. Even the expense or effort needed to obtain a “free” ID is prohibitive for many Americans. With the recent passage of such restrictive laws in a few states, and the possibility of other states following suit, it is critical that election officials be properly trained and that DOJ closely monitor those states where the voter ID laws have changed. DOJ must be aware of both the misapplication of voter ID laws by untrained poll workers, as well as the recent problem of election officials selectively requesting that minority voters produce an ID.¹⁰

Caging and Deceptive Practices

Recently, there has been a rise in the practice of voter caging – a voter suppression tactic generally aimed at poor and minority neighborhoods.¹¹ Voter caging is the practice of sending nonforwardable mail to addresses of registered voters, compiling a list of the mail that is returned, and using that list to purge or challenge voters at the polls on the grounds that the voters on the list do not legally reside at their registered addresses. However, voter caging practices are notoriously unreliable. For example, voters may live in areas where mail delivery is less reliable, voter rolls often contain typos or clerical errors, a voter may not be listed on the mailbox of her residential voting address, or a voter may be temporarily away from her permanent residence. In these cases, the voters are most likely still validly registered and eligible to vote.

In 2004, political operatives systematically targeted more than 500,000 mostly minority voters in caging schemes.¹² Targeting racial minorities to impair their right to vote is illegal under the Voting Rights Act and the U.S. Constitution. DOJ must be more proactive in its prosecution of this suppression tactic. Despite a history of prosecuting voter caging practices, in 2004, DOJ intervened before the election to defend the operatives of a vote caging scheme by the Ohio Republican party.¹³ The scheme targeted newly registered voters in urban areas, most of whom were African

⁹ For more information on the impact of voter ID laws, please see the ACLU’s letter to the U.S. Senate Committee on Rules and Administration, available at http://www.aclu.org/images/asset_upload_file74_34434.pdf.

¹⁰ See *Lessons Learned in the 2004 Presidential Election: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on Judiciary*, 110th Cong. 9-10 (July 24, 2008) (Statement of J. Gerald Hebert, Executive Director & Director of Litigation, The Campaign Legal Center).

¹¹ See *Protecting Voters at Home and at the Polls: Hearing before Senate Comm. on Rules and Administration*, 110th Cong. 2 (Feb. 27, 2008) (Statement of Justin Levitt, Counsel, Brennan Center for Justice).

¹² See generally Teresa James, PROJECTVOTE, CAGING DEMOCRACY: A 50 YEAR HISTORY OF PARTISAN CHALLENGES TO MINORITY VOTERS (2007), http://projectvote.org/fileadmin/ProjectVote/Publications/Caging_Democracy_Report.pdf.

¹³ Hebert Senate Written Testimony, *supra* note 6, at 11-12.

American.¹⁴ Ultimately, the federal court ruled against the Republican Party, finding that the scheme had a discriminatory impact.¹⁵

Moreover, to the extent that political operatives are distributing false information in minority communities about when and where to vote, as we have seen in prior elections, DOJ must be committed and prepared to distribute corrective material and conduct outreach in those communities in a timely fashion. DOJ may need to issue public service announcements or press releases or disseminate other public information before the election. DOJ must stop racially discriminatory schemes – not defend them or ignore them. In 2008, racially motivated and politically partisan voter caging, voter harassment and intimidation, and deceptive practices continue to be real threats that DOJ must be prepared and willing to address.

Misuse of Provisional Ballots

The misuse of provisional ballots is a consequence of changing laws, misinformation, inappropriate voter challenges, and/or poor poll worker training. States often distribute provisional ballots in an attempt to remedy the fact that eligible voters are turned away from polling places. Unfortunately, provisional ballots are far from a panacea for the disfranchisement of eligible voters. In some instances, election officials may dispense them to voters who have the right to vote by regular ballot. Or election officials may improperly refuse to provide provisional ballots to eligible voters, and instead turn them away from the polls altogether. If provisional ballots are cast, election officials should have appropriate standards for deciding whether those ballots count in the final vote tally – it should not be left up to their discretion.

DOJ must seek to guarantee that all eligible voters have their votes counted by ensuring that states do not improperly dispense, fail to distribute, or discard provisional ballots. DOJ should also ensure that jurisdictions do not administer provisional ballots selectively or with a discriminatory purpose or result.

Election Monitors

Under the Voting Rights Act, the Attorney General may send federal monitors to certain jurisdictions to observe Election Day activities and report irregularities. In order to have meaningful observations, monitors must be fully trained on all the civil rights statutes and be sent to those places where there is evidence of possible civil rights violations. In 2004, however, DOJ sent partisan political staff to monitor the polls in closely contested states.¹⁶ In order to restore trust, DOJ must provide greater transparency in the process – the locations and the reasons for the monitors' dispatch should be made public prior to the election. DOJ should also limit the recent practice of using criminal prosecutors and the FBI as election monitors in order to avoid the chilling effect that law enforcement personnel can have in some communities.

In addition, Election Day monitors should not be used to investigate alleged voter fraud. Unfortunately, despite a longstanding practice of the Criminal Division, we understand from DOJ that the Election Crimes Branch will conduct election fraud investigations of individual voters prior to the election. We urge DOJ, because of the possible chilling effect and negative impact on

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 18.

turnout, that such fraud investigations should take place after the November election, unless the fraud undermines the integrity of the election itself.

Conclusion

The reputation of DOJ and that of the Voting Section has been tarnished by the recent reports of political partisanship, selective enforcement of our nation’s voting rights laws, and a shift away from voter protection and access in favor of an undue focus on questionable allegations of voter fraud. The ACLU believes that DOJ’s efforts must focus on expanding the franchise and ending practices that actually threaten the integrity of the federal elections. As we approach this ground-breaking election, it is vital that DOJ return to its historic role of expanding access to the polls for all voters regardless of race, national origin, language proficiency, or disability. A vibrant democracy requires the broadest possible base of voter participation.

Sincerely,



Caroline Fredrickson
Director



Deborah J. Vagins
Legislative Counsel

cc: Members of the Subcommittee on Constitution, Civil Rights, and Civil Liberties
Members and the Subcommittee on Elections