

# LESSONS LEARNED: VOTING RIGHTS AND THE BUSH ADMINISTRATION

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In one sense, it was not surprising that the Bush Administration showed such disdain for protecting voting rights. After all, President Bush was elected due to a series of voting rights failures.<sup>1</sup> Everyone knows about the butterfly ballots in Palm Beach<sup>2</sup> and the abortive recount.<sup>3</sup> But another, less visible problem dwarfed the effects of the butterfly ballot, or the snafus at various polling places, or the undercount attributable to pregnant chads that never gave birth and dimpled chads that never smiled. A staggering number of individuals were denied the chance to participate as a result of Florida's lifetime disenfranchisement of people convicted of a felony.<sup>4</sup> At the time of

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1. *See generally* SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, *WHEN ELECTIONS GO BAD: THE LAW OF DEMOCRACY AND THE PRESIDENTIAL ELECTION OF 2000* (rev. ed. 2001) (discussing the variety of problems that occurred with respect to tallying the vote in Florida); U.S. COMM'N ON CIVIL RIGHTS, *VOTING IRREGULARITIES IN FLORIDA DURING THE 2000 PRESIDENTIAL ELECTION* (2001) (hereinafter *VOTING IRREGULARITIES*), available at <http://www.usccr.gov/pubs/vote2000/report/main.htm> (detailing problems with, among other things, voting rolls, polling place accessibility, voter challenges, pollworker training, voting machines, and vote tabulation).

2. *See id.* at 157-58 (describing the problems with the ballot format in Palm Beach County that resulted in an estimated two-thousand voters who had intended to vote for Al Gore to instead have their votes recorded for Pat Buchanan).

3. *See* *Bush v. Gore*, 531 U.S. 98 (2000) (per curiam).

4. FLA. CONST. art. VI, § 4(a) provides, in pertinent part, that "[n]o person convicted of a felony . . . shall be qualified to vote or hold office until restoration of civil rights." Until reforms enacted in 2008, see Exec. Order No. 08-179 (Aug. 28, 2008), available at

*Bush v. Gore*, Florida disenfranchised more than 600,000 individuals who had finished serving their sentences, including roughly ten percent of the state's African-American population.<sup>5</sup> The official margin of victory for George Bush in Florida was 537 votes.<sup>6</sup> Sociologists Chris Uggen and Jeff Manza have estimated that if ex-offenders who had completed serving their sentences in Florida had been allowed to vote, and had voted only at the same rate as other people of the same socioeconomic background, age and the like, Al Gore would have carried Florida by more than 31,000 votes.<sup>7</sup> Voting rights do make a difference.

The Florida debacle went far beyond disenfranchising hundreds of thousands of citizens for antiquated reasons. Florida did more than just exclude hundreds of thousands of ex-offenders from the polls; it also struck from the rolls large numbers of people who had never been convicted of a disqualifying crime but whose names matched the names of ex-offenders. Thousands of unquestionably eligible voters who showed up to cast ballots were denied the right to participate. In Hillsborough County, the supervisor of elections estimated that fifteen percent of the people purged from the voter lists were in fact eligible to vote and that a majority of the voters purged were black.<sup>8</sup> After the election—when of course it was too late to cure the problem that had already occurred—more than 4,800 Floridians pursued an administrative appeals process and over half were restored to the rolls from which they should never have been purged in the first place.<sup>9</sup> In light of the voting-related failures that propelled him into office, it seems fitting that, when it came to voting rights, the

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<http://www.flgov.com/pdfs/orders/08-179-extension.pdf> (State of Florida, Office of the Governor), it was exceptionally difficult for citizens in Florida who had been convicted of a felony to obtain restoration of their civil rights.

5. Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate Over Felon Disenfranchisement*, 56 STAN. L. REV. 1147, 1157 (2004) (citing *One Person, No Vote: The Laws of Felon Disenfranchisement*, 115 HARV. L. REV. 1939 (2002), and *Johnson v. Bush*, 353 F.3d 1287, 1293 (11th Cir. 2003)).

6. David Leip, 2000 Presidential General Election Results—Florida, <http://uselectionatlas.org/RESULTS/state.php?year=2000&fips=12&f=0&off=0&elect=0> (last visited May 20, 2009).

7. Christopher Uggen & Jeff Manza, *Democratic Contraction? The Political Consequences of Felon Disenfranchisement in the United States*, 67 AM. SOC. REV. 777, 793 tbl.4a (2002).

8. VOTING IRREGULARITIES, *supra* note 1, ch. 5, at text accompanying note 207.

9. See John O. Calmore, *Race-Conscious Voting Rights and the New Demography in a Multiracing America*, 79 N.C. L. REV. 1252, 1275 (2001) (discussing the election results and responses to the results in Florida).

Bush Administration was the most disappointing administration, by far, in American history.

The lessons we can learn from what went wrong during the Bush years are both substantive and procedural. On the substantive front, we saw the specter of fraud, rather than the risk of exclusion, come to dominate the debate over democratic integrity. We need to reframe that debate. On the procedural front, we saw an administration transform the Department of Justice, and particularly the Civil Rights Division's Voting Section, from a nonpartisan protector of voting rights into a political actor. We need to remake that Department.

#### I. SUBSTANTIVE LESSONS LEARNED: HOW THE BUSH ADMINISTRATION TREATED VOTE FRAUD AS A BIGGER PROBLEM THAN POLITICAL EXCLUSION

The decision to elevate voter fraud above voter exclusion as the primary threat to American elections colored the first major voting-related statute passed during the Bush Administration, the so-called Help America Vote Act (HAVA).<sup>10</sup> The initial motivation for federal legislation lay in the problems of the 2000 election, particularly the failures to permit eligible citizens to cast ballots and have those ballots counted, but in the end HAVA did little to safeguard the right to vote and a lot to sow confusion along the way. It replaced one set of problems with another.

HAVA's regulation of voter registration illustrates how the new law created its own set of problems. In the wake of studies that showed that more votes had been lost through flaws in voter registration than through the more notorious malfunctioning machines,<sup>11</sup> HAVA required states to create statewide, computerized

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10. 42 U.S.C. §§ 15301–15545 (2000 & Supp. V. 2005). I say “so-called” because I think the Help America Vote Act has about as much to do with helping Americans to vote as the USA PATRIOT Act has to do with protecting patriotic Americans.

11. A report published by the Caltech/MIT Voting Technology Project estimated that between four million and six million votes had been “lost” during the 2000 election, of which 1.5 million to three million were due to registration-related problems. See VOTING: WHAT IS, WHAT COULD BE 8–9 (2001), available at [http://vote.caltech.edu/drupal/files/report/voting\\_what\\_is\\_what\\_could\\_be.pdf](http://vote.caltech.edu/drupal/files/report/voting_what_is_what_could_be.pdf) (discussing the reasons why votes were lost and the estimated number of votes lost for each reason).

voter registration lists.<sup>12</sup> But the goal of making it “easier to vote” was consistently paired with a desire to make it “harder to cheat.”<sup>13</sup> Thus, HAVA required that the states maintain the accuracy of these new voter registration lists by, among other things, “matching” the information from registration forms and the subsequently generated HAVA-mandated list against information in other government databases—for example, drivers’ license records.<sup>14</sup> Inaccuracies, glitches in data entry, and the like, however, can result in matching failures that prompt states to improperly remove eligible citizens from the rolls.<sup>15</sup> And while HAVA provided a gesture in the direction of a failsafe by requiring states to allow aspiring voters whose names were not on the rolls to cast “provisional ballots,”<sup>16</sup> federal law actually set no rules as to when such ballots must be counted. Not surprisingly, different states have taken significantly different positions on whether to count them.<sup>17</sup>

More importantly, HAVA set the tone for a period in which officials hostile to voting rights, particularly the voting rights of traditionally disenfranchised groups, were able to frame the entire issue as raising a tradeoff between enfranchisement and fraud.

#### A. Voter Identification Laws

The arena where this played out most fully involves voter identification laws.<sup>18</sup> These laws require voters to present specified forms of identification—in the case of Indiana’s law, for example,

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12. See 42 U.S.C. § 15483(a) (2000 & Supp. V. 2005) (“[E]ach state . . . shall implement, in a uniform and nondiscriminatory manner, a single, uniform, official, centralized, interactive computerized statewide voter registration list . . .”).

13. Daniel P. Tokaji, *Voter Registration and Election Reform*, 17 WM. & MARY BILL RTS. J. 453, 470 (2008) (citing David Nather, *Election Overhaul May Have to Wait in Line Behind Other ‘Crisis’ Issues*, CQ WKLY., July 27, 2002, at 2034 (quoting Rep. Steny Hoyer)).

14. See 42 U.S.C. § 15483(a)(5)(A)(i) (2000 & Supp. V. 2005) (requiring, in most cases, a driver’s license number to register a voter).

15. See generally JUSTIN LEAVITT, WENDY R. WEISER & ANA MUÑOZ, MAKING THE LIST: DATABASE MATCHING AND VERIFICATION PROCESSES FOR VOTER REGISTRATION 7–22 (2006), available at [https://www.policyarchive.org/bitstream/handle/10207/8767/27Making the List- Database Matching Verification Processes for Voter Registration.pdf?sequence=1](https://www.policyarchive.org/bitstream/handle/10207/8767/27Making%20the%20List-Database%20Matching%20Verification%20Processes%20for%20Voter%20Registration.pdf?sequence=1) (discussing the requirements put in place by HAVA).

16. 42 U.S.C. § 15482(b)(2)(B) (2000 & Supp. V. 2005).

17. See Gerald M. Feige, Comment, *Refining the Vote: Suggested Amendments to the Help America Vote Act’s Provisional Balloting Standards*, 110 PENN. ST. L. REV. 449, 453 (2005) (noting the differences in state law regarding provisional ballots).

18. For a general discussion of these laws, see Spencer Overton, *Voter Identification*, 105 MICH. L. REV. 631 (2007).

voters were required to present a government-issued, currently valid photo ID<sup>19</sup>—in order to cast their ballot and have it counted. Voter identification laws were passed ostensibly to deal with the problem of vote fraud by impersonation at the polls.<sup>20</sup> There is, however, no evidence whatsoever of significant amounts of such impersonation: in Indiana, for example, there is not one verified incident of vote fraud by impersonation in the state’s entire history.<sup>21</sup> By contrast, there is uncontested evidence that millions of citizens lack the documents necessary to satisfy the most restrictive voter ID requirements.<sup>22</sup>

The Bush Administration went out of its way to abet these new, and unnecessary, barriers to voting. It filed an amicus brief at the Supreme Court in the Indiana voter ID case backing the state’s position. The Administration’s brief asserted as “fact” an unsupported hypothesis advanced in an earlier Supreme Court decision that “[v]oter fraud drives honest citizens out of the democratic process and breeds distrust of our government.”<sup>23</sup> That hypothesis was fundamentally undercut by later research suggesting that fears of fraud “do not have any relationship to a [citizen’s] likelihood of intending to vote or turning out to vote.”<sup>24</sup> And the Administration’s brief implicitly elevated the interests of ID-possessing voters over their less well-documented compatriots by insisting that “voting fraud impairs the right of legitimate voters to vote by diluting their votes—dilution being recognized to be an impairment of the right to vote.”<sup>25</sup> At the same time, the brief dismissively downplayed the

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19. *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610, 1613 (2008) (Stevens, J.).

20. *See id.* at 1617, 1619–20.

21. *Id.* at 1619. For a more extensive discussion of the evidence of fraud—more accurately, the lack thereof—see Overton, *supra* note 18, at 644–50; David Schultz, *Less Than Fundamental: The Myth of Voter Fraud and the Coming of the Second Great Disenfranchisement*, 34 WM. MITCHELL L. REV. 483, 494–501 (2008).

22. *See* Overton, *supra* note 18, at 658–61 (providing various data suggesting that between six and ten percent of all citizens of voting age lack such documentation, with much higher rates among the youngest and oldest Americans of voting age, among persons with disabilities, and in urban minority communities).

23. Brief of the United States as Amicus Curiae Supporting Respondent at 18, *Crawford*, 128 S. Ct. 1610 (No. 07-21) (quoting *Purcell v. Gonzalez*, 127 S. Ct. 5, 7 (2006)), available at <http://www.usdoj.gov/osg/briefs/2007/3mer/1ami/2007-0021.mer.ami.pdf> [hereinafter *Crawford Amicus Brief*].

24. Stephen Ansolabehere & Nathaniel Persily, *Vote Fraud in the Eye of the Beholder: The Role of Public Opinion in the Challenge to Voter Identification Requirements*, 121 HARV. L. REV. 1737, 1739 (2008).

25. *Crawford Amicus Brief*, *supra* note 23, at 28 (quoting the court of appeals opinion, *Crawford v. Marion County Election Bd.*, 472 F.3d 949, 952 (7th Cir. 2007)).

barriers faced by voters who lacked such identification. Left out of the Administration's analysis entirely was any mention of the fact that the Indiana law, like all the recently-enacted restrictions, was passed along a strict party-line vote, with only Republicans supporting the measure.<sup>26</sup>

*B. Voter ID Laws and Section 5 of the Voting Rights Act*

The Administration behaved similarly when it carried out its responsibilities under section 5 of the Voting Rights Act of 1965 to review several states' voter identification laws.<sup>27</sup> Section 5 requires specified jurisdictions that have had a history of disenfranchisement to satisfy federal authorities that any proposed changes in their election laws have neither a racially discriminatory purpose nor a racially discriminatory effect before implementing those changes.<sup>28</sup> This "preclearance" requirement has proved to be the most effective technique in American history for protecting the voting rights of millions of African-American, Latino, Asian-American, and Native American citizens in covered jurisdictions.<sup>29</sup>

Section 5 authorizes the Department of Justice to conduct administrative preclearance proceedings. Two covered jurisdictions, Georgia and Arizona, adopted stringent new voter ID requirements and sought administrative preclearance. Both times, the career staff of the Civil Rights Division raised concerns about the new identification requirements because of the unacceptable risk that they would disenfranchise minority voters who lacked the requisite documents. Both times, political appointees within the Department overrode those concerns and precleared the laws, letting them go into effect.<sup>30</sup>

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26. *Crawford*, 128 S. Ct. at 1623–24 (Stevens, J.)

27. 42 U.S.C. § 1973 (2000 & Supp. V. 2005).

28. *Id.*

29. See Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *Challenges to Racial Redistricting in the New Millennium: Hunt v. Cromartie as a Case Study*, 58 WASH & LEE L. REV. 227, 238–39 (2001) (describing the transformative effects of the Act); Chandler Davidson & Bernard Grofman, *The Voting Rights Act and the Second Reconstruction*, in QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VRA, 1965–90, at 378, 386 (Chandler Davidson & Bernard Grofman eds. 1994) (the VRA is "perhaps the single most successful civil rights bill ever passed").

30. See Paul Keil, *Former DOJ Official: I Left Due to "Institutional Sabotage,"* TPM MUCKRAKER, Apr. 30, 2007, <http://tpmmuckraker.talkingpointsmemo.com/archives/003120.php> (last visited May 20, 2009) (discussing the Georgia preclearance process);

It may well be impossible to determine how many citizens have been, or will be, prevented or deterred from voting by these identification-requirement laws, but we already have seen striking illustrations of their effect. In Indiana, where there had not been a single verified episode of impersonation at the polls in the state's history, we have the Retired Nuns, which is not the name of a rock band: it is a group of retired nuns in their eighties and nineties who went to a polling place located on the ground floor of their convent where a pollworker, who was a fellow sister in their order, turned them away because they lacked currently valid photo IDs.<sup>31</sup> To paraphrase Corinthians, maybe the spirit of the Indiana law had something to do with electoral integrity, but the letter killeth.<sup>32</sup>

In the end, cynical partisans have whipped up an illusory fear of fraud and used it as a device to deflect attention away from the real problem with American elections: it is not that too many imposters vote but that too few citizens participate. Justice Brandeis, in his foundational concurrence in *Whitney v. California*, made a telling argument:

Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears. To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent. There must be reasonable ground to believe that the evil to be prevented is a serious one.<sup>33</sup>

The same argument should apply to suppression of voting rights. Fear of fraud alone should not justify preventing thousands of Americans from casting votes. We fear impersonators and disenfranchise the elderly, the disabled, and the less affluent among us. Laws that are designed to deal with a non-existent problem operate to disenfranchise real voters.

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Tanya Lee, *Ex-Justice Official: Native American Vote May Be Issue in U.S. Attorney Firings*, TARGETED NEWS SERVICE, July 11, 2007 (discussing Arizona preclearance proceeding).

31. Cynthia Tucker, Editorial, *Even God Couldn't Vote in Indiana Without Proper ID*, BALTIMORE SUN, May 12, 2008, at 9A.

32. Cf. 2 *Corinthians* 3:6 (“[N]ot of the letter but of the Spirit. For the letter kills, but the Spirit gives life.”).

33. *Whitney v. California*, 274 U.S. 357, 376 (1927).

*C. Redistricting and Section 5 of the Voting Rights Act*

A second example of the Bush Administration's distortion of voting rights involves what I have called Texas's "DeLayed Redistricting," in honor of then-House Majority Leader Tom DeLay, who engineered the state's mid-decade re-redistricting in order to gerrymander a half-dozen incumbent Democrats out of their seats.<sup>34</sup>

Part of this "DeLayed Redistricting" involved Congressional District 23, which was centered on Laredo, a heavily Latino city in the southwestern part of the state. The district was represented by a Republican, but his days were clearly numbered: he garnered little support from Latino voters, whose share of the electorate was expanding rapidly. To shore up the Republican's prospects, the new plan split the Latino community between two districts, reducing the number of Latinos in District 23. That plan was ultimately struck down by the Supreme Court as a violation of section 2 of the Voting Rights Act, which forbids states from using electoral practices that dilute minority voting strength.<sup>35</sup>

Justice Kennedy's opinion for the Court held that the redrawn lines undercut the "representational rights" of Latino voters who had, after a history of political powerlessness, recently "found an efficacious political identity"<sup>36</sup> that left them "poised to elect their candidate of choice."<sup>37</sup> The State, Justice Kennedy explained, "took away the Latinos' opportunity [to elect a candidate in District 23] because Latinos were about to exercise it," an action that "bears the mark of intentional discrimination that could give rise to an equal protection violation."<sup>38</sup>

The "DeLayed Redistricting," then, was precisely the kind of voting change that section 5 of the Voting Rights Act was intended to prevent. So where was the Department of Justice? On the sidelines. In a detailed, 73-page memorandum, the Department's career staff recommended that the Attorney General deny preclearance of Texas's plan because it would lead to an impermissible retrogression

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34. See Pamela S. Karlan, *New Beginnings and Dead Ends in the Law of Democracy*, 68 OHIO ST. L.J. 743, 755 (2007) (discussing the Texas redistricting process).

35. 42 U.S.C. § 1973 (2000 & Supp. V. 2005).

36. League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 435 (2006).

37. *Id.* at 438.

38. *Id.* at 440.



in minority voting strength.<sup>39</sup> As in the voter ID cases, however, political appointees overrode the career lawyers' analysis and let the plan go into effect. Rather than protecting the ability of minority voters to pick their Member of Congress, the Department gave the green light to a Member of Congress to pick his colleagues' constituents.

## II. CONCEPTUAL LESSONS LEARNED: THE NEED FOR AN AFFIRMATIVE UNDERSTANDING OF THE RIGHT TO VOTE

The problems of the past eight years highlight not just a breakdown of federal commitment to protecting voting rights but also a deeper conceptual problem: the current protections of the right to vote operate as piecemeal prohibitions on specified forms of disenfranchisement or dilution rather than as an affirmative recognition of a fundamental right to effective participation. Towards the end of the nineteenth century, the United States Supreme Court declared itself “unanimously of the opinion that the Constitution of the United States does not confer the right of suffrage upon any one.”<sup>40</sup> The *Bush v. Gore* Court carried that thought forward into the twenty-first century with its offhand comment that “[t]he individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the Electoral College.”<sup>41</sup> Thus, while the Fifteenth Amendment forbids denying or abridging the right to vote on account of race, and the Nineteenth on account of sex, and the Twenty-Fourth on account of failure to pay a poll tax, no amendment—nor, indeed, any statute—requires the government to take significant affirmative steps to make sure that all citizens are registered or that voting is convenient.

This negative conception of a constitutional right can work fairly well if the right is a right to be left alone. The right to privacy, for example, can be vindicated in large part simply by telling the

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39. See Memorandum from the U.S. Dept. of Justice to John Ashcroft, U.S. Attorney General, 71–72 (Dec. 12, 2003), available at <http://www.washingtonpost.com/wp-srv/nation/documents/texasDOJmemo.pdf> (recommending that the Attorney General object to the Texas redistricting plan because it resulted in a retrogression).

40. *Minor v. Happersett*, 88 U.S. 162, 178 (1875).

41. *Bush v. Gore*, 531 U.S. 98, 104 (2000) (per curiam).

government to stay out of our bedrooms, or to stay away from our emails, or to stay off our property. But a negative conception of a right does not work nearly as well when the ability to exercise the right depends on government action. A citizen who is handed an official ballot in a language she does not understand is effectively denied the right to vote. A citizen who lives in a county that uses antiquated election machines and who therefore cannot vote during her lunch hour due to long lines may also be prevented from voting. If the government fails to facilitate voting, we are not going to have a full right to vote.

So what would it mean to develop an affirmative right to vote? It would mean saying that the states should treat the right to vote the way they treat other aspects of citizenship that they take seriously. Consider, for example, jury service: the state affirmatively seeks out citizens to serve and sends them summonses with prepaid mailers. When it comes to voting, by contrast, states generally wait for aspiring voters to come to them. And when states communicate with citizens—say, by providing absentee ballots—they place the cost of responding on the citizens.

Other nations act quite differently. In Canada, for example, the national government for many years conducted a “door-to-door enumeration” before every federal election to make sure that all eligible citizens were able to participate. It moved away from this system only when it had developed a national database with systematic updating.<sup>42</sup> In many other countries, people vote on holidays or the government provides to them, free of charge, the identity documents required to cast a ballot.

One forgotten lesson, not from the Bush Administration but from the Johnson Administration, is that this kind of affirmative executive branch action can work. An important provision of the original Voting Rights Act of 1965 authorized the Attorney General to certify the need for federal examiners to register voters in covered jurisdictions.<sup>43</sup> In the two years after the Act was passed, the Administration used civil service employees to register more African-Americans in the

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42. See Description of the National Register of Electors (February 2005), <http://www.elections.ca/content.asp?section=ins&document=national&dir=nre&lang=e&textonly=false> (last visited May 20, 2009) (describing a brief history of Canada’s voter registration process).

43. Voting Rights Act of 1965, §§ 6–7 (repealed at 42 U.S.C. §§ 1973d, 1973e).

South than had been registered in the century since the Fifteenth Amendment had been ratified.<sup>44</sup> So we know great things can be accomplished if we have an administration that has the will to do them.

### III. INSTITUTIONAL LESSONS LEARNED: HOW THE BUSH ADMINISTRATION POLITICIZED THE CIVIL RIGHTS DIVISION

The institutional lesson we learned from the Bush years is that the Civil Rights Division, and the Voting Section in particular, need to be thoroughly restored. The recent reports by the Department of Justice's Inspector General, Glenn Fine, detail an appalling picture. The titles tell the story:

- An Investigation of Allegations of Politicized Hiring and Other Improper Personnel Actions in the Civil Rights Division<sup>45</sup>
- An Investigation into the Removal of Nine U.S. Attorneys in 2006<sup>46</sup>
- An Investigation of Allegations of Politicized Hiring by Monica Goodling and Other Staff in the Office of the Attorney General<sup>47</sup>
- An Investigation of Allegations of Politicized Hiring in the Department of Justice Honors Program and Summer Law Intern Program.<sup>48</sup>

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44. CHANDLER DAVIDSON, *The Voting Rights Act: A Brief History*, in *CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE* 7, 21 (Bernard Grofman & Chandler Davidson eds., 1992).

45. U.S. Department of Justice Office of the Inspector General & Office of Professional Responsibility, *An Investigation of Allegations of Politicized Hiring and Other Improper Personnel Actions in the Civil Rights Division*, July 2, 2008, available at <http://www.usdoj.gov/oig/special/s0901/final.pdf>.

46. U.S. Department of Justice Office of the Inspector General & Office of Professional Responsibility, *An Investigation into the Removal of Nine U.S. Attorneys in 2006*, Sept. 2008, available at <http://www.usdoj.gov/oig/special/s0809a/final.pdf>.

47. U.S. Department of Justice Office of the Inspector General & Office of Professional Responsibility, *An Investigation of Allegations of Politicized Hiring by Monica Goodling and Other Staff in the Office of the Attorney General*, July 28, 2008, available at <http://www.usdoj.gov/oig/special/s0807/final.pdf>.

48. U.S. Department of Justice Office of the Inspector General & Office of Professional Responsibility, *An Investigation of Allegations of Politicized Hiring in the Department of Justice Honors Program and Summer Law Intern Program*, June 24, 2008, available at <http://www.usdoj.gov/oig/special/s0806/final.pdf>.

The reports themselves make for gripping, if sickening, reading. They show a Department, and a Division, that squandered literally hundreds of years of experience and expertise that were acquired and deployed during previous Administrations, Democratic and Republican alike. The reports also show blatant manipulations of the law enforcement process in order to influence election outcomes.<sup>49</sup>

Approximately sixty percent of the career staff of the Voting Section of the Department of Justice left during the Bush Administration.<sup>50</sup> This was a group of people who had brought an amazing wealth of experience, knowledge, and commitment to the enforcement of the law and, in particular, to the Department of Justice's special responsibilities under section 5 of the Voting Rights Act.

The Civil Rights Division, for five of the eight years of the Bush Administration, brought no Voting Rights Act cases of its own except for one case protecting white voters in a majority-black town in Mississippi.<sup>51</sup> It precleared changes that never would have been precleared in the past. It hired people who never would have been hired in the past because political appointees took over the hiring process for career positions and used straightforwardly political and ideological criteria in selecting applicants. In the end, the Administration turned even on its own appointees, firing a number of presidentially-appointed United States Attorneys for their refusals to manipulate the prosecutorial process to initiate election-related prosecutions for partisan gain.<sup>52</sup> A central lesson we have learned from this Administration is that a politicized Department of Justice *cannot* perform its tasks fully and fairly.

#### IV. CONCLUSION

The Bush Administration compiled a troubling record indeed when it comes to voting rights. But as my favorite baseball

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49. *An Investigation into the Removal of Nine U.S. Attorneys*, *supra* note 46.

50. Oral Testimony of Joseph D. Rich at the Oversight Hearing of the Civil Rights Division Held Before the House Judiciary Subcommittee on the Constitution, Civil Rights and Civil Liberties at 3 (Mar. 22, 2007), *available at* <http://www.votelaw.com/blog/blogdocs/rich%20oral%20testimony%203%2022%20final.pdf>.

51. *United States v. Noxubee County Dem. Exec. Comm.*, 494 F. Supp. 2d 440 (S.D. Miss. 2007).

52. *An Investigation into the Removal of Nine U.S. Attorneys*, *supra* note 46.

philosopher, Satchel Paige, once remarked, “Let whomsoever wishes sit around recollecting. I’m looking up the line.”<sup>53</sup> So going forward, what should we do? First, we need legislation that recognizes an official obligation to make sure all citizens who are eligible to vote are placed on the voting rolls and that elections run smoothly and accurately. We could learn something from examining how other democracies, advanced and emerging, manage to achieve registration and turnout rates that dwarf our own.<sup>54</sup>

Second, in the arena of voting rights, it is critical to make sure the rules are clear and clearly established before the election begins. Once the election is underway, litigation over the rules is likely to cause confusion and the partisan consequences of various decisions become so clear that they can distort the results. If someone had asked the United States Supreme Court in the spring of 2000 how it would decide a hypothetical case like *Bush v. Gore*, I suspect he would have gotten a very different answer than the one given in December 2000, when it was clear which way the chads would fall.

Finally, we must recognize that we can have a political system that works only when the Department of Justice attorneys who enforce voting rights are not themselves partisan activists. Never before the Bush Administration did we have so politicized a process of hiring career employees, supervising career employees, and rewarding and punishing career employees as we have had over the last eight years. And we should make sure this never happens again.

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53. Editorial, *Satchel*, N.Y. TIMES, June 10, 1982, at A30.

54. See, e.g., Institute for Democracy and Electoral Assistance, Turnout in the World—Country by Country Performance, [http://www.idea.int/vt/survey/voter\\_turnout\\_pop2.cfm](http://www.idea.int/vt/survey/voter_turnout_pop2.cfm) (last visited May 20, 2009) (listing the percentage turnout of voters for each country; the United States is ranked 139 out of 172 countries).