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"Lessons Learned from the 2004 Presidential Election"

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My name is Daniel Tokaji. I am an Associate Professor of Law at The Ohio State University's Moritz College of Law, and Associate Director of *Election Law @ Moritz*, a group of legal scholars whose mission is to provide reliable, nonpartisan analysis of election law matters.[1] In addition, I am a co-author of the forthcoming edition of the casebook *Election Law: Cases and Materials* (4th ed. 2008). My research and scholarship focuses primarily on voting rights and election administration. I am honored to appear before you today.

My remarks today will first address the election administration problems that arose in the course of Ohio's 2004 presidential election.[2] I will then discuss some broader lessons from Ohio's experience in 2004 and subsequent years. I close with some thoughts on the proper role for the U.S. Department of Justice in this election season.

For reasons that I shall explain, there are reasons to be worried about how well the election infrastructure of Ohio and other states will bear up to the pressure that will undoubtedly be put upon it this year. Of particular concern are state voter registration systems and the procedures for provisional voting. If these procedures are not functioning properly, many voters are at risk of not having their votes counted. In addition, it is likely that voters in different counties or municipalities within a state will receive inconsistent treatment, raising equal protection concerns. Registration and provisional voting problems also exacerbate the risk of post-election litigation over the result, as occurred in Florida in 2000 and as nearly occurred in

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[1]My affiliations with the University, the College of Law, and *Election Law @ Moritz* are provided solely for purposes of identification. This testimony is offered solely on my own behalf.

[2]I have attached a copy of my article "Early Returns on Election Law: Discretion, Disenfranchisement, and the Help America Vote Act," 73 *Geo. Wash. L. Rev.* 1206 (2005), which discusses these issues at greater length than does this testimony.

Ohio in 2004. Finally, partisanship in the administration and enforcement of voting rules – at the local, state, and federal level – continues to pose a significant threat to the integrity of elections across the country.

Ohio's Experience in 2004

On the morning of November 3, 2004, President George W. Bush led Senator John Kerry by approximately 136,483 votes out of some 5.6 million cast in Ohio, the state upon which the presidential race ultimately turned. This margin was sufficient to overcome any legal challenges that might have arisen from uncounted provisional votes, ambiguously marked punch card ballots, and lengthy lines that may have discouraged many citizens from voting. But had President Bush's morning-after lead been a quarter or perhaps even half what it was, a replay of the legal battles that culminated in *Bush v. Gore* – with the Buckeye State rather than the Sunshine State as the backdrop, Ken Blackwell playing the role of Katherine Harris, and provisional ballots replacing punch-card ballots as the dominant props – would probably have ensued.

Despite the fact that there was no post-election meltdown in 2004, there remains significant room for improvement in the functioning of our election system. It is clear that state election officials, in Ohio and elsewhere, could have done a much better job at implementing the requirements of federal and state law. The issues that generated controversy and litigation during the 2004 election cycle included voting technology, voter registration, provisional voting, voter identification, challenges to voter eligibility, and long lines at the polling place. I will

discuss each of these trouble spots in turn.[3]

Voting Technology. Studies conducted in the wake of the 2000 election demonstrated significant problems in the machinery used to cast votes.[4] By 2004, many states had made the transition to new technology which reduces the rate of votes lost due to overvotes and undervotes. There is evidence showing that approximately 1,000,000 votes were saved nationwide in 2004, due to the transition to better technology and better procedures.[5] Unfortunately, Ohio was not among those states. Approximately 72% of Ohio's voters continued to use the very same type of punch card voting equipment that Florida had used in 2000. My estimate is that between 44,000 and 67,000 Ohioans who voted in November 2004 did not have their votes counted due to the use of unreliable voting equipment. These are votes that would have been counted, if better equipment had been in place.

The good news is that Ohio has since replaced its equipment with newer technology that gives voters notice and the opportunity to correct errors, and thus reduces lost votes. The bad news is that Ohio has had difficulties with some of its new voting technology. The state's largest county, Cuyahoga, which encompasses the Cleveland era, will be moving to a precinct-count optical scan system in November's election. This will be the fourth system it has used since the 2004 election. It is worrisome, to say the least, that such a large and important county has had such difficulty in making the transition to new technology and that it will be using a new system

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[3]Documentation for the information set forth below, including references to cases and other relevant materials, may be found in my article "Early Returns on Election Reform," 73 *Geo. Wash. L. Rev.* at 1220-39.

[4]For a summary of this research, see Daniel Tokaji, "The Paperless Chase: Electronic Voting and Democratic Values," 73 *Fordham L. Rev.* 1711, 1754-68 (2005).

[5]Charles Stewart III, "Residual Vote in the 2004 Election," 5 *Election L.J.* 158 (2006).

for the first time in this critical election.

Voter Registration. In the weeks leading up to November 2, 2004, several issues arose relating to the handling of registration forms. Among the issues was what to do with registration forms in which boxes had been left unchecked, or in which certain identifying information had been omitted. But the most intense controversy concerned Secretary of State Ken Blackwell's September 2004 directive requiring that Ohio registration forms be printed on "white, uncoated paper of not less than 80 lb. text weight" (i.e., the heavy stock paper). Under this directive, forms on lesser paper weight were to be considered mere *applications* for a registration form, rather than a valid voter registration.

Although the Help America Vote Act of 2002 ("HAVA") is silent on the question of the paper-weight of registration forms, voting rights advocates argued that the directive violated the federal law, which requires that "[n]o person acting under color of law" may deny a person the right to vote "because of an error or omission on any . . . paper relating to any . . . registration . . . if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election."[6] Some local election officials stated their intent to accept registration forms regardless of the paper weight on which they were printed, despite Blackwell's directive. In the face of these objections, Secretary Blackwell's office backed down and, in late September, announced that registration forms on ordinary-weight paper should still be processed.

Provisional Voting. The implementation of provisional voting was arguably *the* story of the 2004 election. Title III of HAVA requires provisional ballots to for those eligible voters

[6]42 U.S.C. § 1971(a)(2).

who, due to administrative error or for some other reason, appear at the polls on election day to find their names not on the official registration list.

Ohio saw significant controversy over provisional voting in 2004. The issue that garnered the most attention is whether provisional ballots may be cast or counted if the voter appears in the "wrong precinct." In several states, this issue resulted in litigation. In Ohio, Secretary of State Blackwell issued a directive in September 2004, providing that voters would not be issued a provisional ballot, unless the pollworkers were able to confirm that the voter was eligible to vote at the precinct at which he or she appeared. A federal district court issued an injunction against this order, on the ground that Secretary of State Blackwell's directive failed to comply with the requirements of HAVA. This injunction was affirmed in part and reversed in part on appeal. The Sixth Circuit upheld the district court's order, insofar as it found that the Secretary of State had not fully complied with HAVA by requiring pollworkers to determine "on the spot" whether a voter resided within the precinct and by denying those not determined to reside within the precinct a provisional ballot altogether. But the Sixth Circuit concluded that HAVA did not require provisional ballots to be counted if cast in the wrong precinct.[7]

Although the "wrong precinct" issue received the most attention, it was one of a number of issues surrounding provisional voting that emerged in 2004. Among the others was the question of whether voters should be allowed to cast a provisional ballot, if they had requested but had not received or voted absentee ballots. This also led to litigation, with a federal court in Lucas County ordering that these voters must be given provisional ballots (*White v. Blackwell*). There was also litigation over the standards used to count provisional ballots. On Election Day

[7]Sandusky County Democratic Party v. Blackwell, 387 F.3d 565 (6th Cir. 2004).

2004, a lawsuit was filed challenging the lack of clear standards for determining which provisional ballots should be counted. This case relied on *Bush v. Gore*, for the proposition that a state must set clear voting rules in advance of an election, to avoid unequal treatment of voters from county to county. The case (*Schering v. Blackwell*) was ultimately dismissed after it became clear that it would not affect the result of the 2004 election. It is quite possible, however, that the issue of unclear standards for counting provisional ballots could arise again in future elections.

Voter identification. Related to the controversy over provisional voting were issues regarding voter identification. HAVA includes a requirement that first-time voters who registered by mail show some type of identification. That may include a photo ID or another document (like a utility bill, bank statement or government document) with the voter's name and address. There are at least two ambiguities in the law, however, that emerged in 2004. The first is precisely what sort of documents qualify. The second is what happens to voters if they do not present the required ID when they appear at the polls. In 2004, Secretary Blackwell issued a directive that provisional ballots would be counted only if voters produced the required information by the time the polls closed. That directive was challenged in court by the League of Women Voters and other groups. In response, the Secretary of State softened his position, stating that provisional ballots of those lacking ID would be counted if voters either presented documentary proof of identity *or* provided their driver's license or last four digits of their social security number by the end of the voting day.

Challenges to Voter Eligibility. Another major issue that emerged in the weeks preceding the 2004 general election was the challenge process for questioning voter eligibility.

Many people, particularly in communities of color, saw these challenges as part of a concerted strategy of voter intimidation. Some were also concerned that these challenges would be used to tie up polling places, particularly in heavily populated urban areas.

In Ohio, civil rights advocates and the Democratic Party went to court to challenge the challenges. A federal district court issued an injunction barring pre-election challenges of some 23,000 voters. In addition, there were four separate lawsuits concerning election-day challenges to voter eligibility. These cases produced a dizzying series of court orders and appellate proceedings, leading up to and even extending into election day. Four different trial judges issued orders limiting the challenges, yet each of these court orders was reversed on appeal – one of them on the afternoon of November 2, election day.

There was an undeniably partisan dimension to much of the disagreement over challenges to voter eligibility, with Republicans asserting the need to prevent voter fraud and Democrats generally urging limitations on challengers to ensure access. While it is clearly important to discourage fraud, it is also important to clearly specify the standards and procedures for making challenges, to ensure an orderly process that will not tie up polling places or consume the time of already overburdened local election officials.

Long Lines at the Polling Place. Many Ohio voters waited for hours on or before November 2, 2004 in order to exercise their right to vote. The problems appear to have been particularly acute in some urban precincts in Franklin County, where voters reported waiting for up to four or five hours. And at one polling place near Kenyon College in Knox County, Ohio, voters reportedly waited as long as ten hours. These lines posed a special difficulty for working people who could not be away from their jobs for that long, and for parents of younger children.

It will probably never be known how many people were discouraged from voting, either because they arrived at the polling place to find lines stretching around the block or because they heard about how bad the lines were and thus never went to the polls in the first place.

On election day in 2004, a lawsuit was brought on behalf of voters in Franklin and Knox counties seeking relief from the long lines (*Ohio Democratic Party v. Blackwell*). That evening, a federal district judge issued a temporary restraining order requiring that voters waiting in line be provided with "paper ballots or another mechanism to provide an adequate opportunity to vote," and directing that polls be kept open waiting in line. Despite the requirement to provide paper ballots to voters waiting in line, some voters in these counties waited in line for several hours after the polls closed before casting their vote.

Will we see long lines again in 2008? It is hard to know for sure. There is reason to hope that the purchase of new voting systems will reduce some of the lines that existed in 2004. On the other hand, this is likely to be a very high turnout election, with much stress placed upon our polling places. This is especially worrisome, given the desperate need for more able poll workers, particularly in larger urban jurisdictions.

Lessons from the 2004 Election.

Let me now move to four overriding lessons that can be taken from the 2004 election.

First, there is a need for clear and transparent rules to ensure equal treatment of voters. Truly speaking, we have not a single election system in this country nor even 50, but thousands – consisting of all the local entities with responsibility for the conduct of elections. Perhaps the most important lesson to emerge from both the 2000 and 2004 elections is the need for each state to provide specific and uniform guidance to its local jurisdictions, to ensure some semblance of

consistency among counties. Seven justices of the Supreme Court expressed the need for such clear rules in the *Bush v. Gore* decision, as it relates to the conduct of manual recounts. Regardless of how broadly one reads the holding of this case, clear rules articulated in advance of an election are desirable as a way of promoting consistent and equal treatment of voters, not only for recounts but also for other election administration practices.

In the area of provisional voting, for example, there ought to be consistent procedures and standards for determining voter eligibility across the state. It does not appear that this occurred in 2004. While 77.9% of provisional ballots were counted overall, the percentage of provisional votes counted varied dramatically among Ohio counties, from a low of 60.5% to a high of 98.5%. Such discrepancies in the percentage of provisional ballots counted tend to support an equal protection claim under *Bush v. Gore*, by suggesting that there is an unconstitutional lack of uniformity among counties

It is equally vital that the rules governing the administration of elections be transparent. Transparency was an area in which the Ohio Secretary of State's office was sorely lacking in 2004. It did not even post its directives to the counties governing the administration of elections on its website, even though these directives are obviously matters of public interest. In the controversy over whether voters who had requested an absentee ballot should be allowed to vote provisionally, the Secretary of State's office guidance came in the form of a private email just days before the election. And in some cases, such as the standards for counting provisional votes, it was not until shortly before the election that the directive was actually made public. This can only lend the appearance that the election is being run according to secret (or at least semi-secret) rules. It is absolutely vital that the rules of the game be made public and be made

available to all citizens well in advance of elections. Fortunately, in Ohio at least, the Secretary of State's office has gotten much better in making directives and other official guidance public, with that information available on its public website.

Second, partisanship in election administration remains a serious problem. One of the peculiarities of the American election system is that officials elected on a partisan basis are given responsibility for running elections. In most states, the chief election official – typically the Secretary of State – is elected through a partisan process. In other states, the chief election officials is appointed by someone who is elected as a representative of his or her party.[8] So too, local officials are elected in roughly two-thirds of American jurisdictions, and party-affiliated officials run elections in almost half the jurisdictions in this country.[9] The partisanship of election administrators became a major issue in Florida's 2000 election and in Ohio's 2004 election. Although the chief election officials of both these states happen to be Republican, there have also been accusations of partisanship on the part of Democratic chief election officials – including Ohio, which elected a Democratic Secretary of State in 2006.

It is vitally important that we move beyond personalities, and recognize that partisanship in the administration of elections is an *institutional* problem that will require an institutional solution. One good example is the State of Wisconsin. Instead of having its elections run by a Secretary of State elected in on partisan basis, the Wisconsin's elections are run by a Government Accountability Board (GAB) which is chosen in a manner that ensure bipartisan

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[8]Richard L. Hasen, "Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown," 62 *Wash. & Lee L. Rev.* 937, 976 (2005).

[9]David C. Kimball et al., "Helping America Vote? Election Administration, Partisanship, and Provisional Voting in the 2004 Election," 5 *Election L.J.* 447, 453 (2006).

consensus. This provides the public with greater assurance that its decisions will be made fairly, without regard for partisan consequences. Until other states adopt comparable institutional changes, accusations of partisanship are likely to dog election administrators of both major political parties.

Third, litigation can play an essential role in protecting voters' rights and promoting sound administration. There is often a tendency to bemoan the increase in election-related lawsuits that we have seen in recent years. And to be sure, it would be undesirable for every disagreement over the procedures followed in an election to wind up in court. At the same time, it cannot be denied that the courts – and particularly the federal courts – have an essential role to play in the functioning of our election system. While judges are not entirely free of ideological or even partisan biases, the federal judiciary is more insulated from partisan politics than the executive and legislative branches of government. This provides them with an independence that is absolutely vital in adjudicating election disputes, particularly those which arise under the Equal Protection Clause or other provisions of the Constitution. Even when federal courts decline to issue relief, as was the case in Ohio's 2004 disputes involving "wrong precinct" provisional ballots, litigation can play an essential role in clarifying the rules of the game.

Relatedly, it is desirable for cases challenging the procedures for voting to be brought and resolved as far in advance of the election as possible. Pre-election litigation (like we saw in 2004) is vastly preferable to post-election litigation (like we saw in 2000). Whenever possible, it is better to identify problems and resolve disagreements before Election Day, rather than cleaning up the mess afterwards.

Fourth, election reform remains a work in progress. If the 2004 election should teach us anything, it is that election reform is a process, not a destination. That process is not complete. States have now made the transition to new technology, implemented provisional ballots, and created state registration databases as required by HAVA. There are still serious issues, however, with how well these reforms are working.

One of the most frustrating aspects of election administration is the difficulty in obtaining reliable data, that will allow researchers to make sound comparisons across states and among local government entities. Another problem is the persistent shortage of resources, under which the local election officials responsible for running elections labor. There is a need for ongoing federal funding for federal elections. In return, the federal government should demand reliable information from state and local entities, so that their performance can accurately be evaluated.[10]

The Role of the Department of Justice

I close with some thoughts on the appropriate role of the Department of Justice in this election season. There is no doubt that the United States Department of Justice (DOJ) has a vital role to play in ensuring that the fundamental right to vote is protected. There will inevitably be disagreements over how best to serve this overarching objective. But whatever these differences, we should be able to agree that an integral part of DOJ's historic mission is to ensure that all eligible voters are permitted to exercise their right to vote on equal terms with other citizens. It is especially important that DOJ ensure that no eligible voters are denied the right to

[10]Thad Hall and I set forth this proposal in greater detail in "Money for Data: Funding the Oldest Unfunded Mandate," *available at* http://moritzlaw.osu.edu/blogs/tokaji/2007_06_01_ equalvote_ archive.html.

full and fair participation in elections based on their race, ethnicity, poverty, language proficiency, or disability.

While there are many ways in which the Department can and should act to protect the right to vote, one of the most important areas of voting rights activity in this year's election is likely to be procedures that state and local jurisdictions follow in registering voters and in maintaining voting rolls. The importance of this area is the result of several factors, including the requirements of the Help America Vote Act of 2002 (HAVA), evidence that jurisdictions are not fully complying with the requirements of the National Voter Registration Act of 1993 (NVRA), and state laws that have been enacted in recent years that change registration procedures.

Although voter registration is mostly a state and local matter, there are some important federal legal requirements in place, that are designed to ensure that all eligible voters have a fair opportunity to participate in elections. A cornerstone of these requirements is the NVRA, which requires that voter registration for federal elections be made available at state motor vehicle agencies, as well as state offices providing public assistance services and services to people with disabilities.[11] DOJ is empowered to bring civil actions in federal court to enforce the NVRA's requirements.

Unfortunately, there is evidence of noncompliance with the NVRA's requirements. A recent report found that the number of voter registration applications from public assistance agencies in 2005-06 was a small fraction of what it had been 10 years earlier – despite the fact

[11] 42 U.S.C. §§ 1973gg-3, 1973gg-5.

that roughly 40% of voting-age citizens from low-income households remain unregistered.[12] Survey evidence also indicates that registration opportunities are not being made available as required by the NVRA.[13] Just last week, a federal court in Missouri issued an order requiring that state to comply with the requirement that public assistance agencies provide opportunities for registration.[14]

Put simply, a disproportionate number of poor Americans are not being registered as reuqired by federla law. Unfortunately, this is an area in which DOJ has done a poor job during the current administration. It has done relatively little to make sure that states are making registration opportunities available as federal law requires.[15] Nonprofit advocacy organizations, which lack the investigation and enforcement resources of the federal government, have been left to pick up the slack.

Another priority is to ensure that voters names are not wrongly removed or omitted from state registration lists. This is not merely a theoretical problem. The highly regarded 2001 report of the Caltech/MIT Voting Technology Project found that this was probably the greatest source of lost votes in the 2000 presidential election, with 1.5 to 3 million voters affected by registration errors – probably more than the number of people affected by antiquated voting

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[12]Douglas R. Hess & Scott Novakowski, *Neglecting the National Voter Registration Act, 1995-2007,* at 1 (2008).

[13]*Id.*

[14]ACORN v. Scott, Case No. 08-CV-4084-NKL, Memorandum and Order (July 15, 2008), *available at* http://moritzlaw.osu.edu/electionlaw/litigation/documents/Scott-Order-7-15-08.pdf

[15]*Id.* at 13; *see also* U.S. Department of Justice, Civil Rights Division, *Cases Raising Claims Under the National Voter Registration Act,* available at http://www.usdoj.gov/crt/voting/litigation/ recent_nvra.html#cibola.

equipment.[16] Despite all the changes in the past few years, the accuracy of voter registration lists remains a problem. Evidence for this lies in the relatively high number of provisional ballots in some states, which are required if a voter appears at the polls and finds that his or her name does not appear on the registration list. In my own state of Ohio, for example, the percentage of voters casting provisional ballots actually increased between the 2004 and 2006 general elections.[17] Data from the Ohio Secretary of State's office show that the percentage of people voting provisionally was higher still in the 2008 primary.[18]

No eligible voter should be denied the right to vote and have that vote counted due to a faulty registration list. This basic and undeniable principle is embodied in both the NVRA and HAVA. The NVRA imposes important limitations on voters being "purged" or otherwise having their names wrongly removed from the voting rolls, including a restriction on the systematic removal of voters within 90 days of a federal election.[19] HAVA requires that every state have in place a computerized "statewide voter registration list," commonly referred to as a "statewide registration database."[20] The idea behind this list was to make voter registration lists more accurate, thereby ensuring that eligible voters are not denied the right to vote due to faulty lists while at the same time protecting the integrity of the registration process. HAVA also

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[16]Caltech/MIT Voting Technology Project, *Voting: What Is, What Could Be* 9 (2001)

[17]Steven F. Huefner, et al., *From Registration to Recounts: The Election Ecosystems of Five Midwestern States* 32 (2007) (showing increase from 2.8% to 3.1% from 2004 to 2006).

[18]Information released by the Secretary of State's office shows that approximately 3.4% of Ohioans cast provisional ballots (123,432 provisional ballots were issued, out of 3,603,523 total ballots cast). Ohio Secretary of State, "Absentee and Provisional Ballot Report: March 4, 2008," available at http://www.sos.state.oh.us/SOS/elections/electResultsMain/2008ElectionResults/absentProvReport03042008.aspx.

[19]42 U.S.C. § 1973gg-6.

[20]42 U.S.C. § 15483.

includes requirements designed to ensure that voters names are not wrongly removed from the rolls. Among its requirements relating to list maintenance are that "*only* voters who are not registered or who are not eligible to vote" be removed, and states have in place "[s]afeguards to ensure that eligible voters are not removed in error from the official list of eligible voters."[21]

Here again, there is reason for concern that the requirements of federal law are not fully being complied with. One report, based on a survey of the states, found that many states have adopted registration list practices that "create unwarranted barriers to the franchise."[22] One of the most serious problems is overly stringent "matching" protocols, under which voters names are deleted if they do not perfectly match information available in other databases (such as motor vehicle records). The problem is that data-entry errors, such as misspellings or the inversion of first and last names, can result in voters erroneously being removed from voting lists. Such issues have already spurred lawsuits brought by private parties.[23] Unfortunately, the main thrust of DOJ's enforcement efforts in the current administration, when it comes to voter registration, has been on requiring states to remove purportedly ineligible voters from the rolls. The problem is that overly aggressive purges can result in eligible voters being wrongly excluded.

A final topic of concern in this area pertains to state laws that impede the activities of groups engaged in voter registration efforts. While public agencies have an important role to

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[21]42 U.S.C. § 15483(a)(2)(B)(ii) & (a)(4)(B) (emphasis added).

[22]Justin Levitt, et al., *Making the List: Database Matching and Verification Processes for Voter Registration* (2006).

[23]*See, e.g.*, Washington Association of Churches v. Reed, W.D. Wash., Case No. 2:06-cv-00726-RSM. This case resulted in a stipulated final order which, along with other documents from the case, is available at http://moritzlaw.osu.edu/electionlaw/litigation/wac.php.

play in registering voters, much of the responsibility still lies with non-governmental organizations like the League of Women Voters. This is sometimes referred to as "third-party registration" though I prefer and will use the term "non-party registration," since it involves activities undertaken by groups that are not affiliated with political parties. In Florida and Ohio, private lawsuits have been filed to challenge state laws restricting non-party registration efforts. In both cases, federal courts issued orders enjoining those laws.[24] This too is an area to watch in 2008, as it is quite possible that there will be similar laws enacted in 2008. On this and other voter registration matters, it would be helpful for DOJ to stand up for the rights of voters, as it has historically done, so that all eligible citizens may freely register, vote, and have their votes counted.

Having discussed what I think DOJ *should* do, in the 2008 election cycle, let me close with a few thoughts on what DOJ should *not* do. In the last few years, there has been growing concern regarding the "politicization" of the Justice Department. Many commentators, including a number of former DOJ employees, 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.[25] There have been numerous media reports on personnel and litigation decisions

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[24]*See* League of Women Voters of Florida v. Cobb, S.D. Fla., Case No.06-21265-CIV-JORDAN; Project Vote v. Blackwell, N.D. Ohio, Case No.1:06-cv-01628-KMO. Documents from both these cases may be found at http://moritzlaw.osu.edu/electionlaw/litigation/index.php.

[25]*See, e.g.*, Joseph D. Rich, "Changing Tides: Exploring the Current State of Civil Rights Enforcement within the Justice Department," Testimony for the House Judiciary Committee, March 22, 2007; Testimony of Dr. Toby Moore, Oversight Hearing on the Voting Rights Section of the Civil Rights Division of the U.S. Department of Justice Before the Subcommittee on the Constitution, Civil Rights and Civil Liberties, Committee of the Judiciary, U.S. House of Representatives, October 30, 2007; Mark A. Posner, "The Politicization of Justice Department Decisionmaking Under Section 5 of the Voting Rights Act: Is It a Problem and What Should Congress Do?," January 2006.

reportedly influenced by partisan politics, including dubious voter fraud prosecutions and retaliation against U.S. Attorneys who failed to bring such prosecutions.[26] I have been among those expressing concern about the role of partisan politics in DOJ's actions, such as:

- An undue focus on pursuing allegations of voter fraud rather than expanding access, most notoriously a prosecution brought just before the contested 2006 senatorial election in Missouri in violation of longstanding DOJ policy;

- The DOJ's decision to file an amicus brief in a controversial 2004 case involving provisional voting, which included an argument that private citizens should not be allowed to sue to protect their rights under HAVA;

- An implausible "interpretation" of HAVA in 2005, which would have allowed states to deny a provisional ballot to voters lacking identification, a position from which the Department ultimately backed away; and

[26] *See, e.g.*, Jason McClure, "DOJ Probes Turn to Civil Rights Division," *Legal Times*, June 4, 2007; Gregg Gordon, "Justice Department Actions Expected to Draw Congressional Scrutiny," *McClatchy Newspapers*, June 4, 2007; Dan Eggen & Amy Goldstein, "Voter-Fraud Complaints by GOP Drove Dismissals," *Washington Post*, May 14, 2007; Jeffrey Toobin, "Poll Position: Is the Justice Department Poised to Stop Voting Fraud – or to Keep Voters from Voting?," *The New Yorker*, September 20, 2004.

- The preclearance of Georgia's exceptionally restrictive voter identification law in 2005, contrary to the recommendation of career staff.[27]

There can be no question that the DOJ's reputation has been tarnished by the revelations that have emerged in the past year or so. For this reason, it is vitally important that, in the future, the Department be especially careful to avoid even the appearance of partisanship in the discharge of its responsibilities. The focus of the DOJ's efforts should be on expanding access for all voters – including racial minorities, language minorities, and people with disabilities – rather than on taking actions that tends to chill registration and participation or that might be perceived as advancing partisan interests.

Thank you for giving me the opportunity to testify before you.

[27] *See* Daniel P. Tokaji, "The Politics of Justice," May 22, 2007, available at http://moritzlaw.osu.edu/blogs/tokaji/2007_05_01_equalvote_archive.html. *See also* Daniel P. Tokaji, "If It's Broke, Fix It: Improving Voting Rights Act Preclearance," 49 *Howard L.J.* 785, 798-819 (2006) (discussing allegations of partisanship in the DOJ's exercise of its preclearance possibilities in the 1990s and 2000s).