TESTIMONY OF ROBERT N. DRISCOLL FOR THE OVERSIGHT HEARING ON THE VOTING 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 ON THE JUDICIARY, UNITED STATES HOUSE OF REPRESENTATIVES

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Thank you, Chairman Nadler and members of the Subcommittee for the opportunity to discuss the important work of the Department of Justice's Civil Rights Division.

My name is Bob Driscoll and I am currently a partner at Alston & Bird LLP, here in Washington. From 2001 to 2003, I had the honor of serving as Deputy Assistant Attorney General in the Civil Rights Division of the Department of Justice. During that time I worked on a variety of issues, including racial profiling guidance to federal law enforcement, desegregation, and police misconduct.

My testimony today will touch on a few areas. First, I'll discuss the work that the Civil Rights Division does in the voting area, and the need to balance voters' access to the polls with ensuring ballot integrity. Second, I would also like to discuss the issue of advocacy before the Civil Rights Division. And lastly, I'll talk about the role of career employees in the Civil Rights Division.

The Need to Balance Voter Access to the Polls with Ensuring Ballot Integrity.

In my view, it is critical that the Civil Rights Division strike a balance between ensuring that voters have access to the polls and protecting the integrity of ballots cast. The failure to adequately address either of these area results in effectively disenfranchising rightful voters.

Honest voter registration lists are a requirement to ensure that honest votes are being cast. If an outdated or inaccurate voter registration list is used, this could result in allowing someone to vote who should be not voting. This effectively results in the disenfranchisement of honest votes.

One of the most important rights in this country is to have one's vote counted. If an improper or unlawful vote is cast, a legitimate voter's choice is cancelled by someone who ought not to be voting. In addition, it is likely to increase voter turnout if voters know their vote will count and will not be diluted by improper or unlawful votes.

As an example of this principle, Congress has required that states ensure that applicants are citizens of the United States before registering to vote. This is not an issue of whether one favors or disfavors more or less immigration. As a descendant of Irish immigrants who has married into a family of Cuban immigrants, I am certainly not anti-immigration in any way. It is the simple matter of making sure that only people entitled to vote do so. To do otherwise does not honor and respect those immigrants who have entered the country legally and properly earned the precious right to vote that so many have fought to achieve and maintain.

Although to the uninitiated, these principles might sound non-controversial, in fact there has been substantial disagreement about whether the Department of Justice has gone too far in enforcing these provisions. I find it remarkable that the Department has come under criticism for enforcing the law that Congress has passed and the President has signed. While I think the law represents good public policy, it seems to me that those who disagree on that point should seek to amend the statutes in question, rather than criticize the Department of Justice for enforcing existing law.

The NVRA specifically requires that the following two "yes/no" questions be answered on a voter registration form: "Are you a citizen of the United States of America?" and "Will you be 18 years of age on or before election day?" Under the NVRA, if the citizenship question is not answered, the voter registrar "shall notify the applicant of the failure and provide the applicant with an opportunity to complete the form in a timely manner to allow for the completion of the registration form prior to the next election for Federal office (subject to State law)."

Despite the clear language in this provision that requires individuals to answer the citizenship question before their voter registration can be accepted by election officials, many states have ignored the law, and have continued to register applicants who do not answer the citizenship question.

I believe that the Subcommittee must recognize that illegally cast ballots dilute the vote of legally cast ballots, just as much as if those voters had been denied access to the polls. I could not disagree more strongly with those critics who seem to suggest that non-enforcement of any laws having to do with voter integrity is consistent with the advancement of civil rights. To the contrary, permitting or ignoring unauthorized or illegal voting is just as egregious as permitting a jurisdiction to deny a legal voter the right to vote.

Advocacy Before the Civil Rights Division.

I'd like to discuss now the issue of advocacy before the Civil Rights Division. There are interest groups that advocate for particular results from the Civil Rights Division, and then publicly complain when they don't get their desired results. I think much of this criticism is unfounded.

The simple fact that the Civil Rights Division doesn't agree with everything advocated for by these groups does not mean that the Division isn't doing its job. While the Division may listen to the views of different interest groups, it is the Division's job to apply the laws passed by Congress to the facts and circumstances of each case.

The Division would not be doing its job if it simply parroted the views of different advocacy groups. Indeed, in *Miller v. Johnson*, 515 U.S. 900 (1995), the Supreme Court held that when the Justice Department tried to impose an ACLU redistricting plan on Georgia rather than applying the laws to the redistricting plans proposed by Georgia, that the Department had "expanded its authority under the statute beyond what Congress intended." The Supreme Court also recognized the District Court's "sharp criticism" of the Justice Department for its close cooperation with the ACLU on the redistricting at issue in the litigation. The District Court's decision detailed the ACLU's intense advocacy of the Civil Rights Division on the Georgia redistricting at issue, observing that "Succinctly put, the considerable influence of ACLU advocacy on the voting rights decisions of the United States Attorney General is an embarrassment." *Johnson v. Miller,* 864 F.Supp. 1354, 1368 (S.D.Ga.1994).

The fact that the Division does not take every action requested by advocacy groups indicates that the Division is taking its role seriously, and that it reviews issues independently.

The Role of Career Employees.

I have noted some criticism of career employees of the Division. I find this criticism unfortunate. It is my experience that the Division's career employees do their best to enforce the laws that Congress has passed to the best of their abilities. Career staff historically have not been subject to Congressional oversight hearings.

As in every Division of the Department, in the Civil Rights Division, the career staff carries out the day-to-day operations of the Division, litigates existing cases, and makes recommendations to open new cases. There is no question that the career staff is where the institutional knowledge of the Division generally resides and is a resource that any appointee should draw upon frequently. However, it is the Assistant Attorney General for Civil Rights and the leadership of the Department who are ultimately responsible for the actions of the Division. This is a tremendous responsibility for the AAG and his or her immediate staff – as it is the AAG who will sit before this Committee and explain the Division's position on controversial issues.

Because of this responsibility, the AAG and his or her staff must independently review, and therefore will sometimes disagree with, the recommendations of career staff. There is nothing inherently wrong with this – indeed, I think the Committee would not react well to an Assistant Attorney General who testified that he reached no conclusions that differed in any way from the recommendations presented to him. Such a "rubber-stamp" approach would be, and should be, justly criticized.

Similarly, when the Division makes a mistake – as it did in Torrance, California when it was sanctioned nearly 1.8 million dollars for overreaching in an employment case – it would be no excuse for the AAG to say: "I was merely following the recommendations of the career staff." Therefore, it is the responsibility to "get it right" that obligates the AAG and his or her staff to closely scrutinize the recommendations that come before them.

The important question for the Committee is whether a particular decision to proceed (or not) with a case was correct. The Committee should focus on the quality of the Division's decisions and hold the political appointees accountable when issues arise. It seems to me that it is harmful to the Department from an institutional perspective to bring career employees such as Mr. Tanner up to be questioned by the Subcommittee about their reasoning in matters that may be controversial. Although some may sense a political opportunity to criticize him today, the questioning of a dedicated civil servant rather than political appointees does not serve the long-term interests of the Department.

Thank you for the opportunity to appear before the Subcommittee and I look forward to answering whatever questions the Subcommittee may have.