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2000 – 2006

Oversight Hearing on the Voting Section of the Civil Rights Division
of the U.S. Department of Justice
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Committee on the Judiciary

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Mr. Chairman and members of the Committee,

Thank you for the opportunity to speak to you today about my experiences as the geographer of the Voting Section of the Civil Rights Division from 2000 to 2006. I was hired as a redistricting expert in the fall of 2000. As my job developed, I served as a sort of jack-of-all-trades for demographic, geographic and statistical analyses on a wide variety of cases. I left the Division in April of 2006 to manage the Carter-Baker election reform commission at American University, and I now work in elections and voting research at a nonpartisan, nonprofit research firm in Washington.

My service in the Civil Rights Division was the highlight of my professional career. For a white Southerner born a year after the passage of the Voting Rights Act, and having devoted my career to studying both the South's sad racial history and its remarkable progress, enforcing a federal law born on the Edmund Pettus bridge in Selma, Alabama, was a high honor indeed. The Division has done and continues to do invaluable work across its many areas of responsibility, and I am proud to have served it.

I hope that my experience at the ground level of Voting Section enforcement may be of some value to you in your oversight duties.

The public comments earlier this month by my former boss, John Tanner, in Georgia and California could perhaps be overlooked if they were merely spontaneous, off-the-cuff remarks. Unfortunately for minority voters, and unfortunately for the Department of Justice, Tanner's comments are actually a fair example of his approach to truth, facts and the law. Broad generalizations, deliberate misuse of statistics, and casual supposition, in my experience, were preferred over the analytical rigor, impartiality and scrupulous attention to detail that had marked the work of the Section prior to Tanner taking control in 2005.

For me, this change was driven home by the Section's mishandling of the analysis of a new Georgia voter ID law in the summer of 2005. The problems that plagued our work on this law, and indeed Tanner's troubled tenure since, are symptomatic of the

larger problems caused by the politicization of the Section and its career staff. The ultimate responsibility for Tanner's mismanagement of the Voting Section rests with the political appointees who promoted him, and those who now protect him.

Analysis and the enforcement of voting laws

Voting rights work is by its very nature technical and rather esoteric, and voting rights litigation notoriously complicated. Rarely are smoking guns uncovered, and the evidence is often incomplete and contradictory. Voting rights cases require a knowledge of statistics, skill with geographic information technology, and fairly advanced demographic research.

When I arrived in the Voting Section in late 2000, fresh from my doctoral program, I was impressed by the sophistication of the analyses the Section was performing. There were a number of very experienced analysts and attorneys who combined expertise in the particular methods of the Section with vast local knowledge of the communities where the Section was active. Section staff were thus in a position to cross-train new employees and to help the bright young attorneys who came into the Section from law school learn how to litigate voting rights cases. Deputy chiefs in the Section, particularly my supervisor, Bob Kengle, and Section 5 head Bob Berman, combined legal acumen with a skill and interest in the technical and statistical aspects of the Section's work. The Section Chief, Joe Rich, was a model of restraint and professionalism, mediating between the career staff and the political appointees. Our test was always: will this stand up in court? This test was applied even in instances, such as Section 5 reviews, in which we knew our work would never go before a judge.

The veteran and experienced Section leadership insulated those of us at the line level from partisan political pressures. However, the politicization of the Section through hiring, promotion and the shifting of managerial responsibilities gradually undermined the analytical process. Dozens of experienced analysts and lawyers departed in frustration, particularly in Section 5 enforcement. Joe Rich retired, and was replaced by a chief who I believe was willing to sacrifice balance, truthfulness and accuracy in order to please the political appointees who had promoted him to his position and who then granted him a large salary increase, cash bonuses and awards. In turn, the Division used his career status and long service in the Department as a shield against charges of politicization. The hiring of attorneys with little civil rights experience but solid ideological and partisan credentials blurred the lines of authority in the Division, and blurred as well the very distinction between career positions and political appointments.

The politicization of the Section really only took hold after the departure in 2003 of the first assistant attorney general for civil rights, Ralph Boyd, who in my experience acted as a check on the more aggressive political appointees. I should also note that most of the Republican lawyers who came to the Section under the politicized hiring process run by Bradley Schlozman put aside their personal beliefs and did their jobs without partisan flavor, although some unfortunately did not.

I developed deep misgivings about the way analysis was being conducted, ironically, during two Section projects whose ultimate conclusions I supported. One was the push to more aggressively enforce the language minority provisions under Section 203, and the other was the Section's investigation into election problems in Ohio during the 2004 presidential election.

The Ohio investigation, while I think reaching the correct conclusion, was cursory at best, and extraordinary in that Tanner did it basically by himself, even as he took on managerial responsibility for the Section. One only has to read Tanner's remarkable June 28, 2005, letter exonerating local officials of wrongdoing to sense his eagerness to please. The unctuous tone of the letter, and its use of generalizations and assertions unsupported by any factual evidence, portends his recent defense of voter ID laws. The statistical record in Franklin County is a complicated one, and I respectfully disagree with those who see evidence of a conspiracy to deny African-Americans an equal share of the county's voting machines, but had there been a violation of law, I am confident in Tanner's ability to overlook it. Much remains unknown about what happened. Particularly troubling to me was the evidence of long lines in African-American polling places at closing time, a situation for which we never received a satisfactory explanation. Veteran attorneys in the Section were dumbstruck that Tanner disregarded the longstanding policy of never giving reasons for closing an investigation, just as they were shortly afterwards when the Department launched a misleading public relations campaign on behalf of its misbegotten preclearance of the Georgia ID law.

In Section 203 enforcement, in which the Section analyzes how well jurisdictions are meeting the needs of language minority voters, the Section repeatedly used inappropriate methods aimed at inflating the numbers of voters who needed assistance. Time and again I pointed out what I saw as flaws in the methodologies being pushed by the Section, which were often simple errors in math or logic. I was either ignored, reprimanded or told not to work on such issues. The vast majority of these cases have been settled rather than adjudicated before a judge, which is no accident. On one of the rare instances in which the Section was required to present their statistical evidence in court, in Philadelphia in 2006, a three-judge panel soundly rejected it for precisely the same reasons I (and others) had cited for years. Some of the 203 cases brought in recent years certainly had merit, but many others were brought largely to pump up the Division's statistics, and had marginal impact. Their real purpose, to me, was to provide cover for the Division's deliberate failure to take on the more substantive voting rights work it had traditionally pursued.

The eagerness to conform analysis to decisions already made that characterized the Section's efforts in Ohio in 2004 and in 203 enforcement generally led to a Georgia voter ID investigation in the summer of 2005 in which a determined effort was made to suppress evidence of retrogression, manufacture evidence in support of voter ID laws generally, and to punish those of us who disagreed. To me, it represents the nadir of Voting Section enforcement, worse even than the Section's action in the Mississippi redistricting case.

The 2005 Georgia Voter ID law

I want to make clear that the focus of this part of my testimony is not on the decision on August 26, 2005, to preclear the Georgia law under Section 5 of the Voting Rights Act. Instead it is on the process by which the Section analyzed (or failed to analyze) the impact of that law on minority voters. All of us assigned to the investigation realized that the Department was certain to preclear the law. Given the oft-stated views of von Spakovsky, a Georgian who was the political appointee responsible for the Voting Section at the time, and Tanner's eagerness to please him, none of us thought that the Department would block it. We simply wanted to do our jobs.

At the same time, I would point out that even by the standards of subsequent voter ID laws, the 2005 Georgia law was a nasty piece of legislation. No state endeavoring to pass a photo ID law now is considering the kind of draconian restrictions the DOJ endorsed in Georgia in August of 2005. Voter ID laws tend to get lumped together in the public discussion, but they in fact vary widely, in the array of IDs allowed, the availability of fail-safes such as affidavits, and in efforts to make the IDs available to all voters. As the federal judge in Georgia rightly pointed out in enjoining the law, Georgia did not make free IDs available to all voters, lacked facilities for distributing the IDs, and had done little to make the voting public aware of the requirements. The decision to loosen the rules on absentee ballots – almost universally seen as more susceptible to fraud than voter impersonation – and inflammatory statements by the bill's sponsor regarding black voting called into question the motives behind the requirements.

Personally, I think that the impact of the laws, both on alleged voter impersonation and on disenfranchisement, is frequently overstated. However, the preclearance in 2005 was not a judgment on voter ID laws in general, but a judgment on a specific piece of ID legislation, and history records that that law was a bad one.

Those of us who were assigned to the case and who came to the conclusion that the state had not met its burden of proof were harassed, during and after the investigation. Tanner ignored or dismissed evidence that supported an objection, while he embraced without reservation evidence supporting preclearance. The paper trail inside the Section was manipulated in an effort to suppress both our evidence and our recommendation. There was no procedure; long-established Section practices were abandoned when convenient, and new rules made up literally overnight. Career staff were prevented the opportunity to analyze potentially critical data. Within a year, the four staffers who had recommended an objection were gone from the Section, including the highly admired chief of Section 5 enforcement.

Perhaps the best way to illustrate the bad faith of the Georgia ID investigation would be to give some examples of the shoddy analytical work that the Department used (and still uses) to support its decision, and some of the actions of Section leadership.

1. When a group of prominent law professors submitted a letter with analysis supporting what we had found – that rates of ID ownership and race appeared to be weakly and

negatively correlated, among other things – Tanner fabricated a new version of what they had said and took the unprecedented step of inserting, directly in the staff memo to him, language dismissing the analysis as "bizarre and offensive." It was neither.

2. The governor of Georgia himself had estimated that 300,000 Georgians lacked requisite IDs. Tanner inserted into the staff memo language that suggested, without evidence, that the governor was alluding to the state's illegal immigrant population. (In 2007, two professors at the University of Georgia independently estimated that 305,074 registered voters likely did not possess a valid driver's license or state identification card, and a separate comparison by the state of Georgia of license data and voter registration records this year has put the number at close to 200,000.

3. Census figures showing a racial disparity in access to vehicles, a key piece of evidence in past Section analyses of ID laws, were dismissed by Tanner, even though in 1994 Tanner himself had cited that exact piece of evidence in denying preclearance to an ID law in Louisiana. This time, he rejected the 2000 Census data as out-of-date, despite the relative stability of the data across time and the availability of more recent numbers.

4. Tanner continues to deliberately misuse the racial data from the records of the Georgia Department of Driver Services by saying that blacks in Georgia are more likely than whites to have IDs. Flatly, this is not true. I don't think the data is of much use in this regard, since we have racial data for less than 60% of the records, and there is ample reason to doubt that the racial data we do have is representative of the entire database. If one is going to cite the data, however, the proper comparison is not to voting age population, but to *citizen* voting age population, since the bulk of racial IDs comes from voter registration records. Unfortunately for Tanner's argument, as he knows, using the proper CVAP figure shows that blacks are actually less likely than whites to have ID. (My recollection is that we found the black percent in the database to be 28.0%, while the CVAP was projected for 2005 at 28.7% and the VAP at 27.4%). I would like to know Tanner's numbers, and where he got them.

5. Much of the DOJ's defense of the Georgia ID law rests on figures showing increased turnout in other states which have passed ID restrictions, a favorite trope of current FEC Commissioner Hans von Spakovsky, who was responsible for the inclusion of this utterly irrelevant data in the staff memo. To please von Spakovsky, Tanner edited out our analysis showing why this information was of little use in assessing the potential damage to minority voters in Georgia, which proposed a much tougher ID law than any other state had enacted. As elected officials you know that turnout can vary widely for a range of reasons. After all, if turnout goes up after an ID law is enacted, what does that say about the usefulness of ID laws in the first place? Either there is not as much voter impersonation fraud as proponents claim, or ID laws are of little use in stopping it.

6. Tanner's comment in California – that ID laws help minority voters because they discriminate against the elderly, since minorities die before reaching old age – is not only bizarre but flies in the face of his claim during the Georgia review that practically all Georgians had ID. He certainly never raised this novel hypothesis during our review of

the law. As a matter of fact, Tanner may be surprised to learn that many African-Americans do actually become elderly – more than 200,000 Georgians aged 65 and over are black, one-fifth of the total elderly population. And, of course, Tanner left out the fact that elderly African-Americans in Georgia make up *two-fifths* of the *impoverished* elderly, the population probably most likely to lack IDs. Critical new data from the state of Georgia confirms this, as their analysis shows that African-Americans make up 40% of those voters 65 and over without ID. As Tanner would say, "just the math is such as that."

7. Career staff found a study from the University of Milwaukee-Wisconsin to be one of the few attempts to estimate the number of people who lacked licenses, and valuable for its suggestion that minorities were more likely to lack ID. Tanner edited the staff memo to dismiss the study as "not helpful," because Wisconsin's black population was "almost entirely urban," which suggests that perhaps Tanner considered Atlanta to be rural.

Many of these examples may seem technical and arcane, but the nature of voting cases is often technical and arcane. Beyond the question of their evidentiary value, however, my broader point is that the choices made by Tanner and von Spakovsky, as evidenced in the nearly totally disingenuous Moschella letter released in October of 2005, suggest that the those who decided to preclear the Georgia ID law were more interested in rhetoric than analysis.

For all the problems we encountered during the investigation, which everyone agreed was a difficult one, it was Tanner's actions on Aug. 25 and 26 that I found truly objectionable. Had our recommendation simply been overruled, I would probably not be testifying today.

On the night of August 25, with our memo complete, we met with John to make clear that we wanted our recommendation be preserved in our recommendation memorandum, as had always been the case in the Section previously. It was important to us as career federal employees that the record reflect our recommendation, even if Tanner and the political appointees were free to disregard it. He promised us our recommendation would stay on the memo.

The next morning, as staff prepared the preclearance letter, Georgia officials informed us that critical data it had submitted earlier regarding ownership of photo IDs was invalid. In fact, the state had overstated the number of people who had licenses or ID cards by some 600,000. This came as no surprise, as we had informed John earlier in the week that the state's data appeared to be flawed. Despite our pleas to be given a few days to analyze this data – which would have required no extension of our deadline, and which we had previously taken an extension to obtain – we were denied the opportunity. I have never understood why, after extending our deadline and working daily with state officials to pull this data from the state databases, we were not allowed a few days to analyze it.

I have come to wonder whether a special election slated for the following Tuesday in Gwinnett County played a factor in the rush to preclear. Having the ID law enforced in an election made it the benchmark for analyzing future ID laws. That is precisely what happened with the revised Georgia voter ID bill: it was compared for retrogressive effect to the enjoined 2005 law. Von Spakovsky, as we know, was a local election official in Georgia before coming to Washington. It is also possible that Tanner and von Spakovsky wanted to block any further analysis of the new data. I do not know and certainly have no proof of their motives.

Tanner's offhand explanation to staff on August 26 – that he had analyzed the numbers himself – says much about the way he mishandled the investigation, as does the fact that his memo to the political appointees cited the 7.1 million IDs figure explicitly disavowed by the state that same day.

In addition, when Tanner distributed his edited version of our memo, our recommendation had been stripped out, and language inserted that reversed some of our critical findings. (Tellingly, it was still entitled "recommendation memo," despite having no recommendation). It is important to remember that Tanner was editing a memo *to himself*. Tanner then wrote a cover email, stating his reasons for preclearing the law, and forwarded both to the front office. That allowed Tanner to suppress the dissent of career employees, and subsequently to declare that the recommendation memo was "preliminary" and "a draft." In truth, it was the final staff memo, I'm proud to have been part of it, and its quality and intellectual honesty far exceeds anything Tanner and von Spakovsky have produced in rebuttal.

In the aftermath of the August 26 preclearance, each of us who recommended objection was reprimanded. The lone member who supported preclearance, who came to the Section through Brad Schlozman's politicized hiring process, was given an immediate cash bonus. Offended by Tanner's conduct, I felt it was my duty as a Justice employee to file a complaint with the Office of Professional Responsibility, detailing what I thought were the failures of the Section Chief to supervise an impartial and professional investigation. (Eighteen months after filing my complaint, I was told the investigation was still open. I do not know its current status). At some point, von Spakovsky and Schlozman read through my emails and apparently filed a complaint against me that I had inappropriately disclosed sensitive information in the Ohio investigation and other matters (I was exonerated). I feared my upcoming performance evaluation would be used against me, as had happened to a number of my colleagues. I was tired of the treatment, tired of the stress it placed on my family, and tired of watching the sloppy and dishonest approach the Section was taking on important matters of minority voting rights. I left in April of 2006.

Conclusion

The failure of the Justice Department to fulfill its obligations in its review of the 2005 Georgia voter ID law and in other important cases was a direct result of the politicization of the Voting Section. This has been tolerated by political appointees who

value acquiescence and political expediency more than competence. The myriad problems in the Section under Tanner's leadership – some of which have been made public and some of which have not, but which have rendered the office largely dysfunctional – are a direct result of the desire of political appointees such as Bradley Schlozman and Hans von Spakovsky to bring the Section into the service of their ideological and partisan goals.

John Tanner is both a cause and effect of that politicization.

The current political appointees are by all accounts an improvement over their predecessors. Increased media attention and Congressional oversight has spurred a flurry of Section 2 cases, for example, and hiring practices have generally improved. Good people remain in the Section. However, the managerial problems at the section chief and acting deputy chief levels created during the years of highly politicized supervision have, if anything, grown worse. Morale has plummeted, and federal judges have begun to point out the kind of sloppy analysis I've tried to explicate here. These problems have been most severe in the demoralized Section 5 unit, but have touched other parts of the Section as well. Until someone in the Department, in this administration or the next, admits to the mistakes of the past several years and restores credible leadership, the Voting Section of Civil Rights Division will remain a wounded institution. That ultimately harms not only employees of the Voting Section and minority voters, but all Americans.

Thank you for your attention to this matter and for the opportunity to testify. I would be happy to answer any questions.