



**Testimony of Tova Andrea Wang
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**Hearing on Lessons Learned from the 2008 Election
Before the United States House of Representatives Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights, and Civil Liberties**

March 19, 2009

Mr. Chairman, thank you for having me here today. My name is Tova Wang and I am Vice President of Research for Common Cause, a national, nonpartisan organization with 36 state chapters and 400,000 members and supporters. Common Cause has been dedicated to protecting voting rights and ensuring fair elections for many years. Once again, the organization was extremely active in the effort to prevent and address problems during the 2008 election, taking the lead on confronting issues in many states and working as a major partner in the Election Protection Coalition.

I personally have been conducting research and writing on elections issues for the last eight years, the first seven as Democracy Fellow at The Century Foundation, and now at Common Cause.

The 2008 election was greatly anticipated, not least because many observers predicted record, historic turnout. Indeed there had been unprecedented turnout during the primaries and by the time many voter registration deadlines had passed, an estimated 9 million people had registered to vote for the first time,ⁱ especially in swing states.ⁱⁱ Election reform and voting rights advocates expressed tremendous concern that the system was not constructed to handle such numbers of voters. As I remarked prior to the election, the structure of our voting system is very well designed for low rates of participation, since that has been our experience over the last forty years. In this election we knew that at least in some states, we would find out the answer to the question, what would happen if we held an election and people actually voted?

How did the 2008 election go overall considering the turnout predictions and expressions of concern? Many organizations spent the months prior to the election, and even the previous years, working with election administrators and elected officials to iron out the problems ahead of time. Organizations and election administrators also went beyond where they had gone before in educating voters, recruiting poll workers, and training poll workers, while voting rights groups strived to ensure that elections officials had a proper understanding and interpretation of election laws and were prepared to follow them and implement them in a uniform, nondiscriminatory fashion. There was a fair amount of pre-election litigation when it was necessary. All of this activity went a long way toward making the election smooth, fair and effective for many Americans.

Yet thousands, perhaps millions of voters faced unacceptable and unnecessary barriers to voting in 2008. These included problems with registering to vote effectively, extraordinarily long lines that may have led to disenfranchisement, deceptive practices designed to suppress voting, caging and challenges meant to deter participation, barriers to student voting, and problems with voter identification requirements.

REGISTRATION

Voting rights advocates have long realized that barriers to voter registration present the biggest challenge to the voting system, and analysis of the 2008 election bears this out. We now know through analysis of data from the Cooperative Congressional Election Study ("CCES") by Professor Stephen Ansolabehere of MIT and Harvard University that between 4 and 5 million people reported they could not vote in 2008 because of registration (and absentee ballot) problems – approximately the same number as in 2000, before we were supposed to have started addressing these problems in the wake of that infamous elections. Professor

Ansolabehere estimates 9 million people are not registered to vote in this country because of the administrative hurdles of missing a registration deadline and residency rules.ⁱⁱⁱ

Issues around the voter registration process were not just the biggest problem in 2008, they were also the most controversial. Untold numbers of voters registered to vote but were not on the registration list when they came to vote and had to cast a provisional ballot. Legitimate voters were purged from registration lists, and eligible voters had their registration forms improperly rejected by elections officials.

The root of many of the problems was the lack of clarity in the Help America Vote Act. HAVA required states to create a statewide voter registration database that is able to match information with the state's Department of Motor Vehicles and the federal Social Security Agency, but did not explain explicitly what was to be done with the resulting information. It is clear, however, that whatever the state matching process, under HAVA, "un-matched" registrants are still entitled to cast regular ballots if they provide proof of identity when they register or vote. Moreover, many states very effectively employ a "substantial match" standard that ensures that voters are not improperly left off the rolls.

Nonetheless some secretaries of state and partisan officials demanded in the weeks before the election that the strictest matching standards possible be used, which would have led to a great many voters not making it on to the registration list for unjustified purposes. In other places, secretaries of state illegally purged existing voters from the rolls in violation of the National Voter Registration Act's prohibition on such removal within ninety days of an election except under limited circumstances.^{iv}

Florida

Florida again was the focal point of the debate with its "exact match" or so-called "no match no vote" rule. Although Secretary of State Kurt Browning held off implementing the measure immediately after a court unfortunately upheld it, in the month before the registration deadline he mandated that if the state could not validate the voter's driver's license through the Department of Motor Vehicles database or the last four digits of his social security number by comparing it to the database the Social Security Administration maintains, that registration would be regarded as a "non-match" and after further perfunctory review possibly rejected. Essentially, the state required that the information on a voter's registration application exactly match the information in existing state databases for the registration to be duly processed. Making matters worse, the Secretary of State insisted that the problem could not be rectified by a voter coming in with identification when they voted. Instead, the voter had to take the extra steps of presenting documentation prior to the election or after the election. But not at the election, which would have been much easier for voters to comply with.

The problem was there are many reasons such information might not match that say nothing about the voter's eligibility or identity:

- The voter might use one variation of his name in one database (e.g. on his driver's license) and another on the voter registration form, for example using a middle name in one and not the other. This is particularly likely for Latino voters (who may or may not use mother's maiden name). Errors are more likely to be made with regard to voters with hard to spell or unusual names, often immigrants and African Americans.
- Other government databases are incredibly flawed.

- The person inputting the information might make a mistake, such as a simple typo
- The voter might make a mistake or have poor handwriting

This rule led to over 22,000 voters having their voter registration initially blocked in the state. As of Election Day, some 10,000 of these voters had yet to take the extra, unnecessary step of resubmitting an ID and their vote was thus in jeopardy. As usual, rejected voters statewide were also disproportionately minorities. Slightly more than 27 percent were listed as Hispanic, and 26.8 percent of those rejected were black.^v

On Election Day itself, the exclusionary impacts of the Secretary's actions were ameliorated because of work that had gone on prior to the election. Common Cause was able to obtain lists of voters whose registration was affected and personally contact many of them. Moreover, the county registrars had somewhat of a mass rebellion against the policy and opted to allow voters to cure the problem when they arrived at the polls, at least during early voting.^{vi}

Georgia

A month before Election Day, the Social Security Administration sent a letter to the state claiming that the agency had received 2 million voter verification requests from Georgia in the last year. That far exceeded the number of people who had newly registered to vote in the state of Georgia: 406,000. Moreover, the state was supposed to look at statewide databases for comparisons first, before going to SSA.

More than 50,000 registered Georgia voters were "flagged" by the Secretary of State because of a computer mismatch in their personal identification information. Almost 5,000 of those people had their citizenship questioned and were required to prove their eligibility to vote prior to Election Day in order to cast a regular ballot. Clearly the list was flawed, since the flagged voters proved to be citizens, many of them long time voters.^{vii}

As this information indicated that the Secretary of State, Karen Handel, was purging voters from the rolls in violation of federal law, voting rights attorneys took her to court. The Secretary unlawfully conducted verification checks on existing voters and purged them or flagged them for further investigation or requests for identifying documents in violation of NVRA's provision that there be no systematic removal of registered voters within 90 days of an election unless the voter so requests removal, death, felony or mental incapacity.

A federal court ultimately ruled that those mismatched voters who had not proved their identity to a local board of elections prior to Election Day had be allowed to cast a challenged ballot, which meant it wouldn't automatically be counted. Not surprisingly, many voters were disenfranchised as a result of this voter exclusionary move. According to the Atlanta Journal Constitution, just among the 5,000 or so people whose citizenship was contested, in Gwinnett County, 300 people used the paper "challenge" ballot because the state questioned their citizenship status. Of those, 192 returned to the county elections office to bring documents proving they were citizens. 108 voters did not return. In Cobb County, 227 people cast challenge ballots on Election Day. Of those, 161 returned to furnish their documents. But 51 voters did not return with proof of citizenship and their votes were not counted.

Georgia election administrators themselves said the problem was not that these voters were actually not citizens. In fact, according to DeKalb's election administrator,

When the Georgia secretary of state gave DeKalb an updated list of voters who were not thought to be citizens last fall, there were more than 700 names. Many of those, though, were flagged incorrectly, from something as simple as transposed numbers on their driver's licenses or because they had common names...Some of those red-flagged had even been registered for 25 years and were able to bring in their old voter ID cards, which showed their place of birth. None of the Election Day voters in DeKalb whose ballots were challenged tried to pass muster with false documents, which would have indicated an attempt at fraud. Instead, no one showed up Friday afternoon at the DeKalb election office training room to bring the right documents. The 39 bright pink envelopes, showing they were challenged, will end up being tossed.^{viii}

As one columnist pointed out, "the fact that so many *did* provide documentation only served to bolster the contention of voting-rights groups that the process for flagging voters had been badly flawed. That claim was further strengthened by the fact that the system now seems to have flagged not only naturalized citizens like [the plaintiff in the lawsuit], but also U.S. born voters whose citizenship has never been in question."^{ix}

Ohio

Ohio was of course the focal point of controversy in 2004, and although the strides forward made in Ohio election law and through the leadership of a new secretary of state helped it avoid major problems, that wasn't for some lack of some trying to create them. In October of 2008, the Republican Party filed a lawsuit seeking to force the Secretary to verify voter registration information of everyone who had registered since January 1 with the Social Security Administration database and DMV, flag non-matches and require marked voters to vote by provisional ballot.^x

Of the 665,000 people who had registered since January 1, over 200,000 had some discrepancy between their registration form and information on other databases. As has been explained, such discrepancies can arise for many reasons, virtually never having anything to do with the eligibility of the voter to cast a ballot.

On October 11, a federal appeals court ruled 2-1 in favor of Secretary of State Jennifer Brunner to put on hold an order sought by the Ohio Republican Party. The three-judge panel of the 6th U.S. Circuit Court of Appeals said Brunner was not required to provide county elections boards with the names of voters whose personal information did not match state motor-vehicle or federal Social Security records, as had been ordered days earlier by U.S. District Court Judge George C. Smith. Brunner had sought an emergency order delaying Smith's order, and the appeals court agreed with Brunner that federal law did not require her to provide the names and that the November 4 election was too close for major policy changes.^{xi}

Eventually the Supreme Court also ruled against the GOP on the basis of standing.

Colorado

There were multiple registration issues in Colorado. First, the state insisted upon an extremely narrow technical registration rule that disqualified voters' registration applications for failure to check an irrelevant box on the registration form. On the Colorado form, voters who provided a Social Security number rather than a driver's license also had to check a box that stated "I do not have a Colorado driver's license or Department of Revenue identification number." This impacted thousands of voters.

Furthermore, Common Cause Colorado and other groups had to sue the Secretary of State Michael Coffman for purging thousands of voters from the registration rolls in clear violation of the National Voter Registration Act's prohibition on systematic purging within 90 days of an election. A federal court forced the Secretary to agree to allow the voters who he had improperly purged to vote by a provisional ballot which would be presumed legitimate unless proven otherwise. In a remarkable move, even after the court's order the Secretary of State resumed purging voters from the books in violation of the law. The parties went back to court leading the judge to angrily order him to stop doing so in an emergency hearing.^{xii}

Even as I emphasize the barriers to effective registration, we must not lose sight of the forest but for the trees. Our registration rates remain intolerably low in the United States. 44 million eligible Americans still were not registered to vote in 2008.^{xiii} We must completely rethink voter registration if we are ever to have an effective electoral system.

Recommendations:

1. Amend the Help America Vote Act to ban the practice of automatically rejecting voter registration applications based solely on a "non-match."
2. Enact and implement voter registration modernization, which would provide for automatic and permanent registration for all Americans who want to participate

LONG LINES

While we were proud of the historic turnout on Election Day, the amount of time some Americans had to wait in order to vote was not just unfortunate, it could have denied the right to cast a ballot for many voters. While in many precincts, voting took only a matter of minutes, in Detroit, some had to wait in line for 5 hours. In the St. Louis area it was six hours. While the commitment of so many to wait no matter how long it took was inspiring, some voters inevitably could not wait that long -- they worked for hourly wages, couldn't get that much time off or had child care responsibilities. And once again the distribution of resources was random at best, and possibly discriminatory at worst. This problem was widely predicted by voting right advocates, who warned that states did not have enough voting machines for the expected turnout and had no plans in place for ensuring that the machines available were allocated strategically and fairly.

Some came to refer to this as a "time tax." As the election law scholar and Dean of the Boalt Hall School of Law at Berkeley, Christopher Edley, wrote just prior to the election,

Suppose in your neighborhood there are 600 registered voters per machine, while across town there are only 120 per machine. (That's a 5 to 1 disparity, which is what exists in some places in Virginia today.) On Election Day, your line wraps around the block and looks to be a four-hour wait, while in other areas lines are nonexistent.

This ought to be a crime. It amounts to a "time-tax" on your right to vote, and some of your neighbors will undoubtedly give up and go home. This scenario raises... questions: Nationwide, will it discourage tens of thousands, or untold millions? Which presidential candidate and down-ballot candidates might benefit from this "tax"?^{xiv}

Indeed the Advancement Project, Fairvote and Common Cause all put out reports prior to the election warning there would be long lines due to insufficient voting machines and inadequate plans for equitable and effective distribution.^{xv}

This had been the case in 2004 as well. An assessment of voting in Ohio by academics for the Democratic National Committee found that, "Scarcity of voting machines caused long lines that deterred many people from voting. Three percent of voters who went to the polls left their polling places and did not return due to the long lines... Statewide, African American voters reported waiting an average of 52 minutes before voting while white voters reported waiting an average of 18 minutes. Overall, 20 percent of white Ohio voters reported waiting more than twenty minutes, while 44 percent of African American voters reported doing so."^{xvi}

Were long lines simply the result of inadequate numbers of machines? The data is insufficient to say with precision, but we do know some things. We knew going into the election that there was going to be much higher turnout this year than in the past, but that in many places, especially swing states where turnout would be highest, there were simply not going to be enough voting machines to handle the capacity. Many states had no statewide standards on how many machines there needed to be per voter, while in other states, such as Virginia, the standard ratio was far too high. We also know that machine breakdowns and problems with electronic poll books significantly exacerbated the problem of long waits, especially where there were insufficient back up plans.

Recommendation:

Demand that states identify formulas and create plans for allocation of voting machines that have the best chance of creating an equal playing field and effective voting process on Election Day.

Many states have no requirements regarding machine allocation whatsoever and in others those rules are extremely vague. Often the decision is left to the counties, and only some of them have any concrete discernable formula for making sure there are enough machines, that they are distributed equitably, and allocated in such a way to ensure minimal wait times. In devising standards for voting system distribution states must take into account the voting age population; voter turnout in past elections; the number of voters registered, as of the last possible date leading up to Election Day; the number of voters registered since the last federal election; census data for the population served by the voting site; the educational levels and socio-economic factors of the population; the needs and numbers of voters with disabilities and voters with limited English proficiency; and the type of voting systems used. The decision-making process regarding the distribution of machines should be fully transparent and open to public review.

DECEPTIVE PRACTICES

In 2008, we once again saw the insidious types of deceptive practices that are designed to suppress voting that we have seen in the past – misinformation campaigns that are designed to mislead and confuse voters about whether they can vote and how, when and where to vote. Whereas in the past this had usually taken the form of flyers and mailings, as a report published by Common Cause, the Lawyers Committee for Civil Rights and The Century Foundation predicted prior to the election, in 2008, such activities went online as well.^{xvii} There were robocalls, emails and text messages telling people they could vote on Wednesday in several states across the country including Virginia, Missouri and Florida, as well as at least five other states.^{xviii} Most of these emails said that given the high turnout expected, Republicans were to vote on Tuesday, Democrats on Wednesday. An email went to the entire student body of George Mason University that appeared to be from the provost of the school making this claim.^{xix} There were robocalls in Florida and Nevada telling people they could vote by phone and calls in Virginia fraudulently telling people the wrong place to vote.^{xx} In the days prior to the election there were emails in places like Texas and Florida with misleading information about straight ticket voting and voter identification rules.^{xxi} There was a denial of service attack on the Secretary of State of Ohio's website in the days leading to the election.^{xxii}

As always, there were the more traditional flyers in the Philadelphia area telling people if they had outstanding parking tickets or traffic violations they would be arrested at the polls.^{xxiii} And a flyer was circulated in Virginia, again with the message that Republicans vote on Tuesday, Democrats on Wednesday. Although law enforcement caught the creator of this flyer, no charges were pressed as it was deemed to have been a "joke."^{xxiv}

None of this was anything new. In 2004 and 2006 there were a series of incidents in which individuals and groups – and there is no sense at all of who was behind any of these activities – disseminated flyers and mailers and conducted robocalls with misinformation about voting that was squarely directed at minority voters.

Currently, the Department of Justice does not believe there is a federal statute that explicitly criminalizes this activity.

Recommendation:

There must be reform at the federal and state level that not only criminalizes deceptive practices, but puts in place a mandatory procedure for law enforcement and election officials working with community and voting rights organization to debunk the false information and disseminate the correct information rapidly. The Deceptive Practices and Voter Intimidation Prevention Act would take us in that direction. Law enforcement should also put in the energy and resources it needs to pursue the perpetrators. Indeed, there are already a number of laws on the books that could be used to go after the people responsible for these tactics given a prosecutor with the will to do it.^{xxv}

CAGING AND CHALLENGES

Although it was not at the levels of 2004 or in the period from the 1960s to the 1980s, caging and challenges were again an issue in 2008.

Early on in the fall election season, it was reported that state Republican officials were planning on using lists of people whose homes had been foreclosed as a basis for mounting challenges to their right to vote at the polls. In Michigan, this led to the Democratic Party suing for an

injunction prohibiting challenges on the basis of being in foreclosure. As a result of that case, the Republic National Committee ultimately was forced to enter into a joint statement that bound it not to challenge voters solely on the basis that a voter's home was in foreclosure.^{xxvi} In Ohio and other states election administrators sent out directives and statements that foreclosure was not a legitimate basis for a challenge.

Prior to the election, the Montana Republican Party challenged the eligibility of 6,000 registered voters in six counties that historically are Democratic strongholds.^{xxvii} A lawsuit by the state Democratic Party forced the Republicans to shut the operation down.

Recommendations:

1. Pass the Caging Prohibition Act of 2008, which provides that the right to register to vote or vote shall not be denied by election officials if the denial is based on voter caging and other questionable challenges not corroborated by independent evidence; prohibits persons other than election officials from challenging a voter's eligibility based on voter caging and other questionable challenges; requires that any voter challenge by persons other than election officials be based on personal, first-hand knowledge; and designates voter-caging and other questionable challenges intended to disqualify eligible voters as felonies, crimes eligible for fines up to \$250,000, five years imprisonment, or both.
2. The Department of Justice should reinstate its earlier of prioritization of large scale cases of voter suppression, such as caging and systematic challenges, especially when they appear to be based on race. When a vote caging scheme meant to suppress black voting was uncovered in the 1990 North Carolina Senate race, the Department of Justice acted with strong action both before and after the election. That has not been the case since, especially in recent years when there have been more allegations of vote caging and voter intimidation. Investigations and possible legal action must be given high priority and pursued vigorously by DOJ in these instances going forward.^{xxviii}

STUDENTS

In the 2008 primaries the number of voters under thirty nearly doubled from the comparable election of 2000, to 6.5 million. Young people, polling indicated, were also overwhelmingly in favor of Democrats and Barak Obama in particular.^{xxix} While the expected historic turnout by young people was tremendously exciting, it also meant that youth, and more particularly students, who are easily identifiable, also became a target for vote suppression. And election administrators themselves were the ones most often aiming at that target, usually in the guise of questioning students' right to register and vote from the school they attend. Under a 1971 Supreme Court ruling, students do have the right to register and vote from their campus address and any residency requirements must be applied to students in the same manner as all other citizens.

Virginia, which has a long history of erecting barriers to student voting, had the most egregious examples of attempts to suppress the student vote. Early in the Fall, the registrar in Montgomery, Virginia, home of Virginia Tech University, warned students that if they registered to vote there that they were jeopardizing their scholarships, financial aid, car and health insurance, and status as a dependent on their parent' taxes.^{xxx} This was all false. The problem was that the registrar had based his warning on information on the State Board of Elections Website, which included a questionnaire that inaccurately implied that a student is taking such risks should he or she register from school. Several students withdrew their registration

applications as a result. Another local registrar where Radford University is located in Virginia simply automatically denied all registration applications from students who listed a dorm as their address, in violation of the law.^{xxxix}

There was similar incident in El Paso County, Colorado. A county clerk in Colorado Springs sent a letter to students at Colorado College, a relatively progressive bastion in an otherwise conservative jurisdiction, telling them that they could not vote at school if their parents claimed them as dependents on their federal tax returns. This was also completely untrue.^{xxxix} Students were also targeted by deceptive practices. A flier was disseminated on the campus of Drexel University in Philadelphia warning that undercover officers would be waiting at the polls, looking for voters with outstanding warrants or parking violations to arrest them. On Election Day someone managed to hack into the George Mason University computer system send out an email to the entire student body that appeared to be from the school's provost telling them that Election Day had been moved to Wednesday, November 5.

Long lines on campuses were a special problem in part because, as had been warned, there were insufficient numbers of machines at campus poll sites. This was especially acute in Pennsylvania. Over 1,000 students were waiting in line when the polls opened at 7 a.m. at Penn State in College Park. Students often skipped classes for the two hour waits. Those in line reported many others who left after seeing the lines.^{xxxix} Colleges in Florida reported similar waits of 2.5 hours.^{xxxix} Rock The Vote reported that students at Virginia Tech, many without cars, had to travel over six miles to reach the nearest polling place that was placed at a church hidden away from any of the main roads. Furthermore, there were over twice the legal limit of voters assigned to this one polling place that included most Virginia Tech students.^{xxxix}

Recommendations:

1. Enact federal legislation that explicitly gives students the right to identify what they consider to be their residence for the purposes of registering and voting. It should be made clear that choosing to establish residency under this provision does not affect residency for other purposes.
2. Passage of the Student Voter Act, which would require all universities that receive federal funds to offer voter registration to students at the same time they register for classes. The bill would amend the National Voter Registration Act by designating universities that receive federal funds as "voter registration agencies" for the purposes of the NVRA.

ID LAWS

As proponents of strict voter ID laws continue to argue in statehouses throughout the country that voter ID laws do not disenfranchise voters, and falsely claim that they are necessary to combat fraud, the Ansolabehere analysis found that 2 percent of registered non-voters did not vote in 2008 because they lacked appropriate identification. Of voters who tried to vote but could not, the study found that 150,000 were blocked at the polls for lack of voter identification.^{xxxix}

Perhaps as significant, poll workers demanded photo identification much more often from African Americans and Latinos than white voters. A Harvard survey of thousands of voters in the 2008 Super Tuesday primary found that 53% of whites were asked for photo ID, compared with 58% of Hispanics and 73% of African Americans. This was true even after controlling for factors

such as income, education, age and region.^{xxxvii} In an evaluation of the 2007 gubernatorial elections and the 2008 Super Tuesday primary, researchers from MIT, Caltech, and the University of Utah found that African American voters were 14% points more likely to be asked for photo identification than whites and Latinos were 18% more likely to be asked for photo ID in some states.^{xxxviii}

Recommendation:

The United States Department of Justice should subject any ID laws to intense scrutiny during the Voting Rights Act Section 5 (preclearance) process where applicable and further review their implementation under Section 2 of the Act as a discriminatory voting practice or procedure.^{xxxix}

GOOD NEWS

For the first time, North Carolina implemented a combination of in-person early voting and same day registration at the polling place during this early voting period. With the outreach the campaigns and civic organizations did to make best use of these new tools, the achievement was phenomenal.

North Carolina had the largest increase in voter turnout in the country. 236,700 people became new voters through same day registration, and 39% of those were African American. More than 5% of the 4.2 million voters in the 2008 election registered when they went to vote. 691,000 African Americans voted during the early voting period—51% of the 1.32 million black registered voters in North Carolina.^{xl}

Recommendation

1. Pass federal legislation requiring all states to provide the option of same day registration.

Thank you Mr. Chairman for holding this hearing and giving extremely needed attention to the ongoing challenges we face in perfecting our already great democracy. We are making progress, but there is a great deal of progress yet to be made. I look forward to working with you, the committee, hard working and dedicated elections officials, and my fellow citizens in order to get us there.

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- ^{xxvi} Settlement Agreement at http://s3.amazonaws.com/propublica/assets/docs/settlement_agreement_081020.pdf
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- ^{xxviii} See Testimony Of J. Gerald Hebert, Executive Director And Director Of Litigation Campaign Legal Center Before The House Judiciary Committee's Subcommittee On The Constitution, Civil Rights And Civil Liberties, February 8, 2008
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