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TWENTY
YEARS

THE JUSTICE DEPARTMENT'S
VOTER FRAUD SCANDAL:
LESSONS

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INTRODUCTION

As a presidential candidate, Donald Trump made extraordinary and unfounded claims about widespread voter fraud, declaring that the election was “rigged” against him and even suggesting that he would not accept the outcome if he lost. Remarkably, even after winning the election, the president-elect has continued to pound at the issue. On November 27, he tweeted of “serious voter fraud in Virginia, New Hampshire and California” and said that millions of people voted illegally.¹ Election officials, politicians from both major parties, and others have rightly criticized these baseless claims.²

But it would not surprise if Trump found a more receptive listener in his choice for Attorney General. Jeff Sessions’s prosecution of civil rights leaders for “voter fraud,” all of whom were acquitted, was a key factor in his rejection by a Republican-majority U.S. Senate for a federal judgeship in 1986. Now he has been nominated to lead the U.S. Department of Justice (DOJ), the agency with the single greatest role in protecting voting rights. The Justice Department enforces all federal voting rights laws, civil and criminal; prosecutes election misconduct; issues policies and guidance on compliance with federal voting laws; and sends federal observers to monitor elections. It is currently engaged in ongoing litigation to protect voting rights in at least six states. Should the Department reverse course, and be guided by political goals rather than legal principle, it could seriously damage the institutions of American democracy.

There is reason to worry — because that is exactly what happened little more than a decade ago.

In 2007, the Justice Department was upended by scandal because it had pursued a partisan agenda on voting, under the guise of rooting out suspected “voter fraud.” Its actions during the George W. Bush administration were well outside the bounds of rules and accepted norms of neutral law enforcement. In pursuing this agenda, DOJ political leadership fired seven well-respected U.S. Attorneys, dismissing some top Republican prosecutors because they had refused to prosecute nonexistent voter fraud. Senior officials hired career staff members using a political loyalty test, perverted the work of the nonpartisan Voting Section toward partisan ends, and exerted pressure on states and an independent government agency to fall in line with an anti-voting rights agenda.

Ultimately, the effort backfired badly. The U.S. Attorney firings touched off a wave of investigations that exposed just how partisan the Justice Department had become and how far it had strayed from its mission of neutral law enforcement. The result was the worst scandal to hit the Department since Watergate. The Attorney General, Alberto Gonzales, was forced to resign, as were other top DOJ officials. It also helped drive Karl Rove, President Bush’s chief White House strategist, from his job. Moreover, the Justice Department not only lost credibility with Congress, but it also lost in the courts, where judges repeatedly rejected the untenable anti-voter legal theories it had urged.

The past Justice Department scandal offers clear lessons that Sen. Sessions and his cohorts should consider. Having been down this road before, the Senate Judiciary Committee, in its confirmation hearings for Sen. Sessions, should secure his solemn commitment that voting rights in the Trump Justice Department will not be treated in the same fashion as they were in the Bush Justice Department, and that he will not repeat the mistake of allowing a partisan agenda to infect the Department. At a minimum, Sen. Sessions should pledge to:

- Faithfully enforce the laws of United States, and ensure that enforcement actions are based on the mandates of the law and not partisan interest;
- Reject efforts to pressure state officials, U.S. Attorneys, and other agencies to adopt anti-voter policies or advance a partisan political agenda;
- Uphold the mission of the Department of Justice, including its core mission to protect civil rights and the right of every eligible citizen to vote free from interference and discrimination;
- Preserve the integrity and institutional competence of the DOJ by ensuring that career staff are hired, assigned duties, and evaluated based on their competence, not their politics, consistent with federal law and longstanding policy; and
- Ensure U.S. Attorneys — and all other DOJ employees — are not harassed or removed for failure to adhere to a partisan political agenda.

This paper provides a detailed account of the Justice Department scandal in the mid-2000s. This history offers key lessons and guideposts as to what conduct the next Attorney General must avoid — and must promise to avoid.

I. THE DANGER OF A JUSTICE DEPARTMENT MISUSED FOR PARTISAN GAIN

During the George W. Bush administration, the prosecution of voter fraud was a top priority of the Department of Justice.³ In 2002, Attorney General Ashcroft created the Department-wide Voting Access and Integrity Initiative, which aggressively investigated and pursued allegations of voter fraud.⁴ This priority continued under the leadership of Attorney General Alberto Gonzales. A new voting-related initiative in 2005 required that “all components of the Department place a high priority on the investigation and prosecution of election fraud.”⁵ But after five years of intensive focus on voter fraud, the Department of Justice found little evidence of widespread abuse. A *New York Times* report in 2007 found that only about 120 people were charged and 86 were convicted of election-related crimes during this period,⁶ despite hundreds of millions of votes being cast. Virtually every study since then has found that the rate of voter fraud is vanishingly rare.⁷ Nonetheless, during that era, the pursuit of fraud, regardless of the facts, was the justification for a range of inappropriate actions that resulted in scandal at the Justice Department.

A. Firing of U.S. Attorneys for Not Pursuing Partisan Voter-Fraud Agenda

The Attorney General, and the Department of Justice he or she supervises, are charged with ensuring fair and impartial administration of justice for all Americans.⁸ The Department of Justice represents the people of the United States — not the president, and not any political party. Its mission is to enforce the law and defend the interests of the United States,⁹ without partisan interference. But in the mid-2000’s, that commitment eroded.

In 2007, the Department of Justice came under intense scrutiny for improperly firing seven U.S. Attorneys.¹⁰ At least three of the seven U.S. Attorneys were fired in part because they refused to bow to political pressure to pursue baseless voter-fraud prosecutions and other legal actions targeting alleged voter fraud. The highly suspect circumstances surrounding these dismissals made them unprecedented.¹¹ U.S. Attorneys serve four-year terms. While they serve at the pleasure of the president, they are typically not fired — rather, they tend to remain in office until they choose to leave or a new administration takes office.¹² As the principal litigators enforcing the laws of the United States, they are expected to be neutral prosecutors.¹³ As the DOJ’s independent Office of the Inspector General put it, once U.S. Attorneys assume office, “they should make their prosecutive decisions divorced from partisan political considerations,” based on “the Department’s priorities, the law, and the facts of each case.”¹⁴

President George W. Bush nominated White House Counsel Alberto Gonzales, to the position of Attorney General in February 2005. He was confirmed on February 2, 2005. According to White House spokesman Dan Bartlett, in October 2006, shortly before the midterm elections President Bush told Gonzales in a meeting that he “had been hearing about election fraud concerns from members of Congress regarding three cities: Albuquerque, Philadelphia, and Milwaukee.”¹⁵ Karl Rove, President Bush’s senior advisor, also told Gonzales in the fall of 2006 that he had “concern” over voter fraud in three cities, according to an internal government investigation.¹⁶ Gonzales believed Rove was referring to “the same three cities . . . the President mentioned” to him.¹⁷ The concerns seemed to have come, at least in part, from Republican politicians seeking to have U.S. Attorneys investigate their political

adversaries.¹⁸ Two months after these conversations, on December 7, 2006, seven U.S. Attorneys were asked to resign, following two other U.S. Attorney firings earlier that year.¹⁹ The prosecutors then began to publicly announce their departures.

As the evidence in a subsequent government investigation would make clear, although Department of Justice officials initially said that the firings were based on performance, seven of the nine fired U.S. Attorneys were terminated for improper reasons, usually for failing to bring politically motivated cases under pressure from above. At least three of the seven were terminated in large part because they declined to bring voter fraud cases that lacked sufficient evidence for indictment, but that the White House saw as politically advantageous. The Justice Department also targeted two other U.S. Attorneys for possible termination, one because of his efforts to protect Native Americans from voting discrimination (rooted in unsubstantiated claims of fraud by voters on reservations),²⁰ and one because he was purportedly “weak” on pursuing voter fraud.²¹

Those who lost their jobs for refusing to accede to political maneuvering included:

- ***U.S. Attorney David Iglesias (New Mexico)***. Iglesias resisted urging from partisans to bring prosecutions relating to allegedly fraudulent voter registrations, especially those submitted by voter-mobilization groups, before the 2004 and 2006 elections. One local Republican wrote to Iglesias’s office, “The voter fraud wars continue. Any indictment of the ACORN woman [in a local voting controversy] would be appreciated.”²² Standard Justice Department policy at the time, as laid out in the *Federal Prosecution of Election Offenses* manual, was to “refrain from intervening in an ongoing elective contest in such a way that the investigation is allowed to become a campaign issue.” This rule required that “most, if not all, investigation of a matter await the conclusion of the election involved.”²³ Iglesias had invested ample resources toward investigating fraud, even forming an Election Fraud Task Force. With the support of the Task Force, the DOJ’s Public Integrity Section, and the FBI, Iglesias determined that not one of the 100 complaints collected in this endeavor justified criminal prosecution.²⁴ Iglesias’ refusal to bring politically motivated indictments for which he saw no legal grounds cost him his job.²⁵ He pithily summed up his experience: “First would come the spurious allegations of voter fraud, then unvarnished legal manipulations to sway elections, followed by a rigorous insistence on unquestioned and absolute obedience, and finally, a phone call from out of the blue.”²⁶
- ***U.S. Attorney John McKay (Washington)***. Washington had been on the list of jurisdictions where Karl Rove claimed to have voter-fraud concerns. In the state’s 2004 gubernatorial election,²⁷ the Republican was initially declared the winner until a hand recount awarded the seat to a Democrat by 129 votes. State Republican officials asked McKay to investigate possible voter fraud. These complaints even reached Attorney General Gonzales.²⁸ McKay took the request seriously, consulting with voter-fraud experts and directing his staff and the FBI to monitor state-court litigation in which Republicans alleged forgery of mail-in ballots.²⁹ Although the state litigation efforts failed,³⁰ McKay’s nonpartisan career staff concluded that even if the allegations were true, the governorship was a state office, and there was therefore no basis for federal intervention.³¹ McKay later met with then-White House Counsel Harriet Miers and her deputy William Kelley about possible nomination for a federal judgeship. In the meeting, the first question Miers asked

him was why Washington Republicans believed he had mishandled the election.³² McKay was never nominated to be a judge. Rather, in December 2006, despite having received a positive performance evaluation just three months earlier,³³ he was asked to resign, at least in part for failing to pursue allegations of voter fraud, according to multiple media sources.³⁴ “There was no evidence [to merit prosecution], and I am not going to drag innocent people in front of a grand jury,” he later told reporters.³⁵

- ***U.S. Attorney Todd Graves (Missouri)***. Bradley Schlozman, a political appointee in the Civil Rights Division of the Bush Department of Justice, pressured Missouri U.S. Attorney Todd Graves to bring a civil suit against Missouri Secretary of State Robin Carnahan, a Democrat, for her alleged failure to purge the voter rolls of ineligible voters, despite the fact that the state had been chided by a federal court only a few years earlier for overzealously purging the rolls.³⁶ Graves doubted the merits of the case, and did not yield to the pressure.³⁷ Although Graves brought four voter fraud cases during his tenure, he was still terminated.³⁸ As discussed below, after Graves’ termination, Schlozman was quickly appointed to replace him and brought the case Graves refused to bring, only to lose in federal court. A House of Representatives report raised “substantial concern” that the “real reason” for Graves’ firing was that he was “insufficiently enthusiastic about a controversial lawsuit regarding Missouri’s voter rolls that was pressed by [DOJ leadership].”³⁹

This mass firing did not go unnoticed. Lawmakers from the affected states quickly expressed concern that the firings were politically motivated. Attorney General Gonzales and others involved, including the terminated attorneys, testified in 14 congressional hearings, drawing bipartisan criticism for their actions. At one session the Attorney General answered “I don’t recall” or some variant sixty-four times.⁴⁰ Sen. Tom Coburn (R – Okla.) said Gonzales ought to “suffer the consequences” and resign, and Sen. Lindsey Graham (R – S.C.) said he had a “tremendous credibility problem.”⁴¹ Gonzales claimed that he played a limited role in the firings, a claim that documents later debunked.⁴²

A 2008 report by the Justice Department’s independent Office of the Inspector General found that several DOJ officials had been less than candid with Congress in saying the removals were based on performance.⁴³ Politics, rather than incompetence, drove nearly all of the terminations. Top DOJ officials had “abdicated their responsibility to safeguard the integrity and independence of the Department by failing to ensure that the removal of U.S. Attorneys was not based on improper political considerations,” according to the report.⁴⁴ The Inspector General concluded: “The Department’s removal of the U.S. Attorneys and the controversy it created severely damaged the credibility of the Department and raised doubts about the integrity of Department prosecutive decisions.”⁴⁵

B. Turning the Department’s Voting Section into a Partisan Tool

While the U.S. Attorney firings garnered significant public attention, they were not the Gonzales Justice Department’s only deviation from the law and long-established norms. In a sharp turn from decades of prior practice, political operatives used the Justice Department, and its Voting Section in particular, to restrict voting rights as a means to further partisan goals.

Congress created the Justice Department's Civil Rights Division in 1957, in the wake of the landmark 1954 racial desegregation case, *Brown v. Board of Education*.⁴⁶ Since then, anchored by a career staff of attorneys hired based on qualifications, not partisanship, the Civil Rights Division's Voting Section had been charged with defending voters' rights, especially when states adopted discriminatory practices. But in the hyper-politicized era under the Bush administration, Justice Department leadership turned the Voting Section's core mission on its head by stretching the interpretation and enforcement of federal voting statutes to promote disenfranchisement rather than access.

In a few short years, political appointees conscripted the enforcement powers of DOJ in the service of partisan aims. In so doing, they savaged the career workforce, downgraded and warped voting rights enforcement, bullied states into implementing anti-voter registration rules, and encouraged improper legal interpretations that judges roundly rejected.

1. Improper Politicization of Personnel Decisions

First, Justice Department political leadership illegally politicized the Voting Section's hiring and personnel processes, and improperly compromised the ability of nonpartisan career staff to enforce voting laws.

The Justice Department was intended to function by and large as a nonpartisan institution within the government. While political appointees come and go with changing administrations, the core of the Department since its creation in 1870 is the nonpartisan career staff attorneys. Federal law explicitly prohibits discrimination against federal employees based on political affiliation in hiring and other personnel matters.⁴⁷ Federal law and long-established Justice Department policies also set clear boundaries for how career staff are hired, fired, and assigned responsibilities. According to the Justice Department's own website, hiring of entry-level attorneys, like that of top-flight attorneys, is traditionally based on "demonstrated commitment to public service, academic achievement, leadership, law review or moot court experience, legal aid and clinical experience, past employment, and extracurricular activities that relate to the work of Justice and the relevant component."⁴⁸

But in the Bush-era Department of Justice, these traditions were upended, and partisan concerns seeped into nearly every aspect of the Department's operations. This was particularly so in the Civil Rights Division's Voting Section. Between 2003 and 2006, political leadership replaced career attorneys with underqualified, partisan operatives who would be willing to advance an anti-voter agenda. They diverted job responsibilities from the first group to the second, and harassed and discriminated against career staff unwilling to politicize their work.

This new approach to hiring broke the law,⁴⁹ and departed from past standards of excellence for career lawyers, by bringing on attorneys without the relevant expertise or credentials as long as they could boast conservative bona fides.⁵⁰ In an email to a former colleague, Bradley Schlozman, the political appointee who headed the Civil Rights Division during that period, wrote: "I too get to work with mold spores, but here in Civil Rights, we call them Voting Section attorneys." He continued: "My tentative plans are to gerrymander all of those crazy libs rights out of the section."⁵¹ Schlozman came under congressional scrutiny for his politicized hiring practices, which he extended outside the Voting Section,⁵² but resigned before fully answering for his actions.⁵³

Justice Department political appointees took steps to remove or sideline nonpartisan career staff who predated their arrival. They required all decisions about new cases to go through them. Career staff had “never seen a political appointee exercise this level of control over the day-to-day operations of the Voting Section.”⁵⁴ In his role as politically appointed Counsel to the Assistant Attorney General for Civil Rights, Hans von Spakovsky took over most of the statutory responsibilities and traditional duties of the nonpartisan chief of the Voting Section.⁵⁵ According to career attorneys, he had performance evaluations changed based not on demonstrated skill and professionalism, but on whether the attorneys made investigation and prosecution recommendations that personally pleased him and his political colleagues.⁵⁶ Schlozman went so far as to transfer the Deputy Chief of the Voting Section, Robert Berman, out of the Section after Berman said he agreed with career staff on an enforcement recommendation Schlozman overruled. Such an involuntary transfer was unusual, especially since Berman had spent nearly 30 years in the Civil Rights Division.⁵⁷ The other career staff who recommended enforcement in that same matter received reprimands. The only staff attorney who recommended against enforcement was one who had just been hired under the newly politicized hiring procedures. That attorney received a cash award.⁵⁸

The results of this politicization of enforcement were profound: 55 percent of Voting Section staff, including members of its nonpartisan leadership who had worked in the Section for decades, left within two years.⁵⁹ According to the *Boston Globe*, “[t]he average US News & World Report ranking of the law school attended by new career lawyers plunged from 15 to 65.”⁶⁰

2. Abandoning Traditional Voting Rights Enforcement Practices

a. Voting Rights Act Enforcement

With political operatives in charge of the Justice Department’s Voting Section, its enforcement of voting laws changed drastically — raising questions that decisions were being motivated by political rather than legal concerns.⁶¹ The impact was notable: a significant drop in enforcement of pro-voter laws.

The strongest legal protections in the voting sphere derive from the Voting Rights Act of 1965. The Justice Department is its primary enforcer. Until recently, it used this law to protect voters in two principal ways. First, under Section 2 of the Voting Rights Act, the Department brought lawsuits across the country to stop efforts to deny or abridge the right to vote. Given its importance in protecting voters, prior administrations often brought dozens of cases under Section 2. Between 1993 and 2000, for example, the Justice Department filed 22 cases on behalf of African American voters under Section 2.⁶²

Section 5 of the Voting Rights Act provided another major tool,⁶³ by requiring that jurisdictions with a history of racial discrimination submit proposed changes to their voting laws or procedures to the Justice Department (or to a three-judge federal court) for review. This review, known as “preclearance,” aimed to ensure that changes to voting practices were not discriminatory. Under the Reagan administration, the Justice Department denied preclearance for proposed voting changes 231 times. Similarly, in the Clinton administration, the Department sent 157 objection letters under Section 5.⁶⁴

These figures dropped in the Bush administration, and especially for suits on behalf of African Americans. The Division filed only five Section 2 cases on behalf of African Americans between 2001 and 2008.⁶⁵ And it issued only 46 Section 5 objection letters, less than a third of those issued by the previous administration.⁶⁶ These enforcement decisions, frequently made against the recommendations or over the complaints of career staff, were part of a broader pattern of not enforcing pro-voting laws, and diverting resources from pro-voter to anti-voter efforts.

Battle Over Georgia's 2005 Voter ID Law

One of the more troubling examples of the Department's new approach to voting rights enforcement during this period was the highly unusual preclearance of Georgia's voter ID law. In 2005, Georgia passed a strict voter ID law, which had to be submitted for review under Section 5 before it could be implemented. This was the first time the Justice Department had to review a strict voter ID law, as no state had previously adopted one. An investigation like this typically entails extensive factual research and data analysis, and back-and-forth between career staff and both state officials and political leadership, especially in the event of disagreement. After more than 10 weeks of investigation, career staff submitted a 51-page recommendation against preclearance, noting, among other things, remarks by a prime sponsor of the legislation that African Americans were less likely to vote if not paid to do so.⁶⁷ The next day, Georgia submitted additional data, which would typically warrant further analysis. Yet that same day, political leadership precleared the law — without any discussion of the recommendation or new data, and without any contrary analysis.⁶⁸ A federal court later reviewing the Georgia law invalidated it as a poll tax, likening it to Jim Crow-era voting restrictions.⁶⁹ In response, Georgia's legislature passed a less restrictive bill which, among other things, eliminated the fee for voter IDs, and the court upheld the new law.

This case was also notable because political appointee Hans von Spakovsky did not recuse himself from reviewing Georgia's voter ID law even though he was a former Republican election official from Georgia and a longtime advocate for voter ID laws in Georgia and elsewhere. Under federal law, employees and officials of the Department of Justice are barred from participating in any “investigation or prosecution if such participation may result in a personal, financial, or political conflict of interest, or the appearance thereof.”⁷⁰ According to a different DOJ regulation, a past political relationship with the subject of an investigation gives rise to an appearance of conflict of interest.⁷¹ In addition to running afoul of this statute, von Spakovsky's decision to participate in the investigation of Georgia's law is arguably also inconsistent with long-standing conflict-of-interest canons of the legal profession.⁷²

In addition, while the Justice Department's review was pending, von Spakovsky published an anonymous law-review article — using the grand pseudonym “Publius,” author of the Federalist Papers — appraising ID laws and asserting their legality. Federal law prohibits DOJ employees from engaging in activities outside the workplace that conflict with their workplace duties,⁷³ including the duty of impartiality. For this reason, experts claimed von Spakovsky should have recused himself from the voter ID matter because of his article.⁷⁴

Career staff complained that as a practical matter, political leadership often prevented them from investigating voting-rights violations, even when they were technically granted permission. In one case in Minnesota, for example, career staff unsuccessfully tried to investigate potential disenfranchisement of Native Americans as a result of the Minnesota Secretary of State's refusal to accept tribal ID cards for voting. Although the Justice Department opened an investigation, political leadership instructed staff not to contact county officials at all, and not to take any actions related to the case without their express approval.⁷⁵ These actions constricted the investigation to the point that, with the 2004 election approaching, they effectively ended the inquiry. Shortly before the election, in response to a private lawsuit challenging this rule,⁷⁶ a federal court vindicated career staff's concern, ruling that tribal IDs had to be accepted for voting purposes.⁷⁷

b. Voter Roll Purges

During this period, political operatives for the first time used DOJ's enforcement powers to require states to more aggressively purge their voter rolls — ostensibly to remove ineligible or dead voters, but without evidence of any fraud problems. Voter advocates complained about these suits because large-scale purges of the voter rolls often mistakenly deleted many eligible and living voters.⁷⁸ Before 2004, DOJ had asserted only one claim based on a state's failure to purge the rolls, as part of a broader suit aimed at increasing voter access; from 2004-2007 it asserted six.⁷⁹

Events in Missouri highlighted the harmful potential of politicized enforcement decisions and personnel. In August 2002, the Justice Department settled a complaint it had filed against the city of St. Louis.⁸⁰ Local election officials acknowledged that they had improperly purged roughly 50,000 names from the voter rolls,⁸¹ and agreed to apply uniform and nondiscriminatory rules in their voter-list maintenance.⁸² A few years later, in advance of a hotly contested Senate race in Missouri, Bradley Schlozman tried to pressure U.S. Attorney Todd Graves to bring a civil suit against the Secretary of State for *not* purging the rolls, as described above. Graves refused to bring the suit and was fired. The Justice Department replaced him with Schlozman, using a legal loophole to circumvent normal appointment procedures. In November 2006, in his new role as U.S. Attorney of Missouri, Schlozman mounted the lawsuit seeking to require the state to remove thousands of voters from the rolls.⁸³ In 2007, a district court ruled against the DOJ, citing its inconsistent positions on what federal law required⁸⁴ and noting it had shown no evidence of voter fraud warranting such aggressive action.⁸⁵

3. Pressuring States to Restrict Voting Access

Political operatives also pushed states to restrict voter access in other ways as well.

a. No Match, No Vote

As part of efforts to enforce a new federal requirement that each state build a computerized voter registration list by 2006, operatives pushed states to adopt an unnecessary and disenfranchising “no match” policy that would make it harder for eligible voters to get on the list. Under this policy, election officials were required to reject any voter registration application unless the voter's information on that application *exactly* matched information in state driver's license or Social Security databases. But

because of common database errors, a “no match” policy typically resulted in erroneous rejections of new registrations. Rejection rates were as high as 20 to 30 percent in places that adopted this policy, and they disproportionately affected the young and poor.

Despite the harms of this policy, political appointees in the Justice Department pushed states to adopt it, rejecting states’ more voter-friendly interpretations of federal law. In 2003, von Spakovsky sent a letter, without first consulting any non-partisan career attorneys,⁸⁶ to one of the Maryland government’s top election attorneys advising that under federal law, Maryland was not permitted to accept voter registration applications without an exact match of data to other government databases. Specifically, in response to the state attorney’s assertion that Maryland did not have to reject applications that did not meet these strict criteria,⁸⁷ von Spakovsky wrote, “[c]ontrary to your assertion,” a state that did not adopt a strict “no match” policy “would appear to be in clear violation of” federal law. But, as discussed below, this “no match” policy was not, in fact, required by federal law.

Justice Department political leadership also pushed — and initially achieved — strict matching rules in California. In 2005, the state sought guidance on its plan for setting up a computerized list of voters. DOJ responded that the plan would not comply with federal regulation. Rather than litigate against the federal government, the California Secretary of State agreed to adopt a “no match” policy under which the state system would reject voter registration applications if it failed to find an exact match in the DMV or Social Security database.⁸⁸ In Los Angeles, typographical and technical errors resulted in a high rate of mismatches, blocking at least 18 percent of registrations from going through.⁸⁹ Schlozman hailed the discriminatory policy as “a model for other states.”⁹⁰

The courts disagreed. In 2006, a federal court struck down a “no match” policy out of Washington State, finding it *violated* federal law.⁹¹ Every court to consider the lawfulness of a “no match” policy ruled that federal computer list matching requirements were not intended to serve “as a restriction on voter eligibility.”⁹² California ultimately abandoned it, as did other states. No state today uses a “no match” procedure.

b. Provisional Ballots

In addition to pursuing an unreasonable position on matching, the Justice Department during this period advanced anti-voter readings of the law on provisional ballots.

Provisional ballots gained heightened importance in light of widespread voting problems in the 2000 election.⁹³ Congress wanted to ensure that voters who faced problems on Election Day could still ensure their votes counted by voting provisionally and clearing up questions after the election. For a variety of reasons, some linked to racial discrimination at polling places, racial minorities have typically cast provisional ballots at higher rates than whites.⁹⁴

In its implementation of new federal law on provisional ballots, the Bush Justice Department took a variety of measures to undermine its goals.

First, it tacitly encouraged states to violate the new law by asserting repeatedly in litigation that private citizens could not sue to enforce the law. Prior to this the Justice Department had never asked a federal court to restrict the ability of private citizens or non-government entities to use federal law to protect voting rights. But in the lead-up to the 2004 election, DOJ filed a series of briefs arguing precisely that. Court after court considered the issue and rejected the Department's view, and instead allowed voters to protect their rights even if the Justice Department would not.⁹⁵

Justice Department leadership also pressed unfaithful readings of the law that would directly disenfranchise voters. For example, in 2005 Arizona had adopted a strict law requiring voters to show documentary proof of their U.S. citizenship to register to vote. Previous Justice Department policy was that all voters who had attempted to register to vote — even if their registrations were flawed — had to be provided provisional ballots.⁹⁶ Yet in April 2005, DOJ advised Arizona's Secretary of State that poll workers did not need to offer provisional ballots to voters who had not provided documentary proof of citizenship.⁹⁷ Later that year, DOJ sent a follow-up letter acknowledging that its April position was wrong, but asserting that Arizona did not have to *count* provisional ballots of those who did not bring citizenship documents to the polls.⁹⁸

C. Interfering with an Independent Agency for Partisan Gain

During this period, political operatives within the Justice Department exerted inappropriate political pressure in an attempt to cause an independent federal agency to make decisions to advance a partisan, anti-voter agenda. The Election Assistance Commission (EAC), created in 2002 to remedy some of the voting problems in the 2000 election and responsible for certain voting and voter-registration standards, was expressly designed as an independent, bipartisan agency. Yet DOJ political staff tried to undermine the EAC's independence in several ways.

Under federal law, the chief of the Voting Section is assigned to serve on the EAC's Board of Advisors.⁹⁹ The chief of the Voting Section is a nonpartisan position historically occupied by an experienced election law attorney. Yet, instead of allowing then-chief Joseph Rich to occupy the seat on the board, or having him designate a proxy, Hans von Spakovsky, the politically appointed Counsel to the Assistant Attorney General, went over Rich's head and decided to take the position on the board for himself, in direction violation of federal law.¹⁰⁰

Von Spakovsky appears to have done this end run so he could pursue an explicitly political agenda. The Republican Vice Chairman of the EAC at the time, Paul DeGregorio, told independent government investigators that von Spakovsky's decision-making was "clouded by his partisan thinking" and that von Spakovsky "tried to influence [him]" to this end, urging that DeGregorio should take advantage of his position on the EAC to advance the goals of the Republican party.¹⁰¹

The most controversial example of the pressure von Spakovsky applied to the EAC related to Arizona's documentary proof of citizenship law. Under federal law, all states must let eligible citizens register to vote using a document called the federal voter registration form. The EAC is responsible for determining what is required on that form. In 2004, Arizona adopted a controversial law requiring all citizens to provide documentary proof of citizenship when registering to vote. In a bipartisan ruling, the EAC determined that

applying this requirement to the federal registration form would conflict with federal law, and declined to amend the form to require Arizona citizens to provide documentary proof of citizenship.

Published e-mails reveal that, after this decision, von Spakovsky put political pressure on the EAC to drop its objections to Arizona’s draconian law.¹⁰² In one email, von Spakovsky told DeGregorio that “we had a deal” that the EAC would revise its position on Arizona’s law in exchange for a pro-voter position from the DOJ on a provisional balloting question. The Republican DeGregorio responded that he did “not agree to ‘deals’” when it came to legal interpretation, and that he “do[es] not appreciate” the “attempt by you to put pressure on me — and the EAC.” Not long after these emails, DeGregorio was not reappointed to a new term on the EAC. Sources who spoke to *McClatchy Newspapers* claimed that von Spakovsky engineered his departure because DeGregorio was not partisan enough.¹⁰³ DeGregorio later said that von Spakovsky “was not pleased with the bipartisan approaches I took” while serving at the agency.¹⁰⁴

Justice Department leadership, including von Spakovsky, also tried to stop EAC-commissioned research that ran contrary to their position of overstating the level of voter fraud and understating the disenfranchisement caused by restrictive voter ID laws. First they pushed the EAC not to release a draft report that reflected a consensus that there is “little polling place fraud,”¹⁰⁵ and later they pressured the agency (unsuccessfully) to cancel a research contract that sought to document whether voter ID laws disenfranchise eligible voters.¹⁰⁶

The pressure von Spakovsky and other political appointees at the DOJ put on the EAC was inappropriate and highly unusual. Not only was von Spakovsky never supposed to be on the Advisory Board in the first place, but once there, his actions went well beyond board members’ statutory role of “consultation.”¹⁰⁷

D. Aftermath

This effort to politicize the Department of Justice during the Bush Administration — and the resulting inappropriate and often illegal conduct in the name of preventing voter fraud — created the worst DOJ scandal since Watergate. It produced three internal government investigations, 14 congressional hearings, and a record number of high-level resignations in the Justice Department and White House. Between March and August of 2007, Bradley Schlozman; Kyle Sampson, the Attorney General’s chief of staff; Monica Goodling, the Justice Department’s liaison to the White House; Paul McNulty, the Deputy Attorney General; Karl Rove, White House Senior Advisor; and Alberto Gonzales, the U.S. Attorney General, all resigned. Several of these officials did so while still under investigation for their roles in one or more of the scandal’s components. Von Spakovsky received a recess appointment to the Federal Election Commission in 2006, but his actions while at DOJ prevented his permanent appointment, and he ultimately withdrew from the process.¹⁰⁸ Similarly, after it became clear the Senate would not confirm him as a U.S. Attorney in Missouri, Schlozman resigned and moved to an associate counsel position in the Executive Office for United States Attorneys.¹⁰⁹

II. JEFF SESSIONS: A HISTORY OF BLOCKING THE VOTE

A decade later, some fear Sen. Jeff Sessions could take the Justice Department back to its politically motivated days.

Sen. Sessions, now 70, grew up in rural Alabama, the son of a country storeowner. An Eagle Scout, he went to college and law school in his home state. In 1981 when Sen. Sessions was 35-years-old, Ronald Reagan appointed him U.S. Attorney for the Southern District of Alabama.¹¹⁰

By 1985, Sen. Sessions was making national news. His office charged Albert Turner, a civil rights leader who walked directly behind John Lewis during the Bloody Sunday March in Selma, Turner's wife, and another man in a wide-ranging 29-count indictment. It charged the "Marion Three" with, among other allegations, changing votes on absentee ballots in a Democratic primary.¹¹¹

The indictment was part of an aggressive investigation into alleged voter fraud in Alabama's Black Belt. These heavily black counties typically elected white candidates, and whites continued to dominate state and local government during the mid-1960s.¹¹² But at the time of Sen. Sessions's investigation, black officeholders were gaining a foothold.¹¹³ In the early 1980s, absentee ballots played a key role for civil rights leaders like Turner, who used them to expand the franchise for elderly black voters and citizens whose jobs prevented them from getting out to vote.¹¹⁴ In 1982, about 70,000 blacks were actively voting in the state's 10 western Black Belt counties, up from almost zero in 1965.¹¹⁵ This shift helped elect 138 black officials throughout the region.¹¹⁶

The electorate's changing demographics exacerbated racial tensions, and it was against this backdrop that Sen. Sessions and his counterpart in the Northern District of Alabama began investigating alleged absentee-ballot fraud by black civil-rights activists.¹¹⁷ Five Black Belt counties where black leaders had begun to assume local office — Perry, Sumter, Greene, Wilcox, and Lowndes — became "the focus of a Justice Department investigation in which hundreds of witnesses, most of them black, [were] interviewed about vote fraud."¹¹⁸ Meanwhile, at the same time, the Department of Justice refused to investigate complaints that white politicians solicited longtime nonresidents to submit absentee ballots in local elections.¹¹⁹

In Perry County, where the Marion Three had collected absentee ballots, the FBI went to the doors of hundreds of black citizens, flashing their badges, asking how they had voted, whether they had received help from black civil-rights activists, whether they could read and write, and why they had voted absentee.¹²⁰ The chairman of the National Council of Black State Legislators called the tactics an effort "to disenfranchise blacks who are finally gaining political power in the South."¹²¹ And, in perhaps the crowning irony, black leaders met with Alabama Gov. George Wallace to air their grievances. "Here we are asking the governor of Alabama to tell the Justice Department to stop intimidating blacks," said then-Maryland State Sen. Clarence Mitchell, at the time chairman of the 388-member National Black Caucus of State Legislators. "It is a complete reversal of the 1960s."¹²²

The history here is especially notable because of the parallels to contemporary voting controversies. In recent years politicians in a number of states have restricted voting access in response to increases in turnout among black and low-income voters.¹²³ In North Carolina, for instance, a federal court of appeals

found that politicians had passed a law specifically targeting the forms of voting increasingly used by black voters, such as early voting, for the purpose of decreasing African-American political participation.¹²⁴

The basis for Sen. Sessions's prosecution of the Marion Three was highly questionable.¹²⁵ Before the jury even deliberated, Federal Judge Emmet Cox had dismissed 50 counts brought against the three defendants.¹²⁶ And after a three-week trial in which most of the government witnesses recanted their previous testimony, it took the jury only four hours to acquit the Marion Three on all other charges.¹²⁷ The prosecution was ultimately hard to explain as anything other than a racially-motivated attack on black voter-mobilization efforts in Alabama.

Notwithstanding this history, Reagan nominated Sen. Sessions for a federal district court judgeship in 1986.¹²⁸ In those days, before the scorched-earth battle over the Supreme Court nomination of Robert Bork, judicial nominations — especially to a federal district court — were largely quiet affairs, with the Senate Judiciary Committee routinely approving a president's pick.

Sen. Sessions's voter-fraud investigation, however, was part of a troubling array of racially insensitive conduct that collectively made him only the second person in 48 years to have his judicial nomination killed in committee.¹²⁹ Morton Stavis, a lawyer for the Marion Three, testified before the Senate Judiciary Committee that “the investigation of the case was characterized by fear and intimidation of the witnesses, most of whom were poor, elderly and illiterate, many of whom were ailing, all of whom were black,” and that “notwithstanding its obligation to do so, the government failed to produce before trial FBI notes of a witness that were clearly exculpatory.”¹³⁰ A witness said he heard Sen. Sessions say he wished he “could decline on all” civil rights cases sent by Justice Department headquarters in Washington.¹³¹ By the time Sen. Sessions testified on his own behalf, “his reputation was in tatters,” as *The Washington Post* put it.¹³² The Republican-controlled panel voted, on a bipartisan basis, not to send his nomination to the Senate floor for consideration.¹³³

This defeat was not the end of the line, or the last bit of troubling conduct, for Sen. Sessions. With his path to the judiciary closed off, Sen. Sessions returned to Alabama, eventually becoming its attorney general. He was elected to the Senate in the mid-1990s, where he continued his record of seeking to restrict the franchise. During his tenure, he voted against a bill to restore felons' voting rights once they completed their sentences,¹³⁴ and defended restrictive voter ID laws during speeches from the Senate floor.¹³⁵ Although he voted to extend the Voting Rights Act in 2006, Sen. Sessions questioned the need for Section 5,¹³⁶ which required states with a history of discrimination in voting to gain prior approval from the federal government or a court before implementing changes to their election procedures. He later called the Supreme Court's decision in *Shelby County v. Holder* — which gutted the Voting Rights Act, the “crown jewel”¹³⁷ of the Civil Rights movement — “good news . . . for the South.”¹³⁸

Now Sen. Sessions could be the nation's top law enforcement official — and top enforcer of our voting rights laws. Given his background, and the fact that the president-elect who nominated him falsely maintains there were “millions” of illegal votes in the 2016 election, it is likely that pursuing perceived voter fraud will be one of Sen. Sessions's priorities. But if he is the incoming Attorney General, Sen. Sessions should heed the lessons of what happened when another Republican administration steered the Justice Department toward voter fraud investigations that turned into a partisan boondoggle, ending in the resignation of Attorney General Gonzales and other high-ranking officials.

III. COMMITMENTS FROM THE NEXT ATTORNEY GENERAL

The 2007 scandal dramatically undermined the integrity of the Justice Department, effectively crippled its ability to protect voting rights, and put it on a collision course with long-established rules and norms regulating its conduct. The country cannot afford for this to happen a second time.

To prevent a recurrence, Congress must make sure that the next Attorney General will heed the lessons from the Gonzales era and vigorously reject any efforts to politicize the Justice Department — whether under the guise of addressing voter fraud or otherwise. Sen. Sessions, for his part, must reassure the nation that he will maintain the integrity of the Department and follow the laws and traditions that apply to every administration, regardless of party. At a minimum, Sen. Sessions must explicitly agree that he will:

1. Faithfully adhere to the laws of United States, and eschew any enforcement action motivated by politics rather than facts.
2. Uphold the mission of the Department of Justice, including its mission to protect civil rights and the right of every eligible citizen to vote free from interference and discrimination;
3. Preserve the integrity and institutional competence of the Justice Department by ensuring that career staff are hired, assigned duties, and evaluated based on their competence, not their politics, consistent with federal law and longstanding DOJ policy.
4. Respect the traditional roles of nonpartisan Department of Justice staff and leadership.
5. Ensure U.S. Attorneys — and all Justice Department employees — are not harassed or removed for failing to adhere to a political agenda, and ensure that DOJ conducts a detailed factual investigation and due process before removing any U.S. Attorney.
6. Ensure U.S. Attorneys and their subordinates follow the Justice Department’s rules and policies about pre-election indictments relating to election crimes, avoiding indictments less than 60 days before an election except in exceptional circumstances, and in accordance with protocols established by the Criminal Division of DOJ.
7. Interpret federal voting statutes consistent with their purpose to expand access to voting, and reject efforts to pressure or “encourage” state officials to adopt anti-voter policies or to implement federal law in a manner that unduly restricts access to voting.
8. Avoid making arguments in litigation aimed at restricting the protections for voting rights under federal law.
9. Avoid interference with the decision-making of independent government agencies, including the U.S. Election Assistance Commission, and reject efforts to pressure such agencies to interpret federal statutes based on politics rather than law.

ENDNOTES

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13. Sara Sun Beale, *Rethinking the Identity and Role of United States Attorneys*, 6 OHIO ST. J. OF CRIM. L. 369, 370-71 (2009); Bruce A. Green & Fred C. Zacharias, *Prosecutorial Neutrality*, 2004 WIS. L. REV. 837, 869.
14. OFFICE OF THE INSPECTOR GEN. & OFFICE OF PROF'L RESPONSIBILITY, *supra* note 10, at 331.
15. *Id.* at 175.
16. *Id.* at 153, 175.
17. *Id.* at 175.
18. Dan Eggen & John Solomon, *Firings Had Genesis in White House*, WASH. POST, Mar. 13, 2007, http://www.washingtonpost.com/wp-dyn/content/article/2007/03/12/AR2007031201818_pf.html.
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22. OFFICE OF THE INSPECTOR GEN. & OFFICE OF PROF'L RESPONSIBILITY, *supra* note 10, at 170.
 23. See, e.g., CRAIG C. DONSANTO, DEP'T OF JUSTICE, FEDERAL PROSECUTION OF ELECTION OFFENSES 41 (5th ed. 1988), *available at* <https://www.ncjrs.gov/pdffiles1/Digitization/120204NCJRS.pdf>. In 2007, DOJ made the policy more permissive with respect to election-eve prosecutions, but that was after the pressure Iglesias and others suffered. See CRAIG C. DONSANTO & NANCY L. SIMMONS, FEDERAL PROSECUTION OF ELECTION OFFENSES 91-93 (7th ed. 2007), *available at* <https://www.justice.gov/sites/default/files/criminal/legacy/2013/09/30/electbook-rvs0807.pdf>; OFFICE OF THE INSPECTOR GEN. & OFFICE OF PROF'L RESPONSIBILITY, *supra* note 10, at 162-63, 170-71, 176-77.
 24. OFFICE OF THE INSPECTOR GEN. & OFFICE OF PROF'L RESPONSIBILITY, *supra* note 10, at 163-64.
 25. *Id.* at 187 (“[T]he Department never objectively assessed the complaints raised by New Mexico politicians and activists about Iglesias’s actions on the voter fraud or public corruption cases, or even asked Iglesias about them. . . . [W]e believe Department leaders abdicated their responsibility to ensure that prosecutorial decisions would be based on law, the evidence, and Department policy, not political pressure.”), 190.
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 32. Jason Leopold, *Fired US Attorney John McKay Speaks Out*, TRUTHOUT (June 11, 2007, 4:55 AM), <http://truth-out.org/archive/component/k2/item/71137:jason-leopold--fired-us-attorney-john-mckay-speaks-out>. Although an independent government investigation concluded that the likeliest reason for McKay’s termination was his clashing with higher-ups on a DOJ-wide information-sharing program, it was unable “to conclude, based on the evidence, whether complaints about McKay’s handling of voter fraud cases either did or did not contribute to his removal as U.S. Attorney,” and this was true “particularly without interviews of relevant White House officials.” OFFICE OF THE INSPECTOR GEN. & OFFICE OF PROF'L RESPONSIBILITY, *supra* note 10, at 266-67.
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 34. Sean Alfano, *Former U.S. Attorney: Why I Was Fired*, CBS NEWS (Mar. 14, 2007, 5:31 PM), <http://www.cbsnews.com/news/former-us-attorney-why-i-was-fired/>; Amy Goldstein, *Justice Dept. Recognized Prosecutor’s Work on Election Fraud Before His Firing*, WASH. POST, Mar. 19, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/03/18/AR2007031801077.html>; Jane Mayer, *The Voter-Fraud Myth*, THE NEW YORKER, Oct. 29, 2012, *available at* <http://www.newyorker.com/magazine/2012/10/29/the-voter-fraud-myth> (“John McKay, the U.S. Attorney in Washington State, was also fired after failing to find prosecutable voter fraud.”).
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42. OFFICE OF THE INSPECTOR GEN. & OFFICE OF PROF'L RESPONSIBILITY, *supra* note 10, at 339-44.
43. *See, e.g., id.* at 348.
44. *Id.* at 331.
45. *Id.* at 358.
46. *Brown v. Board of Education*, 347 U.S. 483 (1954).
47. 5 U.S.C. §§ 2302(b)(1)(E), 2302(b)(10) (“Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority . . . discriminate for or against any employee or applicant for employment on the basis of conduct which does not adversely affect the performance of the employee or applicant or the performance of others . . .”). So, for example, in 1983, Theodore Olson, of the DOJ’s Office of Legal Counsel, and later Solicitor General under President George W. Bush, wrote a 56-page memorandum explaining in detail why the DOJ should not fire a career attorney because of the individual’s homosexuality unless it could show that “this particular individual’s homosexuality is adversely affecting his performance.” THEODORE B. OLSON, U.S. DEP’T OF JUSTICE, OFFICE OF LEGAL COUNSEL, *TERMINATION OF AN ASSISTANT UNITED STATES ATTORNEY ON GROUNDS RELATED TO HIS ACKNOWLEDGED HOMOSEXUALITY* 56 (1983), *available at* https://www.justice.gov/sites/default/files/olc/opinions/1983/03/31/op-olc-v007-p0046_0.pdf.
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58. *Id.* at 118-21. A cash award would violate Department policy if based on non-merit factors like partisanship. *See HR Order DOJ1200.1: Part 2. Compensation: Chapter 2-18, Agency Awards and Quality Step Increases*, U.S. DEPARTMENT OF JUST., <https://www.justice.gov/jmd/hr-order-doj12001-part-2-compensation-9> (last updated Aug. 29, 2014).
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60. Savage, *supra* note 38.
61. It should be acknowledged that OIG Investigators did not uncover evidence of improper motive with respect to these Voting Rights Act actions. OFFICE OF THE INSPECTOR GEN., *supra* note 57, at 251.
62. *Id.* at 28.
63. Section 5 was rendered inoperable by *Shelby County v. Holder* (2013), but was in force during the relevant period.
64. *Section 5 Objection Letters*, U.S. DEPARTMENT OF JUST., <https://www.justice.gov/crt/section-5-objection-letters> (last updated Aug. 5, 2015).
65. OFFICE OF THE INSPECTOR GEN., *supra* note 57, at 28.
66. *Section 5 Objection Letters*, *supra* note 64.
67. Memorandum from Robert Berman, Deputy Chief, U.S. Dep't of Justice Voting Section, et al. (Aug. 25, 2005), *available at* <https://www.brennancenter.org/sites/default/files/analysis/08-25-05%20Georgia%20ID%20Preclearance%20Memo%20-%20DOJ%20Staff.pdf>. This document was leaked to the *Washington Post*.
68. Letter from Joseph D. Rich to U.S. Senator Diane Feinstein & U.S. Senator Bob Bennet, *supra* note 56, at 3. Although the facts of the case were complex, DOJ leadership did not request further analysis, nor was there evidence that political operatives performed a similarly thorough analysis, especially not a day after receiving the career staff's recommendation. OFFICE OF THE INSPECTOR GEN., *supra* note 57, at 85-87.
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- U.S. 238, 249 (1980) (“In appropriate circumstances the Court has made clear that traditions of prosecutorial discretion do not immunize from judicial scrutiny cases in which the enforcement decisions of an administrator were motivated by improper factors or were otherwise contrary to law.”).
71. 28 C.F.R. § 45.2.
 72. See, e.g., AM. BAR ASS’N, ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY ¶ EC 5-2 (1980) (“A lawyer should not accept proffered employment if his personal interests or desires will, or there is a reasonable probability that they will, affect adversely the advice to be given or services to be rendered the prospective client. After accepting employment, a lawyer carefully should refrain from acquiring a property right or assuming a position that would tend to make his judgment less protective of the interests of his client.”), available at <http://www.americanbar.org/content/dam/aba/migrated/cpr/mrpc/mcpr.authcheckdam.pdf>.
 73. 5 C.F.R. § 2635.101(b)(10). DOJ ethics guidelines similarly prohibit any “activity that conflicts with [one’s] official duties and responsibilities.” U.S. DEP’T OF JUSTICE, ETHICS HANDBOOK FOR ON AND OFF-DUTY CONDUCT 9 (2016), available at <https://www.justice.gov/jmd/page/file/190546/download>.
 74. Letter from Joseph D. Rich to U.S. Senator Diane Feinstein & U.S. Senator Bob Bennet, *supra* note 54, at 3. Perhaps because he took the unusual step of hiding his authorship, von Spakovsky also departed from traditional practice at the Department, where for decades scholarly articles written by officials included a disclaimer that the author’s views did not necessary reflect the Department’s. *Id.* at 2-3.
 75. Hamburger, *supra* note 20; Letter from Joseph D. Rich to U.S. Senator Diane Feinstein & U.S. Senator Bob Bennet, *supra* note 54, at 4.
 76. See Complaint, ACLU of Minn. v. Kiffmeyer, No. 04-4653 (D. Minn. 2005), available at <https://www.aclu.org/legal-document/aclu-et-al-v-kiffmeyer-petition>.
 77. ACLU VOTING RIGHTS PROJECT, VOTING RIGHTS IN INDIAN COUNTRY 50 (2009), available at <https://www.aclu.org/files/pdfs/votingrights/indiancountryreport.pdf>.
 78. MYRNA PÉREZ, BRENNAN CTR. FOR JUSTICE, VOTER PURGES 1-3 (2008), available at <http://www.brennancenter.org/sites/default/files/legacy/publications/Voter.Purges.f.pdf>.
 79. OFFICE OF THE INSPECTOR GEN., *supra* note 57, at 94, 97.
 80. *Cases Raising Claims Under the National Voter Registration Act*, U.S. DEPARTMENT OF JUST., <https://www.justice.gov/crt/cases-raising-claims-under-national-voter-registration-act> (last updated Oct. 16, 2015).
 81. Greg Gordon, *2006 Missouri’s Election Was Ground Zero for GOP*, McCLATCHY DC, (May 2, 2007, 3:00 AM), <http://www.mcclatchydc.com/news/politics-government/congress/article24463423.html>.
 82. *Cases Raising Claims Under the National Voter Registration Act*, *supra* note 80.
 83. *Id.*
 84. Order at 16, *United States v. Missouri*, No. 05-4391 (W.D. Mo. 2007), available at <https://www.brennancenter.org/sites/default/files/analysis/04-13-07%20US%20v.%20Missouri%20Order.pdf> (“In this case, the Government seems to have developed its interpretation of Missouri’s obligations under the NVRA either in preparation for litigation or during the course of litigation. Furthermore, notwithstanding inevitable state-to-state variations, the Government has not shown that its position with respect to Missouri’s obligations is consistent with its position as to any other state’s obligations.”), *rev’d in part on other grounds*, 535 F.3d 844 (8th Cir. 2008); The Associated Press, *Federal Lawyers Seek to Drop Suit Against Missouri on Voter Rolls*, ST. LOUIS POST-DISPATCH, Mar. 8, 2009, http://www.stltoday.com/news/local/federal-lawyers-seek-to-drop-suit-against-missouri-on-voter/article_b1fbd0d-48df-5904-bf30-ebecf081dbd.html.
 85. Order, *supra* note 84, at 21 (“It is also telling that the United States has not shown that any Missouri resident was denied his or her right to vote as a result of deficiencies alleged by the United States. Nor has the United States shown that any voter fraud has occurred.”).

86. Paul Kiel, *Civil Rights Groups Seek to Stop Florida Voter Purge Law*, TALKING POINTS MEMO (Nov. 8, 2007, 6:52 PM), <http://talkingpointsmemo.com/muckraker/img-src-http-www-tpmmuckraker-com-images-spakovsky-jpg-vspace-5-hspace-5-align-left-civil-rights-groups-seek-to-stop-florida-voter-purge-law>.
87. See Letter from Hans A. von Spakovsky, Counsel to the Assistant Attorney Gen., U.S. Dep't of Justice, to Judith A. Arnold, Assistant Attorney Gen., Office of the Md. Attorney Gen. (Sept. 8, 2003), *available at* https://www.brennancenter.org/sites/default/files/legal-work/von_Spakovsky_Maryland_Letter.pdf.
88. Declaration of Conny McCormack at 4, Fla. NAACP v. Browning, 569 F. Supp. 2d 1237 (N.D. Fla. 2008) (No. 07-402), *available at* <https://www.brennancenter.org/sites/default/files/legacy/Democracy/FloridaNAACPvBrowning-09-17-07.McCormack.Decl.pdf>.
89. *See id.* at 5-6; Letter from Conny McCormack, Registrar-Recorder/County Clerk, L.A. County, to Bruce McPherson, Sec'y of State, State of Cal. 2-3 (Apr. 3, 2006), *available at* https://www.brennancenter.org/sites/default/files/legal-work/Letter_McCormack_to_McPherson.pdf.
90. Press Release, U.S. Dep't of Justice, Justice Department Reaches Agreement with California on Federally Required Statewide Voter Registration Lists (Nov. 2, 2005), *available at* https://www.justice.gov/archive/opa/pr/2005/November/05_crt_585.html.
91. *See generally* *Washington Association of Churches v. Reed*, BRENNAN CENTER FOR JUST. (Mar. 16, 2007), <https://www.brennancenter.org/legal-work/washington-association-churches-v-reed>.
92. *Wash. Ass'n of Churches v. Reed*, 492 F. Supp. 2d 1264, 1268 (W.D. Wash. 2006) (citing 42 U.S.C. § 15483(a)(1)(A)(i)).
93. *See, e.g.*, NAT'L COMM'N ON FED. ELECTION REFORM, TO ASSURE PRIDE AND CONFIDENCE IN THE ELECTORAL PROCESS 34 (2001), *available at* https://www.verifiedvoting.org/wp-content/uploads/2012/10/NCFER_2001.pdf; CALTECH/MIT VOTING TECH. PROJECT, VOTING: WHAT IS, WHAT COULD BE 30 (2001), *available at* http://vote.caltech.edu/documents/153/voting_what_is_what_could_be.pdf.
94. Joshua Field, Charles Posner & Anna Chu, *Uncounted Votes: The Racially Discriminatory Effects of Provisional Ballots*, CENTER FOR AM. PROGRESS (Oct. 29, 2014, 6:00 AM), <https://www.americanprogress.org/issues/race/reports/2014/10/29/99886/uncounted-votes/>.
95. *See, e.g.*, Order Granting Preliminary Injunction at 9, Fla. Democratic Party v. Hood, 345 F. Supp. 2d 1073 (N.D. Fla. 2004) (No. 04-395), *available at* <http://moritzlaw.osu.edu/electionlaw/docs/florida/hood-order.pdf> ("The relevant section of HAVA clearly evinces a congressional intention to create a federal right. Indeed, that is the whole point of the provision. . . . Finally, although HAVA has other enforcement mechanisms, they are not inconsistent in any respect with the availability of relief under §1983. In sum, under *Schwier* and the line of cases it interpreted, this statute clearly creates a federal right enforceable under §1983.").
96. Letter from Joseph D. Rich to U.S. Senator Diane Feinstein & U.S. Senator Bob Bennet, *supra* note 54, at 2.
97. Letter from Sheldon T. Bradshaw, Principle Deputy Assistant Attorney Gen., U.S. Dep't of Justice, to Janice K. Brewer, Sec'y of State, State of Ark. 3 (Apr. 15, 2005), *available at* <http://www.brennancenter.org/sites/default/files/analysis/04-15-05%20Arizona%20Provisional%20Ballot%20ID%20Letter%20-%20Bradshaw.pdf> ("[I]t is our considered judgment that neither HAVA nor any other provision of federal law preempts states from imposing identification requirements at the polls, including identification requirements for the receipt of provisional ballots."); Greg Gordon, *Efforts to Stop 'Voter Fraud' May Have Curbed Legitimate Voting*, McCLATCHY DC (May 20, 2007, 12:22 PM), <http://www.mcclatchydc.com/news/article24463966.html>.

98. Letter from Bradley J. Schlozman, Acting Assistant Attorney Gen., U.S. Dep't of Justice, to Janice K. Brewer, Sec'y of State, State of Ark. (Sept. 1, 2005), *available at* <http://moritzlaw.osu.edu/blogs/tokaji/DOJ-AZProvisional050901.pdf>. *See also* Letter from Bradley J. Schlozman, Deputy Assistant Attorney Gen., U.S. Dep't of Justice, to Thomas J. Miller, Attorney Gen., State of Iowa (Oct. 26, 2004), *available at* <https://www.brennancenter.org/sites/default/files/analysis/10-26-04%20Iowa%20Provisional%20Ballot%20Letter%20-%20Schlozman.pdf> (Iowa may decide whether and how to count provisional ballots).
99. 52 U.S.C. § 20944(a)(13).
100. Letter from Joseph D. Rich to U.S. Senator Diane Feinstein & U.S. Senator Bob Bennet, *supra* note 56, at 4.
101. OFFICE OF THE INSPECTOR GEN., U.S. ELECTION ASSISTANCE COMM'N, REPORT OF INVESTIGATION: PREPARATION OF THE VOTER FRAUD AND VOTER INTIMIDATION REPORT 17 (2008), *available at* <https://www.eac.gov/assets/1/1/Page/EAC%20Inspector%20General%20Report%20on%20the%20Preparation%20of%20the%20Voter%20Fraud%20and%20Voter%20Intimidation.pdf>.
102. Email from Hans von Spakovsky, Counsel to the Assistant Attorney Gen., Civil Rights Div., U.S. Dep't of Justice, to Paul DeGregorio, Vice Chairman, U.S. Election Assistance Comm'n (May 30, 2005, 8:32 AM), *available at* <http://www.mcclatchydc.com/latest-news/article24173659.ece/BINARY/Emails%20DeGregorio%20&%20von%20Spakovsky>.
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104. *Id.*
105. OFFICE OF THE INSPECTOR GEN., *supra* note 101, at 15.
106. Gordon, *supra* note 97.
107. 52 U.S.C. § 20987.
108. John Bresnahan, *Hans von Spakovsky Withdraws FEC Nomination*, POLITICO (May 15, 2008, 5:19 PM), <http://www.politico.com/blogs/politico-now/2008/05/hans-von-spakovsky-withdraws-fec-nomination-008856>; Press Release, Brennan Ctr. for Justice, Brennan Center & Lawyers' Committee Applaud Senate for Blocking Von Spakovsky Nomination (Dec. 21, 2007), *available at* <http://www.brennancenter.org/press-release/brennan-center-lawyers-committee-applaud-senate-blocking-von-spakovsky-nomination>.
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110. *Biography of U.S. Senator Jeff Sessions of Alabama*, SENATOR JEFF SESSIONS, <http://www.sessions.senate.gov/public/index.cfm/biography> (last visited Dec. 6, 2016).
111. JOHN SLAUGHTER, NEW BATTLES OVER DIXIE 85 (1992); Michael Hirsley, *Alabama Torn by Vote-Fraud Charges*, CHI. TRIB., June 17, 1985, http://articles.chicagotribune.com/1985-06-17/news/8502080448_1_black-leaders-disenfranchise-blacks-vote-fraud-charges.
112. CHANDLER DAVIDSON, QUIET REVOLUTION IN THE SOUTH 66 (1994); Hirsley, *supra* note 111; LANI GUINIER, LIFT EVERY VOICE 188 (2003).
113. Allen Tullos, *Crackdown in the Black Belt*, 7 S. CHANGES, no.1, 1985, at 1, 4, *available at* http://beck.library.emory.edu/southernchanges/article.php?id=sc07-1_008; Hirsley, *supra* note 111.
114. Ken Bode, *Ballot Bollix*, THE NEW REPUBLIC, July 15, 1985, at 21, 23; Tullos, *supra* note 113; *The Nomination of Jefferson B. Sessions III, of Alabama, to Be U.S. District Judge for the Southern District of Alabama Before the S. Comm. on the Judiciary*, 99th Cong. 184 (1986) [hereinafter *The Nomination of Jefferson B. Sessions III*] (testimony of Lani Guinier, Assistant Counsel, NAACP Legal Defense and Education Fund, Inc.); GUINIER, *supra* note 112, at 187-88.

115. Allen Tullos, *Voting Rights Activists Acquitted*, THE NATION, Aug. 3, 1985, at 78, 79; *Civil Rights Implications of Federal Voting Fraud Prosecutions: Hearing Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 99th Cong. 13 (1985) (statement of Rep. John Conyers), available at <https://babel.hathitrust.org/cgi/pt?id=pst.000011973607;view=1up;seq=17>; GUINIER, *supra* note 112, at 188.
116. Tullos, *supra* note 115; GUINIER, *supra* note 112.
117. Around the same time that Sessions investigated the Marion Three, Frank Donaldson, U.S. Attorney for the Northern District of Alabama, indicted the “Green Five” for voter-fraud offenses. One of them, Spiver Gordon, was another notable civil rights activist. Almost all were acquitted of the offenses charged, and even though Gordon was convicted of fraud with respect to two votes, a federal appellate court overturned the ruling, finding among other things, that the prosecution had stricken potential jurors using racially discriminatory challenges. The case noted an “unidentified Justice Department spokesman in Washington who said that the prosecution of black political activists in Alabama’s Black Belt without prosecution of whites was ‘a new policy...brought on by the arrogance on the part of blacks in these counties.’” Ron Nixon, *Turning Back the Clock On Voting Rights*, THE NATION, Oct. 28, 1999, available at <https://www.thenation.com/article/turning-back-clock-voting-rights/>. See *United States v. Gordon*, 817 F.2d 1538 (11th Cir. 1987). Even Gordon’s mail fraud convictions were reversed soon after, when the Supreme Court decided that the federal mail-fraud statute applied only to deprivations of money or property through the mail. *United States v. Gordon*, 836 F.2d 1312 (11th Cir. 1988).
118. Hirsley, *supra* note 111.
119. Bode, *supra* note 114 (“However, black leaders also charge that whites systematically gather absentee votes, that some of those votes come from longtime nonresidents of the Black Belt counties, and that federal authorities have been indifferent to their repeated complaints about the practice. They offer as evidence letters sent to out-of-state former Alabamians, and appeal from the Concerned Citizens of Sumter County”); GUINIER, *supra* note 112, at 189 (“Whereas the Justice Department under President Carter had dismissed years of complaints from blacks about white use of the absentee process, under Ronald Reagan it seized the very first opportunity to investigate the absentee ballot process when called upon to do so by whites who had long held power. The FBI descended on precisely those five Black Belt counties where incumbent politicians lost support and where black newcomers were slowly gaining political ascendancy—Greene, Sumter, Perry, Lowndes, and Wilcox counties. The agency conducted no investigations where local white politicians won.”).
120. Allen Tullos, *Crackdown in the Black Belt: Not-So-Simple Justice*, 7 S. CHANGES, no.2, 1985, at 2, 10, available at http://beck.library.emory.edu/southernchanges/article.php?id=sc07-1_008; GUINIER, *supra* note 112, at 188-89.
121. Hirsley, *supra* note 111.
122. *Id.*
123. Keith Gunnar Bentele & Erin E. O’Brien, *Jim Crow 2.0?: Why States Consider and Adopt Restrictive Voter Access Policies*, 11 PERSP. ON POL. 1088 (2013), available at <http://acme.highpoint.edu/~msetzler/IntroPSC/introReads/VoterSupressionPerOnPol2014.pdf>; Wendy Weiser & Erik Opsal, *The State of Voting 2014*, BRENNAN CENTER FOR JUST. (June 17, 2014), <http://www.brennancenter.org/analysis/state-voting-2014>.
124. N.C. State Conference of NAACP v. McCrory, 831 F.3d 204 (4th Cir. 2016).
125. See Tullos, *supra* note 120, at 2; *The Nomination of Jefferson B. Sessions III*, *supra* note 114, at 182-86 (noting that there was also no federal interest as a basis for federal prosecution, because all the races in question were for local office, and contending that, based on Guinier’s views as a lawyer for the Marion Three and a prior federal DOJ prosecutor, Sessions “never had a case in the first place from the indictment to the verdict.”).

126. The Associated Press, *Rights Activists Are Acquitted of Voting Fraud*, N.Y. TIMES, July 6, 1985, <http://www.nytimes.com/1985/07/06/us/rights-activists-are-acquitted-of-voting-fraud.html>.
127. *Id.*
128. Amber Phillips, *10 Things to Know About Sen. Jeff Sessions, Donald Trump's Pick for Attorney General*, WASH. POST, Nov. 18, 2016, https://www.washingtonpost.com/news/the-fix/wp/2016/11/18/10-things-to-know-about-sen-jeff-sessions-donald-trumps-pick-for-attorney-general/?utm_term=.99cb90508463; Isaac Stanley-Becker, *In Trump's GOP, Jeff Sessions Goes from Fringe to Prime Time*, WASH. POST, July 18, 2016, https://www.washingtonpost.com/politics/in-trumps-gop-sessions-rockets-from-the-fringe-to-prime-time/2016/07/18/1fc04d14-490b-11e6-acbc-4d4870a079da_story.html?tid=a_inl&utm_term=.e5288d22bc41.
129. Charles B. Winberry, Jr. was the first to be rejected by the committee since 1938. Lena Williams, *Senate Panel Hands Reagan First Defeat on Nominee for Judgeship*, N.Y. TIMES, June 6, 1986, <http://www.nytimes.com/1986/06/06/us/senate-panel-hands-reagan-first-defeat-on-nominee-for-judgeship.html>; Four other judicial nominees were reported out 'unfavorably,' but Sessions and Winberry were the only two who failed to be reported out between 1938 and 1986. BARRY J. McMILLION, CONG. RESEARCH SERV., U.S. CIRCUIT AND DISTRICT COURT NOMINATIONS: SENATE REJECTIONS AND COMMITTEE VOTES OTHER THAN TO REPORT FAVORABLY, 1939-2013 9-10 (2014), available at <https://fas.org/sgp/crs/misc/R40470.pdf>.
130. *The Nomination of Jefferson B. Sessions III*, *supra* note 114, at 362-63 (affidavit of Morton Stavis, Co-Founder, Center for Constitutional Rights).
131. Kristina Wong, *The Racial Controversy that Cost Sen. Sessions a Judgeship*, ABC NEWS (June 2, 2009), <http://blogs.abcnews.com/politicalpunch/2009/06/you-cant-dwell-on-those-things-sen-jeff-sessions-r-alarecently-told-the-examiners-byron-york-if-i-had-be.html>.
132. Stanley-Becker, *supra* note 128.
133. Michelle Ye Hee Lee, *The Facts About the Voter Fraud Case that Sank Jeff Sessions's Bid for a Judgeship*, WASH. POST, Nov. 28, 2016, https://www.washingtonpost.com/news/fact-checker/wp/2016/11/28/the-facts-about-the-voter-fraud-case-that-sank-jeff-sessionss-bid-for-a-judgeship/?utm_term=.b831ed029c6a.
134. 107 CONG. REC. S809 (daily ed. Feb. 14, 2002).
135. 155 CONG. REC. S10130 (daily ed. Oct. 6, 2009) (statement of Sen. Sessions); 159 CONG. REC. S5745 (daily ed. July 17, 2013) (statement of Sen. Sessions).
136. Mary Troyan, *Sessions' Senate Career Shows Mixed Record on Voting Right Act Support*, USA TODAY, Nov. 24, 2016, <http://www.usatoday.com/story/news/politics/2016/11/24/sessions-senate-career-shows-mixed-record-voting-rights-act-support/94303120/>.
137. S. REP. NO. 109-295, at 2 (2006), available at <https://www.congress.gov/109/crpt/srpt295/CRPT-109srpt295.pdf>.
138. Meredith Shiner, *Can Congress Fix the Voting Rights Act?*, ROLL CALL (June 25, 2013, 2:13 PM), http://www.rollcall.com/news/can_congress_fix_the_voting_rights_act-225935-1.html.

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