

EFFECTIVE MONITORING OF POLLING PLACES

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INTRODUCTION

Candidates and political parties have long monitored polling places on Election Day, as have federal observers acting under the direction of the Department of Justice pursuant to the Voting Rights Act.¹ The problems voters faced as they went to the polls in the 2000 presidential election have spurred a dramatic increase in the monitoring of the polls by independent organizations. The most prominent private monitoring effort has been that of Voter Protection, a large consortium of civil rights organizations. The 2004 Voter Protection effort included a telephone hotline and over 25,000

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¹42 U.S.C. § 1973f (2000). The Department has identified its considerations for assignment of federal observers or other monitors at http://www.usdoj.gov/crt/voting/examine/activ_exam.htm#request. Those requesting observers should:

Provide specific and detailed information regarding the need for a federal presence, including:

- Any incidents of discrimination or interference with the right to vote in connection with upcoming or recent elections;
- Any complaints to local or state officials about the incidents and what, if anything, was done in response;
- Names and contact information for victims of discrimination or other violations of federal voting rights law;
- Names and contact information for any persons who have first-hand knowledge of the incidents;
- Names and contact information, if possible, for persons alleged to have engaged in discrimination or other violations of federal voting rights law;
- Locations where incidents have occurred; and
- As much lead time as possible is important in order to permit pre-election investigations and to make logistical and staffing arrangements.

The role of federal observers is discussed in detail in *Voting Rights Act: Section 6, 7 and 8 – The Federal Examiner and Observer Program: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. (2005) (statement of Barry H. Weinberg, former Deputy Chief and Acting Chief, Voting Section, Civil Rights Div., U.S. Dep't of Justice).

individuals, including 7000 lawyers, which covered activities of polling places across the United States.²

These monitors were, no doubt, successful in resolving large numbers of problems for individual voters on Election Day and removing barriers to voting at polling places across the United States. The monitors during the 2004 general election also gathered valuable information, with nearly 43,000 complaints and other reports, many of which involved multiple issues.³ This mass of information sheds valuable light on what goes on at polling places in the United States, and in many cases it paints a troubling picture very unlike the process contemplated by state election law. The light the reports shed on election administration illuminates election policy issues and informs potential changes in state and federal statutes and practices.

The Voter Protection information gathered during the 2004 election also describes a large number of problems with potential for federal lawsuits under existing statutes. For example, the Voter Protection site identifies over 4000 incidents of intimidation.⁴ While the reports have led to remarkably little post-election voting rights litigation, they have led to one case with potentially great, even tectonic, significance. *League of Women Voters v. Blackwell*⁵ involves the State of Ohio, which had 4166 Voter Protection incident reports.⁶ The complaint in that case, which is still pending, included a litany of horror stories of the effect of

²Lawyers' Committee for Civil Rights Under Law, *Election Protection to Provide Primary Election Day Hotline to Assist Voters in North Carolina and Indiana*, (2008), <http://www.lawyerscommittee.org/2005website/publications/press/press050208.html>.

³*The Verified Voting Foundation*, Election Incident Reporting System: Nationwide Election Incidents, Election Year 2004, <http://www.voteprotect.org/index.php?display=EIRMapNation&tab=ED04> (2004). Details of these reports, which vary considerably in quality and legal relevance, can be found at <http://www.voteprotect.org>. They are well worth detailed study.

⁴*The Verified Voting Foundation*, Election Incident Reporting System: Nationwide Election Incidents, Election Year 2004, <http://www.voteprotect.org/index.php?display=EIRMapNation&tab=ED04> (2004) (click on the dropdown menu titled "Show" and then select "Voter Intimidation").

⁵432 F. Supp. 2d 723 (N.D. Ohio 2005).

⁶*The Verified Voting Foundation*, Election Incident Reporting System: Nationwide Election Incidents, Election Year 2004, <http://www.voteprotect.org/index.php?display=EIRMapNation&tab=ED04> (2004). Ohio had the third largest number of reports. Florida had 5089 and Pennsylvania had 4835, with 1850 in Philadelphia alone.

maladministration of election on individual voters.⁷ The complaint raised claims of denial of Fourteenth Amendment rights and 42 U.S.C. § 1983 in terms of equal protection, based on the extraordinary variations in election experience based on the precincts in which individual voters lived; substantive due process; and procedural due process based on the failure to inform voters of their removal from the voter rolls or to give them an opportunity to challenge such removal.⁸

As sweeping as it was, however, the *Blackwell* complaint omitted much that the Voter Protection monitors reported. It did not, for example, include any claim of racial discrimination.⁹ A number of post-election reports raised numerous complaints of racial discrimination in the 2004 election across the United States, including in Ohio.¹⁰ The omission of any claim of racial discrimination certainly did not reflect neglect or indifference: no one would suggest that the League of Women voters or the organizations providing counsel—the Lawyers Committee for Civil Rights Under Law, the National Voting Rights Institute, People for the American Way Foundation, and the Lawyers Committee for Civil Rights of the San Francisco Bay Area—would be anything less than eager to press a claim of racial discrimination. Instead, the omission of any legal claim of racial discrimination appears to flow from the failure to capture sufficient verifiable instances of racially disparate treatment in a form that would be admissible at trial, or that would lead to admissible evidence that would establish illegal racial discrimination in the conduct of the election. While the monitoring effort helped individual voters and produced a wealth of information for policy-makers, it has thus proved less useful for enforcement of the array of anti-discrimination laws already on the books. Indeed, most of the current monitoring efforts leave a gap since the great bulk of the information collected cannot be used at trial.

⁷Complaint for Injunctive and Declaratory Relief at 56, *League of Women Voters v. Blackwell*, 432 F. Supp. 2d 723 (N.D. Ohio July 28, 2005) (No. 3:05CV7309).

⁸*Id.* at 57–60. The complaint also raised a claim under the Help America Vote Act (“HAVA”) based on the inadequacy of the state’s voter database. The HAVA claim was quickly dismissed as premature because the HAVA statewide database requirement was not yet in effect. *Blackwell*, 432 F. Supp. 2d at 731.

⁹*Blackwell* Complaint, *supra* note 7.

¹⁰*See, e.g.*, DEMOCRATIC STAFF OF THE H. JUDICIARY COMM., 109TH CONG., STATUS REPORT, PRESERVING DEMOCRACY: WHAT WENT WRONG IN OHIO (2005) (primary author John Conyers); Robert F. Kennedy Jr., *Was the 2004 Election Stolen?*, ROLLING STONE, June 15, 2006, at 46.

This is not to fault the Voter Protection effort. Election monitoring on a national scale is at best a Herculean task. Each state has its own election laws and procedures, and important variations often exist within individual states, such as the use of different voting machines in different counties. The sheer scope of the task of establishing a system for gathering information on election practices and problems all across the United States makes the sharp focus necessary for gathering courtroom-quality evidence nearly impossible to achieve.

The importance of courtroom quality evidence to support a vote denial claim has risen with what appears to be a Supreme Court trend toward disallowing, or certainly discouraging, facial challenges to election statutes in favor of as-applied challenges.¹¹ This trend and the importance of evidence of victims of the charged violation as part of a strong factual underpinning for a voting rights lawsuit was on vivid display in the Supreme Court's recent decision in *Crawford v. Marion County Election Board*, where the plaintiffs' failure to produce an actual victim of the challenged statute (someone who actually would not be able to vote because they lacked required identification) proved fatal to their challenge to Indiana's voter identification statute.¹² True, the plaintiffs also presented an "utterly incredible and unreliable" statistical analysis to support their case.¹³ Even a voting rights claim backed by a reliable expert witness report, however, would have been bolstered by the testimony of citizens who actually had felt adverse effects from that statute: an expert report alleging hundreds of thousands of victims loses force, to say the least, when the plaintiffs cannot produce any individual victims. A careful litigator should act on the assumption that significant victim testimony is essential to such a successful case.

¹¹ See, e.g., *Wash. State Grange v. Wash. State Republican Party*, 128 S. Ct. 1184 (2008). Compare *McConnell v. FEC*, 540 U.S. 93, 207 (2003) with *Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 127 S. Ct. 2652, 2659 (2007).

¹² 128 S. Ct. 1610, 1622 (2008); see also *Common Cause v. Billups*, 504 F. Supp. 2d 1333, 1374 (N.D. Ga. 2007) (dismissing challenge to identification requirement due to lack of standing where no actual victims identified); *Perdue v. Lake*, 282 Ga. 348, 647 S.E.2d 6 (2007) (dismissing voter identification challenge where no actual victims identified). The plaintiff's case in *Billups*, like that in *Crawford*, also suffered from weak plaintiffs' expert witness reports. Indeed, the reports were rejected under *Daubert v. Merrill Dow Pharm., Inc.*, 509 U.S. 579, 597 (1993). *Common Cause v. Billups*, No., 4:05-CV-0201-HLM (N.D. Ga. Sep. 6, 2007). Note – as I recall, this refers to the unpublished opinion on the Daubert issue.

¹³ *Crawford*, 128 S. Ct. at 1622.

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Past monitoring efforts have been important. Fixing and averting problems for voters is valuable work. Raising policy issues to help craft future legislation is important, and no one who has seen election machinery at work can fail to see the opportunity for additional legislation. It is frustrating, however, to have so much information of conduct in the polls, so many serious problems, and so many indications of violations of existing federal laws, yet still be left without useable information to vindicate the rights of voters and prevent future abuses in subsequent elections.

Election monitoring certainly is not a panacea for all voting rights claims. Much can go wrong far from the polls and before Election Day. Election monitoring, however, has in the past and can in the future to produce the sort of facts that can be used successfully at trial to vindicate the rights of voters under vitally important federal statutes. To create such a program, it is necessary to re-orient the monitoring considerably.

I. ELEMENTS OF A LITIGATION-ORIENTED MONITORING PROGRAM

A program that can better capture information concerning problems at the polls has seven elements:

1. Capture names and contact information of victims and witnesses.
2. Consider the key state and federal laws.
3. Recognize that there are limits on the amount of information monitors can gather effectively.
4. Select sites for monitoring in light of the specific local candidates and issues, likely violations and demographic circumstances.
5. Provide effective training and forms.
6. Arrange for communication, advice and supervision on Election Day.
7. Provide effective retrieval of the information.

Such a program can, and indeed should, be part of or work in concert with a national or other broader election monitoring program. A local focus does sacrifice some information gathering that could be useful for policy purposes, and it is likely to require more resources for training, monitoring, and communication. A regional or national monitoring program may therefore wish to identify in advance a limited number of jurisdictions where Voting Rights Act or other violations and thus lawsuits are most likely.

A. Obtaining Evidence: Names and Contact Information of Witnesses and Victims

The election process is highly regulated by law, both state and federal, and fairly littered with documents. Citizens complete forms when they register to vote. Various notices are sent to voters (or not), and there are registration books, signature pages, absentee ballot applications and forms, more forms for provisional ballots and to update registration information, lists and tabulations of registered voters for each precinct, ballots, paper trails (sometimes), records of who voted and who did not, records of the purchase of voting equipment, records of the assignment of voting machines to particular precincts, records of the repair of voting machines, receipts of various sorts, and many, many records of the results of the election. These documents provide evidence of racial bloc voting, disparate assignment of voting equipment, absentee voting fraud, and other practices that occur away from the polls, but other important evidence can be captured only in the polling place, or most efficiently in the polls. Much of that evidence does not exist on paper and can only be captured by persons who are present and observe some or all of the activity.

Eyewitnesses, including the victims themselves, can testify to what they have seen, heard, and felt. The first priority of the monitor should be to obtain the name and contact information of the victim of the improper conduct. The monitor may need to leave the polling place in order to obtain this information, as the state law is likely to prohibit conversations with the voters in the polls.¹⁴ The victim is, of course, likely to give the most compelling testimony, and capturing the victim as a witness is the core function of an election monitor where a possibility of litigation exists. Secondly, the monitor should seek to identify as many additional witnesses as possible.

¹⁴See, e.g., ALA. CODE § 17-8-7(d) (2007) (prohibiting disturbing voters); *id.* § 17-9-1 (requiring county sheriffs to “preserve good order”); OHIO REV. CODE ANN. § 3599.24 (LexisNexis Supp. 2008) (“Interference with conduct of election. (A) No person shall . . . (3) . . . prevent an election official from performing the official’s duties . . . (5) . . . hinder, delay, or interfere with the conduct of the registration or election.”); *id.* § 3501.35 (“(A) During an election and the counting of the ballots, no person shall do any of the following: (1) Loiter, congregate, or engage in any kind of election campaigning within the area between the polling place and the small flags of the United States placed on the thoroughfares and walkways leading to the polling place, and if the line of electors waiting to vote extends beyond those small flags, within ten feet of any elector in that line; (2) In any manner hinder or delay an elector in reaching or leaving the place fixed for casting the elector’s ballot.”).

A monitor should, of course, identify as many relevant external circumstances as possible: the who, what, where, when, and how. What is relevant depends on the specific statute involved.

Reports of federal observers helped undergird the Justice Department's first voter suppression lawsuit, *United States v. Conecuh County*,¹⁵ as well as subsequent cases.¹⁶ The *Conecuh County* observer reports include crude terms of racial abuse and systematic disrespect of minority voters that can be astonishing twenty-five years later.¹⁷ More recently, in *United States v. Springfield*,¹⁸ the Department of Justice provided compelling testimony of the impact of violations of the minority language provisions of the Voting Rights Act on Latino voters, including declarations of forty victims, here summarized in the dry and aggressively neutral language of the Department:

Ramon Sornoza, an LEP¹⁹ voter, attempted to cast a ballot in November 2004 at the Springfield Wesleyan Church (Precinct 3H), but was ultimately turned away without being permitted to vote. He had registered to vote as soon as he became a citizen that year, but the English-speaking poll worker told him that he was not on the list and that he could not vote. He was not offered a provisional ballot. He did not see or hear any poll worker who could speak Spanish and who could help explain what he needed to do

Jaime Dominguez Almena, who has trouble with more complicated English, spent three hours searching for a polling place in November 2004 because poll workers could not correctly determine where he was supposed to vote, and bounced him from polling place to polling place. He was not offered assistance in Spanish

¹⁵ Civil Action No. 83-1201-H (S.D. Ala. June 12, 1984).

¹⁶ *Voting Rights Act: Section 6, 7 and 8 – The Federal Examiner and Observer Program: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 47–48 (2005) (statement of Barry H. Weinberg, former Deputy Chief and Acting Chief, Voting Section, Civil Rights Div., U.S. Dep't of Justice).

¹⁷ *Id.* at 11, app. C.

¹⁸ Civil Action No. 06-30123-MAP (D. Mass. 2006).

¹⁹ Limited English Proficient, i.e., unable to participate effectively in English-only elections.

Delia Benitez asked for bilingual assistance at the Mason Square Fire Station in Ward 4, but an English-speaking poll worker . . . pointed to the presidential candidates on the sample ballot and told her, “here and here,” but then left before explaining more. Ms. Benitez had wanted to vote the entire ballot, but because she did not understand, she did not complete it. Ms. Benitez was discouraged by this experience, which she described as rushed, uncomfortable, and unpleasant. As a result, she did not vote in the November 2005 election.

Maria Melendez, an LEP voter who had a seventh grade education in Puerto Rico, went to vote for the first time in the 2004 presidential election. There was no one to assist her at the Independence House polling place, and she filled out her ballot without knowing which candidate she was marking. The experience was so discouraging that she said, “I won’t ever vote again.”²⁰

Other eyewitness testimony documented the hostile treatment of minority voters at the polls:

Maria Idali Torres witnessed a group of Hispanic voters in November 2004 speaking to each other in Spanish at Our Lady of Hope polling place (Wards 2B/2C). The voters were visibly confused, but rather than getting assistance in Spanish from poll workers (which was not available), a white poll worker told them in a loud and hostile voice, “We are in America.” In the late 1990s, Carlos Gonzalez was translating for an elderly Hispanic man, when an older white female poll worker overheard them speaking Spanish and said, in a rude and degrading way to the voter, “You can’t speak English!” Jose Molina, a bilingual poll worker in Ward 1, witnessed a police officer stationed at the polling place and the lead worker say that “we are in America and you should speak English” in front of the Spanish-speaking workers. The police officer also became

²⁰Memorandum of Points and Authorities in Support of United States’ Motion for Temporary Restraining Order, or in the Alternative, A Preliminary Injunction and Request for Oral Argument, 11–13, Civil Action No. 06–30123–MAP (D. Mass. 2006).

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“furious” with Hispanic voters who spoiled their ballot and requested a new one.

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Carlos Gonzalez witnessed a Spanish-speaking voter become frustrated when a police officer prevented him from receiving help from Mr. Gonzalez. The LEP voter shouted in Spanish, “I’m leaving and I’m never voting again.”²¹

In addition to testimony of the victims themselves, the Springfield brief included some testimony from a monitor from a well-organized private monitoring effort sponsored by “MassVote”:²²

Christian Densmore, a monitor stationed at the Brookings School polling site in Ward 3, described her short time there to be “shocking” because a high number of voters, who were mostly Hispanic, left without voting because of language communication problems, the failure to have identification, or the inability of poll workers to find the voters’ names on the poll list. One Hispanic voter was sent away only to return to the same polling place, because the poll workers had misdirected him.²³

Such testimony can be compelling. A trier of fact, and indeed the defendants themselves, certainly should and almost invariably will conclude that voters should not have to put up with such treatment and that Congress intended to prevent it.

Again, identification of witnesses can be difficult, and as with any monitoring program, it is helpful to work with the local officials. Officials may be willing and able (or required) to provide a list of poll workers at each polling place prior to the election,²⁴ and in some instances they may

²¹ *Id.* at 11–13, 17.

²² *Id.*

²³ *Id.* at 14–15.

²⁴ For example, in Alabama, polling place workers are selected fifteen to twenty days prior to the election. ALA. CODE § 17-8-1 (2007). A list of all of the poll workers is published in a newspaper of general circulation. *Id.* § 17-8-2. It may be possible, and certainly can be useful, to obtain a list of the poll workers from the immediate preceding election.

have an advance list of poll watchers that they will be willing to share.²⁵ Providing lists of poll workers to the monitors in advance of the election can help on several levels, from correct spelling and pronunciation of names to identification of last-minute replacement poll workers who may not have received training in election procedures. These lists will also provide the names of potential witnesses (and perpetrators) and themselves may be valuable exhibits.²⁶

B. Key State and Federal Laws

The second preliminary step is to consider which violations of state and federal statutes are likely to be apparent at the polls on Election Day.

1. State Laws

The actual mechanics for conducting elections are largely determined by state law. State election codes have highly detailed provision for the conduct of elections, including the control by the poll workers of the activity within the polling place.²⁷ There is tremendous variation among and even within the states. Each state, for example, bans electioneering within a certain distance from the polls. That distance varies from 600 feet in Louisiana²⁸ to ten feet in Pennsylvania.²⁹ California makes it a felony for

²⁵In some states, such as Colorado, the names of watchers must be submitted to the county clerk or other chief election official, who then transmits the names to the election judges at various polling places. COLO. REV. STAT. ANN. § 31-10-102(11) (West 2002). In Connecticut, the names of “checkers” are announced forty-eight hours in advance of the election. CONN. GEN. STAT. ANN. §§ 9-235, 9-436a (West 2002). In Louisiana, the list must be filed ten days in advance of the election. LA. REV. STAT. ANN. § 18:435(B) (2007).

²⁶As a practical matter, prior consultation with election officials also is helpful in that each state appears to empower one or more polling place officials to eject any person from the polling place. Advise the head election official of your plans to monitor. Assure that office that the monitors will bring matters to attention of the election officials so that they can have an opportunity to correct them. Ask how the officials would like matters to be reported to them. Go over the procedures for handling specific situations so that a common understanding of the appropriate procedures exists. Local election officials may agree to alert polling place officials of the presence of monitors and urge the poll workers to cooperate. They also may emphasize particular statutes or other issues of interest to the monitoring group during the training of poll workers.

²⁷See, e.g., Title 17 of the Alabama Code.

²⁸LA. REV. STAT. ANN. § 18:1300.6 (2007).

²⁹PA. STAT. ANN. § 3060(c),(d) (West 2007). New Hampshire also has a ten foot limit on electioneering, but that distance can be extended by poll officials, N.H. REV. STAT. ANN. § 659:43

any “person in possession of a firearm or any uniformed peace officer, private guard, or security personnel or any person who is wearing a uniform . . . in the immediate vicinity of . . . a polling place without written authorization of the appropriate city or county elections official,”³⁰ while state law requires that “at least one” uniformed police officer be stationed at every polling place in New York City.³¹

Compliance with state laws *per se* may be of interest primarily to supporters of a particular candidate. As a rough and general rule, violations of state law will overturn the results of an election where they are numerous and severe enough to change the outcome of the election.³² Less severe problems are for law enforcement or local election officials to address.

State law also may provide broader prohibition of practices than federal law. California, for example, makes it illegal to “[p]hotograph, videotape, or otherwise record a voter entering or exiting a polling place,”³³ and specifically prohibits “mass, indiscriminate” challenges to voters and challenges “without probable cause.”³⁴

Monitors should always be aware of key election laws of the state in which they are working. State laws are important in themselves, as governing the activities both of the monitors and of state and local officials. Departures from state law by poll workers or others in the polling place can

(LexisNexis 2007), or by town bylaw, N.H. REV. STAT. ANN. §§ 31:41-c (LexisNexis 2008), 47:17 (LexisNexis 2001 & Supp. 2008). In Vermont, the distance varies: the ban extends to “the walks and driveways leading to a building in which a polling place is located.” VT. STAT. ANN. tit. 17, §§ 1972, 2508 (2007). Connecticut has a seventy-five foot limit, but it makes an exception for bake sales. CONN. GEN. STAT. ANN. § 9-236(a) (West 2002).

³⁰CAL. ELEC. CODE §18544 (West 2003). Exceptions exist that allow such persons to enter the polls and vote, and for personnel who are regularly on duty at the site for days when there is no election.

³¹N.Y. ELEC. LAW § 8-104(6) (Consul 1986).

³²BARRY H. WEINBERG, THE RESOLUTION OF ELECTION DISPUTES 17 (International Foundation for Election Systems ed. 2006). This source offers a thorough practical discussion of challenges to the outcome of elections.

³³CAL. ELEC. CODE §18541(a)(3) (West 2003).

³⁴*Id.* § 18541. Such an improper challenge is a misdemeanor, while a conspiracy to challenge voters is a felony. *Id.* Michigan makes it illegal for a religious leader to excommunicate a voter or otherwise express “religious disapproval” of a voter’s choices. MICH. COMP. LAWS SERV. § 168.931(1)(e) (LexisNexis 2004). This law would appear to violate the First Amendment.

be addressed under state law and also may help establish a violation of federal law.³⁵

2. Federal Laws

Congress has passed a number of statutes touching on the conduct of elections, and key statutes, discussed briefly as violations, are likely to be manifest inside the polls on Election Day itself. Chief among federal election laws is the Voting Rights Act of 1965.³⁶ The Voting Rights Act applies to “all actions to make a vote effective in any primary, special or general election.”³⁷

a. Voting Rights Act

The Voting Rights Act marshals a series of provisions to protect the voting rights of all citizens, a number of which have particular application to Election Day activity at the polls.

i. Section 2

Section 2 provides:

No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or [membership in a language minority group].³⁸

“Language minority group” is a defined term that includes Hispanic, Asian American, Native American, and Alaskan Native citizens.³⁹ The

³⁵For example, adherence to state law is a “factor usually considered important by the decision maker.” *Arlington Heights v. Metro. Hous. Corp.*, 429 U.S. 252, 267 (1977).

³⁶The Voting Rights Act, 42 U.S.C. §§ 1973–1973aa-6 (2000).

³⁷*Id.* § 19731(c)(1).

³⁸*Id.* § 1973(a).

³⁹*Id.* § 19731(c)(2). There is, of course, overlap between racial and language minority groups, and the term “race” is imprecise at best. *Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 610 n.4 (1987). The United States, in bringing a lawsuit under Section 2 on behalf of Yemeni voters, framed the complaint as follows:

essence of a section 2 claim is that the practice in question particularly burdens a group of minority voters: “Section 2 protects the right of minority voters to be free from election practices, procedures or methods, that deny them the same opportunity to participate in the political process as other citizens enjoy.”⁴⁰ In monitoring an election with an eye to establishing a section 2 violation, it is important to remember that it is not enough to show that, for example, voters illegally were required to show identification, that their polls opened late, that their voting machine broke down, or that they had to wait in long lines in order to vote—although each of those practices may establish a violation of some other provision of law. To establish discrimination in violation of section 2, it is necessary to show that minorities suffered these burdens and white citizens did not, or at least that white citizens did not suffer to the same extent.⁴¹ The monitors therefore should take care to record not only the instances in which a particular burden was placed on minority voters, but also the absence of such a burden on white voters.⁴²

Successful challenges to racial discrimination that can be documented by monitors at the polls on Election Day have included, but are by no means limited to, cases involving subjecting minority voters to racial slurs, rude treatment, and intimidation;⁴³ race-based challenges to voters’

In that election, more than 40 dark-skinned Arab American citizens were required to take an oath as a condition to voting, a requirement that was not imposed on white citizens. Because the Attorney General find that this race-based prerequisite violates federal laws designed to enforce the Fourteenth and Fifteenth Amendments

United States v. City of Hamtramck, Civil Action No. 00-73541 (E.D. Mich. Aug. 4, 2000). See also John Tanner, Voting Rights of Arab American Citizens, Arab American News, August 22, 2008, available at <http://www.arabamericannews.com/news/index.php?mod=article&cat=USA&article=1406>.

⁴⁰S. REP. NO. 97-417, at 206 (1982), as reprinted in 1982 U.S.C.C.A.N. 177.

⁴¹Section 2 protects all voters, including white voters who are discriminated against because they are white. This includes protection from discrimination at the polls on Election Day. United States v. Brown, 494 F. Supp. 2d 440, 443–44 (S.D. Miss. 2007). This article uses the rhetorical construct of burdens on minority votes, as opposed to white voters, as a matter of convenience, and because that is by far the more common situation.

⁴²It therefore may be necessary in order to establish discrimination with respect to certain practices, such as long lines and delays at minority polling places, to monitor non-minority polling places as well to document the absence of comparable lines at those sites.

⁴³United States v. Berks County, Pennsylvania, 277 F. Supp. 2d 570 (E.D. Pa. 2003); United States v. Conecuh County, No. 83-1201-H (S.D. Ala. June 12, 1984); Consent Agreement, United States v. City of Philadelphia, No. 2:06cv4592, 2006 U.S. Dist. LEXIS 85557 (E.D. Pa. Nov. 7,

eligibility;⁴⁴ racial discrimination in hiring poll officials;⁴⁵ disparate demand for ID;⁴⁶ disparate refusal of provisional ballots;⁴⁷ coercing voters to select certain candidates;⁴⁸ blocking entrance to the polls;⁴⁹ failure to translate information into Spanish;⁵⁰ and refusal to allow illiterate, disabled and non-English speaking voters to receive necessary assistance in voting or to choose the person whom they prefer to assist them.⁵¹

The impact of section 2 litigation on the treatment of voters has been dramatic. Consider the case of Alabama, where the Department of Justice regularly assigned large numbers of federal observers to monitor the polls to protect the rights of African American voters. After the initial statewide order in *Harris v. Graddick* requiring appointment of minority poll workers in Alabama,⁵² the number of federal observers in off-year elections (non-presidential years in which the governor, legislature, and most county

2006); Consent Agreement, *United States v. City of Boston*, 497 F. Supp. 2d 263 (D. Mass. Oct. 18, 2005) (No. 05-11598 WGY). Copies of the complaints and relief in the more recent unreported Department of Justice cases can be found at <http://www.usdoj.gov/crt/voting/litigation/caselist.htm>.

⁴⁴Consent Decree at 3, *United States v. Long County, Ga.*, Case No. CV206-040 (S.D. Ga. Feb. 10, 2006).

⁴⁵*Harris v. Siegelman*, 695 F. Supp. 517, 529 (M.D. Ala. 1988); *Conecuh County*, No. 83-1201-H. The actual hiring of poll officials, of course, takes place well in advance of Election Day. The racial composition of the poll worker contingent can be documented on Election Day, however, as can the discriminatory actions of those poll officials and the fitness for service at the polls. (*Conecuh County* also included a claim of employment discrimination under Title VII of the Civil Rights Act of 1964.)

⁴⁶*United States v. City of Hamtramck*, *supra* note 39, at 4–5.

⁴⁷Consent Agreement, *United States v. City of Philadelphia*, *supra* note 43, at 9; Consent Agreement, *United States v. City of Boston*, *supra* note 43, at ¶ 20(e).

⁴⁸Consent Agreement, *United States v. City of Philadelphia*, *supra* note 43, at 9; Consent Agreement, *United States v. City of Boston*, *supra* note 43, at ¶ 20(e).

⁴⁹*United States v. City of Philadelphia*, *supra* note 43, at 9.

⁵⁰*United States v. Berks County, Pa.*, 277 F. Supp. 2d 570, 581 (E.D. Pa. 2003); Complaint at ¶ 7(e), *United States v. Osceola County, Fla.*, Civil Action No. 6:02-CV-738-ORL-22JGG (M.D. Fla. July 22, 2002).

⁵¹Consent Agreement, *United States v. City of Philadelphia*, *supra* note 43, at 9; *United States v. City of Boston*, *supra* note 43, at ¶ 20(b); *United States v. Osceola County, Fla.*, *supra* note 50, at ¶ 8.

⁵²*Harris v. Graddick*, 593 F. Supp. 128, 138 (M.D. Ala. 1984).

offices are selected) plummeted from 973 in 1982 to 149 in 1986, sixty-one in 1990, ninety-five in 1994, and twenty-nine in 1998.⁵³

ii. Sections 203 and 4(f)(4)

Section 203 requires election officials in certain jurisdictions to provide in one or more minority languages all information that they provide in English.⁵⁴ The jurisdictions and the languages they must provide are determined by a formula set forth in the Act.⁵⁵ The Director of the Census announced the most recent determinations identifying covered jurisdictions on July 26, 2002.⁵⁶ Section 4(f)(4) of the Act has a separate coverage formula, but identical substantive requirements: all materials and information that are available in English must also be available in the minority language.⁵⁷

The requirements of these two sections are straightforward. On Election Day, there must be a sufficient number of bilingual poll workers to meet the needs on minority language voters and all signs and notices must be posted in the minority language(s).⁵⁸ Native American and Alaskan Native languages often are historically unwritten, and in those jurisdictions, all information must be available in audio form.⁵⁹ In essence, these provisions bar any English language literacy test for voters.

Sections 203 and 4(f)(4) have proved a fruitful area for litigation to protect minority voters in recent years,⁶⁰ and the lawsuits have had a major practical impact:

⁵³*Voting Rights Act: Section 6 and 8 – The Federal Examiner and Observer Program: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 47–48 (2005) (statement of Barry H. Weinberg, former Deputy Chief and Acting Chief, Voting Section, Civil Rights Div., U.S. Dep’t of Justice).

⁵⁴Voting Rights Act § 203, 42 U.S.C. §§ 1973aa-1a (2000).

⁵⁵*Id.* § 1973aa-1a(b)(2).

⁵⁶Voting Rights Act Amendments of 1992, Determinations Under Section 203, 67 Fed. Reg. 48,871 (July 26, 2002), available at http://www.usdoj.gov/crt/voting/sec_203/203_notice.pdf.

⁵⁷42 U.S.C. § 1973b(f)(4) (2000); see also 28 C.F.R. pt. 55 (1999) (listing jurisdictions covered under § 4(f)(4)). Note that the section 203 determinations have been superseded. Voting Rights Act Amendments of 1992, Determinations Under Section 203, 67 Fed. Reg. 48,871 (July 26, 2002), available at http://www.usdoj.gov/crt/voting/sec_203/203_notice.pdf.

⁵⁸42 U.S.C. § 1973aa-1a(c).

⁵⁹*Id.*

⁶⁰The Voting Section web site provides copies of complaints and consent decrees of other relief at <http://www.usdoj.gov/crt/voting/litigation/caselist.htm>.

[Justice Department lawsuits] on behalf of language minority voters have made a remarkable difference in the accessibility of the election process to those voters. As a result of [a] lawsuit, Boston now employs five times more bilingual poll workers than before. As a result of [a] lawsuit, San Diego added over 1,000 bilingual poll workers, and Hispanic voter registration increased by over 20 percent between our settlement in July 2004 and the November 2004 general election. There was a similar increase among Filipino voters, and Vietnamese voter registration rose 37 percent. [Justice Department lawsuits] also spur voluntary compliance: after the San Diego lawsuit, Los Angeles County added over 2,200 bilingual poll workers, an increase of over 62 percent. In many cases, violations of Section 203 are accompanied by such overt discrimination by poll workers that Section 2 claims could have been brought as well. However, [the Justice Department] has been able to obtain complete and comprehensive relief through our litigation and remedies under Section 203 without the added expense and delay of a Section 2 claim.⁶¹

These provisions have remarkable potential where they apply,⁶² and section 203 is well suited to election monitoring. It should be possible,

⁶¹*Voter Suppression: Hearing Before the Subcommittee on the Constitution, Civil Rights, and Civil Liberties of the House Committee on the Judiciary*, 110th Cong. 12 (2008) (statement of Asheesh Agarwal, Deputy Assistant Att’y Gen., Civil Rights Div., U.S. Dep’t of Justice).

⁶²Justice Department suits have had a significant impact on election procedures and results:

The Division’s minority language enforcement efforts likewise have made a tremendous difference in enhancing minority representation in the politically elected ranks. A Section 203 lawsuit in Passaic, New Jersey, was so successful for Hispanic voters that a Section 2 challenge to the at-large election system was subsequently withdrawn. A Memorandum of Agreement in Harris County, Texas, helped double Vietnamese voter turnout, and the first Vietnamese candidate in history was elected to the Texas legislature—defeating the incumbent chair of the appropriations committee by 16 votes out of over 40,000 cast.

Fanni Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Reauthorization and Amendments Act of 2006 (Part II): Hearing on H.R. 9 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 109th Cong. 13 (2006) (statement of Rena J. Comisac, Principal Deputy Assistant Att’y Gen., Civil Rights Div., U.S. Dep’t of Justice). The latter election was the

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through cooperation with local officials, to create or obtain a list of all materials that will be available to voters in the polls, and to determine whether all have been translated and whether they actually are out of their containers and available to the voters. Failure to post instructions and other signs in minority languages (or to provide accurate translations of posted materials) or to have bilingual personnel present at the polls (who actually can translate election information) can easily be determined and documented by monitors.

iii. Section 4(e)

The Voting Rights Act provides additional protections for certain language minority voters. Section 4(e) provides:

No person who demonstrates that he has successfully completed the sixth primary grade in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English, shall be denied the right to vote in any Federal, State, or local election because of his inability to read, write, understand, or interpret any matter in the English language, except that in States in which State law provides that a different level of education is presumptive of literacy, he shall demonstrate that he has successfully completed an equivalent level of education in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English.⁶³

This provision assures Spanish language election information to people educated in Puerto Rico. While there are geographic limits to the requirements of sections 203 and 4(f)(4), section 4(e) protects Puerto Rican

first Democratic gain of a seat in the Texas House since 1972. Janet Elliot, *State Certifies Democrat Vo's House Victory*, HOUSTON CHRON., Nov. 19, 2004, at B5.

⁶³42 U.S.C. § 1973b(e)(2) (2000). The provision was necessary “to secure the rights under the fourteenth amendment of persons educated in American-flag schools in which the predominant classroom language was other than English.” *Id.* § 1973b(e)(1).

voters in all parts of the United States.⁶⁴ No minimum threshold of Puerto Rican voters in a particular city or county exists that must be met to trigger the protections, unlike that which exists under section 203 and 4(f)(4).⁶⁵

iv. Section 208

Additional provisions secure rights of all citizens. Section 208 of the Voting Rights Act provides: “Any voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by a person of the voter’s choice, other than the voter’s employer or agent of that employer or officer or agent of the voter’s union.”⁶⁶

The protections of section 208 apply to any other person who cannot access, read, and understand the English language ballot and otherwise navigate the voting process without assistance. Although section 203 limits the definition of language minorities to specific groups, no such limitation exists in section 208.⁶⁷ Persons who rely on other languages also are protected.⁶⁸

“Any person” means just that. A voter can choose, for example, a candidate, a poll watcher or someone who already has assisted multiple voters, and poll officials cannot observe or monitor the assistance.⁶⁹ Any treatment that is burdensome for voters who need assistance is likely to run afoul of section 2 as well as section 208.⁷⁰

⁶⁴ Compare 42 U.S.C. § 1973b(e)(2) (2000) with 42 U.S.C. §§ 1973aa-1a(b)(2), 1973b(f)(4) (2000).

⁶⁵ The 2000 Census figures for Puerto Ricans in particular jurisdictions can be found, along with other helpful census data, at <http://censtats.census.gov/pub/Profiles.shtml>.

⁶⁶ 42 U.S.C. § 1973aa-6 (2000).

⁶⁷ *Id.* § 1973aa-1a(e).

⁶⁸ See Consent Order at 1–2, *United States v. Miami-Dade County, Fla.*, No. 02-21698 (S.D. Fla. June 17, 2002) (protection for Haitian-Creole voters), available at http://www.usdoj.gov/crt/voting/sec_2/miamidade_cd.htm.

⁶⁹ See Letter from William Bradford Reynolds, Assistant Att’y Gen., Civil Rights Div., U.S. Dep’t of Justice, to John L. Hatcher, Bolivar County, Miss., Bd. of Election Comm’rs (Apr. 16, 1984) (on file with author) (objecting under section 5 of the Voting Rights Act to a limitation on assistance to blind, disabled, and illiterate voters and to a provision that assistance to voters be observed by poll officials when not observed by federal observers); Letter from Drew S. Days, Assistant Att’y Gen., Civil Rights Div., U.S. Dep’t of Justice, to A.F. Summer, Att’y Gen. of Miss. (July 6, 1979) (on file with author) (interposing a section 5 objection to legislation that denies voters the right to choose as their assistor a person who had assisted five voters previously).

⁷⁰ See *Harris v. Siegelman*, 695 F. Supp. 517, 526 (M.D. Ala. 1988).

As described below, the Help America Vote Act provides that each polling place must have at least one voting device that is accessible to persons with disabilities and on which they can vote a secret and independent ballot.⁷¹ The machine also must include accessible minority language versions of the ballot in section 203 jurisdictions.⁷² Persons with disabilities and those who cannot read the English ballot are not, however, required to use the accessible voting machine. Voters may not trust the accessible voting equipment or may find the assistance of a person preferable for any of a number of reasons.⁷³

b. National Voter Registration Act (NVRA)

The NVRA has a series of provisions related to voter registration, an act that in most states occurs entirely outside the polls, well before Election Day: section 5 provides for all but automatic voter registration at the time of applying for a driver's license,⁷⁴ section 6 for voter registration by mail,⁷⁵ and section 7 for registration at state offices including at minimum, those providing public assistance and services to persons with disabilities.⁷⁶ The statute also has detailed requirements for timely processing of voter registration applications, notifying voters before they are removed from the poll list, and requiring removal of the names of persons ineligible to vote, such as the deceased.⁷⁷

While violations of these provisions occur, if at all, outside the polls, the effects of violations can be identified inside the polls. Because the NVRA has broad provisions for getting citizens registered to vote in the normal course of their lives, each voter whose name does not appear on a poll list is a potential victim of one or more NVRA violations. If the would-be voter had obtained or renewed a driver's license or visited a designated state agency during the preceding four years, the citizen should be on the poll list

⁷¹ 42 U.S.C. § 15481(a)(3) (Supp. IV 2000).

⁷² *Id.* § 15481(a)(4).

⁷³ Beyond distrust of the voting devices, voters may be frustrated where poll workers are unable to operate the accessible machines. See Meg Heckman, *Blind Voters: We Were Slighted*, CONCORD MONITOR, Jan. 15, 2008, available at <http://www.concordmonitor.com/apps/pbcs.dll/article?AID=/20080115/NEWS01/801150363>.

⁷⁴ 42 U.S.C. § 1973gg-3 (2000).

⁷⁵ *Id.* § 1973gg-4.

⁷⁶ *Id.* § 1973gg-5.

⁷⁷ *Id.* § 1973gg-6.

unless she had affirmatively rejected the opportunity to vote, as well as all other opportunities to register, or the agency failed to process the application properly. Either situation could violate the NVRA .

In November 2006, the Justice Department dispatched federal observers to Cibola County, New Mexico.⁷⁸ The Department subsequently filed and successfully resolved a lawsuit against the county for multiple NVRA violations.⁷⁹

c. Help America Vote Act (HAVA)

HAVA, unlike the statutes discussed above, applies only to those elections in which some federal office is on the ballot.⁸⁰ It has several provisions that can be monitored on Election Day.

i. Accessible Voting Systems

Section 301(a)(3) of HAVA provides that each voting system used in an election for Federal office shall:

(A) be accessible for individuals with disabilities, including nonvisual accessibility for the blind and visually impaired, in a manner that provides the same opportunity for access and participation (including privacy and independence) as for other voters;

(B) satisfy the requirement of subparagraph (C) through the use of at least one direct recording electronic voting system or other voting system equipped for individuals with disabilities at each polling place.⁸¹

⁷⁸Terry Frieden, *Justice Department Dispatches Election Monitors*, CNN, Nov. 6, 2006, available at <http://www.cnn.com/2006/POLITICS/11/06/election.observers/>.

⁷⁹Amended Complaint at 11–13, *United States v. Cibola County*, Civil Action No. 93-1134-LH/LFG (D.N.M. Jan. 31, 2007); Second Order Extending and Modifying Stipulation and Order Originally Entered Apr. 21, 1994 at 3, *United States v. Cibola County*, No. CV-93-1134-LH/LFG (D.N.M. Mar. 19, 2007).

⁸⁰42 U.S.C. § 15301 (Supp. V 2005). The NVRA creates voter registration requirements for federal elections only; however, the task of maintaining separate state and federal voter registration lists has proved too daunting, even for Mississippi. *See* chapter 508, Acts of the 1964 Mississippi Legislature. Evidence of a failure in the registration and voter list maintenance systems in any election is likely to be helpful in establishing an NVRA violation.

⁸¹42 U.S.C. § 15481(a)(3) (Supp. IV 2004).

Thus, each polling place in the United States must have at least one voting machine or device that provides for an accessible, private ballot for voters with disabilities. There appears to be no voting machine that is accessible to all voters with disabilities, and the requirement appears to have been read widely as requiring simply an audio device for vision-impaired persons that also is adjustable as to height for persons in wheelchairs.⁸² In any event, the accessible machine must be (a) in the polling place; (b) actually operational; and (c) available to the voters. The Department of Justice has filed suit where polling place workers “were unable or unwilling to attach the audio function or informed blind and disabled voters that the polling place did not have a disability machine. In addition, poll workers discouraged and pressured blind and disabled voters against using the disability accessible machine.”⁸³ The rights of voters with disabilities also may be violated where the use of the accessible machines is limited to persons with disabilities only, and other voters are barred from using the machine.⁸⁴

In jurisdictions subject to the requirements of section 203 of the Voting Rights Act, the audio ballot must be available in the minority language as well as in English.⁸⁵

The polling place itself also should be accessible. The Department of Justice has issued guidance that:

Section 301(a)(3) means what it says—all polling places in the United States which are used for elections for federal office must have at least one voting system which is accessible to persons with disabilities for use in elections for federal office on and after January 1, 2006. As we have expressed, logically, persons with disabilities must be able

⁸² See, e.g., NOEL H. RUNYAN, IMPROVING ACCESS TO VOTING: A REPORT ON THE TECHNOLOGY FOR ACCESSIBLE VOTING SYSTEMS 2–3 (Voter Action and Demos 2007) (noting problems for voters with such disabilities as severe motor impairments, cognitive impairments, hearing loss, and other impairments). The article also is critical of current audio technology.

⁸³ *United States v. City of Philadelphia*, No. 2:06cv4592 (E.D. Pa. Apr. 26, 2007).

⁸⁴ John Tanner, *Equal Voting Rights for Citizens with Disabilities*, ACDD ADVOCATE, Fall 2008 at 21–22, available at <http://www.contentedits.com/img.asp?t=2&id=23492>.

⁸⁵ 42 U.S.C. § 15481(a)(4) (2000). *United States v. San Diego County* includes a claim that the county failed “to make available in Spanish and Tagalog an audible version of the ballot for the March 2, 2004 federal primary election such as was made available in English for voters unable to read the ballot.” Complaint at 4, *United States v. San Diego County*, No. 04CV1273IEG, (S.D. Cal. June 23, 2004).

to gain access to the polling place in order to be able to use the accessible voting system. Having an accessible voting system does little good if voters cannot enter the polling place to use it. Hence, not only must the voting system be accessible to persons with disabilities but also the polling place where the voting system is located.

The only exception to the physical accessibility requirement for polling places might arise if a polling place uses a portable voting system that is accessible to persons with disabilities and can be taken out to a car at the curbside, but only if such system is fully accessible and gives the voter the same opportunity to vote privately and independently as other voters.⁸⁶

The Department of Justice also has published detailed guidance on what constitutes an accessible polling place.⁸⁷

The common sense approach of the von Spakovsky letter is precisely the sort of proposition that in litigation can be bolstered effectively by the testimony of victims of the violation: the prospect of a paraplegic citizen pulling himself into a polling place, as Mr. Lane had to pull himself into the courthouse, is compelling evidence with the potential to shock the conscience.⁸⁸

ii. Provisional ballots

Issues regarding voter registration constituted over seventy percent of all issues on the 2004 general election monitoring effort by the voting rights consortium.⁸⁹ Many of the reports involved citizens who went to the polls and found that their names were not on the list of registered voters. HAVA

⁸⁶Letter from Hans von Spakovsky, Counsel to the Assistant Att’y Gen. for Civil Rights, U.S. Dep’t of Justice, to John W. Eads, Assistant Sec’y of State for Elections, State of Miss. (Mar. 4, 2005), available at <http://www.usdoj.gov/crt/voting/hava/msdisability.htm>.

⁸⁷U.S. Department of Justice, ADA Checklist for Polling Places, available at <http://www.ada.gov/votingck.htm>.

⁸⁸Tennessee v. Lane, 541 U.S. 509, 514–15 (2004). Compare the result in this case with the result in *Crawford v. Marion County Election Bd.*, where there was a lack of victim testimony. 128 S. Ct. 1610, 1637 (2008).

⁸⁹Nationwide Election Incidents
<http://www.voteprotect.org/index.php?display=EIRMapNation&tab=ED04>.

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provides that if a citizen declares that she is registered to vote in that precinct, she has the right to cast a provisional ballot:

(a) Provisional voting requirements

If an individual declares that such individual is a registered voter in the jurisdiction in which the individual desires to vote and that the individual is eligible to vote in an election for Federal office, but the name of the individual does not appear on the official list of eligible voters for the polling place or an election official asserts that the individual is not eligible to vote, such individual shall be permitted to cast a provisional ballot as follows:

(1) An election official at the polling place shall notify the individual that the individual may cast a provisional ballot in that election.

(2) The individual shall be permitted to cast a provisional ballot at that polling place upon the execution of a written affirmation by the individual before an election official at the polling place stating that the individual is—

(A) a registered voter in the jurisdiction in which the individual desires to vote; and

(B) eligible to vote in that election.

(3) An election official at the polling place shall transmit the ballot cast by the individual or the voter information contained in the written affirmation executed by the individual under paragraph (2) to an appropriate State or local election official for prompt verification under paragraph (4).

(4) If the appropriate State or local election official to whom the ballot or voter information is transmitted under paragraph (3) determines that the individual is eligible under State law to vote, the individual's provisional ballot shall be counted as a vote in that election in accordance with State law.

(5)(A) At the time that an individual casts a provisional ballot, the appropriate State or local election official shall

give the individual written information that states that any individual who casts a provisional ballot will be able to ascertain under the system established under subparagraph (B) whether the vote was counted, and, if the vote was not counted, the reason that the vote was not counted.

(B) The appropriate State or local election official shall establish a free access system (such as a toll-free telephone number or an Internet website) that any individual who casts a provisional ballot may access to discover whether the vote of that individual was counted, and, if the vote was not counted, the reason that the vote was not counted.⁹⁰

Note the steps involved: the election official must alert the voter to the opportunity to cast a provisional ballot, the voter must complete a form, and the voter must be given a paper letting her know that she can find out whether her vote was counted (and, if not, why not) through a cost-free system. Each of these steps is mandatory and each can be observed to take place (or not) in the polling place.

Where a court orders the polls to stay open beyond normal voting hours, those who cast ballots during the extended period must vote by provisional ballot.⁹¹ Again, compliance is easily observable within the polling place. If voting hours are extended at multiple polling places, monitors at the various affected sites will be able to document any disparities in practice.

HAVA's provisional ballot requirement is especially tricky. The statute leaves up to the states the circumstances under which provisional ballots will be counted, if at all; HAVA requires the offer of a provisional ballot even when it is certain that the ballot will not be counted.⁹² A provisional ballot that would be counted in one state may not be counted in another state.⁹³ Therefore, it is essential that the monitors know the rules of their

⁹⁰ 42 U.S.C. § 15482(a) (2000).

⁹¹ *Id.* § 15483(b).

⁹² *Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565, 576–78 (6th Cir. 2004); *Florida Democratic Party v. Hood*, 342 F. Supp. 2d 1073, 1079–81 (N.D. Fla. 2004); Letter from Bradley J. Schlozman, Acting Assistant Att'y General, Civil Rights Div., Dep't of Justice, to Janice K. Brewer, Ariz. Sec'y of State (Sept. 1, 2005), available at http://www.usdoj.gov/crt/voting/hava/az_id.pdf.

⁹³ ELECTIONLINE.ORG, THE ELECTION REFORM INFORMATION PROJECT, SOLUTION OR PROBLEM? PROVISIONAL BALLOTS IN 2004 (2005), <http://www.pewcenteronthestates.org/uploadedFiles/ERIP10Apr05.pdf>. Confusion over

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state. In some states, voters need only cast their ballots in the appropriate city, county, or state in order to have at least part of their ballots counted.

iii. Voter Information

HAVA requires that certain information must be posted inside each polling place, including:

- (A) a sample version of the ballot that will be used for that election;
- (B) information regarding the date of the election and the hours during which polling places will be open;
- (C) instructions on how to vote, including how to cast a vote and how to cast a provisional ballot;
- (D) instructions for mail-in registrants and first-time voters under section 15483(b);
- (E) general information on voting rights under applicable Federal and State laws, including information on the right of an individual to cast a provisional ballot and instructions on how to contact the appropriate officials if these rights are alleged to have been violated; and
- (F) general information on Federal and State laws regarding prohibitions on acts of fraud and misrepresentation.⁹⁴

This requirement has been enforced in several lawsuits.⁹⁵ Monitors can ascertain whether the signs are posted and whether they are posted in any minority language.

iv. Voter Identification

Congress also imposed a voter identification requirement in HAVA for those who registered to vote for the first time by mail, rather than in person

provisional ballots is a continuing problem. See ZACHARY S. MARKOVITS & DOUGLAS M. SPENCER, *LINES AT POLLING PLACES: DATA COLLECTION IN THE 2008 CALIFORNIA PRIMARY* 10 (2008), <http://www.pewcenteronthestates.org/uploadedFiles/Berkeley%20study%20Report%20-%20Final.pdf>.

⁹⁴ 42 U.S.C. § 15482(b) (2000).

⁹⁵ See, e.g., *United States v. Cochise County*, No. CV-06-304-TUC-FRZ (D. Az. October 12, 2006).

before a county clerk, deputy registrar or the like.⁹⁶ Again, HAVA leaves the selection of acceptable identification to each state, and marked variation exists among the various states.⁹⁷ As a practical matter, the voter registration list should clearly identify the first-time voters who must present identification; otherwise, the poll official would be unable to enforce the provision. This information should be readily available to all monitors who are inside the polls, even for a relatively short period. Monitors who are present for longer periods will be able to document any racial or other disparity in the application of the federal or any state identification requirement, or the imposition by poll workers of an identification requirement not imposed under state law.

One lawsuit has been brought under the HAVA voter identification requirement. In *United States v. Cibola County*, the Department of Justice obtained relief under HAVA in an omnibus complaint against a clearly dysfunctional election office. The Department also obtained relief under the NVRA and sections 2 and 203 of the Voting Rights Act.⁹⁸

As indicated above, failure to apply identification requirements on a race-neutral basis would constitute a violation of section 2.

d. Section 1983 of the Civil Rights Act of 1871

Section 1983 provides, in essence, a civil remedy to any federal constitutional or statutory violation committed by a public official including, significantly, acts in which the public official was himself violating the law.⁹⁹ Thus, the statute is a potential tool for citizens to use when they are not covered by a federal statute, such as when they are being deprived of their rights by polling place officials on the basis of some factor other than race or membership in a language minority group.¹⁰⁰

⁹⁶ 42 U.S.C. § 15483(b) (2000).

⁹⁷ See ELECTIONLINE.ORG, ELECTION REFORM INFORMATION PROJECT, VOTER ID LAWS (2008), <http://www.pewcenteronthestates.org/uploadedFiles/voterID.laws.6.08.pdf>. Note the range from the restrictive practices of Indiana litigated in *Crawford* to the expansive, even nose-thumbing list in California, where prison release papers are acceptable identification.

⁹⁸ No. 93-1134-LH/LFG, at 1 (D.N.M. March 19, 2007).

⁹⁹ *Monroe v. Pape*, 365 U.S. 167, 185 (1961).

¹⁰⁰ The statute is often used in other voting-related cases. See, e.g., *League of Women Voters v. Blackwell*, 432 F. Supp. 2d 723, 726 (N.D. Ohio 2005) (detailing a comprehensive challenge to Ohio election dysfunction); *Doe v. Rowe*, 156 F. Supp. 2d 35, 59 (D. Me. 2001) (detailing a denial of right to vote under guardianship based on mental illness). It has also long been used to protect discrimination on the basis of race.

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III. ORGANIZING A MONITORING EFFORT

A. *Gathering Information Inside or Outside the Polls*1. *Monitoring While Inside the Polls*

State law regulates who besides the poll workers can be present inside the polls on Election Day. There is a provision in each state for poll watchers appointed by political parties, candidates, or other groups, although their number, qualifications, and role varies considerably. The monitoring group should check state law qualifications early in the process. The most restrictive state law appears to be that of Oklahoma.¹⁰¹ There, poll watchers must arrive at the polling place no later than 6:30 a.m. to watch the voting device before the polls open, leave while the polls are open, and return by 7 p.m. to watch the voting device after the polls close.¹⁰² During this period, the watcher cannot give any information about the voting device count to anyone until the Inspector posts a copy of the Totals Printout on the polling place door.¹⁰³

Illinois is much more open, and permits established political parties; candidates; organizations with investigation or prosecution of election fraud among their purposes; state nonpartisan civic organizations within the county; organized proponents or opponents of ballot propositions; representatives of the local election authority; the State Board of Elections; and law enforcement agencies including but not limited to a U.S. Attorney, State's attorney, the Attorney General, and police departments to enter and remain in the polling place in the performance of their official election duties.¹⁰⁴ Understandably, the statute also has provisions for controlling a crowded polling place.¹⁰⁵

¹⁰¹ OKLA. ADMIN. CODE § 230:35-5-134 (a)-(d) (2007).

¹⁰² *Id.* The Oklahoma statute offers little opportunity to monitor anything beyond the machine count, the availability in the site of requisite election materials (such as provisional ballot materials), and the posting of required signs and notices.

¹⁰³ *Id.*

¹⁰⁴ 10 ILL. COMP. STAT. ANN. § 5/17-23 (West Supp. 2008).

¹⁰⁵ *Id.*

California affirmatively invites monitors into the polls, and to that end, each county must have an Election Observer Plan.¹⁰⁶ The plans contain guidance for monitors,¹⁰⁷ and Los Angeles County even provides a form on which monitors can document problems and report back to their organizations.¹⁰⁸ In New York City, the Asian American Legal Defense and Education Fund (AALDEF) regularly monitors conditions inside polling places (and issues reports on its findings).¹⁰⁹

There is potential for the perception of bias on the part of monitors, and many people who are willing to spend hours at the polls will have a dearly-loved dog in the fight. Others will monitor due to an interest in improvement of the election process. In the latter case, it is preferable, where good-government or academic sponsorship is not permitted, for the monitors to be associated with as neutral a candidate or organization as possible. Members of a group could possibly serve as poll watchers on behalf of an unopposed candidate, or a candidate who is an overwhelming favorite, or to watch on behalf of a lower-profile initiative or referendum.

Where monitors are located inside the polls, they should remember that they can be ejected by the poll workers and that any such ejection can be enforced by local law enforcement.¹¹⁰ The monitors should act accordingly and restrict their activities to observing and recording. Any conversation with a voter has the potential of appearing to involve electioneering or disruption of the work of the poll workers, and any communication regarding a voter should be made to the head poll worker rather than to the

¹⁰⁶The California Secretary of State provides an Election Observer Template for counties to help them develop their Election Observer Plans. The templates can be found at <http://www.sos.ca.gov/elections/eop.htm>.

¹⁰⁷*See, e.g.*, County of Lake Registrar of Voters Office, Election Observer Panel Plan, available at http://www.sos.ca.gov/elections/eop_june/lake.pdf; Santa Clara County Registrar of Voters, Election Observer Panel Plan, available at http://www.sos.ca.gov/elections/eop_june/santa_clara.pdf.

¹⁰⁸County of Los Angeles Registrar-Recorder/County Clerk, Re: June 3rd Statewide Direct Primary, available at http://www.lavote.net/VOTER/PDFS/06032008/Election_Observer_Panel_Plan.pdf.

¹⁰⁹AALDEF Access to Democracy 2004: Local Compliance with the Voting Rights Act and Help America Vote Act (HAVA) in NY, NJ, MA, RI, MI, IL, PA, VA, August 2005, p. 25, available at http://www.aaldef.org/articles/2005-08-18_189_AsianAmericanA.pdf.

¹¹⁰*See, e.g.*, OHIO REV. CODE ANN. § 3501.33 (LexisNexis Supp. 2008) (“The sheriff, all constables, police officers, and other officers of the peace shall immediately obey and aid in the enforcement of any lawful order made by the precinct election official”).

voter.¹¹¹ The monitor should leave the polls to make or receive telephone calls; indeed, state law may prohibit the use of wireless communication devices, tapes recorders, and cameras in or near the polls.¹¹²

2. Monitoring from Outside the Polls

Where the monitoring group is organized by a tax-exempt organization, it may be unwilling to take advantage of opportunities to serve as partisan poll watchers. Monitoring from outside the polls through second-hand reports is a poor substitute for actually observing activity inside the polls because the monitor cannot be a direct witness to the events at issue, and thus, can only testify as to very limited facts.¹¹³ Monitoring outside the polls provides two opportunities for the monitor to obtain helpful information. To the extent possible given statutory limits on speaking to voters near the polls, the monitor may offer help to voters as they approach the polls and thereby obtain information as to a likely problem (such as lack of English skills, uncertainty as to registration status, etc.). The monitor may, in addition to offering help or advice to the voter, look for the voter upon his exit from the polls and ascertain how the issue was handled inside the polls. If a problem exists, the monitor can make a record of it and obtain contact information from the voter. Monitors also may attempt to interview voters—especially those who appear agitated—as the voters leave the polling place. During this interview they also may obtain information about their experience and contact information. Contact information is essential where only the voter is able to testify. Where a voter is unwilling to provide contact information, the voter may be able to identify a significant witness inside the polls (a poll worker, a poll watcher, or another voter) whom it is, in theory, possible to track down later. These possibilities, however, are likely to be slender reeds on which to rely, and it is by far better to be inside the polls.

Even when state law bars monitors from the polls, it may be possible for a monitor to enter the polls for a short period of time and gather first-hand information. If the monitor is registered to vote in that precinct, she or he can enter the polls to vote and can make note of signage and other readily

¹¹¹ See, e.g., TEX. ELEC. CODE ANN. § 33.058 (Vernon 2003).

¹¹² *Id.* § 61.013 (Vernon Supp. 2008).

¹¹³ For example, testimony that the monitor witnessed a voter leave the polls in tears tends to corroborate a claim that a poll worker or poll watcher was rude and abusive toward the voter. Some voter statements may be excited utterances.

observable matters. State law also may provide opportunities to enter the polls for short periods, as to review the voter list, so long as the privilege is not abused.¹¹⁴ If present in the polls to vote or for other purposes during periods of heavy voting, the monitor may witness instances of voters needing assistance, voters whose names are not on the poll list, or other issues. An individual voter may be able to test the language skills of poll workers by asking a question in Spanish or another language.

Where voters will need assistance in marking their ballot, persons providing that assistance can enter the polls with the voter and accompany them through the balloting process. In some circumstances, as where the poll workers lack language skills to serve voters, or where voters who require assistance have reason to distrust the poll workers, monitors who have language skills or enjoy the trust of voters may assist multiple voters, and they have an opportunity while doing so to witness a variety of aspects of the election process.

B. Practical Limits of Monitors

The monitoring group will likely have a particular focus, such as on the rights of African American voters or on voters with disabilities, that motivates the monitoring effort. It is important for the monitors to maintain that focus because there are limits on what an individual monitor can capture and record. Polling places can be hectic, and there can be much to tax the poll workers. Elections are extraordinarily complicated events that occur only two or three times a year, if that, and it is hard for poll workers to develop and maintain the skill that comes from frequent practice at any task. The poll workers are ordinary, civic-minded residents, who may or may not be well trained in the rapidly changing regulations and equipment of elections. They have as many cares, opinions, and quirks as the rest of us, and the voters with whom they interact may have a limited or completely inaccurate understanding of the election process, in addition to cares, concerns, and quirks of their own. The opportunities for friction and the universe of potential problems are enormous. It is easy for poll monitors to become distracted by departures from standard procedures that in the end do no harm, at least in terms of the purposes for which they are monitoring. If individuals in the polling place try to keep track of

¹¹⁴See, e.g., OHIO REV. CODE. ANN § 3501.23 (LexisNexis 2005).

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everything that goes on, or everything that goes wrong, they will find it difficult to get complete details on anything that goes wrong.

An effective litigation-oriented election monitoring program will focus on a limited number of issues, and it will seek to obtain high quality information about those issues at the expense of overlooking other issues. That means examining the circumstances of a particular election in a particular city or county. The particular strengths and weaknesses of the officials running the election are important and may be determined from past experience, records of complaints on the VoteProtect.org web site and similar sources, and from pre-election conversations with those election officials.

Most important is the nature of the contests on the ballots. Contests with the highest voter turnout put the most stress on the election machinery. They are the elections that ideally should run most smoothly but which in practice seem to operate more like the air traffic control system when there are thunderstorms over Atlanta and Chicago. Volume, however, is far from the only source of stress on the election process.

Again, data on the assignment of federal observers is informative in identifying high-stress elections. In Mississippi, as in Kentucky, New Jersey, and Virginia, state and local elections are held on odd years. Again, data on the assignment of federal observer are instructive, as observers can only be assigned to protect voters against racial discrimination in the polls.¹¹⁵ Consider the number of federal observers assigned to Mississippi in the years of major state and local elections as compared to presidential years:

<u>Year</u>	<u>Observers</u>
1975	1,252
1976	132
1979	1,212
1980	274
1983	1,282
1984	439

¹¹⁵ *Fanni Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Reauthorization and Amendments Act of 2006 (Part II): Hearing on H.R. 9 Before the Subcommittee on the Constitution of the House Committee on the Judiciary*, 109th Cong. 13 (2006). Prior to the 2006 amendments, the appointment of a federal examiner was necessary to the assignment of federal observers. 42 U.S.C. § 1973d (2000).

1987 490
1988 139¹¹⁶

Few observers were assigned for presidential elections, but large numbers were present for the state elections.¹¹⁷ The state and local elections were those which, in the nature of things, involved the principal contests for local office, and thus the principal local contests in which black candidates opposed white candidates.¹¹⁸ The local contests in these years, moreover, tended to involve “breakthrough” elections, or the first black challenges to white control of particular positions.

The sources of tension in an election will help inform the issues on which monitors may most productively focus. Other factors include the nature of the group on which the monitoring is conducted, such as a racial or language minority, and the particular local problems faced by those voters. The conduct of poll watchers or challengers will be a source of major concern in some areas, and less so in others. Compliance with section 208 will be important in areas where significant numbers of voters face language, literacy, or physical barriers in voting. The relative restrictiveness of a state’s provisional ballot policy can affect the importance of the HAVA mandate that provisional ballots be offered.

¹¹⁶*Voting Rights Act: Sections 6 and 8 – The Federal Examiner and Observer Program Before the Subcomm. On the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 153 (2005) (Appendix to the statement of Barry H. Weinberg). The 1984 election involved a congressional contest in the Delta area in a district with a black voting age majority. *Jordan v. Winter*, 604 F. Supp. 807, 812–15 (N.D. Miss.) (ordering state legislature to redistrict Delta area without dividing cohesive black population), *aff’d mem. sub nom.* Mississippi Republican Executive Comm. v. Brooks, 469 U.S. 1002 (1984).

¹¹⁷The 2008 presidential election was *sui generis*.

¹¹⁸

The DOJ focus during the pre-election surveys is to find circumstances that are likely to lead to actions that will disadvantage voters in the polls on Election Day. To allow black voters to vote without interference in the South, the Voting Section focuses on counties where black candidates are facing white candidates. Those are the circumstances where experience has shown that polling place workers are more apt to take actions that deprive African American of their right to vote. Moreover, the inclination of polling place workers to take discriminatory action against African American voters is more likely when the black candidates have a real chance of beating white opponents.

(For concerns about other kinds of problems at the polls, the pre-election survey would focus on the facts and antipathies relating to those problems.) See *infra* note 125 at 153.

Other sources of tension come readily to mind. There is, of course, significant tension over the immigration issue at the present time, and the Justice Department's recent election monitoring has included a number of locations where the immigration issue has been heated.¹¹⁹ In any event, simply too much is going on in an election for a monitor to track everything effectively. To gather facts with the precision and completeness necessary for litigation, the monitoring group should select a relative handful of issues and situations on which the monitors should focus. In this regard, the single category of "unequal treatment" or violation of section 2 of the Voting Rights Act actually encompasses a wide range of behaviors. Each of the types of violations—subjecting minority voters to racial slurs, rude treatment, and intimidation, race-based challenges to voters' eligibility, disparate demand for ID and the like—is a separate issue.

The monitoring group should determine the issues that are most relevant to the election, the problems the group it is seeking to protect or observe is most likely to face, the statutes that address those issues, and the facts essential to those statutes. For a voter turned away without identification, for example, the essential fact is contact information. Progressively less essential facts include whether the voter has an ID but forgot it, information on the various circumstances that impede the voters' access to or possession of identification, and the voter's race. The latter facts can be obtained if the essential fact – the voter's contact information, is obtained. For a racially discriminatory practice, the important facts are (1) description of the practice imposed on the minority voter(s), (2) the absence of such a practice

¹¹⁹See, e.g., AP, *Justice to Monitor Elections in 2 Immigration Hot Spots*, HOUSTON CHRONICLE, May 9, 2008, available at <http://www.chron.com/disp/story.mpl/ap/tx/5768585.html>. There is no central public source of jurisdictions monitored by the Justice Department. For an interesting sequence see *Justice Department to Monitor Elections in Illinois And Massachusetts*, Apr. 16, 2007, http://www.usdoj.gov/opa/pr/2007/April/07_crt_250.html (citing monitoring in the Village of Carpentersville, Kane County, Ill.); Alex Kotlowitz, *Our Town*, NEW YORK TIMES MAGAZINE, Aug. 5, 2007, available at <http://www.nytimes.com/2007/08/05/magazine/05Immigration-t.html> (on tension over immigration in Carpentersville); Memorandum of Agreement at 13, *United States v. Kane County*, CIVIL ACTION NO. 07 C 5451 (N.D. Ill. Dec. 13, 2007) ("Prior to each election, in addition to any required State or County training, the County shall train all . . . election personnel present at the polls regarding . . . the requirement that election judges, poll officials, and interpreters be respectful and courteous to all voters regardless of race, ethnicity, color, or language abilities and to avoid inappropriate comments.").

respecting white voters, and (3) contact information for as many victims as possible.¹²⁰

C. Selecting the Polling Places to Monitor

Election law violations are unique in that we know the exact day on which they will occur. The hard part is determining where they will occur—not in which state, but in which room among the thousands in which voting will occur in that state. The monitoring group will be of finite size, and the group will need to select which polling places to monitor. The group's numbers can increase through coalition and cooperation with other monitoring groups, with each gathering facts of interest for the other. There may be, however, a trade-off between the larger numbers of a coalition of groups and the quality of the information gathered. The more issues the monitors must address, the less well they will address each individual issue, and it is a short step back to the policy-oriented monitoring already in place.

The priority sites for monitoring are those most likely to have problems. A particularly heated contest may affect only a part of a city or county, and those precincts could be priority sites for monitoring. Sources of ethnic conflict within a community may include the presence of minority versus white contests, tension over issues such as immigration, and shifting demographics such as minority population expansion into white (or other minority) neighborhoods.

A number of data sources are useful in selecting polling places to monitor. Census data is a starting point, but the census figures are now badly outdated.¹²¹ Census data, however, may still be useful in rural jurisdictions where little population movement has occurred. The census data also may be useful as a point of comparison with more recent data to identify areas where racial shifts have occurred. These areas may now be areas of racial tension. Voter registration data is sometimes available by

¹²⁰Where the discriminatory treatment is in the nature of racial slurs and abusive race-based language, proof of the absence of slurs against white voters is not essential. *See Shaw v. Reno*, 509 U.S. 630, 659–60 (1993).

¹²¹Matching census data with precinct boundaries will be beyond the reach of most citizen groups. State authorities, political parties, or others interested in redistricting may have precinct-level data by race which they are willing to share, at least as to the precinct boundaries that existed at the time of the census.

race¹²² or minority surname.¹²³ There also may be other sources of current data by race, such as school enrollment. Less formal sources of information include realtors, letter carriers, and others familiar with the population movement in a particular area. Comparison of information from these sources with census data will show areas into which the minority population has moved and will illuminate possible sources of tension on Election Day.

The local concerns will also inform the time or times to monitor particular polling places. Monitors can determine compliance with section 203 very quickly by checking the signs and notices posted inside the polls to document whether all are posted bilingually, whether all of the translations are reasonably accurate, and by determining how many, if any, poll workers are fluent in the minority language(s). Where the concern is that poll officials may stuff the ballot box, effective monitoring begins when the doors to the polls are first unlocked and ends when the election results and all materials have been safely deposited with the appropriate officials after the polls have closed.

Some sites will tend to have the heaviest turnout during particular times of day, such as before and after work. Voting may be heavy at polling places in elementary schools when parents are dropping off or picking up their children. Some sites will see a surge when a factory shift ends, or when there is a particular program at a polling place in a senior center. Awareness of, and responsiveness to, the timing of turnout in various precincts can allow monitors to gather effective information at multiple sites during the day, and to take a break at times when turnout can be predicted to slacken.

Where the concern is that minority voters face longer lines than white voters, effective monitoring will include a large number of representative sites, some heavily minority, and others heavily white. Voter flow can be

¹²²For example, Alabama, <http://www.sos.state.al.us/downloads/election/vr/ALVR-2008.xls>; Florida, http://election.dos.state.fl.us/voterreg/pdf/2007/PPP2008_CountyRace.pdf; Georgia, http://sos.georgia.gov/elections/voter_registration/documentdirect%20ssvrz195.pdf; North Carolina, <http://www.sboe.state.nc.us/content.aspx?id=41>; South Carolina, http://www.scvotes.org/statistics/by_counties_and_precincts.

¹²³The Texas Secretary of State provides each County Clerk with the number of Spanish surnamed voters in county precincts where bilingual poll workers are mandated under State law (five percent of all registered voters have Spanish surnames) or where the number of Spanish surnamed registered voters reaches the number (100) used in numerous Department of Justice consent agreements. *See, e.g.*, Op. Tex. Sec'y State No. GS-11 (2004), available at <http://www.sos.state.tx.us/elections/laws/advisory2004-11.shtml>.

documented by counting the number of people who have voted at each site as of set times (such as every hour on the hour), and by timing individual voters from their arrival at the site (or in line) through their exit from the polls. Such documentation requires considerable time and attention, but it can replace current supposition and impression with hard data.

Where the concern is that minority voters will be subject to challenge or other mistreatment inside the polling place, the impulse may be to simply monitor the most heavily minority locations, though that may be inefficient. The person running the polling place is likely to be a minority member, especially where the poll official is drawn from the precinct, and thus, they are armed by the law with the authority to ignore improper challenges and remove the challengers from the polls.¹²⁴ Additional disincentives to mistreatment of minority voters are likely to come from the other voters in and near the polls. Precincts to which minorities have been moving more recently may be less likely to be staffed with minority officials. Minority voters in these precincts are likely to be highly vulnerable to challenges or other abuse, so those sites should be the priority for monitoring, especially if poll workers hold resentment of the racial-ethnic changes in their neighborhood.

D. Effective Retrieval of Information

1. Training and Forms

As noted above, in the context of monitoring for minority language compliance, it is possible to create a checklist enumerating the various materials that are required to be in the polls and available to voters. The monitors can then quickly check to determine whether each is present and reasonably available to voters, together with space for any necessary explanation (such as, “Chinese materials remained shrink-wrapped in a box behind the seats of the poll workers’ table”). Monitoring to document improper manipulation of electronic voting machines would call for a checklist of things for which the monitor would have to look that would tend to show such manipulation. It is possible, indeed best, to tailor a form to capture the specific problems that are the focus of the monitoring effort, rather than use a standard form.

¹²⁴Examination of the list of election officials by local citizens before elections can help identify sites where the individual serving at the polls may not be willing to exercise this power and where there is a need for changes in personnel.

Each monitor should have a form on which to record her observations. Activity in the polls can be unpredictable, and in addition to space for recording observations regarding the principal areas of concern, the form should have abundant space on which to record other observations.

It is also important that the monitors understand their role and its limitations, if only so that they will not give the poll officials an excuse to eject them. As discussed in Part III.A.1 (Monitoring Inside the Polls), the access of monitors to the polls lies largely in the hands of the poll workers, and it clearly is wise to avoid antagonizing them. Ways to avoid antagonism include staying out of the way, deferring to the poll officials, avoiding interaction with voters while inside the polls, and directing all complaints and suggestions to the coordinating attorney rather than the poll workers, at least in the first instance. Frequent communication with the monitor coordinators will facilitate adherence to these standards, and it will also keep the monitors from being distracted by colorful incidents and disputes that are beyond and irrelevant to the focus of the monitoring exercise.

2. Communication and Guidance on Election Day

The monitors should maintain regular contact with an attorney or other person well versed in the election law of that state and the federal election law. This has been the practice of the Department of Justice in monitoring for *Conecuh County* and other cases:

During Election Day an observer supervisor makes repeated visits to the polling places where federal observers are stationed, and remains in constant telephone contact with the DOJ attorney who is in the county. This gives the DOJ attorney in the county a constant flow of information throughout the day about activities that transpire inside the polls. When the federal observers inform the DOJ attorney of actions of polling place officials that the attorney concludes are interfering with the voting rights of African Americans, the DOJ attorney gives the facts to the local official in charge of the election, which allows him or her to stop the discriminatory activity. Local officials also can

use this information after the election to take steps to prevent the incidents from happening again.¹²⁵

Regular contact also offers an opportunity for an attorney to guide the observations of monitors when a particular situation arises. When a monitor calls to report that a voter has been turned away without a provisional ballot, the attorney can help guide the subsequent interview of the victim.

3. After the Election

The monitors should go over the forms at the end of the day and complete any incomplete thoughts, clarify any illegible handwriting, and generally refine their reports to accord accurately and completely with their observations. When the monitor forms have been completed, they must be collected, preferably by having the monitors return to a central location as soon as they leave the polls. To the extent possible, attorneys familiar with election law should go over each report, preferably in company with the monitor(s) who completed the report, having them clarify the report in accord with evidentiary standards (fleshing out conclusory statements, for example) while the incidents are fresh in the mind of the monitor. It is more effective to have fewer well-documented reports than a large number of reports that will not be admissible.

CONCLUSION

The 2000 election brought into public view a host of problems in the administration of elections, including many very serious problems that occur at the polls on Election Day. Many such problems involve violations of existing federal law as well as state administrative regulations. It is increasingly clear that existing laws against Election Day discrimination and similar barriers to participation that manifest themselves at the polls can be enforced most effectively through the presentation of solid evidence in court, including victim and other eyewitness testimony. It is possible for ordinary citizens to collect such evidence, and to effect change in their communities. With 25,000 Voter Protection monitors, countless poll watchers for the Democratic and Republican Parties, and many other poll monitors for other candidates and organizations, there is immense

¹²⁵Barry H. Weinberg & Lyn Utrecht, *Problems in America's Polling Places: How They Can Be Stopped*, 11 TEMP. POL. & CIV. RTS. L. REV. 401, 418–19 (2002).

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opportunity for gathering such information. Greater rigor in the collection of specific information regarding election practices can also provide a more solid foundation for policy discussion and needed improvements in the conduct of elections in the United States.