

SYMPOSIUM: WHERE'S MY VOTE? LESSONS LEARNED FROM WASHINGTON STATE'S GUBERNATORIAL ELECTION

KEYNOTE SPEECH

VOTING RIGHTS AT A CROSSROADS: RETURN TO THE PAST OR AN OPPORTUNITY FOR THE FUTURE?

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Good afternoon. I want to open by conveying my thanks to Professor John Mitchell for that introduction. I want to extend my compliments to Dean Kellye Testy and to the members of the Law Review for conceiving and sponsoring this Symposium. Greetings to all assembled guests, it is indeed a pleasure to be here today. But before I start my address, I wanted to say how very lucky the students of Seattle University are to have Joaquin Avila, one of our nation's foremost voting rights and civil rights legal minds as a professor. It is a special privilege to have the opportunity to learn from one of our nation's keenest civil rights practitioners.

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I. INTRODUCTION

As we all know, leadership is the key to motivating people and institutions to accomplish great things. In June 1963, President John F. Kennedy called 250 leaders of the Bar to the East Wing of the White House from which the Lawyers' Committee was formed to provide leadership to the legal profession by marshalling the resources of the private bar, particularly those of the nation's most prominent law firms, to fully confront racial injustice and promote racial justice. Over the years the Lawyers' Committee has advanced President Kennedy's vision by mobilizing pro bono law firm services for the poor and excluded in our nation and by promoting diversity and maintaining a global perspective on those challenges.

Being that this year is the 40th Anniversary of the Voting Rights Act of 1965, the focus of my presentation this afternoon is on "Voting Rights at a Crossroad: Return to the Past or an Opportunity for the Future?" As students who are on the career path to becoming practitioners of law, and as attorneys and law professors, no role is more important to us than enhancing our democracy. In today's speech I will address the topic of voting rights from a national perspective highlighting the most pressing challenges. In addressing this theme, there are four areas of voting rights that I will cover:

- Election Protection
- Election Reform
- Reauthorization of the Expiring Provisions of the Voting Rights Act
- Felon Re-enfranchisement

I have chosen this theme because democracy, the fundamental underpinning of our society, is endangered by racial discrimination, hostility to voters, especially those perceived as newcomers, lack of access due to disenfranchising laws and governmentally-imposed obstacles, election administration incompetence, an erosion of confidence in voting machines and vote counting, indifference, and disaffection. Here in Washington State, you have just witnessed a dizzy, convoluted vote counting process because of a close election that left many voters without confidence in the electoral process. All of these delimiting factors meant that in 2004, despite a record turnout of some 110 million voters, nevertheless, there were still 75 million eligible non-voters, including over 30 million registered non-voters, who did not participate in the electoral process. This abysmally low rate of voter participation is the worst in any Western industrialized democracy. Other nations have placed a higher priority on ensuring voter participation in elections by declaring a na-

tionwide holiday to avoid conflicts with work, school schedules, or other demands and/or by having multiple days of voting. Again, the United States differs from other Western democracies in lacking a uniform federal system of election administration allowing for uniform procedures for all citizens. A large part of the disenfranchisement of non-voters lies with our decentralized election system which allows states to set their own election laws, and with many of these states delegating significant discretion in election administration to local municipalities. Nor does the open political affiliation of election administrators, including Secretaries of State or Directors of elections, who serve as Chairs of political campaigns, imbue any confidence in the voting public that there will be independent and impartial administration of elections and in the counting of votes. And too often, the brunt of the worst in election administration is borne by racial minorities whose votes are systematically denied through registration and voting errors.

This state of affairs is especially shocking when one considers the hope that existed with the passage of the 1965 Voting Rights Act. Faced with literacy tests, grandfather clauses, poll taxes, and outright violence and intimidation, the right to political participation was effectively precluded for millions of Americans prior to the enactment of this historic legislation. On August 6, 1965, when President Lyndon Baines Johnson signed the Voting Rights Act of 1965, it was not an event that happened out of the goodness of the heart of Congress. Instead, the road to the Voting Rights Act was one marked by tremendous sacrifices, as popularized in James Weldon Johnson's renowned poem "Life Every Voice and Sign"—also known as the "Negro National Anthem"—which notes "the blood of the slaughtered." In March, I joined thousands who traveled to Selma, Mississippi to participate in the 40th Anniversary of Bloody Sunday, when 600 civil rights marchers seeking equal voting rights for African Americans were beaten senselessly by state troopers. Indeed, as I rode with Rev. Jesse Jackson from Montgomery, Alabama to Selma for the commemorative march, the entire drive was infused with a sense of surrealism as Mississippi state troopers in 2005 provided us a police car escort and Rev. Jackson would remark from time to time, "Right over there is the spot where they killed [X or Y]." These sacrifices are still fresh in our national consciousness. In Jackson, Mississippi, still standing as a memorial, is the home of Medgar Evers, the Director of the Mississippi NAACP who was assassinated in June 1963, as he exited his car following a voter registration drive. The brutal murders of Chaney, Swerner, and Goodman still resonate as a bitter chord in the fight for voting rights.

All of these heroic actions place a distinctive and unique imprimatur upon the Voting Rights Act of 1965 and the continuing quest for voter equality. Indeed, the enforcement of the provisions of the Voting Rights Act has resulted in a "Quiet Revolution" of achievements for racial and national origin minorities in the United States, including the election of thousands of elected officials at the local, county, state, and federal level. Many of these accomplishments were the result of hard fought litigation in the federal courts to challenge racially polarized voting and vote dilution schemes. The remedial frameworks of mandating district based elections and majority-minority districts have radically transformed the nation's political landscape. Before the passage of the Act in 1965, there were little more than 330 African American elected officials in the United States, whereas in 2005 there are more than 9000, with a majority hailing from the South. Today the Congressional Black Caucus and the Hispanic Congressional Caucus have all time record high memberships. African American voter registration and turnout has also reached new heights. Similarly, Latino voter registration and turnout is also experiencing a new and wide growth. More and more, Asian voters are influencing elections. The same is true in many local, city, county, and state political divisions.

Compelling today's unlawful discrimination and devious practices toward racial minorities is the fear and resistance to the demographic change rapidly occurring in our nation. THIS IS VOTING RIGHTS AT THE CROSSROADS. With our nation heading towards becoming majority/minority by 2050, there is immense anxiety and resistance to the potential impact of these minorities on the outcome of elections. Recent studies by the Joint Center for Political Studies and by Prof. Ron Walters all reveal that the young 18–35 year old African American voter is one of the most socially progressive voters in the United States. Similar studies show an overall progressive voting pattern for large segments of the Latino population. There is no doubt that these populations, should they be able to register without obstacles and freely vote, will eventually, in coalition with progressive white voters, transform the political landscape of this nation. Yet, the true potential of the minority electorate remains artificially suppressed by unlawful discrimination and devious practices.

In our current times, these challenges and the sacrifices of our for-bearers ring loud as a constant reminder of the tenuousness of the enforcement of the vital right to vote and call upon those of us in today's legal profession to answer the call by embracing the legacy of so many, known and unknown, for the fight for a full and equal democracy.

II. ELECTION PROTECTION

Following the 2000 Election debacle, it was manifestly clear that systemic efforts had taken place in Florida to suppress the African American vote. The Lawyers' Committee filed suit along with the NAACP and other civil rights organizations months after the election and obtained a settlement which demanded changes by the State of Florida and thirteen counties in election administration to prevent the problems encountered by minority voters in 2000. However, we decided that filing suit after the fact was not sufficient. We recognized that in the changed paradigm of racial suppression after the 2000 election, we needed a new proactive campaign to prevent the proliferation and success of such tactics in future elections. Thus was created Election Protection. Many of you, along with some 8000 legal volunteers, consisting of both lawyers and law students, participated nationwide in the 2004 Non-Partisan Election Protection Program sponsored by the Lawyers' Committee and a host of prominent civil rights organizations. [At this point in the speech, a video was shown of the 2004 Election Protection Program.]

As you have just witnessed, the legions of law students, who monitored polling sites throughout the nation provided direct assistance to weary voters, were invaluable to making this program a success. We were appreciative of the support of Anthony Butler of the Loren Miller Bar Association, who monitored elections here in Washington State and of the many lawyers and law students who traveled to other states to participate in Election Protection. In addition, the twenty-one call-in centers, which received over 205,000 calls, showed the importance of providing advice and assistance to voters in many states and counties confronting a confusing and dysfunctional electoral system. In Seattle, the National Bar Association Affiliate and local lawyers were a vital part of the national Election Protection effort. The thousands of Americans who were seeking advice and assistance will never forget that lawyers volunteered their time to make a difference in their lives.

As the video recited, our democracy is undermined by several key problems. In the administration of elections, these problems included:

- long lines;
- voter registration errors;
- malfunctioning voting machines;
- hostile and partisan election officials;
- failure to provide absentee ballots;
- provisional balloting problems (notably, in King County our Electronic Incidence Reporting System recorded that there were

manifest problems with polling places running out of ballots early during Election Day);

- racial intimidation and voter suppression; and,
- an unequal supply of poll workers and election equipment in minority neighborhoods.

Remarkably, as a civil rights lawyer, I was most taken by the new forms of voter suppression we witnessed in 2004. Most surprising was the use of technological devices, such as automated telephone calls and telephone banking, to deceive voters by telling them they could vote by phone, sending voters to the wrong precincts, especially in states which invalidated votes cast in the wrong precinct, and providing deceptive information about the day on which to vote. Another suppression technique included flyers, in numerous states throughout the nation, allegedly from fictitious African American organizations or governmental entities warning African Americans that they would be jailed if they sought to vote but had not paid utility bills, rent, traffic tickets, or child support. Indeed, a Wisconsin flyer threatened that one punishment would be the loss of custody of one's children. But the worst technique of voter suppression was the paid operatives who walked minority neighborhoods passing out and collecting fake "absentee ballots" which were promptly discarded.

You can obtain a copy of the full Preliminary Report on the 2004 Election prepared by the Lawyers' Committee, People for the American Way Foundation, and the NAACP entitled "Shattering Myth" from our website: www.lawyerscommittee.org. The Executive Summary of the Report has been included in audience participant's booklets. This preliminary report summarizes the first 30,000 of what are now over 40,000 reports from election protection volunteers which were entered into the Electronic Incident Reporting System invented by the Lawyers' Committee and the Verified Voting Foundation.

Given the success of the 2004 Non-Partisan Election Protection Program, there are plans underway for a limited Election Protection Program in 2005 to cover races in three states: New York, New Jersey, and Virginia. Plans are being formulated for a large Election Protection Program for 2006 as all of the Congress will be up for election and a large percentage of the Senate. Unfortunately, in many states with dysfunctional or unequal election administration, it is clear that programs such as Election Protection will continue to be critical to the protection of the right to vote.

III. ELECTION REFORM

Based on the documentation of the systemic electoral failures in 2004, legislation is now pending in the U.S. Congress. For example, there is the Ensign/Reid Bill to address voting machines and the need for paper ballots. Also, Sen. Mitch McConnell has introduced an Anti-Fraud Bill which would place restrictions on voter registration groups, require photo ID, and allow provisional ballots only in correct precincts. Finally, there is the “Count Every Vote Act,” introduced by Senators Hilary Clinton and Barbara Boxer, which would promote a series of election administration reforms including:

- establishing provisional balloting counting mandates;
- allowing voters to vote anywhere in the same county;
- permitting same day registration;
- standardizing accessibility of equipment;
- instituting early voting with at least one weekend;
- mandating voting machine standards and paper ballots;
- prohibiting election officials from serving as heads of partisan campaigns;
- criminalizing deceptive practices; and,
- many other needed reforms.

Interestingly, the combination of two reforms—same day registration and early voting—alleviates more than 85% of all election-related problems. Indeed, Election Day Registration states—Wisconsin, New Hampshire, Minnesota, Maine, Wyoming, and Idaho—reported the least Election Day problems in 2004. Minnesota, Wisconsin, and Maine also had the highest rate of voter turnout. Unfortunately, all of these critical reforms face an uphill battle against a U.S. Congress that is disinterested, divided, and too political to make needed reforms.

Indeed, in irony of ironies, the United States did administer a fairly great election in 2005—unfortunately, that election was in Iraq where we provided for a federalized system of elections, guaranteed women rights to vote, provided widespread language translated ballots, and announced a winner only after every single vote was counted.

Instead in the United States, the real potential for immediate election reform resides not at the federal level but at the state level. There is a crucial role for lawyers and law students to play in underpinning these state reform efforts. Also, it is important that those who believe in an open election process become involved at the state level to prevent adverse laws from passage. Sadly, since the election, a number of states have passed even more repressive voter identification requirements.

IV. REAUTHORIZATION OF THE VOTING RIGHTS ACT

In this year, as we celebrate the groundbreaking accomplishments of the Voting Rights Act of 1965 (VRA) over these last four decades, there exists a fundamental threat to the continued vitality of this legislation.

All over the Internet, rumors are flying that Black Folks are about to lose their right to vote. These urban myths are wrong. The fundamental right to vote remains secured by the 15th Amendment. However, fueling this myth is a **SERIOUS PROBLEM**. Three major provisions of the VRA are set to expire/sunset on August 6, 2007.

The major sections of the VRA set to expire are Section 5, the preclearance provisions; Section 203, the Language Access Provisions; and the several Department of Justice election monitoring provisions pursuant to Section 5. What is at stake is the crucial enforcement of the right to vote.

A. Expiring Provisions of the Voting Rights Act

The Voting Rights Act of 1965 is generally recognized as one of the seminal pieces of legislation enacted by Congress. Indeed, during the reauthorization hearings of 1982, Congress hailed the Voting Rights Act as "one of the most important civil rights bills passed by Congress" and recognized it as the "most effective tool to protect the right to vote." The expiring provisions of the Act are some of its most important. These provisions are: (1) the Section 5 "preclearance" provisions, which require jurisdictions in all or part of sixteen states to submit voting changes to the United States Department of Justice (DOJ) or the United States District Court for the District of Columbia for preclearance approval before they can be implemented; (2) the Section 203 minority language provisions, which require more than 450 counties and townships to provide language assistance to voters with limited English proficiency; and (3) the examiner and observer provisions, which authorize DOJ to appoint an examiner or send observers to any jurisdiction covered by Section 5. The temporary provisions relating to preclearance and examiners and observers were part of the original 1965 enactment and were scheduled to last for five years. However, Congress underestimated the tenacious grip that discrimination had on voting and has continued to reauthorize and add to the Voting Rights Act. Section 5 and the examiner provisions were reauthorized in 1970, 1975, and 1982. The minority language provisions were enacted in 1975 and reauthorized in 1982 and 1992.

There is a major need for massive public education regarding the importance of these provisions to enforcing the right to vote. Obtaining a strong reauthorization of the expiring provisions will not be easy in this

Congress. There are serious problems in both major political parties. The far-right of the Republican Party is radically opposed to reenactment of Section 5 because they view it as imposing race-conscious results. On the other hand, there are those in the Democratic Party who silently oppose the reauthorization of Section 5 because they think Republicans have used it in redistricting challenges to weaken the grip of White democrats by packing minority voters in majority/minority districts. Yet another dispute is over Section 203 where far-right "English Only" advocates are opposed to this reenactment because they believe language accommodation impedes newer citizens from learning English. Very importantly, there will be a serious debate over the "trigger" criteria, which decides which jurisdictions are covered by Section 5 and Section 203. Lastly, it will be imperative upon Congress to build a strong record to meet constitutional standards of strict scrutiny and recent Supreme Court jurisprudence on federalism.

There are several strategies that the Lawyers' Committee is leading or participating in to provide this needed assistance to communities and the Reauthorization process.

B. National Commission on the Voting Rights Act

The Lawyers' Committee is facilitating the private, non-partisan, National Commission on the Voting Rights Act. The purpose of the Commission is to conduct a massive research and education project by collecting evidence regarding current discrimination and obstacles to minority voters through public testimony at a series of regional hearings throughout the United States. Through these hearings, the Commission will explore the effectiveness of the expiring provisions, proposed reforms, and other gaps in coverage. A comprehensive report of the Commissions' findings will be issued and entered into the Congressional Record.

The Commission consists of a diverse panel of eight Commissioners. Members include the Honorable Charles Mathias as Honorary Co-Chair; as Chair, the Honorable Bill Lann Lee, former Assistant Attorney General for Civil Rights under the Clinton Administration; Professor Charles Ogletree of Harvard University; Elsie Meeks; Dolores Huerta; the Honorable John Buchanan; Joe Rogers, former Lieutenant Governor of Colorado; and renowned author Chandler Davidson. In addition, Guest Commissioners are added to the hearing panel from the region or state in which the National Commission conducts a hearing to provide local expertise on voting.

Lawyers from several law firms are helping with this project. Among the tasks these lawyers are engaged in include:

- interviewing and preparing witnesses;
- conducting research;
- staffing Commissioners.

The Commission plans to hold 10 hearings throughout the nation. To date the Commission has held two hearings:

- Southern Regional Hearing—Montgomery, AL—March 11; and
- Southwestern Regional Hearing—Phoenix, AZ—April 7 at Arizona State University.

Upcoming are more scheduled hearings:

- Northeastern Regional Hearing—New York City—June 14 at the Association of the Bar of the City of New York

More Regional hearings are being scheduled:

- Midwest Regional Hearing—Minneapolis, Minnesota—July 22
- Western Regional Hearing—Los Angeles—September 27
- Mid-Atlantic Hearing—Washington, D.C.—October

There are three state specific hearings being scheduled:

Rural Georgia Hearing on August 2nd, Florida Hearing on August 4th in conjunction with the 80th Annual Convention of the National Bar Association, South Dakota Hearing in September, and Mississippi Hearing on October 29th.

To our surprise, there have been several requests from communities seeking the Commission to hold town hall meetings or other forms of community dialogues in their cities.

The plans are for the National Commission to issue its report by January, 2006. This report will help present research information from hearings. It will codify a record of modern day racial discrimination in voting. We fully expect that members of the Commission will testify before Congress about the Report and the Hearings during Congressional hearings on the Reauthorization of the Voting Rights Act. The Report will also be used to educate the media and the public.

C. Petition Drive and August 6th Voting Rights March

On another note, Rainbow/PUSH is heading up a massive coalition of civil rights, religious, labor, and civic organizations that is planning a series of grassroots activities to educate the public regarding Voting Rights Act Reauthorization and to facilitate community organizing to support the Reauthorization. Central to this campaign is a petition drive to collect one million signatures by this year to present to the White House and Congress calling for the Reauthorization of the expiring pro-

visions of the Voting Rights Act. On August 6, 2005, in Atlanta, a major Voting Rights March will be held with local teach-ins in various states. Law students, lawyers, professors, and community activists are key to these local teach-ins.

V. FELON DISENFRANCHISEMENT

No speech on the subject of modern day impediments to the franchise would be complete without a few words about ex-felon disenfranchisement. Numerous states make it too hard for those who have been imprisoned and completed their sentencing to reinstate their right to vote. Some states have a requirement that ex-felons have to wait 2–10 years after release from imprisonment and the completion of parole before they can be eligible to vote. Whereas four states effectively permanently ban ex-felons. There are an estimated 4.3 million ex-felons prohibited from voting. Of that number, 1.3 million are African Americans. In Florida alone over 400,000 ex-felons are banned from voting.

Recent legal attacks upon these felon disenfranchisement laws have been largely unsuccessful. The 11th Circuit Court of Appeals ruled just this week in the case of *Johnson v. Bush*¹ that the 1868 law was not adopted with a discriminatory intent despite statements by legislators about “keeping the negro in this place” during the constitutional convention; that any discriminatory intent was cured in the 1960s when these provisions of the Constitution were readopted despite the absence of any legislative findings; and that Section 2 of the Voting Rights Act was not contemplated to effect this level of statewide election decision-making. There is an urgent need for political activity to rollback these laws.

In recent months, several states have passed laws to repeal disenfranchising statutes. In March, Nebraska repealed their law and overrode a gubernatorial veto. The old law prohibited ex-felons from voting for ten years after they had completed their sentence and parole. The new law reduces this time to only two years. In a 2004 study of Atlanta, Georgia, it was found that fourteen percent of all African American males are disenfranchised based on ex-felon status. These felon disenfranchisement statutes also impacted Latinos. A recent student found significant disenfranchisement of Latino ex-felons in Arizona. Again, lawyers play a very meaningful role in advocating for these reforms.

VI. CONCLUSION

In a nation whose cornerstone is the law, the role of the legal profession in advancing equality of voting rights for all is essential. As we

1. 405 F.3d 1214 (2005).

confront “Voting Rights at a Crossroads,” it is the legal profession that must demonstrate leadership in advocating that we can never return to the past nor allow new methods of disenfranchisement to proliferate. Through bar associations advocating for election reforms to make the franchise more accessible to voters and to combat restrictive voting laws, our state election administration can be dramatically improved. By each and every lawyer and law student committing herself to being involved in this fight—either through Election Protection, legislative advocacy, or community education and organizing—we will be able to carry forth the legacy of the civil rights martyrs who fought so hard for the Voting Rights Act. All of us here today have a role to play in deciding if at this crossroads in voting rights, our nation can embrace the path of equal voting opportunity for all in the future!