

TESTIMONY OF

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**HEARING ON OVERSIGHT OF THE CIVIL RIGHTS DIVISION
OF THE DEPARTMENT OF JUSTICE**

**UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY,
SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES**

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Mr. Chairman, Ranking Member, and members of the subcommittee:

Thank you for the opportunity to testify today on the performance and the future of the Civil Rights Division of the U.S. Department of Justice.¹ The Division has a storied past and should play a vital role in the great fight for American democracy. Its career attorneys and researchers continue to advance its mission. But in this administration, the Civil Rights Division has retreated from civil rights to pursue, instead, divisiveness. Going forward, we should all work to renew the Division so it once again can play its vital role.

This hearing takes place at a solemn moment in a painful year. In July, we lost Rep. John Lewis, whose bravery brought the Voting Rights Act into being in 1965. This past week, we lost Justice Ruth Bader Ginsburg, whose commitment to that very statute was the heart of her most powerful dissent. And it comes at a time of a nationwide reckoning with the reality and consequences of persistent systemic racism against Black Americans and other minorities – the very phenomenon the Civil Rights Division is charged with seeking to combat and eradicate. That embedded discrimination is the worst of America – and at its best, the Justice Department has been the best of America. It should be again.

The Justice Department and the Civil Rights Division work in myriad ways to advance equality and racial justice. On the burning issue of police misconduct, for example, the Department possesses broad authority, particularly through “pattern and practice” investigations of police departments and resulting consent decrees.² The Trump Administration abdicated that power in 2017, and has initiated only one such investigation in three years. As a result, key federal oversight powers have gone unused even as issues of policing and race convulsed the country.³ On education, LGBTQ rights, gender equality, housing, and so many other issues, this Department should play a vital, central role – and must do better.

This testimony will focus on one of the issues the Brennan Center knows best: voting rights and the health of our democracy.

¹ The Brennan Center for Justice at NYU School of Law is a nonpartisan law and policy institute that works to reform, revitalize, and defend our country’s system of democracy and justice so they work for all. This year, the Brennan Center has litigated and lobbied in eighteen states for voting rights and strong election administration. I have led the Center since 2005. I have authored books on government, the presidency, and the law, including *The Fight to Vote* (Simon & Schuster, 2016), a history of the struggle for voting rights. I previously served as Director of Speechwriting for President Bill Clinton from 1995-99, and as Special Assistant to the President for Policy Coordination. I would like to thank Alan Beard, Harold Ekeh, Jeanine Chirlin, Sean Morales-Doyle, Max Feldman, Clio Morrison, Spencer LaFata, Izabela Tringali, Emily Eagleton, Myrna Perez, Wendy Weiser, Dan Weiner, Martha Kinsella, Maya Efrati, Kirstin Dunham, Larry Norden, Gowri Ramachandran, Brianna Cea, Taryn Merkl, Lauren-Brooke Eisen, Edgardo Cortes, Hannah Klain, and Liz Howard for research and assistance in drafting this testimony. My testimony does not purport to convey the views, if any, of the NYU School of Law.

² Civil Rights Division, U.S. Department of Justice, *The Civil Rights Division’s Pattern and Practice Police Reform Work: 1994-Present*, January 2017, <https://www.justice.gov/crt/file/922421/download>.

³ For a general discussion of how the Justice Department should augment its work on policing, see *Written Testimony from the Brennan Center for Justice to the President’s Commission on Law Enforcement and the Administration of Justice*, (June 8, 2020,) (Statement of Lauren-Brooke Eisen, Director of Brennan Center Justice Program and Spencer Boyer, Director of Brennan Center Washington Office), <https://www.brennancenter.org/our-work/research-reports/testimony-brennan-center-presidents-commission-law-enforcement-and>.

I. ABDICATION OF DUTY

Under this administration, unfortunately, the Justice Department has retreated from its historic role as a protector of voting rights. Indeed, too often, it has ignored or even embraced voter suppression moves. It has also shifted resources to other areas and enforcement topics, draining focus on the Division's core voting rights work.

Some of the change, of course, is due to the U.S. Supreme Court's 2013 ruling in *Shelby County v. Holder*.⁴ This stripped from the Department its most potent tool to prevent voting abuse: Section 5 of the Voting Rights Act (VRA) of 1965. For forty-eight years, the Civil Rights Division was charged with preclearance for changes to voting laws. It did so with minimal bureaucratic burden. From 1998 to 2013, the Division blocked 86 state and local submissions of election changes. These numbers understate the law's effectiveness. Preclearance deterred states and localities from enacting discriminatory voting changes in the first place. Between 1999 and 2005 alone, 153 voting changes were withdrawn and 109 were superseded by altered submissions after DOJ requested more information.⁵

As we all are reminded this week, during oral argument in *Shelby County*, Justice Scalia called the Voting Rights Act little more than a "racial entitlement." Chief Justice Roberts was more decorous. In the majority opinion, he wrote, in effect, that systemic racial discrimination was no longer part of "current conditions," and that states with long histories of discrimination should not be treated differently. In her dissent Justice Ginsburg famously wrote, "Throwing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet." Plainly, Justice Ginsburg's prediction was right.

In the seven years since *Shelby County*, a wave of disenfranchisement and suppression swept across states previously covered by the preclearance requirement.⁶ Soon after the ruling, Texas, Mississippi, and Alabama began to implement and enforce photo ID laws previously barred by preclearance.⁷ In states once covered by Section 5, voter purges soared, typically 40 percent higher than in the rest of the country.⁸ Were preclearance still in effect, these changes would have been screened before they were enacted and before voters were hurt.⁹

Yet the Division's retreat from its core mission cannot solely be blamed on the Supreme Court. Too often, its officials have actively worked to curb voting rights.

⁴ *Shelby County v. Holder*, 570 U.S. 557 (2013).

⁵ Myrna Pérez and Vishal Agraharkar, *If Section 5 Falls: New Voting Implications*, Brennan Center for Justice (June 13, 2013), https://www.brennancenter.org/sites/default/files/2019-08/Report_Section_5_New_Voting_Implications.pdf.

⁶ Myrna Pérez, "7 Years of Gutting Voting Rights," *The Brennan Center for Justice*, June 25, 2020, <https://www.brennancenter.org/our-work/analysis-opinion/7-years-gutting-voting-rights>.

⁷ "The Effects of *Shelby County v. Holder*," *The Brennan Center for Justice*, August 6, 2018, <https://www.brennancenter.org/our-work/policy-solutions/effects-shelby-county-v-holder>.

⁸ Kevin Morris, "Voter Purge Rates Remain High, Analysis Finds," Brennan Center for Justice, August 21, 2019, <https://www.brennancenter.org/our-work/analysis-opinion/voter-purge-rates-remain-high-analysis-finds>.

⁹ Myrna Pérez, "7 Years of Gutting Voting Rights," Brennan Center for Justice, June 25, 2020, <https://www.brennancenter.org/our-work/analysis-opinion/7-years-gutting-voting-rights>.

The Division has flinched in the most basic way: it simply brings no cases. This administration is the first, since the passage of the Voting Rights Act in 1965, to not bring a single enforcement action under the VRA. According to the Justice Department website, during the Obama administration, the Voting Section brought twelve VRA enforcement cases, and during the George W. Bush administration, it brought 46.¹⁰ Even this does not even fully illustrate the abdication of duty. Since Trump was inaugurated on January 20, 2017, the Voting Section has filed claims in only three cases total under any of the statutes it has authority to enforce.¹¹ (In comparison, it filed claims in 32 cases during the Obama administration and in 69 cases under George W. Bush.¹²) True, in this administration the Voting Section has shown the most interest in enforcing the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), filing two enforcement cases. But it filed sixteen UOCAVA cases under President Obama.¹³

The Voting Section has failed to spend its resources protecting voting rights in other ways as well. In the Obama administration, the Section filed amicus briefs or statements of interest in 24 cases. Since Trump took office, it has filed only five.¹⁴ Moreover, even when it weighs in, often it does not defend voting rights. In two of these five cases, the Voting Section filed a Statement of Interest defending state laws requiring voters to have a witness sign their absentee ballots.¹⁵ (During the Covid-19 pandemic, when absentee voting is on the rise and hard for isolated voters, plaintiffs had sued to challenge these laws as an unlawful “voucher” requirement under the VRA.¹⁶) At a time of crisis, instead of advancing voting rights, the storied Civil Rights Division instead has defended states’ rights.

Indeed, in two key cases the Division switched sides. It lurched abruptly to support policies that just days before it had argued were racially discriminatory. Either the policies suddenly ceased to be discriminatory, or the Justice Department’s political overseers suddenly decided such conduct is acceptable. The latter analysis unfortunately is far more likely.

One case concerned the harsh voter ID law in Texas, implemented just hours after the Court announced its ruling in *Shelby County*.¹⁷ (Under this law you could not use a University of Texas ID as a government ID, but could use a concealed carry gun permit.) A federal judge found that

¹⁰ See Voting Section Litigation, <https://www.justice.gov/crt/voting-section-litigation>.

¹¹ These cases include two cases under the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) that were immediately settled, and an intervening complaint seeking to force Kentucky to remove inactive voters from the rolls. See https://www.justice.gov/crt/cases-raising-claims-under-uniformed-and-overseas-citizen-absentee-voting-act#wi_uocava18 (describing *United States v. State of Wisconsin* (W.D. Wisc. 2018) and *United States v. State of Arizona* (D. Ariz. 2018)); <https://www.justice.gov/crt/cases-raising-claims-under-national-voter-registration-act#nynvra2016> (describing *United States v. Commonwealth of Kentucky* (E.D. Ky. 2018)).

¹² See Voting Section Litigation, <https://www.justice.gov/crt/voting-section-litigation>.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ See Statement of Interest of the United States Concerning Section 201 of the Voting Rights Act, *Thomas v. Andino*, No. 3:20-cv-1552 (D.S.C. 2020); Statement of Interest of the United States Concerning Section 201 of the Voting Rights Act, No. 2:20-cv-619 (N.D. Ala. 2020).

¹⁶ See 52 U.S.C. § 10501(b)(4).

¹⁷ SB 14, 82nd Leg. (2011); Act of May 16, 2011, 82d Leg., R.S., ch. 123, 2011 Tex. Gen. Laws 619.

more than 600,000 registered voters lacked the required ID.¹⁸ The Justice Department spent six years opposing Texas’s law. Together with private litigants—including parties represented by the Brennan Center—it won federal court rulings that the law was discriminatory and unlawful. Then came Inauguration Day, 2017. The Department abruptly abandoned its longstanding position, and asked the Court of Appeals to allow Texas to enforce the law.¹⁹

In Ohio, a similar switch occurred.²⁰ During the Obama administration the Justice Department had successfully opposed the state’s effort to purge thousands of voters from the rolls because they had not voted in recent elections. Again, the Justice Department abruptly reversed position, arguing before the Supreme Court that the state’s actions were compliant with federal law.

The Civil Rights Division has actively worked, too, to politicize and undermine the Census. The Trump administration tried to add an untested, unprecedented citizenship question; named unqualified political appointees to ill-defined Census Bureau leadership positions late in the census cycle; and refused to comply with congressional subpoenas. The Justice Department actively participated in these moves. For instance, it helped concoct a rationale for adding a citizenship question. Then it defended that pretext in the courts as an authentic reason for the administration’s actions. A 5-4 vote of the U.S Supreme Court stopped the scheme, a ruling which turned in part on the Justice Department’s purported rationale being little more than a pretext.²¹

The Division also has sought to obscure its actions. In 2017, the head of the Voting Section sent a letter to most states, requesting detailed information on the policies, practices, and procedures related to voter list maintenance. Voting rights advocates feared it was a prelude to a broader effort to force states to aggressively purge voter rolls, and the Brennan Center filed a FOIA request seeking information.²² Three years later, DOJ refuses to release thousands of pages of documents, asserting that releasing them would interfere with ongoing law enforcement proceedings.

¹⁸ For a history of the litigation, see Court Case Tracker: Texas NAACP v. Steen (consolidated with Veasey v. Abbott), Brennan Center for Justice, <https://www.brennancenter.org/our-work/court-cases/texas-naACP-v-steen-consolidated-veasey-v-abbott>.

¹⁹ Sari Horwitz, “Justice Department changes its position in high-profile Texas voter-ID case,” *Washington Post*, February 27, 2017, https://www.washingtonpost.com/world/national-security/justice-department-changes-its-position-in-high-profile-texas-voter-id-case/2017/02/27/cfaafac0-fd0c-11e6-99b4-9e613afeb09f_story.html; and Pam Fessler, “Justice Department Reverses Position On Texas Voter ID Law Case,” *NPR*, February 27, 2017, <https://www.npr.org/2017/02/27/517558469/justice-department-reverses-position-on-texas-voter-id-law-case>.

²⁰ Sari Horwitz, “Justice Dept. sides with Ohio’s purge of inactive voters in case headed to Supreme Court,” *Washington Post*, August 8, 2017, https://www.washingtonpost.com/world/national-security/justice-department-reverses-position-to-allow-ohio-to-purge-inactive-voters-from-rolls/2017/08/08/e93c5116-7c35-11e7-9d08-b79f191668ed_story.html.

²¹ *Department of Commerce v. New York*, 588 U.S. ____ (2019).

²² Wendy Weiser to Nelson D. Hermilla, July 20, 2017, Freedom of Information Act Request, Request for Expedited Processing and Fee Waiver, (Brennan Center for Justice, New York, NY), https://www.brennancenter.org/sites/default/files/analysis/Brennan_Center_FOIA_Request.pdf.

II. THE POLITICIZATION OF THE JUSTICE DEPARTMENT

The Civil Rights Division is embedded within a cabinet agency distorted and politicized by its leadership. The Justice Department today is under greater improper political duress than at any point in the past half century. One must return to the days of Richard Nixon and John Mitchell to find anything close.

Attorney General William P. Barr has made clear as a matter of doctrine and brute political will that too often the professional judgments of the prosecutors and attorneys at the Department of Justice mean little. In a recent speech, he stated that non-political staff are not as “equipped [as political appointees] to make the complex judgment calls concerning how we should wield our prosecutorial power.”²³ He decried the “criminalization of politics” (even as he pursued former Obama officials seemingly at the behest of the president’s Twitter feed).²⁴ He appears to have intervened in ongoing prosecutions, over and over, to benefit the president’s personal and political interests.²⁵ President Trump’s operative Roger Stone had his sentence commuted; his former campaign manager Paul Manafort, jailed for tax evasion and bank fraud, was granted home confinement.²⁶ The Justice Department, having won a guilty plea from former National Security Advisor Michael Flynn for lying to the FBI about his conversation about sanctions with the Russian ambassador, now has moved to drop the case. The trial judge was so concerned about improper political motive that he has convened an extraordinary inquiry, over the objections of the Justice Department.²⁷ The president’s personal attorney, Michael Cohen, who credibly accused Trump of participation in a criminal campaign finance scheme, was sent back to prison after he was released during the pandemic because he was writing a book critical of the president.²⁸ Most recently, the Justice Department stepped in to defend Donald Trump in a personal lawsuit alleging sexual assault.²⁹ The president’s personal interest and the actions of the Justice Department appear to have fused. Donald Trump long reportedly has asked, “Where’s my

²³ Martha Kinsella, Gareth Fowler, Julia Boland, Daniel L. Wiener, “Trump Administration Abuses That Thwart Pandemic Response,” Brennan Center for Justice, updated September 22, 2020, <https://www.brennancenter.org/our-work/research-reports/trump-administration-abuses-thwart-us-pandemic-response#s7a>.

²⁴ Attorney General William P. Barr, “Remarks by Attorney General William P. Barr at Hillsdale College Constitution Day Event,” (speech, Washington, D.C., September 16, 2020), U.S. States Department of Justice, <https://www.justice.gov/opa/speech/remarks-attorney-general-william-p-barr-hillsdale-college-constitution-day-event>.

²⁵ Katie Benner, Sharon LaFraniere, and Nicole Hong, “Fearful of Trump’s Attacks, Justice Dept. Lawyers Worry Barr Will Leave Them Exposed,” *The New York Times*, May 18, 2020, <https://www.nytimes.com/2020/02/15/us/politics/trump-barr-justice-department.html>.

²⁶ Peter Baker, Maggie Haberman, and Sharon LaFraniere, “Trump Commutes Sentence of Roger Stone in Case He Long Denounced,” *The New York Times*, July 10, 2020, <https://www.nytimes.com/2020/07/10/us/politics/trump-roger-stone-clemency.html>; Eileen Sullivan, “Paul Manafort, Trump’s Ex-Campaign Manager, Released to Home Confinement,” *New York Times*, May 13, 2020, <https://www.nytimes.com/2020/05/13/us/politics/paul-manafort-released-coronavirus.html>.

²⁷ Colbert King, “It’s Roger Stone Now. Manafort and Flynn Are Next.” *The Washington Post*, July 11, 2020, <https://www.washingtonpost.com/opinions/2020/07/11/its-roger-stone-now-manafort-flynn-are-next/>.

²⁸ Benjamin Weiser and Alan Feuer, “Judge Orders Cohen Released, Citing ‘Retaliation’ Over Tell-All Book,” *The New York Times*, July 23, 2020, <https://www.nytimes.com/2020/07/23/nyregion/michael-cohen-trump-book.html>.

²⁹ Alan Feuer, “Justice Dept. Intervenes to Help Trump in E. Jean Carroll Defamation Lawsuit,” *The New York Times*, September 8, 2020, <https://www.nytimes.com/2020/09/08/nyregion/donald-trump-jean-carroll-lawsuit-rape.html>.

Roy Cohn,” pining for the legendarily ruthless and corrupt attorney and fixer. Startlingly, he has managed to find “his Roy Cohn” in the Attorney General.

All this is in service of Trump’s yearning for an imperial presidency. Last July, Trump declared: “I have an Article II [of the Constitution], where I have to the right to do whatever I want as president.”³⁰ Attorney General Barr has given a pseudo-scholarly gloss to this misreading of the Constitution. Barr’s words articulating the “unitary executive” assert that the president has untrammled control over the executive branch, that the attorney general has untrammled control over the prosecutorial decisions of the Justice Department.³¹ His actions assert with equal force that he sees no problem with wielding that absolute control to advance the personal and political interest of the president.

All this raises profoundly alarming questions about the role the Justice Department will play in the upcoming election. In recent months Attorney General Barr has joined in spreading misinformation and threatening misconduct.

- Barr has said that “elections that have been held with mail have found substantial fraud and coercion.”³² This is false.
- Last month, Trump threatened to use law enforcement personnel on Election Day, claiming they were needed to quell “election night riots.” “We’re going to have sheriffs,” he explained, “and we’re going to have law enforcement, and we’re going to have, hopefully, U.S. attorneys.” He added, “We’ll put them down very quickly if they do that.”³³ Days later during an interview with CNN, Barr defended the president’s comments, saying it would be legal to send law enforcement to polling locations on Election day if it were in response to “a particular criminal threat.”³⁴
- Barr has claimed that mail-in voting leads to substantial voter fraud based on a Texas case in which “we indicted someone in Texas – 1,700 ballots collected from people who could vote, he made them out and voted for the person he wanted to.” Barr’s description of the case does

³⁰ President Donald Trump, “Remarks by President Trump at Turning Point USA’s Teen Student Action Summit 2019,” Washington, D.C., July 23, 2019, <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-turning-point-usas-teen-student-action-summit-2019/>.

³¹ Attorney General William P. Barr, “Attorney General William P. Barr Delivers the 19th Annual Barbara K. Olson Memorial Lecture at the Federalist Society’s 2019 National Lawyers Convention,” (speech, Washington, D.C., November 15, 2019) U.S. Department of Justice, <https://www.justice.gov/opa/speech/attorney-general-william-p-barr-delivers-19th-annual-barbara-k-olson-memorial-lecture>.

³² Salvador Rizzo, “Attorney General Barr’s False Claims About Voting By Mail,” *Washington Post*, September 4, 2020, <https://www.washingtonpost.com/politics/2020/09/04/attorney-general-barrs-false-claims-about-voting-by-mail/>.

³³ Quint Forgey, “‘We’ll Put Them Down Very Quickly’: Trump Threatens to Quash Election Night Riots.” *POLITICO*, September 11, 2020, <https://www.politico.com/news/2020/09/11/trump-election-night-riots-412323>

³⁴ Justin Wise, “Barr Suggests Law Enforcement Could Be Sent to Polling Places Over ‘Criminal Threat,’” *The Hill*, September 3, 2020, <https://thehill.com/homenews/administration/514931-barr-suggests-law-enforcement-could-be-sent-to-polling-places-if>.

not match the facts: only one ballot was fraudulent, the fraud was detected, and the perpetrator was punished accordingly.³⁵

- Barr echoed Trump in claiming that vote by mail somehow opened the way for foreign governments to commit fraud. “I’m saying people are concerned about foreign influence, and if we use a ballot system with a system that some – that states are just now trying to adopt, it does leave open the possibility of counterfeiting, counterfeiting ballots either by someone here or someone overseas.”³⁶
- Barr said the U.S. will go down a “socialist path” if Trump isn’t reelected, a frightening direct step into partisan politics.³⁷

How could such power be misused in and around the election? Recently we have seen the executive branch stir division and challenge First Amendment-protected activity. In June, protestors responding to the killing of George Floyd gathered in Lafayette Square. It was the Attorney General who organized federal officials from DOJ and elsewhere – including Bureau of Prisons riot policemen – to blast through the square, using flash grenades and gas, so the President could hold a photo opportunity. In July, the federal government (in this case, the Department of Homeland Security) sent forces into Portland, Oregon, provoking street battles that stirred fear and dominated the news.

Typically the Justice Department under both parties has carefully avoided actions that could affect an election. In 2000, for example, despite the topsy-turvy Florida recount, the Justice Department under Attorney General Janet Reno did not intervene in the counting – let alone on behalf of her own political party. FBI Director James Comey’s disruptive public statements about Hillary Clinton in 2016 stood out for that very reason.

But Congress has ample reason for concern, given the recent record of this Attorney General – and should make clear it would be a gross abuse of power for the Justice Department to take partisan actions around the election. One hesitates to enumerate them: Could the Department send federal law enforcement into what President Trump calls “Democrat cities” supposedly to protect federal facilities – but in fact, to suppress the vote in a racially discriminatory manner? Could it seize ballots as they are legitimately counted in service of the President’s fevered insistence that ballots cast by mail (other than his) are improper? And so on. We should not risk normalizing such actions by speculating. They would be a breach of our democratic order.

³⁵ Salvador Rizzo, “Attorney General Barr’s False Claims About Voting By Mail,” *Washington Post*, September 4, 2020, <https://www.washingtonpost.com/politics/2020/09/04/attorney-general-barrs-false-claims-about-voting-by-mail/>.

³⁶ Salvador Rizzo, “Attorney General Barr’s False Claims About Voting By Mail,” *Washington Post*, September 4, 2020, <https://www.washingtonpost.com/politics/2020/09/04/attorney-general-barrs-false-claims-about-voting-by-mail/>.

³⁷ Katie Benner, “In an Interview, Barr Warned of the U.S. Going Down ‘the Socialist Path’ if Trump is not Re-Elected,” *The New York Times*, September 16, 2020, <https://www.nytimes.com/2020/09/16/us/elections/in-an-interview-barr-warned-of-the-us-going-down-the-socialist-path-if-trump-is-not-re-elected.html>.

III. RENEWING THE CIVIL RIGHTS DIVISION

The task for the Justice Department goes beyond a duty not to abuse power. We should expect more than mere restoration of the Civil Rights Division to its previous work and role. Rather, the deep problems in our electoral system exposed by the pandemic compel us to think anew, and to ask what changes could improve and modernize the Division and its work.

A. Restore the Voting Rights Act

The most important legislative task is to restore the strength of the Voting Rights Act of 1965, the nation's most effective civil rights law.

Congress should promptly pass the John R. Lewis Voting Rights Advancement Act (VRAA), which passed the House of Representatives last year as H.R. 4. When the Supreme Court gutted preclearance, it stated explicitly that Congress could fix the VRA, using current data and taking a wider perspective than the last time it reauthorized the law.³⁸ Congress has engaged in extensive fact-finding and built a strong record.

The John Lewis Act would update the coverage formula that the Supreme Court struck down in *Shelby County*, renewing the Civil Rights Division's authority to block discriminatory voting rules in states with a recent history of voting rights violations.³⁹ The Justice Department would once again review proposed changes, before they are implemented, to ensure that they do not make it more difficult for racial and language group minorities to cast a ballot.

The VRAA would also give the Department stronger tools to combat discrimination. It would require preclearance of certain known, discriminatory voting practices nationwide, increase transparency by requiring reasonable public notice for voting law changes, and reinforce the Attorney General's authority to send observers to polling places.⁴⁰

B. Focus On Today's Threats to the Vote

A renewed Civil Rights Division should be an active force that takes on the myriad urgent threats to the vote nationwide.

Abusive voter purges. Rather than pressing states to ever-more-frenetically purge voters, the Division should refocus its list maintenance enforcement efforts around protecting voters from improper purges. Another example: in 2018, voters of color experienced longer wait times at the polls than their white counterparts and were more likely to wait in the longest lines.⁴¹ The Division should investigate and remedy these inequities.

Pay-to-vote schemes. The Division should also step up enforcement of rights guaranteed by the U.S. Constitution. A prime example: in 2018, 64 percent of Florida voters endorsed ending the state's policy of lifetime felony disenfranchisement, a Jim Crow remnant that affected 1.4

³⁸ *Shelby County v. Holder*, 570 U.S. 557 (2013).

³⁹ John R. Lewis Voting Rights Act, H.R. 4, 116th Cong. § 3 (2019).

⁴⁰ See John R. Lewis Voting Rights Act, H.R. 4, 116th Cong. §§ 5-7 (2019).

⁴¹ Hannah Klain, et al, "Waiting to Vote," Brennan Center for Justice, June 3, 2020, <https://www.brennancenter.org/our-work/research-reports/waiting-vote>.

million people. But last year, Gov. Ron DeSantis signed into law a requirement that denies people the right to vote unless they pay fees and costs whose primary purpose is to raise revenue for the state. Former Civil Rights Division officials filed an amicus brief decrying the law as a blatant violation of the Twenty-Fourth Amendment, which prohibits making voting rights contingent on the payment of taxes.⁴² But the current Department itself sat idly by while a federal appeals court ruled that it was constitutional to deny voting rights to hundreds of thousands of Floridians simply because they were not wealthy enough to pay their fees and fines.

Deceptive practices. American elections are awash in misinformation. These lies and threats, magnified exponentially by social media, are the most effective way to deter Americans from exercising their core right to vote. We may see increasing evidence of this as the November ballot approaches.

The Justice Department should be given stronger authority to police and punish those who deter voting through false information about eligibility or the “time, place and manner” of an election, or who hinder voters through intimidation. The For the People Act (H.R. 1), sweeping democracy reform passed by the House of Representatives last year, includes these and other measures to strengthen the Division’s power to address voter suppression through misinformation. It also charges the Department with publicizing corrective information when misinformation is disseminated.

C. Protect Election Security

Cyberattacks put American democracy at risk. They pose real, not imaginary, challenges to Americans’ right to vote. The Civil Rights Division could do more to help bolster the nation’s defenses.

The Help America Vote Act (HAVA) was passed in 2002 after the Florida recount. It aimed to modernize the nation’s election systems. The Justice Department has authority to enforce many of its provisions, authority it has not used during the Trump administration. HAVA enforcement would particularly help effort improve election infrastructure security. For instance, the law requires that when a voter’s eligibility is questioned, provisional ballots should be available as a failsafe at polling places.⁴³ That is important not only for individuals; it is a key resiliency mechanism should registration or pollbook data be corrupted. Some states always offer these ballots,⁴⁴ but others do not do so consistently.⁴⁵ Indeed, a recent Georgia State Board of

⁴² “Brief of Former Officials of the Civil Rights Division of the United States Department of Justice as Amici Curiae in Support of Plaintiffs-Appellees and Affirmance,” <https://assets.documentcloud.org/documents/7012575/Doj-Lawyers-Florida-2020-08-03.pdf>; Marcia Coyle, “36 Former DOJ Civil Rights Attorneys Urge Court to Scrap Florida’s ‘Pay-to-Vote’ System,” National Law Journal, August 3, 2020, <https://www.law.com/nationallawjournal/2020/08/03/36-former-doj-civil-rights-attorneys-urge-court-to-scrap-floridas-pay-to-vote-system/>.

⁴³ Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666, § 302 (2002).

⁴⁴ “Provisional Voting,” North Carolina State Board of Elections, accessed September 21, 2020, <https://www.ncsbe.gov/voting/provisional-voting>.

⁴⁵ *Georgia Pollworker Manual*, Office of Georgia Secretary of State Raffensperger, August 2020, 74-80, <https://georgiapollworkers.sos.ga.gov/Shared%20Documents/Georgia%20Poll%20Worker%20Training%20Manual.pdf>.

Elections hearing revealed that during the June primary, multiple polling locations ran out of envelopes and could not offer voters this option.⁴⁶ Yet the Department of Justice has not issued clarifying guidance on maintaining the supplies needed to effectuate this right.

In another important provision, HAVA requires that voting systems used in federal elections provide an auditable paper trail, and that voters can change their selections before that permanent paper record is produced.⁴⁷ These requirements should prohibit Direct Record Electronic (DRE) devices that lack a paper record in federal elections, as well as any online voting systems in which voters return their ballots through email or over the internet, a method that is not secure. Yet even as some jurisdictions in eight states continue to employ the use of DREs without a paper record,⁴⁸ and as jurisdictions have become tempted to permit online ballot return,⁴⁹ no clarification or enforcement action has been taken to protect the security of those ballots. Justice Department action matters greatly because the existence of a private right of action to enforce some sections of HAVA is sometimes contested.⁵⁰

Particularly important after the foreign attacks on registration databases in 2016: HAVA's mandate that computerized registration lists be protected by "adequate technological security measures."⁵¹ Russian hackers were able to exfiltrate data from at least one registration database in 2016.⁵² We know that Russia is at it again, potentially along with other malevolent foreign governments or groups. Even subtle manipulation of databases can wreak havoc on Election Day and undermine public confidence. It is therefore vital that officials and vendors meet HAVA's requirement for basic cybersecurity standards.

D. Restore the Independence of the Justice Department

A final recommendation goes to a fundamental challenge for American governance: the politicization of law enforcement. Donald Trump is hardly the first president to seek to influence the Justice Department. Nor is William Barr the first Attorney General to oblige. But as discussed above, their misconduct has wrenched the Department, sparking a crisis of confidence within its ranks and with the public.

⁴⁶ *Georgia State Board of Elections Hearing*, (September 10, 2020), recording available at <https://sos.ga.gov/admin/files/September%2010,%202020%20State%20Election%20Board%20Meeting.mp4>.

⁴⁷ Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666, § 301 (2002).

⁴⁸ For jurisdictions in Ohio, Kansas, Tennessee, Indiana, Mississippi, Louisiana, Texas, and New Jersey that use DREs lacking a paper record for all who vote in person, see, "The Verifier," Verified Voting, accessed September 21, 2020, <https://verifiedvoting.org/verifier/#mode/navigate/map/ppEquip/mapType/normal/year/2020>.

⁴⁹ Eric Geller, "Some States Have Embraced Online Voting. It's a Huge Risk," *Politico*, June 9, 2020, <https://www.politico.com/news/2020/06/08/online-voting-304013>.

⁵⁰ *E.g.*, Memorandum by United States as Amicus Curiae, *Bay County Dem. Party v. Land*, 347 F.Supp. 404 (E.D. Mich. 2004) (arguing that HAVA does not create a private right of action); *County of Nassau v. New York*, 724 F.Supp. 295, 305 (E.D. New York 2010). ("[T]here is no indication that HAVA provides any exclusive cause of action or, for that matter, any private right of action with respect to voting machines and procedures.")

⁵¹ Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat.1666, § 303(a)(3) (2002).

⁵² U.S. Senate, Select Committee on Intelligence, *Report on Russian Active Measures Campaigns and Interference in the 2016 U.S. Election*, 2019, vol. 1, 22, https://www.intelligence.senate.gov/sites/default/files/documents/Report_Volume1.pdf.

The Brennan Center has done a substantial amount of work on partisan abuses at the Department of Justice. Our bipartisan National Task Force on the Rule of Law and Democracy, comprised of former senior political officials who have served in both Republican and Democratic administrations, created a legislative agenda to strengthen guardrails against abuse of power in the executive branch.⁵³ The Brennan Center has also published a set of proposals for executive actions that the next president can take to rebuild unwritten rules of governance that safeguard our democracy.⁵⁴ Additionally, we have a tracker of the Trump administration's abuses of power throughout its response to the Covid-19 pandemic, including those occurring at the Department of Justice.⁵⁵

Undue political interference gravely threatens the work of the Civil Rights Division, and the Department of Justice in general, a threat that has recurred during the past several administrations. For instance, under the George W. Bush presidency, the Department's inspector general and Office of Professional Responsibility found that the political official overseeing the Civil Rights Division "considered political and ideological affiliations in hiring career attorneys and in other personnel actions affecting career attorneys" there.⁵⁶ Indeed, when political officials pressured prosecutors to bring voter fraud charges against innocent people, some of the prosecutors refused and were fired. The resulting scandal led to the resignation of Attorney General Alberto Gonzales.

Political interference at the Department of Justice has again reached a crisis point during the current administration. As described above, repeatedly the Department has made prosecution and sentencing decisions about the President's political associates. And the president has meddled in politically sensitive prosecutions, including by firing the U.S. attorney for the Southern District of New York, whose office is investigating matters involving the president and his close associates.⁵⁷

⁵³ *National Task Force on Rule of Law & Democracy*, Brennan Center for Justice, 2019, <https://www.brennancenter.org/issues/bolster-checks-balances/ethics-rule-law/national-task-force-rule-law-democracy>.

⁵⁴ Martha Kinsella, Rudy Mehrbani, Wendy Weiser, and Daniel Weiner, *Executive Actions to Restore Integrity and Accountability in Government*, Brennan Center for Justice, 2020, 5, <https://www.brennancenter.org/our-work/policy-solutions/executive-actions-restore-integrity-and-accountability-government>.

⁵⁵ Martha Kinsella, Gareth Fowler, Julia Boland, and Daniel Weiner, *Trump Administration Abuses Thwart US Pandemic Response*, Brennan Center for Justice, 2020, <https://www.brennancenter.org/our-work/research-reports/trump-administration-abuses-thwart-us-pandemic-response>.

⁵⁶ U.S. Department of Justice Office of the Inspector General and Office of Professional Responsibility, *An Investigation of Allegations of Politicized Hiring and Other Improper Personnel Actions in the Civil Rights Division* (Washington, D.C.: Department of Justice Office of the Inspector General and Office of Professional Responsibility, 2009): 64, https://www.oversight.gov/sites/default/files/oig-reports/final_9.pdf.

⁵⁷ Alan Feuer et al., "Trump Fires U.S. Attorney in New York Who Investigated His Inner Circle," *The New York Times*, June 20, 2020, <https://www.nytimes.com/2020/06/20/nyregion/trump-geoffrey-berman-fired-sdny.html>. Senior political officials also pressured department attorneys to conduct an antitrust investigation of automakers that attempted to lower their emissions and to cut Trump ally Roger Stone "a break" in sentencing. Kyle Cheney and Leah Nylen, "Prosecutor Says He Was Pressured to Cut Roger Stone 'a Break' Because of His Ties to Trump," *Politico*, June 23, 2020, <https://www.politico.com/news/2020/06/23/prosecutor-says-he-was-pressured-to-cut-roger-stone-a-break-because-of-his-ties-to-trump-336075>.

This abuse must stop. The Brennan Center has crafted a series of solutions — building on longstanding practices — that would safeguard against undue political interference at the Department of Justice. Among these solutions is a proposal to strengthen the policy of limiting contacts between the White House and the Department.⁵⁸ Our Task Force has also proposed expanding the jurisdiction of agency inspectors general to include investigations into improper interference in law enforcement matters.⁵⁹ It also makes sense to strengthen safeguards at other agencies that interact with the Justice Department. For example, the Census Bureau and the Commerce Department could be required to maintain publicly accessible logs of the communications that senior officials have with personnel from other federal agencies, such as the Department of Justice.

Congress is already moving to address these issues. Seven committee chairs, including Chairman Nadler, this week introduced groundbreaking legislation that would, among other things, codify new safeguards to prevent improper political interference with the Department of Justice.⁶⁰ This proposal is similar to a separate bill introduced by Rep. Jeffries.⁶¹ Another bill sponsored by Rep. Richmond, which passed the House of Representatives, would expand the jurisdiction of the inspector general for the Department of Justice to include allegations relating to a Department attorney’s authority to investigate, litigate, or provide legal advice.⁶²

There is reason to hope that in a new Congress, such legislation could attract bipartisan support.

* * *

The Civil Rights Division has a storied history. It must play a vital role in the defense of our democracy. At a time of extraordinary stress on our political institutions, it can once again step forward to advance the voting rights of millions of Americans. It must be renewed and revitalized. That will require determination, a resistance to inappropriate political interference, and a commitment to following the law.

⁵⁸ Preet Bharara, Christine Todd Whitman, et al., *Proposals for Reform*, National Task Force on Rule of Law & Democracy, 2018, 17-

20, https://www.brennancenter.org/sites/default/files/publications/TaskForceReport_2018_09_.pdf; and Martha Kinsella, Rudy Mehrbani, Wendy Weiser, and Daniel Weiner, *Executive Actions to Restore Integrity and Accountability in Government*, Brennan Center for Justice, 2020, 7, https://www.brennancenter.org/sites/default/files/2020-07/ExecutiveActions_Draft03-2.pdf.

⁵⁹ Bharara, Whitman, *Proposals for Reform*, 20–21. Relatedly, the Brennan Center has also proposed that the president issue a memorandum laying out standards ensuring that inspectors general are insulated from political pressure. Martha Kinsella, Rudy Mehrbani, Wendy Weiser, and Daniel Weiner, *Executive Actions to Restore Integrity and Accountability in Government*, Brennan Center for Justice, 2020, 9, https://www.brennancenter.org/sites/default/files/2020-07/ExecutiveActions_Draft03-2.pdf.

⁶⁰ Adam Schiff, Jerrold Nadler, Carolyn Maloney, John Yarmuth, Zoe Lofgren, Eliot Engel, and Richard Neal, “Democratic House Chairs: Here’s How We Can Protect Democracy from a Lawless President,” *Washington Post*, September 23, 2020, <https://www.washingtonpost.com/opinions/2020/09/23/democratic-house-chairs-trump-damage-democracy/>.

⁶¹ Security from Political Interference in Justice Act of 2019, H.R. 3380, 116th Cong. (2019).

⁶² Inspector General Access Act of 2019, H.R. 202, 116th Cong. (2019).