Poll Position

Is the Justice Department poised to stop voter fraud—or to keep voters from voting?

by Jeffrey Toobin

On March 7, 1965, John Lewis, the twenty-five-year-old chairman of the Student Nonviolent Coordinating Committee, led about six hundred marchers across the Edmund Pettus Bridge, in Selma, Alabama. When they reached the crest of the bridge, the protesters were set upon by helmeted Alabama state troopers and local sheriff's posses, who were swinging clubs and firing tear gas. One of the first troopers on the bridge slammed his nightstick into the left side of Lewis's head, fracturing his skull. "I remember how strangely calm I felt as I thought, 'This is it,' " Lewis wrote years later in his autobiography. " 'People are going to die here. I'm going to die here.' " As it turned out, more than fifty marchers were treated for injuries, but no one died.

The attack on the unarmed protesters shocked the country, and President Johnson used the events of what became known as Bloody Sunday to advance an essential part of his civil-rights program. On March 15th, Johnson addressed a Joint Session of Congress to demand that legislators pass, at long last, the Voting Rights Act. Adopting the great anthem of the civil-rights movement, the President concluded his speech with the words " . . . and we shall overcome." Five months later, on August 6th, Johnson signed the bill into law, and invited Lewis to the Oval Office to celebrate the occasion. Toward the end of their meeting, as Lewis recalled, Johnson told him, "Now, John, you've got to go back and get all those folks registered. You've got to go back and get those boys by the balls. Just like a bull gets on top of a cow. You've got to get 'em by the balls and you've got to squeeze, squeeze 'em till they hurt."

Thirty-seven years later, in 2002, Lewis was called on by a federal court to answer a charge that he had violated the Voting Rights Act by discriminating against African-Americans. Lewis was an eight-term member of Congress by then, and a pillar of the Georgia Democratic Party. In the nearly four decades since the act's passage, it had revolutionized the franchise in the South. The literacy tests that were still in effect throughout the region were immediately suspended. Federal registrars replaced local officials who refused to register blacks. And the Attorney General was authorized to eliminate poll taxes wherever they remained. Amended and expanded in 1970, 1975, and 1982, the act also prohibited the kind of racial gerrymandering that allowed white state legislators to draw district lines that prevented African-Americans from winning elective office. It was this provision which Lewis was charged with violating.

During most of that time, the Justice Department's Voting Section, which consists of three dozen or so lawyers who are responsible for enforcing the Voting Rights Act, had insisted that states in the South draw some legislative districts with heavy minority populations, so that African-Americans could be assured of representation. But in the re-districting that followed the 2000 census Lewis and the Democrats, who then controlled Georgia's General Assembly, decided that this process had become counterproductive to black interests and they spread the largely Democratic African-American vote around to more districts. "My congressional district was probably sixty or sixty-five per cent black," Lewis told me recently. "Now it's barely fifty-two per cent. That's fine. I can win, and I'm running unopposed this year." As Lewis testified in the voting-rights trial, Georgia is "not the same state that it was . . . in 1965 or in 1975 or even in 1980 or 1990. We've changed. We have come a great distance. It's not just in Georgia but in the American South. I think people are preparing to lay down the burden of race."

The Justice Department argued that the Georgia plan violated the rights of African-Americans in several of the redrawn districts, a contention that outraged Lewis. "For

them to suggest that someone who almost lost his life to get the Voting Rights Act passed wanted to violate it, that was just unbelievable," he told me.

But the government's position wasn't frivolous. The Georgia plan did make it somewhat less certain that blacks would win in several legislative districts. That could be seen as a "retrogression" of African-American rights, which is prohibited by the Voting Rights Act. The fight went all the way to the United States Supreme Court, which last year upheld Georgia's redistricting plan by a margin of just five to four. As it turned out, the five more conservative justices supported the Georgia plan, while the more liberal justices dissented, saying, in effect, that the Voting Rights Act had been designed to help black voters—not to serve the shifting agendas of incumbent politicians, African-American or otherwise. "If one appreciates irony, it is a wonderful case," Daniel Lowenstein, a professor of law at U.C.L.A., says. "Here you have the standard five so-called conservatives on the Court deciding in favor of John Lewis and the Democratic Party of Georgia, and the so-called liberals in favor of the Republicans in Georgia."

The Georgia controversy also raised a question that once seemed unthinkable: Is the Voting Rights Act obsolete? The question has special salience because key provisions of the law expire in 2007, and it's not clear how, or whether, Congress will reauthorize them. "The Voting Rights Act was a transformative statute," Samuel Issacharoff, a professor at Columbia Law School, says. "It's hard to think of any civil-rights law in any walk of life that has been as dramatically effective." In more recent years, the law has gone far beyond such basic issues as eliminating the poll tax; it has, for instance, stopped cities from annexing suburbs to dilute the importance of the minority vote, and the law has made sure that city councils are elected by neighborhood, rather than in at-large citywide races, which had been another way to limit the number of minority candidates who would win seats. As a result of all its changes, according to Issacharoff, "the act created a black political class that is now deeply embedded and politically savvy." The civil-rights establishment—which includes interlocking networks of public-interest organizations, legal academics, and social scientists—is now conducting a sober and uncertain appraisal of the law, but doing so with little momentum and unclear goals.

It is a vacuum that the Justice Department, under John Ashcroft, has moved quickly to fill. As 2007 approaches and liberal activists cautiously explore their options, conservatives—including those in the Justice Department—are using the traditional language of voting rights to recast the issues, invariably in ways that help Republican candidates. The results of this quiet rightward revolution within the Justice Department may be apparent as soon as the November election.

On October 8, 2002, Attorney General Ashcroft stood before an invited audience in the Great Hall of the Justice Department to outline his vision of voting rights, in words that owed much to the rhetoric used by L.B.J. and Lincoln. "The right of citizens to vote and have their vote count is the cornerstone of our democracy—the necessary precondition of government of the people, by the people, and for the people," Ashcroft told the group, which included several veteran civil-rights lawyers.

The Attorney General had come forward to launch the Voting Access and Integrity Initiative, whose name refers to the two main traditions in voting-rights law. Voter-access efforts, which have long been associated with Democrats, seek to remove barriers that discourage poor and minority voters; the Voting Rights Act itself is the paradigmatic voter-access policy. The voting-integrity movement, which has traditionally been favored by Republicans, targets fraud in the voting process, from voter registration to voting and ballot counting. Despite the title, Ashcroft's proposal favored the "integrity" side of the ledger, mainly by assigning a federal prosecutor to watch for election crimes in each judicial district. These lawyers, Ashcroft said, would "deter and detect discrimination, prevent electoral corruption, and bring violators to justice."

Federal law gives the Justice Department the flexibility to focus on either voter

access or voting integrity under the broad heading of voting rights, but such shifts of emphasis may have a profound impact on how votes are cast and counted. In the abstract, no one questions the goal of eliminating voting fraud, but the idea of involving federal prosecutors in election supervision troubles many civil-rights advocates, because few assistant United States attorneys have much familiarity with the laws protecting voter access. That has traditionally been the province of the lawyers in the Voting Section of the Civil Rights Division, whose role is defined by the Voting Rights Act. In a subtle way, the Ashcroft initiative nudged some of these career civil-rights lawyers toward the sidelines.

Addressing the real but uncertain dimensions of voter fraud means risking potentially greater harm to legitimate voters. "There is no doubt that there has been fraud over the years—people voting twice, immigrants voting, unregistered people voting—but no one knows how bad the problem is," Lowenstein says. "It is a very hard subject for an academic or anyone else to study, because by definition it takes place under the table." And, despite its neutral-sounding name, "voting integrity" has had an incendiary history. "It's one of those great euphemisms," Pamela S. Karlan, a professor at Stanford Law School, says. "By and large, it's been targeted at minority voters." During the Senate hearings on William Rehnquist's nomination as Chief Justice, in 1986, a number of witnesses testified that in the early nineteen-sixties Rehnquist, then a lawyer in private practice and a Republican political activist, had harassed black and Latino voters at Arizona polling places, demanding to know if they were "qualified to vote." (Rehnquist denied doing so.) In the 1981 governor's race in New Jersey, the Republican Party hired armed off-duty police officers to work in a self-described National Ballot Security Task Force, which posted signs at polling places in minority neighborhoods reading, "WARNING, THIS AREA IS BEING PATROLLED BY THE NATIONAL BALLOT SECURITY TASK FORCE. IT IS A CRIME TO FALSIFY A BALLOT OR TO VIOLATE ELECTION LAWS."

As recently as last year's gubernatorial election in Kentucky, Republicans placed "challengers," who may query a voter's eligibility, in polling places in Louisville's predominantly black neighborhoods, an act that many Democrats regarded as an attempt at racial intimidation. An emphasis on voting integrity, whatever the motivations behind it, often helps Republicans at the polls.

The person in over-all charge of the Administration's voting-rights portfolio is R. Alexander Acosta, the Assistant Attorney General for the Civil Rights Division. On May 4th, Acosta invited representatives of many leading traditional civil-rights organizations, such as the N.A.A.C.P. Legal Defense and Educational Fund and the Leadership Conference on Civil Rights, to the seventh-floor conference room in the Justice Department Building to talk about his plans for the upcoming election. Acosta, who is a thirty-five-year-old Cuban-American from Miami, served first as a top political appointee in the Civil Rights Division, where he was known for his close attention to the rights of Spanish-speaking minorities. After the 2000 census, Acosta asked the Census Bureau to make data available before the 2002 elections, hoping to locate Spanish-speaking communities and provide bilingual ballots. "Alex was very helpful in making sure that the bureau got the data on a timely basis, so jurisdictions could make all aspects of voting accessible," says Marisa Demeo, who was then a lawyer with the Mexican-American Legal Defense and Education Fund, which gave Acosta its 2003 Excellence in Government Service Award.

The May 4th meeting addressed issues that related more to the traditional voting-rights concerns of African-Americans than to those of Latinos. Acosta opened the session with an unusual request: that no one take notes on what he had to say. The meeting was a courtesy, he said, but he didn't want to have his exact words thrown back at him later. (Acosta has declined repeated requests to be interviewed.) According to several people present at the meeting, Acosta described how Voting Section lawyers will monitor ballot access at the polls while federal prosecutors will be on call to respond to

allegations of fraud. He informed the group that ninety-three federal prosecutors would travel to Washington in July for a two-day training session, and that they would all be on duty on Election Day. Acosta said that the changes were being made in good faith and asked those assembled to keep an open mind.

The idea of placing prosecutors on call on Election Day created misgivings both inside and outside the Voting Section. "A lot of assistant U.S. attorneys are going to be more interested in voting integrity than in voter protection," Jon Greenbaum, a lawyer who recently left the Voting Section, after nearly seven years, to join the progressive Lawyers' Committee for Civil Rights Under Law, told me. "How many people are scared off from voting because you ask them a question at a polling place? There is no way to know." As another civil-rights lawyer puts it, "Voting is kind of an irrational act anyway. It's easy to discourage people from doing it." Justice officials insist that they don't want to keep anyone from legitimately voting. "I understand that, historically, intimidation is something that could be used as a method to get people not to vote," Luis Reyes, who is counsellor to Acosta, says. "But intimidation is antithetical to our mission with this initiative."

By most accounts, Ashcroft's Access and Integrity Initiative came too late to make much difference in the 2002 elections, which followed his announcement by about a month. Civil-rights advocates note, however, that the only major fraud investigation that came out of that election concerned Native Americans in South Dakota, who generally vote overwhelmingly for Democrats.

The spectre of the vote-counting controversy in Florida after the 2000 election still haunts most discussions of voting-rights law, and gives everything about voting rights a partisan slant. This is especially true of the government's most direct response to the 2000 election—the legislation that became known as the Help America Vote Act, or HAVA, which Congress passed in 2002 and which is only now having widespread practical effect. Though HAVA is often described as Congress's answer to the Florida imbroglio, some of its original inspiration, according to Kit Bond, a Missouri Republican who was one of its principal sponsors in the Senate, was a voting controversy in Missouri that same year. "I don't believe we had anywhere near an honest election in St. Louis in 2000," Bond told me. "They kept the polls open late and let all kinds of people vote who shouldn't have—people who registered from vacant lots, dead people on the rolls, even a springer spaniel. After what I saw, I said we are going to make it easier to vote but harder to cheat." (On November 7, 2000, Democrats in St. Louis persuaded a local judge to extend voting hours, arguing that high voter turnout had caused lines to back up at polling places; Republicans charged that the maneuver was an illegal attempt to gain partisan advantage.)

At the time HAVA was passed, it was generally portrayed as a compromise between voter access and voting integrity: Democrats got more money for the states to invest in modern voting technology, and Republicans won new and tighter restrictions on fraud. So far, though, implementation of the law seems to have favored Republicans. HAVA authorized the government to spend up to $3.9 billion over three years on new registration systems and voting machines, but states have received less than half of the original amount. The law requires each state to create a computerized list of all registered voters, but forty states have been granted waivers of this obligation until 2006. The antifraud provisions, however, are expected to take effect in time for the November elections. This is what Bond intended. "There is nothing like the fear of jail time to get people to stop messing with elections," he told me. HAVA also requires states to allow people who claim they are wrongly denied the right to vote at the polls the chance to cast "provisional" ballots. The recent history of provisional ballots is not promising, though. For example, in Chicago during this year's primary, 5,498 of 5,914 provisional ballots were ultimately disqualified. The question of how and whether provisional votes

will be counted in 2004 is unsettled in many states and could delay the posting of results on Election Night.

One of the more controversial parts of the new law requires, in most circumstances, voters who have registered by mail to provide their driver's license or Social Security numbers, and to produce an official photo I.D. at the polls, or a utility bill. Hans A. von Spakovsky, a counsel to Acosta and the main Justice Department interpreter of HAVA, wrote to Judith A. Armold, an assistant attorney general in Maryland, that the Justice Department believed states must "verify" the Social Security numbers that people submit on their registration forms. For most states, this requirement won't apply until 2006, but it may be a major hurdle for both the states and newly registered voters. "What D.O.J. is saying is clearly contrary to the statute in our view," Armold says.

Von Spakovsky, a longtime activist in the voting-integrity cause, has emerged as the Administration's chief operative on voting rights. Before going to Washington, he was a lawyer in private practice and a Republican appointee to the Fulton County Registration and Election Board, which runs elections in Atlanta. He belonged to the Federalist Society, a prominent organization of conservative lawyers, and had also joined the board of advisers of a lesser-known group called the Voting Integrity Project.

The V.I.P. was founded by Deborah Phillips, a former county official of the Virginia Republican Party, as an organization devoted principally to fighting voting fraud and promoting voter education. In 1997, von Spakovsky wrote an article for the Georgia Public Policy Foundation, a conservative research group, that called for an aggressive campaign to "purge" the election rolls of felons. Within months of that article's publication, the V.I.P. helped put von Spakovsky's idea into action. Phillips met with the company that designed the process for the removal of alleged felons from the voting rolls in Florida, a process that led, notoriously, to the mistaken disenfranchisement of thousands of voters, most of them Democratic, before the 2000 election. (This year, Florida again tried to purge its voting rolls of felons, but the method was found to be so riddled with errors that it had to be abandoned.) During the thirty-six-day recount in Florida, von Spakovsky worked there as a volunteer for the Bush campaign. After the Inauguration, he was hired as an attorney in the Voting Section and was soon promoted to be counsel to the Assistant Attorney General, in what is known as the "front office" of the Civil Rights Division. In that position, von Spakovsky, who is forty-five years old, has become an important voice in the Voting Section. (Von Spakovsky, citing Justice Department policy, has also declined repeated requests to be interviewed.)

In a recent speech at Georgetown University, von Spakovsky suggested that voting integrity will remain a focus for the Justice Department, and that voter access might best be left to volunteers. "Frankly, the best thing that can happen is when both parties and candidates have observers in every single polling place, wherever the votes are collected and tabulated, because that helps make sure that nothing happens that shouldn't happen, that the votes are counted properly, and that there is transparency to maintain public confidence in elections," he said. "Not enough people volunteer to be poll-watchers. They ought to do that so that there are poll-watchers everywhere in the country throughout the whole election process." The Bush-Cheney campaign has announced plans to place lawyers on call for as many as thirty thousand precincts on Election Day, to monitor for vote fraud. Democratic lawyers also plan to be out in force.

Since Ashcroft took office, traditional enforcement of the Voting Rights Act has declined. The Voting Section has all but stopped filing lawsuits against communities alleged to have engaged in discrimination against minority voters. "D.O.J. is a very bureaucratic institution," Jon Greenbaum, the former Voting Section lawyer, said, "and it's hard to get cases filed under any Administration, but we were filing cases in the Clinton years." As even civil-rights advocates acknowledge, there are fewer vote-discrimination cases to bring than there have been in the past. The Justice Department's Web site says

that "several lawsuits of this nature are filed every year," but since Bush was sworn in the Voting Section has filed just one contested racial vote-discrimination case, in rural Colorado, which it lost. Justice Department sources say the Voting Section is also considering whether to sue a Mississippi locality that has an African-American majority. Such a lawsuit would be the first use of a key section of the Voting Rights Act to protect the rights of white voters.

The main business of the Voting Section is still passing judgment on legislative redistricting in areas that have a history of discrimination. Under Ashcroft, its actions have consistently favored Republicans—for instance, in Georgia, where the department challenged the Democrats' gerrymander, and in Mississippi, where the Voting Section stalled the redistricting process for so long that a pro-Republican redistricting plan went into effect by default. The Voting Section's role in the controversial redistricting of Texas was more direct and, ultimately, more significant. After the 2000 census, Texas, like most states, put through a new redistricting plan. Then, after the midterm elections, Tom DeLay, the House Majority Leader, who is from Houston, engineered passage of a revised congressional redistricting plan through the state legislature, which may mean a shift of as many as seven seats from the Democrats to the Republicans. It was unprecedented for a state to make a second redistricting plan after a post-census plan had been adopted. When the DeLay plan was submitted to the Justice Department for approval, career officials in the Voting Section produced an internal legal opinion of seventy-three pages, with seventeen hundred and fifty pages of supporting documents, arguing that the plan should be rejected as a retrogression of minority rights. However, according to people familiar with the deliberations, the political staff of the Voting Section exercised its right to overrule that decision and approved the DeLay plan, which is now in effect for the 2004 elections.

Far from Washington, and even farther from the reigning ideology there, some civil-rights advocates have begun to sketch the beginnings of an alternative scenario for voting rights. At a conference at Harvard Law School on May 10th, under the direction of Christopher Edley, who is also a member of the United States Commission on Civil Rights, about forty litigators, law professors, and social scientists started debating key moves for the reauthorization of the Voting Rights Act in 2007.

"Mostly, we concentrated on trying to identify the right questions," Edley, who recently became the dean of Boalt Hall, the law school of the University of California at Berkeley, said. "You can't be utopian. This was not an exercise in how to reinvent democracy. But we were trying to figure out what could one plausibly argue for." Decades removed from the struggles of the nineteen-sixties, Edley and his colleagues faced a complex set of issues. How should the government draw multiethnic districts, where Hispanics or Asians lay claim to seats held by whites or even by African-Americans? "Who speaks for the African-American community?" Edley asked. "Is it the African-American incumbents, or do we discount their testimony, because of their self-interest?"

For Edley and his colleagues, the lessons of the Florida recount suggest possible reforms of the Voting Rights Act. Some of the more lurid allegations of racial discrimination in Florida during the 2000 election, like racial profiling at roadblocks near polling places in black neighborhoods, were never proved, but there is little doubt that African-Americans faced disproportionate difficulties at the polls. In Jacksonville, for example, apparently because of a confusing ballot design, more than twenty-five thousand votes—nine per cent of all ballots cast—were rendered invalid. Nearly nine thousand of these invalid votes were concentrated in African-American precincts. Gadsden County had the highest percentage of black voters in the state and the highest rate of disqualified ballots, with one in eight votes not counted. In its current form, the Voting Rights Act offers no specific redress for these problems. Perhaps, Edley suggested, the law should be expanded to include such things as the quality of voting machines. "In Florida, we saw

tremendous geographic disparities in spoilage rates for ballots," Edley said. "We don't accept those kinds of disparities when it comes to the standards for drinking water. Why do we accept them when it comes to the quality of the voting process?" Still, Edley recognizes that control of the Justice Department may matter as much as the precise words of the laws on the books. "Obviously, the effectiveness of it is going to be greatly diminished if enforcement takes on a pronounced ideological tilt," he says.

Under Ashcroft, the Justice Department has also changed its method of hiring lawyers, who are supposed to be apolitical, and often go on to spend their careers working for the government. The department, which employs close to four thousand attorneys, hires junior-level lawyers through a program known as the Attorney General's Honors Program, which brings in about a hundred and fifty new lawyers each year. In the past, the program was run by mid-level career officials, who were known for their political independence. Since 2002, the Honors Program has been run by political appointees. "It's called the Attorney General's Honors Program, and when Attorney General Ashcroft signed the first batch of appointments he said, 'I'm the Attorney General. How come I don't know anything about this?' " Mark Corallo, Ashcroft's spokesman, says. "He said he wanted the top people in the department getting involved. He said he wanted greater outreach, different law schools approached, reaching out not just for racial minorities but for economic minorities as well." Corallo dismisses complaints about the changes as coming from malcontents. "A bunch of mid-level people here had their boondoggle taken away from them, going on these recruiting trips for weeks at a time, wining and dining at great hotels on the government's dime," he said.

Lawyers inside and outside the department say that the change in the Honors Program has already had an effect, especially in politically sensitive places like the Voting Section. "The front office disbanded the hiring committee and took over all hiring," one lawyer who recently left the Voting Section told me. "That was a huge deal. Under previous Republican Administrations, that hadn't happened. They even took it over for summer volunteer clerks." Thanks to these changes, some in the department believe, it's only a matter of time before tensions in the Voting Section disappear. As a current employee puts it, "Soon, there won't be any difference between the career people and the political people. The front office is replicating itself. Everyone here will be on the same page."