

# Michigan Journal of Race and Law

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Volume 13

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2007

## The Power of Observation: The Role of Federal Observers Under the Voting Rights Act

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### Recommended Citation

James T. Tucker, *The Power of Observation: The Role of Federal Observers Under the Voting Rights Act*, 13 MICH. J. RACE & L. 227 (2007).

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## THE POWER OF OBSERVATION: THE ROLE OF FEDERAL OBSERVERS UNDER THE VOTING RIGHTS ACT

James Thomas Tucker\*

*The Voting Rights Act of 1965 (VRA) is one of the most successful civil rights laws ever enacted. Following its passage, the promise of the Fifteenth Amendment has become a reality for millions of Americans. Black voters in the South register to vote without being subjected to discriminatory tests or devices. Minority citizens can cast ballots free of intimidation and violence. Barriers posed by English-only elections have been removed for many language minority voters. Voters are permitted to receive assistance from the person of their choice. Federal observers play an indispensable role in serving as the eyes and ears of the Federal Government and the public it protects to ensure compliance with the Act.*

*This Article explores the role of federal observers under the recently reauthorized VRA. It describes the federal observer provisions, including the role of observers, where they are deployed, how they are trained, and the ways in which their reports are used. It outlines steps that have been taken to ensure the provisions are constitutional by allowing observers to observe all steps of the voting process while preserving ballot secrecy. It explains why federal observers must be kept neutral and free from partisanship. It concludes with a discussion of the substantial role that*

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Much of the content of this Article was included in the Senate record. See *The Continuing Need for Federal Examiners and Observers to Ensure Election Integrity*, S. HRG. 109-669, at 402-08, 463-90 (2006) (testimony of James Thomas Tucker).

I am deeply indebted to Kristen Clarke-Avery, Assistant Counsel in the Political Participation Group of the NAACP Legal Defense and Educational Fund, Inc., and formerly a trial attorney in the Voting Section, for her extensive comments and suggestions on this Article, and the underlying testimony.

I also would like to acknowledge the contributions of my other former Voting Section colleagues with whom I worked on the Passaic County, New Jersey litigation: Angela Hart-Edwards, lead counsel; Luz Lopez-Ortiz, co-counsel; Maria Bonilla, paralegal; and Bob Kengle, Deputy Section Chief. Without the dedication and extensive work of each of these remarkable professionals, the Passaic story would be quite different from the one that is told in this Article. Of course, the voting discrimination in Passaic County could not have been documented and remedied without the substantial efforts of the U.S. Office of Personnel Management, particularly Donna Pressley, David Lopez, and of course, the federal observers.

*federal observers played in securing the voting rights for limited-English proficient Spanish-speaking voters in Passaic County, New Jersey, in the face of widespread disenfranchisement. By preventing discrimination, enforcing the VRA, and measuring progress of non-compliant jurisdictions, federal observers help “secure equal voting rights of all citizens.”*

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## INTRODUCTION

A well-known riddle asks, “If a tree falls in a forest, and no one is around to hear it, does it make a sound?” A variation of that riddle could be applied to public elections. If voting discrimination occurs and no one is around to observe it, did it happen?

The Voting Rights Act of 1965 (VRA) authorizes federal courts<sup>1</sup> and the Attorney General of the United States<sup>2</sup> to send federal observers to

1. See 42 U.S.C. § 1973a (2000).

2. See *id.* § 1973f.

certified jurisdictions “to secure equal voting rights of all citizens.”<sup>3</sup> Observers serve as the eyes and ears for the Federal Government and the public it protects to ensure compliance with the Act. Their presence at polling and ballot counting locations make voting discrimination less likely to occur on election day without being documented and addressed.<sup>4</sup> In the course of doing so, federal observers help preserve the fundamental right of all voters to participate in the democratic process.

This Article explores the role of federal observers under the recently reauthorized VRA. Part I provides an overview of the federal observer provisions, including the role of observers, selection of jurisdictions for observer coverage, training of observers, and the preparation and use of observer reports. Part II describes the constitutionality of the provisions through preservation of ballot secrecy and prevention of voting discrimination. Part III explains the need to keep federal observers neutral and free from partisan influences that often lead to the very discrimination requiring their presence. The manner in which the federal observer provisions operate in practice is detailed in Part IV through the case study of Passaic County, New Jersey. The ability of federal observers to watch the conduct of elections is a tremendous power that goes far towards making the promise of democracy a reality for all American citizens.

#### I. OVERVIEW OF THE FEDERAL OBSERVER PROVISIONS

The critical role federal observers play in the comprehensive protection of voting rights cannot be appreciated without understanding how the federal observer provisions operate. Federal observers have a unique role in preventing voting discrimination, enforcing the VRA, and measuring progress to remedy violations of the VRA and the Fourteenth and Fifteenth Amendments. There are certain requirements for certifying jurisdictions for observer coverage, which have changed as a result of the 2006 amendments to the VRA. Even after a jurisdiction is certified for coverage, the Attorney General has to make an administrative determination whether to deploy observers for a particular election. Once that decision is made, Justice Department staff must map out a comprehensive strategy to deploy the federal observers in the areas where they are most likely to fulfill their statutory function. The creation of the federal observer report and training of observers on how to use it is vital to those

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3. H.R. Rep. No. 89-439 at 29 (1965), as reprinted in 1965 U.S.C.A.N. 2437, 2460.

4. See 42 U.S.C. § 1973f (2000) (authorizing observers to monitor and tabulate voting at election sites for the purpose of ensuring that those who have a right to vote are allowed to do so).

efforts. This Part provides an overview of these important components of the federal observer program.

### A. *The Role and Function of Federal Observers*

The role of federal observers is straight-forward: They are non-lawyer employees of the United States Office of Personnel Management (OPM) authorized to observe “whether persons who are entitled to vote are being permitted to vote” and “whether votes cast by persons entitled to vote are being properly tabulated.”<sup>5</sup> They are “trained by OPM and [by] the Justice Department to watch, listen, and take careful notes of everything that happens inside the polling place during an election, and are also trained not to interfere with the election in any way.”<sup>6</sup> In jurisdictions with significant numbers of language minorities, bilingual observers are preferable because not only are they able to observe the manner in which language minority voters are treated, but they can also assess the quality of any written language materials and oral language assistance offered to voters in their native language.<sup>7</sup> When a voter requires assistance to cast a ballot, the observer may accompany that voter behind the curtain of the voting booth if the observer first obtains the voter’s permission.<sup>8</sup>

Federal observers are not sent to every certified jurisdiction for every election. Instead, they typically are only dispatched to certified jurisdictions in which it has “been determined that there is ‘a substantial prospect of election day problems.’”<sup>9</sup> The role of federal observers should be viewed in terms of the acronym “PEP”: Prevent, Enforce, and Progress.

#### 1. Prevention of Vote Denial

Federal observers “Prevent” vote denial in several respects. According to the 1975 Senate Report, “the role of Federal observers can be critical

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5. *See id.*

6. U.S. Dep’t of Just., Civ. Rts. Div., Voting Sec., Frequently Asked Questions, <http://www.usdoj.gov/crt/voting/misc/faq.htm> (last visited Sept. 27, 2007); *see also* U.S. OFFICE OF PERSONNEL MGT., MINORITY LANGUAGE CAPTAIN/CO-CAPTAIN MANUAL app. E (1998) [hereinafter OBSERVER MANUAL] (summarizing the training federal observers receive concerning their election-day responsibilities).

7. *See generally* COMPTROLLER GEN. OF THE U.S., VOTING RIGHTS ACT: ENFORCEMENT NEEDS STRENGTHENING 24–25 (1978) [hereinafter COMPTROLLER REPORT] (summarizing complaints received from minority contacts about the absence of minorities serving as federal observers).

8. *See* United States v. Executive Comm. of the Democratic Party of Greene County, 254 F. Supp. 543, 545–547 (N.D. Ala. 1966); United States v. Louisiana, 265 F. Supp. 703, 715 (E.D. La. 1966).

9. U.S. COMM’N ON CIVIL RIGHTS, A CITIZEN’S GUIDE TO UNDERSTANDING THE VOTING RIGHTS ACT 12 (1984).

in that they provide a calming and objective presence which can serve to deter any abuse which might occur. Federal observers can also serve to prevent or diminish the intimidation frequently experienced by minority voters at the polls.”<sup>10</sup> In many cases, the mere assignment of federal observers to an election makes people less likely to engage in discrimination because neutral outsiders are watching and documenting their actions.<sup>11</sup> As one witness explained, “[f]ew officials discriminate when they are under the microscope.”<sup>12</sup> Similar to Section 5 preclearance,<sup>13</sup> federal observers can stop discrimination before it happens. This element of protection is critical to furthering the underlying purposes of the Voting Rights Act. Observers discourage problems by both voters and election officials—they help prevent voter discrimination while making officials more likely to properly comply with the law, thereby facilitating the smooth conduct of elections.<sup>14</sup> In the process, voters “feel empowered” because they have “a vehicle through which to directly report Election Day problems at their polling place.”<sup>15</sup>

Even when the presence of federal observers does not deter discrimination from happening, the information gathered by observers can be used by the Justice Department to stop it almost immediately. Often, a phone call from a Department attorney to local election officials is sufficient to end the discriminatory conduct; where it is not, the Department may seek to enjoin the conduct on Election Day or in the future.<sup>16</sup> A

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10. S. REP. NO. 94-295, at 21, as reprinted in 1975 U.S.C.C.A.N. 774, 787.

11. See H.R. REP. NO. 109-478, at 24-25 (2006); see also *The Continuing Need for Federal Examiners and Observers to Ensure Electoral Integrity: Hearing on S. 2703 Before the Subcomm. on the Constitution, Civil Rights and Property Rights of the S. Comm. on the Judiciary*, S. HRG. 109-669, at 503 (2006) [hereinafter *Senate Observer Hearing*] (testimony of Alfred Yazzie, Navajo Language Consultant, U.S. Dep’t of Justice); *id.*, at 390-94, 451, 458-59, 462 (testimony of Constance Slaughter-Harvey).

12. *Senate Observer Hearing*, *supra* note 11, at 391 (testimony of Constance Slaughter-Harvey).

13. For an overview of Section 5 of the VRA, see generally James Thomas Tucker, *The Politics of Persuasion: Passage of the Voting Rights Act Reauthorization Act of 2006*, 33 J. LEGIS. 205, 218-23 (2007).

14. One witness stated that federal observers deter discriminatory treatment against racial and minority language voters. Such discriminatory treatment includes making them “feel uncomfortable” by treating them rudely or disenfranchising them through mechanisms such as “failing to find their names on the lists of registered voters and refusing to allow them to vote on provisional ballots, or misdirecting them to other polling places.” See *The Voting Rights Act: Sections 6, 7, and 8—Federal Examiner and Observer Provisions, Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 24 (2005) [hereinafter *House Observer Hearing*] (testimony of Barry H. Weinberg, former Deputy Chief and Acting Chief, Voting Sec., Civil Rights Div., U.S. Dep’t of Justice).

15. See *Senate Observer Hearing*, *supra* note 11, at 500 (testimony of Alfred Yazzie).

16. See *House Observer Hearing*, *supra* note 14, at 23 (testimony of Barry H. Weinberg); see also U.S. GOV’T ACCOUNTABILITY OFFICE, DEP’T OF JUSTICE’S ACTIVITIES TO ADDRESS PAST ELECTION-RELATED VOTING IRREGULARITIES 46-47 (2004).

United States Government Accountability Office (GAO) report explained this process:

When Voting Section staff monitor elections and receive allegations of or information about voting irregularities while on site, they make efforts to resolve allegations by contacting local election officials immediately. Further investigation of such irregularities is conducted after an election if the allegation was not resolved on Election Day or if it is deemed otherwise necessary to prevent such problems from arising in the future.<sup>17</sup>

Between 2000 and 2003, the Justice Department closed approximately twelve meritorious cases relating to Election Day voting discrimination, with an additional eight cases pending.<sup>18</sup>

Federal observers likewise can prevent vote denial through their role in documenting training provided to election officials and poll workers. Poll workers are only as good as the training they receive and their willingness to follow that training. Typically, only Justice Department employees attend poll worker training sessions, although in some cases officials from the Office of Personnel Management also may do so.<sup>19</sup> On Election Day, federal observers often ask poll workers about the training they received and observe the election procedures being used and their impact on minority voters. Justice Department employees can communicate that information to local election officials to improve training and facilitate implementation of non-discriminatory practices. If a poll worker refuses to follow their training, then that information can be passed on to allow election officials to refrain from using that poll worker in future elections. As one witness noted, “when federal oversight does not occur,” the quality of poll worker training “is often insufficient and superficial,” particularly where language assistance must be provided.<sup>20</sup>

Federal observers also document evidence of seemingly innocent Election Day practices that have the effect of disenfranchising minority voters. For instance, Hispanic men and women commonly have more than one surname, using their mothers’, fathers’, or sometimes both. In the Passaic County litigation, federal observers documented numerous

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17. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 16, at 45.

18. *See id.* at 48. Of the twelve meritorious cases, five were closed because the jurisdiction took actions to resolve the issues; four were closed because DOJ provided post-election feedback regarding the discrimination; two cases were closed because jurisdictions agreed to implement changes for future elections, and one case was closed because a state court issued an order addressing the conduct. Of the eight cases still pending, six were open pending fulfillment of consent decrees for violations of federal law, and two cases closed because jurisdictions fulfilled the requirements of consent decrees requiring them to remedy violations of federal law. *Id.*

19. *See Senate Observer Hearing, supra* note 11, at 497–99 (testimony of Alfred Yazzie).

20. *Id.* at 498.

instances in which Hispanic voters were denied the right to vote because their names purportedly were not in the voter registration book.<sup>21</sup> In the course of interviewing those voters, federal observers learned that these voters had registered under different surnames, which were on the voter registration list.<sup>22</sup> The Justice Department used this information to recommend to local election officials that they train poll workers to ask any voter whose name did not appear to be in the voter registration list, "Have you registered under another name?"<sup>23</sup> That simple training suggestion eliminated many instances of vote denial.<sup>24</sup>

## 2. Enforcement of the Voting Rights Act

In addition to their prophylactic effect, federal observers help "Enforce" compliance with the Voting Rights Act. Observers do not engage in civil enforcement themselves. Instead, they serve as the eyes and ears of the Justice Department and federal courts.<sup>25</sup> Federal observers are a key component of efforts to enforce the Voting Rights Act and the Fourteenth and Fifteenth Amendments because they prepare reports that can be used in subsequent litigation and the observers can testify as witnesses.<sup>26</sup> Observer reports and their availability as testimonial witnesses are key components in enforcing the VRA and the Fourteenth and Fifteenth Amendments.<sup>27</sup> Since the reports are prepared contemporaneously to the observed actions by impartial observers, they provide evidence that is generally unassailable in court proceedings.<sup>28</sup>

There are other uses for information collected in observer reports. Federal observers document the identity of election officials and others

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21. See *infra* notes 176–177, 182–183, 190, 210, 229 and accompanying text.

22. See *id.*

23. *Senate Observer Hearing*, *supra* note 11, at 412–13 (testimony of James Thomas Tucker).

24. *Id.* at 413.

25. See generally H.R. REP. NO. 109-478, at 25 ("Observers have played a critical role in preventing and deterring 14th and 15th amendment violations by communicating to the Department of Justice any allegedly discriminatory conduct for further investigation.").

26. See generally 42 U.S.C. § 1973f (2000) (providing that persons assigned as observers "shall report to an examiner . . . to the Attorney General, and if the appointment of examiners has been authorized pursuant to section 1973(a) . . . to the court"); see also S. REP. NO. 94-295, at 21, as reprinted in 1975 U.S.C.C.A.N. 787 (noting that "observer reports have served as important records relating to the conduct of particular elections in subsequent voting rights litigation"); accord Frequently Asked Questions, *supra* note 6 (observers "prepare reports that may be filed in court, and they can serve as witnesses in court if the need arises.").

27. See *Senate Observer Hearing*, *supra* note 11, at 435 (testimony of Kay Cole James); *Id.* at 495 (testimony of Alfred Yazzie).

28. See *infra* notes 91–95 and accompanying text.



engaging in discriminatory conduct. If the person engaging in discrimination is an election official, a Justice Department attorney can communicate that information to local officials to get the person removed from the polling place immediately and for future elections. If the discrimination is a violation of the criminal provisions of the VRA<sup>29</sup> or other federal laws, the evidence gathered by federal observers can be communicated to either the Civil Rights Division's Criminal Section or the Criminal Division's Public Integrity Section. Both departments work with local United States Attorneys to prosecute the perpetrators.<sup>30</sup> Effective enforcement of the Act and the guarantees of the Fourteenth and Fifteenth Amendments would not be possible without federal observers.

Elections conducted in Berks County, Pennsylvania serve as an illustration of how observer reports are used to enforce the Voting Rights Act. In 2003, a federal court found "there is substantial evidence of hostile and unequal treatment of Hispanic and Spanish-speaking voters by poll officials" in the County.<sup>31</sup> The intentional discrimination was compounded by

29. See, e.g., 42 U.S.C. §§ 1973i, 1973j, 1973aa-3, 1973bb(b)(2000).

30. See *Senate Observer Hearing*, *supra* note 11, at 495-96 (testimony of Alfred Yazzie); see also *House Observer Hearing*, *supra* note 14, at 24 (testimony of Barry Weinberg).

31. See *United States v. Berks County*, 277 F. Supp. 2d 570, 575-576 (E.D. Pa. 2003). The court summarized many of these discriminatory practices by poll officials in the City of Reading:

[They] turned away Hispanic voters because they could not understand their names, or refused to "deal" with Hispanic surnames . . . .

[They] made hostile statements about Hispanic voters attempting to exercise their right to vote in the presence of other voters, such as "This is the U.S.A.—Hispanics should not be allowed to have two last names. They should learn to speak the language and we should make them take only one last name," and "Dumb Spanish-speaking people . . . I don't know why they're given the right to vote . . . ."

[They] placed burdens on Hispanic voters that were not imposed on white voters, such as demanding photo identification or a voter registration card from Hispanic voters, even though it is not required under Pennsylvania law . . . .

[They] required only Hispanic voters to verify their address and told Department staff that they did so because Hispanics "move a lot within the housing project . . . ."

[They] boasted of outright exclusion of Hispanic voters to Voting Section staff during the May 15, 2001 municipal primary election . . . .

Hispanic voters stated that this hostile attitude and rude treatment makes them uncomfortable and intimidated in the polling place, and discourages them from voting.

the County's failure to recruit bilingual poll workers despite their ready availability, its discriminatory poll worker application process, its lack of Spanish election materials for Puerto Rican voters, and the County's denial of assistance to Hispanic voters even when they brought someone with them to render assistance.<sup>32</sup> These examples of discriminatory treatment were documented through federal observer reports. As a direct result of that evidence, the federal court concluded that Berks County violated the Voting Rights Act. The court authorized the continued use of federal observers to assess the County's compliance with orders requiring the elimination of voting discrimination.<sup>33</sup> Federal observer reports were key to measuring Berks County's progress and facilitated the court's ability to rapidly implement additional remedies.

### 3. Measuring Progress in Curing Voting Rights Violations

Observers also measure "Progress" that jurisdictions are making in curing voting rights violations.<sup>34</sup> Federal observers often are sent to monitor a jurisdiction's compliance with the constitutional and statutory protections of the right to vote, as well as court orders enforcing those protections. Systemic violations and deeply ingrained discriminatory practices do not disappear over night. Frequently, federal observers need to be present in jurisdictions for several years to measure what incremental progress, if any, is being made.<sup>35</sup> Once the progress is sufficient to demonstrate substantial compliance with all requirements protecting the right to vote, reports from federal observers facilitate determinations by federal courts or the Department of Justice to terminate coverage. The manner in which federal observers are used to measure progress is described at length in Part V in the case study of Passaic County, New Jersey.

#### B. Certification of Jurisdictions for Federal Observers

In the 2006 reauthorization of the VRA, Congress substantially revised the procedures for selecting jurisdictions for federal observer coverage. The federal observer and examiner provisions originally were codified as Sections 3, 6-9, and 13 of the VRA. Sections 3, 7, and 13 are permanent provisions that were not up for renewal in 2007. Under the original statutory framework, a jurisdiction first had to be certified for

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*Id.*

32. *Id.* at 575-77.

33. *Id.* at 585.

34. See generally H.R. REP. NO. 109-478, at 44 (finding that observers "have served a critical oversight function, monitoring and reporting on the actions of voters and poll workers inside the polling locations").

35. See *Senate Observer Hearing*, *supra* note 11, at 503 (testimony of Alfred Yazzie).

federal examiners before federal observers could be dispatched to cover its elections. Certification occurred through two different mechanisms. If a jurisdiction was covered under either Section 4(f)(4) or Section 5, then certification occurred under Section 6. That Section provided that the Attorney General could certify the jurisdiction for federal examiners if he or she either had received twenty meritorious written complaints from residents in the jurisdiction alleging voting discrimination or if he or she believed their appointment was necessary to enforce voting rights protected under the Fourteenth and Fifteenth Amendments to the United States Constitution.<sup>36</sup> Nearly all of the more recent certifications have been based upon the Attorney General's determination that certification is necessary to cure a constitutional violation.<sup>37</sup>

If a jurisdiction was not covered by Sections 4(f)(4) or 5, then certification occurred under Section 3(a). That Section permits a federal court to certify a jurisdiction for federal examiners "for such period of time . . . as the court shall determine is appropriate to enforce the voting guarantees of the [F]ourteenth or [F]ifteenth [A]mendment."<sup>38</sup> Federal courts were authorized to certify a jurisdiction for coverage as part of any "interlocutory order"<sup>39</sup> or "as part of any final judgment," as long as "the court finds that violations of the [F]ourteenth or [F]ifteenth amendment justifying equitable relief have occurred" in the jurisdiction being covered.<sup>40</sup> Like the "pocket trigger" for Section 5 coverage,<sup>41</sup> this pocket trigger for examiner coverage allowed private parties, as well as the Attorney General,

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36. See 42 U.S.C. § 1973d (2000), *repealed by* Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act (VRARA) of 2006 § 3(c), *enacted as* Pub. L. No. 109-246 § 3(c), 120 Stat. 577, 579-580.

37. See U.S. Dep't of Justice, Civil Rights Div., Voting Section, About Federal Examiners and Federal Observers, [http://www.usdoj.gov/crt/voting/examine/activ\\_exam.htm](http://www.usdoj.gov/crt/voting/examine/activ_exam.htm) (last visited Sept. 27, 2007).

38. See 42 U.S.C. § 1973a(a) (2000).

39. An interlocutory order encompasses any preliminary relief awarded before a full hearing on the merits. See BLACK'S LAW DICTIONARY 815 (6th ed. 1990).

40. See 42 U.S.C. § 1973a(a) (2000). Appointment of examiners did not have to be authorized if the violations of the right to vote "(1) have been few in number and have been promptly and effectively corrected by State or local action, (2) the continuing effect of such incidents has been eliminated, and (3) there is no reasonable probability of their recurrence in the future." *Id.*

41. The "pocket trigger" for Section 5 coverage allows a court to require that a jurisdiction not subject to Section 5 submit future voting changes to the Attorney General for an "appropriate time" until violations of the fourteenth and fifteenth amendments have been eliminated. See 42 U.S.C. § 1973a(c). The Section 5 pocket trigger has been applied to the States of Arkansas and New Mexico; Buffalo County, South Dakota; Escambia County, Florida, and Cicero, Illinois. See NAT'L COMM'N ON THE VOTING RIGHTS ACT, PROTECTING MINORITY VOTERS: THE VOTING RIGHTS ACT AT WORK, 1982-2005 34 (2006), *reprinted in* *Voting Rights Act: Evidence of Continued Need*, 109th Cong., 154 (2006) (report by the Nat'l Comm'n on the Voting Rights Act).

to request certification of a jurisdiction not otherwise subject to the VRA's special provisions (including the observer provisions).<sup>42</sup>

Certified jurisdictions could also petition for termination of federal examiner coverage. Section 13 provided that a jurisdiction certified under Section 6 could petition the Attorney General to request the Director of the Census to take a census or survey of voter participation. The Attorney General could terminate the certification if: (1) the Director of the Census determined more than 50% of the nonwhite persons of voting age are registered to vote; (2) all persons listed by an examiner had been placed on the voter registration lists; and (3) there was no longer reasonable cause to believe that persons would be denied the right to vote on account of race or color or on the basis of their language.<sup>43</sup> In the alternative, a certified jurisdiction could file a declaratory judgment action seeking termination in the District Court of the District of Columbia.<sup>44</sup> A jurisdiction certified under Section 3(a) could petition the court that issued the order to terminate certification.<sup>45</sup>

At the beginning of 2006, 165 political subdivisions of sixteen states were certified for federal examiners.<sup>46</sup> A total of 148 counties or parishes in nine states were certified by the Attorney General under Section 6 of the VRA: twenty-two in Alabama, three in Arizona, twenty-nine in Georgia, twelve in Louisiana, fifty in Mississippi, three in New York, one in North Carolina, eleven in South Carolina, and seventeen in Texas.<sup>47</sup> Seventeen political subdivisions in nine states were certified by federal courts under Section 3(a) of the VRA for designated periods of time specified in the courts' orders: three counties and three cities in California; St. Landry Parish in Louisiana; Boston, Massachusetts; two counties in New Mexico; two counties and one school district in New York; Berks County, Pennsylvania; Buffalo County, South Dakota; Ector County, Texas; and Yakima County, Washington.<sup>48</sup> All of the Section 3(a) jurisdictions except for Landry Parish, Louisiana were certified as a result of court orders remedying voting discrimination against language minority citizens.<sup>49</sup>

Under the framework of the original 1965 Act, federal examiners were authorized to examine voter registration applicants concerning their qualifications for voting, to create lists of eligible voters to forward to the local registrar, and to issue voter registration certificates to eligible

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42. See 42 U.S.C. § 1973a(a) (2000).

43. See *id.* § 1973k.

44. See *id.*

45. See *id.* § 1973a(a).

46. See About Federal Observers and Election Monitoring, *supra* note 37.

47. See *id.*

48. See *id.*

49. See *id.*

voters.<sup>50</sup> Such provisions were aimed at combating widespread discriminatory registration procedures that were primarily directed at African Americans in the South. Those procedures included literacy tests, “moral character” requirements, denial of voter registration materials, limited registration hours, slow registration processing,<sup>51</sup> voter purges, threats, intimidation, violence, and social pressure against applicants including loss of employment, eviction, and even denial of food and water in a particularly egregious example from Mississippi.<sup>52</sup> Federal examiners were authorized under the VRA to “examine applicants concerning their qualifications for voting” and to register them if they met the qualifications “prescribed by State law not inconsistent with the Constitution and laws of the United States.”<sup>53</sup>

The federal examiners provision proved to be extraordinarily successful in achieving its goal of allowing eligible minority citizens to register to vote.<sup>54</sup> Although federal examiners initially accounted for a large percentage of black voters registered in the South after passage of the Voting Rights Act in 1965, they were “used sparingly in recent years” and no new voters had been added since 1983.<sup>55</sup> The recent additions of other federal statutes, including the National Voter Registration Act (NVRA),<sup>56</sup> the Uniformed and Overseas Citizen Absentee Voting Act

50. See 42 U.S.C. § 1973e (2000), repealed by Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act (VRARA) of 2006 § 3(c), enacted as Pub. L. No. 109-246 § 3(c), 120 Stat. 577, 579-580.

51. For example, in many southern counties, voter registration sites were only open for a few hours each month or deliberately slowed down the pace of registration of African American voting age citizens. See H.R. REP. NO. 89-439, at 16 (1965), reprinted in 1965 U.S.C.C.A.N. 2437, 2447 (summarizing evidence of discrimination in voter registration in Alabama and Louisiana).

52. See James Thomas Tucker, *Affirmative Action and [Mis]representation: Part I—Reclaiming the Civil Rights Vision of the Right to Vote*, 43 How. L.J. 343, 344-350, 370 (1999-2000); see also *Senate Observer Hearing*, supra note 11 at 442-45 (testimony of Constance Slaughter-Harvey) (summarizing the history of voting discrimination in Mississippi that led to the passage of the federal observer provisions).

53. 42 U.S.C. §§ 1973e(a)-(b) (2000), repealed by Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act (VRARA) of 2006 § 3(c), enacted as Pub. L. No. 109-246 § 3(c), 120 Stat. 580.

54. For a good summary of the impact the federal examiner program had on black voter registration in the South, see *House Observer Hearing*, supra note 14, at 21-22; see generally QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT, 1965-1990 (Chandler Davidson & Bernard Grofman eds., 1994) (summarizing the dramatic increases in minority voter registration under the provisions).

55. S. REP. NO. 94-295, at 20 as reprinted in 1975 U.S.C.C.A.N. 674, 786. As of December 31, 2005, there were only 112,078 federally registered voters remaining in five southern states: Alabama (50,566), Georgia (2,253), Louisiana (12,289), Mississippi (42,388), and South Carolina (4,582). About Federal Examiners and Federal Observers, supra note 37.

56. National Voter Registration Act, 42 U.S.C. §§ 1973gg-1973gg-8 (2000).

(UOCAVA),<sup>57</sup> and the Help America Vote Act (HAVA),<sup>58</sup> likewise have contributed to the tremendous increase in voter registration. By 2006, the federal examiner provision was used only as a mechanism to certify a jurisdiction as eligible for federal observers, and not for its original purpose of registering voters. Therefore, the provision was no longer needed.

The Voting Rights Act Reauthorization Act of 2006 (VRARA)<sup>59</sup> made several changes to the existing framework of the federal examiner and observer provisions to update the certification process to contemporary needs and usage.<sup>60</sup> Section 3(c) of the VRARA repealed the federal examiner provisions in Sections 6, 7, and 9 in their entirety because those provisions had outlived their utility.<sup>61</sup> Section 3(d) of the VRARA substituted references to “observers” for references to “examiners” in the remaining Sections of the Act because the examiner provisions had been repealed.<sup>62</sup> Section 3(a) of the VRARA used the two existing certification methods, with some slight modifications, but applied them to federal observers in Section 8 of the Act.<sup>63</sup> Section 3(b) of the VRARA updated the process for terminating certifications by the Attorney General based solely upon evidence that “there is no longer reasonable cause to believe that persons will be deprived of or denied the right to vote on account of race or color.”<sup>64</sup> A federal court continues to retain the authority to terminate certifications made under the pocket trigger for observer coverage.<sup>65</sup> The VRARA’s elimination of the federal examiner provisions enhanced opportunities for observer coverage in jurisdictions by streamlining the certification process to focus on those places where it is needed. In the process, Congress made clear that the “traditional functions of the Federal observers remain unchanged.”<sup>66</sup>

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57. Uniformed and Overseas Citizen Absentee Voting Act, 42 U.S.C. §§ 1973ff-1973ff-6 (2000).

58. Help America Vote Act, 42 U.S.C. §§ 15301-15545 (2000).

59. Voting Rights Act Reauthorization Act of 2006, Pub. L. No. 109-246, 120 Stat. 577 (2006).

60. For a discussion of the 2006 amendments to the VRA, see generally Tucker, *supra* note 13.

61. Voting Rights Act Reauthorization Act of 2006, § 3(c).

62. *Id.* § 3(d).

63. *Id.* § 3(a). For one of the certification methods, the VRARA substitutes a requirement of “written meritorious complaints” from “residents, elected officials, or civic participation organizations” in place of the current requirement of 20 such complaints from “residents” of the jurisdiction. The other method of certification under Section 6 is identical, except for the substitution of “observer” for “examiner.” *Cf. id.* with 42 U.S.C. § 1973d (2000).

64. Pub. L. No. 109-246 § 3(b), 120 Stat. 579.

65. *See id.*

66. H. R. REP. NO. 109-478, at 63 (2006).

C. *The Administrative Process to Deploy Federal Observers*

The Department of Justice has not issued regulations governing how certified jurisdictions are selected for coverage by federal observers.<sup>67</sup> However, the Department has informally stated that the following procedure typically is used: Department employees initially conduct telephone surveys of covered jurisdictions with significant minority populations to determine whether any minority candidates are running; a second telephone survey then is conducted of minority contacts in jurisdictions in which there are minority candidates or where there is information suggesting there may be Election Day problems; if there is sufficient evidence of potential problems, a Department attorney is dispatched to the jurisdiction to conduct an investigation and recommends whether observers should be dispatched; and the decision then is made whether to send observers.<sup>68</sup>

It is not always possible to send federal observers to areas where coverage may be needed. According to the Justice Department, “sometimes the Department learns of election-related problems that may appear to warrant the assignment of federal observers but there is insufficient time to either arrange for the assignment to or to develop the factual predicate necessary for the certification of the political subdivision.”<sup>69</sup> Some jurisdictions may not be eligible for certification because they are not covered by Section 5 or under a court order pursuant to Section 3. Where this occurs, the Department may assign attorneys to monitor elections either in person or by telephone.<sup>70</sup>

Since 1965, approximately 22,000 federal observers have monitored elections in certified jurisdictions. Five of the six states originally covered in their entirety by Section 5 of the VRA have accounted for approximately two-thirds of all federal observer coverage since 1982,<sup>71</sup> with Mississippi accounting for the greatest percentage.<sup>72</sup> The number of ob-

67. COMM’N ON CIVIL RIGHTS, *supra* note 9, at 12.

68. *Id.*; COMPTROLLER REPORT, *supra* note 7, at 22–23; *House Observer Hearing, supra* note 14, at 36–39 (testimony of Barry H. Weinberg).

69. *See* About Federal Examiners and Federal Observers, *supra* note 37.

70. *See id.*

71. *See* H. R. REP. NO. 109-478, at 44 (2006).

72. *See generally* Senate Observer Hearing, *supra* note 11 at 448–49 (testimony of Constance Slaughter-Harvey).

(“Since 1982, federal observers have been deployed to 48 of the state’s 82 counties. In total, federal observers have monitored elections in Mississippi on more than 250 occasions since the 1982 renewal—the highest number of deployments of all covered states. Indeed, Mississippi accounts for 40 percent of all federal observer deployment efforts since 1982. Moreover, many of these jurisdictions have been the subject of multiple observer deployments during that time period . . . Multiple observer deployments may provide an indication that a jurisdiction is somewhat hostile to the protections afforded by the Voting

servers has gone up dramatically recently as part of the Justice Department's increased enforcement activities in jurisdictions covered by the language assistance provisions of the VRA. According to the Justice Department, in 2004 "a record 1,463 federal observers and 533 Department personnel were sent to monitor 163 elections in 105 jurisdictions in 29 states."<sup>73</sup> In 2005, an off-election year, the Department deployed 640 federal observers and 191 Department personnel to monitor 47 elections in 36 jurisdictions in 14 states.<sup>74</sup> In June 2006, the Justice Department sent federal observers to eighteen counties in five states, primarily to monitor compliance with federal court orders in language assistance cases.<sup>75</sup> In the past five years, much of the observer coverage has been for violations of the language assistance provisions of the Voting Rights Act.<sup>76</sup>

#### *D. Mapping Out a Deployment Plan for a Federal Observer Exercise*

The Justice Department tailors federal observer coverage on a case-by-case basis by making calculated determinations about the problems and issues that exist within a particular jurisdiction. Whenever feasible, Department attorneys meet with local election officials to establish lines of communication and describe the role that the federal observers play during the course of the election. Federal observers do not interfere with the local conduct of the election and are prohibited from offering assessments to election officials or others present in the polls.<sup>77</sup> Rather, observers merely observe and document activity inside the polling place, and communicate this information to a DOJ attorney.<sup>78</sup> Where necessary, Justice Department attorneys will share information about voting discrimination identified by federal observers with election officials,

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Rights Act or illustrate the degree of racial tension and intimidation experienced by voters in an area.").

73. Press Release, U.S. Dep't of Justice, Justice Department to Monitor Elections in Louisiana, [http://www.usdoj.gov/opa/pr/2006/May/06\\_crt\\_312.html](http://www.usdoj.gov/opa/pr/2006/May/06_crt_312.html) (May 20, 2006).

74. *Id.*

75. Press Release, U.S. Dept. of Justice, Justice Department to Monitor Elections in Alabama, California, New Jersey, New Mexico and South Dakota (June 05, 2006), [http://www.usdoj.gov/opa/pr/2006/June/06\\_crt\\_347.html](http://www.usdoj.gov/opa/pr/2006/June/06_crt_347.html).

76. See H. R. REP. NO. 109-478, at 44-45; see also *Senate Observer Hearing*, *supra* note 11, at 436 (testimony of Kay Cole James) (describing increased observer coverage to protect language minority voters in Arizona, New Mexico, New Jersey, California, Michigan, Pennsylvania, and New York); *House Observer Hearing*, *supra* note 14, at 23 (testimony of Barry H. Weinberg) (attributing the increase in observer coverage since 1982 to growing efforts to protect the voting rights of language minority citizens).

77. See *Senate Observer Hearing*, *supra* note 11, at 495 (testimony of Alfred Yazzie, Navajo Language Consultant, U.S. Dep't of Justice); *House Observer Hearing*, *supra* note 14, at 22 (testimony of Barry H. Weinberg).

78. See *Senate Observer Hearing*, *supra* note 11, at 495-96 (testimony of Alfred Yazzie, Navajo Language Consultant, U.S. Dep't of Justice).



especially if there is a possibility that a voter may be denied the right to cast a ballot.<sup>79</sup> Local election officials frequently welcome federal observers, particularly if they help establish compliance with the VRA.<sup>80</sup> However, observers remain an enforcement arm of the Justice Department and are not there to interfere with or perform the work of local election officials.<sup>81</sup>

Federal observer exercises require substantial planning. The planning begins early on, when Department of Justice attorneys and other employees begin documenting evidence that justifies the selection of jurisdictions for coverage.<sup>82</sup> Often, this documentation includes summarizing written complaints from voters or community groups of suspected Election Day problems.<sup>83</sup> Department attorneys call local contacts to determine whether there is evidence of racial tensions, racial appeals, or efforts to directly or indirectly suppress the voting rights of racial or ethnic minority citizens.<sup>84</sup> Local press accounts often provide evidence of tense conditions. The presence of racially heated white/black or Anglo/Latino races is also a significant factor that is considered.<sup>85</sup> Similarly, elections in which minority voters are in a position to elect candidates of choice for the first time or possibly to gain a majority of seats on an elected body are a strong basis for sending observers.<sup>86</sup>

After the preliminary investigation is completed, the Department may then send an attorney to the jurisdiction to gather supplemental information and assess the situation on the ground. Based upon meetings with local officials and other evidence gathered, the Chief of the Voting Section may forward a written recommendation requesting deployment of federal observers to the Attorney General or his or her designee, who makes the final decision. The entire investigation and recommendation process typically takes at least three weeks, although expedited authorizations can be secured if circumstances dictate. Typically, an investigation is not conducted for jurisdictions being monitored under a federal court order because the evidence already supports continued observer coverage.

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79. *Id.*; *House Observer Hearing*, *supra* note 14, at 39–40 (testimony of Barry H. Weinberg); *id.* at 14 (testimony of Penny Pew).

80. *See House Observer Hearing*, *supra* note 14, at 24 (testimony of Barry H. Weinberg).

81. *See id.*

82. *See id.* at 37–39.

83. *See Senate Observer Hearing*, *supra* note 11, at 450 (testimony of Constance Slaughter-Harvey).

84. *See id.* at 450–57.

85. *See id.*

86. *See id.*

*E. Creation and Use of the Federal Observer Report*

When a jurisdiction is approved for federal observer coverage, the responsible Department attorney works with OPM to develop the form report and plan the exercise.<sup>87</sup> Federal observer reports require documenting information for each covered voting precinct including:

- the opening and closing times for the polling place;
- how many poll workers are present at opening and closing;
- any problems opening or closing the polling place or with poll worker staffing;
- voters waiting in line at opening or closing;
- signage and publicity showing the location of the polling place;
- the number, race, ethnicity, language abilities, position, and training of each poll worker;
- how the polling place is configured;
- where all of the poll workers and voting materials are located;
- polling place accessibility, particularly for handicapped and elderly voters;
- voter assistance compliance under both Sections 203 and 208 of the Act; and
- compliance with provisions of the Help America Vote Act (HAVA).

In jurisdictions required to provide language assistance, observers also document whether all written materials are provided in the covered language (unless it is an unwritten language), the availability of language assistance, and whether that assistance is available at every stage of the election process.

The report also allows observers to report how voters are treated inside and outside of the polling place, whether they are offered provisional ballots if their names are not on the voter registration list, and the availability of voting instructions and assistance using the voting machine or casting a paper ballot. Observers are provided with special forms to complete in the report if a voter is turned away without being allowed to vote, without receiving assistance, or any other action taken against the

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87. See *Senate Observer Hearing*, *supra* note 11, at 495 (testimony of Alfred Yazzie, Navajo Language Consultant, U.S. Dep't of Justice).

voter. Thus, reports are “designed to address the relevant issues and specific problems” in the jurisdiction where observers are being deployed.<sup>88</sup>

Reports are written in objective terms so the observer merely documents what he or she sees, without drawing any conclusions as to whether those observations are discriminatory or violations of any constitutional or statutory protections.<sup>89</sup> In places where federal observer coverage has been conducted previously, the report is typically updated to reflect any changes in local election laws or expected Election Day activities from the previous coverage.

Federal observer training includes: going over the observer’s role; reviewing the report; role-playing to demonstrate proper and improper methods of observation; and driving through the jurisdiction to familiarize each observer team with their polling place location(s).<sup>90</sup> Observers are instructed to request a voter’s permission before accompanying them into the voting booth, including the least intrusive way of making that request. Although many OPM employees have participated in observer coverage for several years, they are required to complete the daylong training like all of the other observers to ensure uniformity and consistency during the exercise.

Usually, two observers are paired together as a team. If the observers are in a jurisdiction to document language assistance compliance, efforts will be made to ensure that at least one of the observers is fluent and can read and write in the language they are there to observe. Bilingual observers are important for several reasons. They can observe and document the language abilities of poll workers, usually by engaging the poll workers in a short conversation when voters are not present. In addition, they are able to observe communications between poll workers and voters in the covered language. Observers do not make any judgments on the quality of language assistance that is offered, but merely document their observations. Occasionally, OPM must hire contract employees if it does not have sufficient employees proficient in the covered languages for an observer exercise, particularly for American Indian languages. Observers are selected because of their communication skills, attention to detail, and writing abilities.

A Department attorney and OPM captain establish a command center to receive reports from co-captains and observer teams as activities

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88. See *id.*

89. See *id.*; see also OBSERVER MANUAL, *supra* note 6, at 3 (explaining that in reporting the quality of translations, “Observers do not make decisions as to whether or not the translation is adequate. Observers simply report on the translation process using a preprinted report form provided by OPM. The DOJ takes this information and makes the appropriate determinations as to the adequacy of the translation process.”).

90. See *House Observer Hearing*, *supra* note 14, at 40 (testimony of Barry H. Weinberg); OBSERVER MANUAL, *supra* note 6, at 5–7.

develop in the field.<sup>91</sup> Election coverage usually commences at least one hour before the polls open and ends after all of the polls close. Sometimes, federal observers will be present during the counting and final tabulation of ballots, including absentee and provisional ballots and any other ballots or voter challenges addressed during the canvassing process.

Immediately after coverage of the polling places and/or ballot-counting ends, observers work with Department attorneys and OPM managers to finalize their reports while the information is still fresh in their minds. In most cases, the original versions of the reports are maintained either by OPM or the Department of Justice. Copies of the reports are usually submitted to a supervising federal court under seal to protect voter identity. Occasionally, redacted versions of observer reports are provided to local election officials; more frequently, the Department of Justice provides local elections officials with a summary of information gathered by the observers.<sup>92</sup>

Training and reports highlight that observer coverage is not one-sided. Reports from observer coverage may vindicate a jurisdiction by documenting the absence of voting discrimination. For example, observer reports aided a federal court in determining that election irregularities in Humphreys County, Mississippi, were insufficient to warrant setting aside the election results.<sup>93</sup>

Contrary to what the plaintiffs alleged, federal observers documented that ballots “were rejected without overtones of racial discrimination” because ballots for both white and black candidates were disregarded.<sup>94</sup> The court reasoned that any contrary conclusion, which contradicts the basic findings of the federal observers, is without credible evidentiary support and must be rejected as inconsistent with the plainly established facts.<sup>95</sup> The court found that “white officials, while rendering assistance at the polls, did not mislead, intimidate or coerce black assisted voters contrary to their wishes.”<sup>96</sup> Therefore, federal observer reports are

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91. See *House Observer Hearing*, *supra* note 14, at 22–23 (testimony of Barry H. Weinberg).

92. See *id.* at 23; OBSERVER MANUAL, *supra* note 6, at 2.

93. *James v. Humphreys County Bd. of Election Comm'rs*, 384 F. Supp. 114 (N.D. Miss. 1974). The court described the important evidentiary role that the reports played in weighing contradictory evidence:

It is impossible for the court to satisfactorily resolve many irreconcilable evidentiary disputes without resort to the federal observers' reports. These reports . . . were compiled by disinterested persons almost immediately following the election; they were submitted in the regular course of official duty and are regarded as highly credible.

*Id.* at 125.

94. *Id.* at 122.

95. *Id.* at 125.

96. *Id.* at 129.

an important tool to exonerate a jurisdiction if there is no observed evidence of voting discrimination.

## II. CONSTITUTIONALITY OF THE FEDERAL OBSERVER PROVISIONS

In *City of Boerne v. Flores*, the United States Supreme Court set the parameters for congressional exercise of its remedial powers under the Fourteenth and Fifteenth Amendments.<sup>97</sup> According to the Court, “while preventive rules are sometimes appropriate remedial measures, there must be a congruence between the means used and the ends to be achieved” considered “in light of the evil presented.”<sup>98</sup> *Boerne* cited the evidence of racial discrimination supporting the VRA as the type of record necessary to meet the congruence standard.<sup>99</sup> Where that record is established, Congress has “wide latitude” in determining appropriate deterrent or remedial legislation,<sup>100</sup> “even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into ‘legislative spheres of autonomy previously reserved to the States.’”<sup>101</sup> This is particularly true for legislation such as the VRA, in which “the possibility of overbreadth” is reduced by limiting its applications “to those cases in which constitutional violations were most likely” and terminating it when the danger subsided.<sup>102</sup> Following *Boerne*, the Court confirmed that congressional power is at its apex for legislation protecting fundamental rights afforded heightened constitutional scrutiny.<sup>103</sup>

The federal observer provisions fall squarely within Congress’s powers under the Enforcement Clauses of the Fourteenth and Fifteenth Amendments.<sup>104</sup> Federal courts have found the provisions are constitutional, even where they appear to conflict with state ballot secrecy laws. During the recent reauthorization hearings, substantial evidence demonstrated that effective enforcement of the Voting Rights Act requires use of

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97. See generally *City of Boerne v. Flores*, 521 U.S. 507, 517–19 (1997) (noting that the “positive grant of legislative power” given to Congress under the Enforcement Clause of the Fourteenth Amendment was “remedial” in nature).

98. *Id.* at 530.

99. See *id.* at 530, 532–33.

100. *Id.* at 519–20.

101. *Id.* at 518 (citing *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976)).

102. *Id.* at 533 (listing several cases that illustrate the point).

103. See generally *Tennessee v. Lane*, 541 U.S. 509 (2004) (upholding congressional abrogation of state sovereign immunity under Title II of the Americans with Disabilities Act because it protected the fundamental right of access to the courts); *Nev. Dep’t. of Human Res. v. Hibbs*, 538 U.S. 721 (2003) (upholding the congressional abrogation of state sovereign immunity under the Family Medical Leave Act because the Act prevented sex discrimination).

104. U.S. CONST. amend. XIV, § 5; U.S. CONST. amend. XV, § 2.

federal observers. As a result, the federal observer provisions were extended without any objections from witnesses or members of Congress.

#### A. *Preservation of Ballot Secrecy*

In *South Carolina v. Katzenbach*, the United States Supreme Court declined to rule on the constitutionality of the federal observer provisions in Section 8 of the VRA, noting that judicial review would have to wait for subsequent litigation.<sup>105</sup> It did not take long for federal courts to accept *Katzenbach's* invitation. Shortly following that decision, three Alabama counties challenged Section 8 as an unconstitutional exercise of federal power.<sup>106</sup> The counties had prohibited federal observers from entering polling places because they claimed that the federal observer provisions were contrary to state law protecting the right of voters to cast a secret ballot.<sup>107</sup> The federal court rejected the counties' argument. The court explained:

The purpose of federal observers, as stated by one of the sponsors of that portion of the act, is "to observe and report back any corrupt practices which prevent persons certified as eligible voters from casting a ballot and having their votes counted." In this context, the function of a federal observer appears to be a constitutional exercise of Congress' authority to enforce the Fifteenth Amendment within the standards set by *State of South Carolina v. Katzenbach*.<sup>108</sup>

The court acknowledged that Alabama had an important state interest in preserving the secrecy of the ballot, but balanced that against the substantial federal interest in using observer coverage to ensure compliance with the Fifteenth Amendment. The court reasoned that the state's concern was adequately addressed if a voter consented to having a federal observer present while casting a ballot.<sup>109</sup> Therefore, the court concluded that the "Supremacy Clause of the United States Constitution requires that this procedure of Alabama law give way to enforcement of the Voting Rights Act of 1965."<sup>110</sup>

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105. *South Carolina v. Katzenbach*, 383 U.S. 301, 316–17 (1966).

106. *United States v. Executive Comm. of Democratic Party*, 254 F. Supp. 543 (N.D. Ala. 1966). Marengo County, one of the three counties challenging Section 8, had a lengthy history of discriminating against Black voters, detailed in *Clark v. Marengo County*, 469 F. Supp. 1150, 1172–74 (S.D. Ala. 1979).

107. *Executive Comm.*, 254 F. Supp. at 544, 546.

108. *Id.* at 546.

109. *Id.* at 546–47.

110. *Id.* at 547.

Other federal courts agreed with this reasoning. In *United States v. Louisiana*, the court enjoined the state and local defendants from interfering with federal observers in the performance of their duties under Sections 8 and 14 of the VRA.<sup>111</sup> As the court explained, “contrary to the understanding of some persons, the federal observers observe; they do not render assistance to illiterates.”<sup>112</sup> Upon the consent of the voter, observers were even permitted to go into the voting booth with the voter to observe the process.<sup>113</sup> Ballot secrecy would be maintained by placing the observer “under the same duty to preserve the secrecy of the ballot” as election officials authorized to render assistance to illiterate voters.<sup>114</sup> Equally important, the *Louisiana* court held that federal courts have no authority to enjoin the use of federal observers in properly certified jurisdictions.<sup>115</sup> Instead, Section 8 provides that “the appointment of observers is a matter of executive discretion and is not subject to judicial review.”<sup>116</sup>

### B. *The Continuing Need for Federal Observers*

Federal observer coverage plays a critical role in ensuring that jurisdictions comply with the VRA and the Fourteenth and Fifteenth Amendments.<sup>117</sup> It allows the Justice Department and federal courts to observe discrimination that might otherwise go undetected on Election Day. Federal observers are able to monitor every aspect of an election, from the time the voter enters the polling place to the moment that he or she casts her ballot, and even thereafter when the ballots are tabulated. In the process, federal observers can document voter treatment by election officials and others both outside and inside polling places; the availability of voting materials and assistance (particularly for language minority, first time, elderly, illiterate, and handicapped voters); and the extent to which all voters have an equal opportunity to participate in the electoral process. That documentation is critical not only in identifying jurisdictions where voting discrimination occurs, but also in measuring compliance of jurisdictions with court orders.

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111. *United States v. Louisiana*, 265 F. Supp. 703, 713 (E.D. La. 1966).

112. *Id.* at 715.

113. *Id.*

114. *Id.*

115. Sections 3 and 13 of the VRA, as amended by the VRARA, provide for judicial review of the process of certifying and terminating observer coverage. See *supra* notes 43–45, 62–63 and accompanying text.

116. *United States v. Louisiana*, 265 F. Supp. at 715.

117. For an extended discussion of some of the evidence establishing the constitutionality of the federal observer provisions under the VRA, both as initially enacted in 1965 and as reauthorized in 2006, see generally *House Observer Hearing*, *supra* note 14, at 27–37.

The federal observer provisions of the VRA complement, but do not trump, the other provisions in the Act, such as Section 5. For example, where federal observers document the implementation of unprecleared voting changes,<sup>118</sup> the failure of the Justice Department to object does not waive the preclearance requirement. The jurisdiction still must obtain preclearance.<sup>119</sup> The presence of federal observers in a covered Section 5 jurisdiction in some circumstances may be evidence of the ongoing need for coverage because of continuing voting problems in that jurisdiction.<sup>120</sup>

In 2005 and 2006, Congress developed a “substantial volume of evidence” of racial discrimination to demonstrate the continued need for federal observers.<sup>121</sup> That evidence, summarized in Section 2 of the VRARA, included “vestiges of discrimination” such as “second generation barriers” to minority voting.<sup>122</sup> It also encompassed “continued evidence of racially polarized voting in each of the jurisdictions covered by the expiring provisions” that made racial and language minorities “politically vulnerable.”<sup>123</sup> The evidence showed that in jurisdictions covered by the temporary provisions, there was substantial non-compliance with Section 5, many had been denied requests to bailout from Section 5 coverage,<sup>124</sup> minorities continued to file Section 2 cases, and the Department of Justice had to actively enforce the language assistance provisions.<sup>125</sup> Similarly, there had been widespread use of federal observers in certified jurisdictions to document and prevent voting discrimination.<sup>126</sup>

Despite substantial progress under the Act, forty years was insufficient “to eliminate the vestiges of discrimination following nearly 100 years of disregard” for the Constitution.<sup>127</sup> Unless the VRA was reauthorized, minority voters would be deprived of their fundamental right to

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118. See generally *Senate Observer Hearing*, *supra* note 11, at 458 (noting that the “observer program provides one vehicle that can be used to ‘catch’ those non-compliant jurisdictions in order to ensure compliance with the preclearance provisions of the Act”).

119. See *Moore v. Leflore County Bd. of Election Comm’rs*, 351 F. Supp. 848, 851 (N.D. Miss. 1971).

120. See 42 U.S.C. § 1973b(a)(1)(C) (2000) (providing that one of the criteria for bailout requires evidence that no federal examiners have been assigned to a covered jurisdiction for a period of at least ten years).

121. H.R. REP. NO. 109-478, at 64.

122. Voting Rights Act Reauthorization Act of 2006, § 2(b)(2).

123. *Id.* § 2(b)(3)

124. “A jurisdiction may be removed, or ‘bailout,’ from coverage if it can show, among other things, that for the past ten years it has fully complied with Section 5, not engaged in voting discrimination . . . and does not have any pending lawsuits against it alleging voting discrimination.” Tucker, *supra* note 13, at 219–20.

125. See Voting Rights Act Reauthorization Act of 2006, § 2(b)(4).

126. *Id.* § 2(b)(5).

127. *Id.* § 2(b)(7).



vote, undermining their “significant gains.”<sup>128</sup> These findings presented a compelling basis to reauthorize the Act’s federal observer provisions for twenty-five years under the *Boerne* line of cases.<sup>129</sup>

### III. NO PARTY FAVORS: THE NEED FOR NEUTRAL FEDERAL OBSERVERS

During the 2006 reauthorization debate on the VRA, a few conservative attorneys attempted to rewrite the Act to further their own partisan interests. Their work was most apparent in intense lobbying efforts to sabotage efforts to restore key provisions of Section 5 of the Act.<sup>130</sup> Although reauthorization of the federal observer provisions was non-controversial, even those provisions were not spared from the efforts of these political operatives. Mark F. Hearne, II, a conservative who boasted service as national election counsel and supervisor of partisan challengers for the Bush-Cheney campaign,<sup>131</sup> proposed sweeping changes to the federal observer program that would inject them squarely into partisan pitched battles for the first time.<sup>132</sup> According to Hearne, “for an observer to be effective—whether a federal official, an independent observer or a ‘challenger’ from a political party—the observer must have the meaningful opportunity to monitor the election process without interfering with any *legitimate* voters’ right to cast a ballot.”<sup>133</sup> Contrary to such an ill-advised proposal, partisan poll monitors are not interchangeable with federal observers authorized under the VRA. Use of partisan federal observers would be akin to having a player referee the game in which his

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128. *Id.* § 2(b)(9). Equally important, the VRARA reaffirmed the existing statutory findings in Sections 4(f)(1), 10(a), 202(a), and 203(a) of the VRA. See Voting Rights Act Reauthorization Act of 2006; see also 42 U.S.C. §§ 1973b(f)(1), 1973h(a), 1973aa-1(a), 1973aa-1a(a) (2000).

129. See H.R. REP. NO. 109-478, at 57-58.

130. See Tucker, *supra* note 13, at 235-39, 243-51, 254-58, 260-67.

131. See Mr. Hearne’s political biography published on the website of his Missouri law firm, Lathrop & Gage, <http://www.lathropgage.com/people/detail.aspx?attorney=1584> (last visited Sept. 30, 2007). In May 2007, Mr. Hearne’s organization, the so-called “American Center for Voting Rights,” disappeared over night amidst allegations that the Center’s evidence supporting voter identification laws was manufactured, overstated, and non-existent. See Richard L. Hasen, *The Fraudulent Fraud Squad: The Incredible Disappearing American Center for Voting Rights*, SLATE, May 18, 2007, available at <http://www.slate.com/id/2166589/pagenum/all/>. Mr. Hearne cleansed his resume of any affiliations to the organization which he founded and for which he served as General Counsel. *Id.*

132. See *Senate Observer Hearing*, *supra* note 11, at 417, 431 (testimony of Mark F. (Thor) Hearne, II).

133. *Id.* (emphasis added). As discussed below, there are no circumstances under which any observer—federal or otherwise—should be allowed to determine who is and who is not a “legitimate” voter. Such an approach is a recipe for perpetrating, not remedying, voter disenfranchisement.

team is playing. The reason is best explained by the several critical differences between federal observers and partisan poll monitors.

First, partisan poll monitors are precisely that: partisan. They work for a particular political party, candidate, or organization with a vested interest in the outcome of the election. The manner in which they approach their activities inside and outside polling places is influenced by the partisan objectives that they bring to the table. On the other hand, federal observers are neutral outsiders who have no stake in the election.<sup>134</sup> Except in extremely rare cases, a federal observer is not even deployed to observe elections in the jurisdiction where they reside.<sup>135</sup> Every effort is made to ensure that federal observers maintain their objectivity and are not associated with a particular candidate or election outcome. Instead, federal observers work as an extension of the United States Department of Justice or federal courts supervising implementation and compliance with the VRA.<sup>136</sup>

Second, partisan poll monitors not only are trained to inject themselves into the election process, they are expected and encouraged to do so. Many state laws specifically provide for partisan poll monitors to challenge voters about their qualifications to vote.<sup>137</sup> Partisan poll monitors often take advantage of those laws by aggressively challenging any voter who is not on a pre-printed list of registered voters supporting their party, candidate, or issue. Partisan poll monitors regularly engage poll workers with comments or criticisms about the voters they are allowing to cast ballots and how the poll workers are conducting the election. In sharp contrast, federal observers are specifically trained to refrain from participating in the election process, including providing any feedback to poll workers.<sup>138</sup>

Third, partisan poll monitors routinely make value judgments about how the election is being conducted. Conversely, federal observers are trained not to make any value judgments at all.<sup>139</sup> Federal observers

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134. See *supra* notes 5–35, 87–96 and accompanying text.

135. *Senate Observer Hearing*, *supra* note 11, at 403 (testimony of James Thomas Tucker). In some cases involving language minority voters for which there may be a particularly small pool of available federal observers, an exception might be made. However, these exceptions are extremely rare. For example, even for the very small community of Navajo language speakers in Arizona, New Mexico, and Utah, Navajo federal observers are deployed to communities other than those where they reside despite the more limited pool of persons available to serve as observers. *Id.* at 403 note 1.

136. See *supra* notes 16–18, 21–35 and accompanying text.

137. Common bases for challenging voters include failure to register to vote, failing to update voter registration records to reflect changes of address, no longer residing in the jurisdiction, age, citizenship, status as a convicted felon whose civil rights have not been restored, the voter is deceased, or the voter has already cast an absentee ballot or otherwise voted previously.

138. See *supra* notes 6, 77–81 and accompanying text.

139. See *supra* note 89 and accompanying text.

dispassionately document their observations without rendering any conclusions about whether those observations demonstrate compliance with the law. Federal observers also scrupulously document their observations in comprehensive reports that allow them to recreate what transpired in the polling place or ballot counting location.

Thus, many aspects of the proposal to make federal observers partisan are severely flawed, would undermine Justice Department enforcement, and might facilitate voter intimidation and discrimination. For example, Hearne asserted that observers “should be trained in the requirements of federal election law and the relevant state’s election law and procedure.”<sup>140</sup> On the surface, that suggestion seems alluring. However, it overlooks the fact that federal observers, unlike partisan monitors, are not there to make value judgments. Instead, they are simply there to observe “whether persons who are entitled to vote are being permitted to vote” and “whether votes cast by persons entitled to vote are being properly tabulated.”<sup>141</sup> It is not the role of federal observers to evaluate whether election officials are complying with the law.

The proposal that observers “should be free to communicate with the press and others outside of the election facility” is even more problematic.<sup>142</sup> Under the VRA, federal observers are present at polling sites and ballot tabulation centers to perform a law enforcement function. They are extensions of the United States Attorney General or the federal courts in places that are certified under Section 3(a) of the VRA.<sup>143</sup> Authorizing federal observers to communicate with persons outside of the Justice Department and the Office of Personnel Management would undermine the evidence they are gathering to measure compliance with the VRA. In the process, it would destroy the “highly credible” reports they produce.<sup>144</sup> It would open up the objectivity of their observations to attack from statements taken out of context, or even worse, mischaracterized or misquoted by the press. Federal observers would become distracted by outside influences instead of focusing on documenting what they are observing. It also would make it more likely that voter confidentiality and ballot secrecy would be compromised and in the process could render the federal observer program unconstitutional.<sup>145</sup> In short, all

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140. *Senate Observer Hearing, supra* note 11, at 431 (testimony of Mark F. (Thor) Hearne II).

141. 42 U.S.C. § 1973f (2000).

142. *Senate Observer Hearing, supra* note 11, at 431 (testimony of Mark F. (Thor) Hearne II).

143. *See* 42 U.S.C. § 1973a(a) (2000).

144. *See Humphreys County*, 384 F.Supp. at 125.

145. *See generally id.*; *Greene County*, 254 F.Supp. at 546–47 (upholding the federal observer provisions because of the substantial steps that had been taken to preserve the First Amendment right of voters to cast a secret ballot); *see supra* notes 105–114 and accompanying text.

of the qualities that make federal observer reports unassailable and the role of the observer constitutional would be eliminated.

For similar reasons, the suggestion that federal observers “should have the means to provide a timely objection to election misconduct by communication with senior election officials or law enforcement authorities” also is erroneous.<sup>146</sup> Federal observers do not work for local election officials or state officials. They work for the Office of Personnel Management as an extension of the United States Attorney General.<sup>147</sup> Vesting discretion in federal observers to report their observations to state or local officials ignores their unique role and would encourage them to engage in value judgments that they are supposed to avoid.<sup>148</sup> Moreover, such an action could impair their ability to observe and receive candid information from voters because they could be perceived as merely an extension of election officials who may be engaging in discriminatory conduct. It also is completely unnecessary. Justice Department attorneys already may communicate observations to local election officials in a real-time manner, particularly if there is a possibility of vote denial. By doing so, it keeps federal observers free to perform their sole function: to observe.

Some of the strongest evidence against any proposal to federalize partisan monitors comes from how partisan monitors have functioned in practice. For example, in 2006, the Department of Justice successfully sued Long County, Georgia for permitting partisan monitors to discriminatorily challenge only Latino voters in an effort to discourage them from voting.<sup>149</sup> Law enforcement officials and others serving as partisan challengers in Passaic County, New Jersey engaged in similar discriminatory conduct within the past five years.<sup>150</sup> In recent elections in Sunflower, Mississippi, white poll watchers “were encouraged to aggressively challenge Black voters,” contributing to “lackluster voter turnout.”<sup>151</sup>

In November 1999, Arabic U.S. citizens in Hamtramck, Michigan were targeted for disenfranchisement by partisan workers.<sup>152</sup> A group of

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146. *Senate Observer Hearing, supra* note 11, at 431 (testimony of Mark F. (Thor) Hearne II).

147. *See* 42 U.S.C. § 1973f (2000).

148. *See supra* notes 6, 77–81, 89, 138, 139 and accompanying text.

149. *See* *United States v. Long County, Georgia*, No. CV206-040 (S.D. Ga. Feb. 10, 2006).

150. *See* Robert Ratish & Josh Gohlke, *Violence Mars Election*, NORTH JERSEY HERALD & NEWS, Nov. 3, 1999, at A8; Maia Davis, *FBI Probing Election Day Attacks, Reviewing Incidents for Civil Rights Violations*, BERGEN RECORD, Feb. 5, 2000; *see also infra* notes 180, 209, 210, 238–240, 267 and accompanying text.

151. *Senate Observer Hearing, supra* note 11, at 394 (testimony of Constance Slaughter-Harvey).

152. *See* Press Release, U.S. Dep’t of Justice, City of Hamtramck, Michigan to Revamp Election Procedures to Prevent Voter Discrimination Under Justice Department Settlement (Aug. 4, 2000), available at <http://www.usdoj.gov/opa/pr/2000/August/456cr.htm> [hereinafter Hamtramck Press Release].

non-Arab voters formed an organization called “Citizens for Better Hamtramck” to register individuals to be present in polling places to challenge the citizenship of voters who “looked” Arab, had dark skin such as Bengali voters, or who had distinctly Arab or Muslim names.<sup>153</sup> The intimidating and harassing actions of these partisan workers resulted in substantially depressed voter participation by members of the Arab and Bengali community, leading to lengthy federal oversight assisted by non-partisan federal observers.<sup>154</sup>

In summary, it is commonplace for partisan challengers to threaten, intimidate, and discourage minority voters from registering or casting a ballot. Regardless of their party, the presence of partisan monitors is far more likely to lead to VRA violations than to prevent them. For that reason, Congress chose to ensure the continuing neutrality and impartiality of federal observers free of the value judgments and bias implicit in any proposal to make federal observers partisan. As the former Director of OPM testified, the federal observer program needs to be kept “free from political interference.”<sup>155</sup> Federalizing partisan poll watching would turn the VRA on its head and promote, rather than prevent, voting discrimination.

#### IV. A CASE STUDY OF FEDERAL OBSERVERS: PASSAIC COUNTY, NEW JERSEY

The United States Department of Justice is charged with ensuring that jurisdictions comply with the Voting Rights Act.<sup>156</sup> The Department’s enforcement record emphasizes “voluntary compliance” and recognizes “that the most effective remedies are those that are developed in common-sense consultation between jurisdictions and their minority

153. See Complaint at 2, *United States v. Passaic City*, (D.N.J. 2000) (No. 00-73541); see also Hamtramck Press Release, *supra* note 152. In many cases, Arab or Bengali voters were pulled out of voting lines before even submitting their names or any other identifying information. See *id.* Even when Arab or Bengali voters were able to produce United States passports as proof of citizenship, they were asked to take citizenship oaths; no non-Arab voters were challenged or asked to take an oath. See *id.*

154. In August 2000, Hamtramck entered into a consent decree with the Justice Department that designated the City for federal observer coverage to monitor the City’s efforts to remedy the discrimination. See *id.* Federal observers were sent to Hamtramck eight times by the end of 2003 to monitor the City’s progress under the court order. The State of Michigan also “issued a memorandum to all election clerks in the state instructing them that discriminatory challenges should not be allowed to proceed, and reminding clerks that they have the power to expel challengers who abuse the challenge process.” *Id.* In 2005, the City settled a discrimination suit brought by fifteen of the Arab-American voters by paying them \$150,000 in damages. See <http://hamtramckstar.com/index.php/2005/05/11/plsl> (last visited July 1, 2006) (on file with author).

155. *Senate Observer Hearing*, *supra* note 11, at 436 (testimony of Kay Cole James).

156. See 42 U.S.C. § 1973aa-2 (2000).

language communities.”<sup>157</sup> When efforts at obtaining voluntary compliance are unsuccessful, the Justice Department gives jurisdictions a “push” by using the enforcement mechanisms at its disposal.<sup>158</sup> Federal observers play a crucial role in allowing the Department to assess whether a covered jurisdiction is providing effective minority language voter materials and assistance to covered language groups.<sup>159</sup> This Part discusses the vital role of federal observers in Passaic County, New Jersey in preventing discrimination, enforcing the minority language assistance provisions of the Voting Rights Act, and measuring progress under numerous court orders.

### A. Background and Demographics

Passaic County is a metropolitan county in the northern part of New Jersey, about fifteen miles from New York City. The County boasts a rich historical heritage, tracing the origins of its first organized township to 1693 by the Dutch in what is now the City of Passaic.<sup>160</sup> The City of Paterson, which has been called the “Cradle of American Industry,”<sup>161</sup> was the site of one of the first textile mills in the United States established in 1793 on the Passaic River by Alexander Hamilton, a gun mill built by Samuel Colt in 1836 to manufacture his revolving firearms, some of the country’s largest silk manufacturing plants, and one of the first hydroelectric plants in the world built by Thomas Edison and still in use today.<sup>162</sup>

Passaic County has produced well-known citizens including Governor William Paterson (a signer of the Declaration of Independence), Mathew Maguire (the Father of Labor Day), Poet Allen Ginsberg, and Lou Costello (of the Abbot and Costello comedy team), in addition to more controversial contemporary figures such as Ruben “The Hurricane” Carter and Eastside High Principal Joe Clark, who were immortalized in the movies *The Hurricane* and *Lean on Me*, respectively.<sup>163</sup> The County has

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157. Hearing on H.R. 351: A Bill to Amend the Voting Rights Act of 1965 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 104th Cong. WL 202187 (1996) (statement of Deval Patrick, Assistant Att’y Gen. for Civil Rights).

158. *Id.*

159. See *supra* notes 7, 21–24, 31–33 and accompanying text.

160. See D. Stanton Hammond, *Notable Dates in Passaic County History, 1609–1937* (1937), available at [http://www.rootsweb.com/~njpchsgc/pce/passaic\\_cty\\_dates.htm](http://www.rootsweb.com/~njpchsgc/pce/passaic_cty_dates.htm). The Dutch Township, Acquackanonk, initially was in Essex County, but later was ceded to Passaic County and renamed after the Passaic River, which it bordered. See Mark S. Auerbach, *An Overview of the History of the City of Passaic, New Jersey*, available at <http://www.tccweb.org/passaic.htm#An%20Overview> (last visited Aug. 30, 2007).

161. Passaic County, New Jersey, *Passaic County’s Historical Attractions*, <http://www.passaiccounty.nj.org/history/history.html> (last visited Sept. 7, 2002) (on file with author).

162. See Hammond, *supra* note 160.

163. See *The People and How They Live: Famous People*, <http://www.patersonhistory.com/people/famous.html> (visited Sept. 7, 2002).

a diverse population, ranging from the early Dutch and English settlers to the later arrival of German, Irish, Scandinavian, Slovak, Austro-Hungarian, Italian, Greek, Russian, Ukrainian, Polish, and Jewish residents, who have left their most visible marks on the County in the form of the dozens of ethnic churches of virtually every religious denomination that still dot the landscape.<sup>164</sup>

Beginning after World War II, the ethnic composition of Passaic County began to experience dramatic demographic changes with the arrival of large numbers of Puerto Ricans.<sup>165</sup> This transformation continued in the 1970s with the arrival of other Hispanic immigrants from Central America, South America, Mexico, and the Caribbean.<sup>166</sup> By 1984, Passaic County had enough limited-English proficient Hispanic citizens to become covered under Section 203 of the Voting Rights Act,<sup>167</sup> which requires that written election materials and assistance be available in Spanish.<sup>168</sup> The rate of Hispanic immigration to Passaic County accelerated further in the 1990s, with the percentage of persons of Spanish heritage in the County increasing from 21.7 percent in 1990 to 30.0 percent in 2000, and the percentage of voting-age persons of Spanish heritage increasing from 19.2 percent in 1990 to 27.5 percent in 2000.<sup>169</sup> According to the 2000 Census, roughly 146,000 of the County's total population of half-million residents are persons of Spanish heritage.<sup>170</sup> Five communities in Passaic County have large percentages of Hispanic residents: Passaic City, Paterson, Prospect Park, Haledon, and Clifton.<sup>171</sup> Over half of these

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164. See Auerbach, *supra* note 160.

165. See *id.*

166. See *id.*

167. See DETERMINATIONS UNDER THE MINORITY LANGUAGE ASSISTANCE PROVISIONS OF THE VOTING RIGHTS ACT, 49 Fed. Reg. 25,887 (Bureau of the Census, Dep't of Commerce June 25, 1984).

168. For a discussion of the requirements of the language assistance provisions of the VRA, see generally James Thomas Tucker, *Enfranchising Language Minority Citizens: The Language Assistance Provisions of the Voting Rights Act*, 10 N.Y.U. J. LEGIS. & PUB. POL'Y 195 (2006); Tucker, *supra* note 13, at 223–27.

169. See BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, Census 2000 Redistricting Data (Public Law 94-171) Summary File 1, available at <http://factfinder.census.gov> (search "Fast Access to Information" for "Passaic").

170. See *id.*

171. According to the 2000 Census, these communities have the following numbers of persons of Spanish heritage: Passaic, with 62.5 percent of its total population of 67,861, and 60.0 percent of its voting-age population of 46,962 residents; Patterson, with 50.1 percent of its total population of 149,222, and 49.0 percent of its voting-age population of about 104,785 residents; Prospect Park, with 38.3 percent of its total population of 5,770, and 35.2 percent of its voting-age population of 4,070 residents; Haledon, with 22.6 percent of its total population of 8,252, and 19.4 percent of its voting-age population of 6,144 residents; and Clifton, with 19.8 percent of its total population of 78,672, and 17.1 percent of its voting-age population of 61,700 residents. See *id.*

recent arrivals cannot speak English well enough to participate effectively in the political process without election assistance in Spanish.<sup>172</sup>

### B. *Disenfranchisement of Spanish-Speaking Voters*

New Jersey was one of the first states to enact legislation providing for minority language assistance to address the difficulties faced by these Spanish-speaking citizens, predating the 1975 enactment of Section 203 of the Voting Rights Act.<sup>173</sup> Under New Jersey law, the county elections board must ensure that at least two bilingual board workers (or poll workers) of Hispanic origin fluent in Spanish are present in each designated Spanish Election District, which are those voting precincts “in which the primary language of 10% or more of the registered voters is Spanish.”<sup>174</sup> Passaic County failed to comply with this requirement.

In 1986, a state court annulled the results of the Paterson city council election after finding that the County had failed “to provide Spanish speaking workers in major Hispanic districts.”<sup>175</sup> The problems created for limited-English Spanish-speaking voters were compounded further by the inclusion of a disproportionate number of those voters on the County’s “Peremptory Order” or voter confirmation lists, containing the names of registered voters whose sample ballot was returned to the County as undeliverable to their address of record.<sup>176</sup> The court concluded that the nonexistence of Spanish-speaking poll workers coupled with the already evidenced confusion caused by varied directions or no directions at all, resulted in the disenfranchisement of many Hispanic voters who were unable to communicate with poll workers.<sup>177</sup> The court instructed Passaic County to take appropriate steps to ensure that each designated Spanish Election District had at least two Spanish-speaking board workers,

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172. See *id.* (reporting that out of 121,346 persons in Passaic County reporting during the 2000 Census that they spoke Spanish, 67,316, or 55.5 percent of that total, reported speaking English “less than very well”). One-third of Passaic County’s nearly forty thousand Spanish households also reported that they were “linguistically isolated.” *Id.* at P20. Between 1995 and 1999, the number of students in New Jersey designated as “limited English proficient” increased by 42 percent, or by 16,000 students, with the number of students from homes where English was not the first language climbing by 19 percent. See Jean Rimbach & Monika Mathur, *A Challenge in Any Language*, BERGEN RECORD, Feb. 17, 2000, at A1.

173. See N.J. STAT. ANN. § 19:6-1 (West 1999).

174. *Id.*

175. In re the Election for the Office of Council of the City of Paterson, County of Passaic, No. 58, slip op. at 33 (N.J. Super. Ct. Law Div., Passaic County, Aug. 11, 1986) (Special Proceedings).

176. See *id.* at 11–26.

177. *Id.* at 33.



suggesting that the County also have alternates available if there was “concern about ‘no shows.’”<sup>178</sup>

Passaic County did not comply with the court’s order. Instead, the barriers faced by Spanish-speaking citizens increased as their population grew in the County. Hispanic candidates running for office were threatened and subjected to ethnic slurs.<sup>179</sup> Democratic officials alleged that the Republican County Sheriff placed deputies in the polls to discourage Hispanic voters from voting.<sup>180</sup> Some Hispanic persons were denied opportunities to register voters.<sup>181</sup> County officials were accused of failing to timely process voter registration applications submitted by Hispanics, and purging the names of Hispanic registered voters in violation of federal law.<sup>182</sup> Disproportionate numbers of Hispanic voters continued to be placed on voter confirmation lists, resulting in Hispanic voters being turned away from the polls even if they had not changed their addresses and had voted in the last election.<sup>183</sup> The County did not have any Spanish-speaking elections officials immediately available to assist Hispanic

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178. *Id.* at 42.

179. See Elizabeth Moore, *Security Increased at Polls for Passaic Elections*, NEWARK STAR-LEDGER, May 2, 1993 at 13.

180. See Maia Davis, *U.S. Probing Passaic Election Tactics, Voter Intimidation Alleged in Paterson*, THE RECORD, Dec. 4, 1998, at A1.

181. See generally Meeting Minutes Journal 3, Passaic City Council at 603 (Jan. 6, 1977) (denying a Hispanic citizen permission to set up tables in the business section of Passaic City to register voters).

182. See David Voreacos, *5,000 Voter Records Pulled from Books, State Order to Restore Names Ignored*, BERGEN RECORD, May 8, 1996, at A1; see also David Voreacos, *Elections Chief Draws More Fire, Accused of Making Racial Comments*, BERGEN RECORD, July 2, 1996, at NJ1. The National Voter Registration Act (“NVRA”), more popularly known as the “motor-voter” law, requires a jurisdiction to send notices to voters about the disposition of their registration status before being allowed to change their registration status or purge them. 42 U.S.C. §§ 1973gg-6(a), 1973gg-6(d) (2000).

183. See Stephanie Stokes, *Passaic’s Hispanic, Black Voters Made a Difference*, BERGEN RECORD, May 14, 1987, at B3 (discussing the red-tagging of voter registration sheets of approximately 21,000 persons on the voter confirmation list, requiring them to be turned away from their polling site and directed to their city clerk’s office to receive instructions on the location of their new polling site); see also David Voreacos, *Passaic Election Chief Under Fire, Accused by Democrats of Trying to Suppress Urban Vote*, BERGEN RECORD, Aug. 9, 1996, at B7 (discussing how in 1996, the Passaic County Democratic Party sued to stop the practice, asserting that the County violated the NVRA by failing to investigate the voters’ residency); Jerry DeMarco & David Voreacos, *Suit Seeks to Ease Voting After a Change of Address*, BERGEN RECORD, Oct. 2, 1996, at A4 (describing how the case was settled by allowing voters on the confirmation list to vote by a provisional ballot if they signed an affidavit attesting to their new residency); Kelly David, *State Wouldn’t Help Monitor Passaic Vote*, BERGEN RECORD, Oct. 31, 1996, at L3; N.J. STAT. ANN. § 19:53 (West 2007) (describing provisional ballot procedures to ensure that no voter is turned away from the polls on Election Day); 42 U.S.C. § 15482 (2000) (establishing a federal provisional voting procedure for voters).

voters calling the office.<sup>184</sup> Election information was not advertised in Spanish language newspapers or media.<sup>185</sup> Often, Hispanic voters spent hours trying to locate their polling places.<sup>186</sup>

The lack of Spanish heritage poll workers, who are the most likely to be bilingual in English and Spanish, likewise imposed significant obstacles to Spanish-language voters. Passaic County elections officials failed to actively recruit Spanish-speaking poll workers.<sup>187</sup> Passaic County officials candidly admitted that the 81 designated Spanish Election Districts<sup>188</sup> did not have enough Spanish-speaking poll workers “or enough literature in Spanish to explain to them how to vote.”<sup>189</sup> The absence of Spanish-speaking poll workers and materials prevented limited-English proficient Hispanic voters from receiving instructions on how to vote, and made it difficult for poll workers to locate their names on the voter registration lists.<sup>190</sup>

Many Spanish-speaking voters who went to the polls were treated rudely by non-Hispanic poll workers,<sup>191</sup> and often were subjected to ethnically derogatory remarks such as “those damn . . . Hispanics, Mexicans,

184. See generally Dan Kraut, *Hispanics Poll Access Being Monitored; Observers Fan Out in Passaic, Paterson*, BERGEN RECORD, June 8, 1999, at L1 (noting that all the phones in the election office were answered in English, and although there was a Spanish speaker available, “some callers may have given up before being transferred”). Voters contacting the elections office on Election Day typically do so because they have forgotten where they are supposed to vote or want to know the polling hours. *Id.*

185. See Elizabeth Moore, *Passaic to Hire More Latino Poll Workers, City Recruits Spanish Speakers in Response to Justice Department Report of Voter Discrimination*, NEWARK STAR-LEDGER, Apr. 15, 1999, at 27; Gerardo Fernandez Dep. 88:3-89:5, Dec. 8, 2000 (on file with author).

186. Fernandez Dep. 63:12-69:4.

187. See Leonor Ayala, *Passaic Takes Step to Meet Bilingual Mandates in Voting Law*, BERGEN RECORD, Apr. 17, 1999, at A4; see also Fernandez Dep. 88:3-92:3; Santiago Dep. 74:7-76:25, Oct. 5, 2000 (on file with author).

188. See Memorandum from the Passaic County Bd. of Elections (May 9, 1991) (on file with author).

189. Fernandez Dep. 79:22-23; see also Elizabeth Moore, *Passaic to Hire More Latino Poll Workers, City Recruits Spanish Speakers in Response to Justice Department Report of Voter Discrimination*, NEWARK STAR-LEDGER, Apr. 15, 1999, at 27; Ayala, *supra* note 187; Santiago Dep. 462:15-463:5, Oct. 18, 2000 (on file with author); Robert Hare Dep. 21:24-22:10, Dec. 11, 2000 (on file with author) (providing similar statements by other leaders). For example, in Passaic City, only about one-third of the number of bilingual poll workers required by New Jersey law were in the poll sites for the April 1999 school board election. Dan Kraut, *Passaic Near Settlement of Hispanic Vote-Bias Issue, Agreement Calls for Adding More Bilingual Poll Workers*, BERGEN RECORD, Apr. 29, 1999, at L1.

190. See Elizabeth Moore, *Passaic to Hire More Latino Poll Workers, City Recruits Spanish Speakers in Response to Justice Department Report of Voter Discrimination*, NEWARK STAR-LEDGER, Apr. 15, 1999, at 27; Fernandez Dep. 69:5-72:12, 80:19-25, 89:15-90:6.

191. As One Hispanic election official testified, “the poll workers, most of them are old ladies. They’ve been doing it for ages. They don’t speak . . . Spanish and . . . they get upset easily. Tell them your name, they can’t find [it].” Fernandez Dep. 70:19-71:2.

Puerto Ricans.”<sup>192</sup> Non-Hispanic poll workers made statements to Spanish-speaking voters seeking language assistance such as “my parents came over here and learned how to speak English before they could vote, you should too.”<sup>193</sup> These problems were further exacerbated by the refusal of many poll workers to permit limited-English proficient Hispanic voters to receive voting assistance from the person of their choice.<sup>194</sup> The presence of these structural barriers to Spanish-speaking voters frequently caused them to be turned away from the polls without voting and discouraged others from making any attempt to vote.<sup>195</sup>

### C. Federal Consent Decree and Early Problems

In April 1999, the United States Department of Justice notified the State of New Jersey, Passaic County, and Passaic City that it was prepared to sue them for knowingly discriminating against Hispanic voting-age citizens, in violation of the Voting Rights Act and the United States Constitution.<sup>196</sup> In June 1999, the United States filed a complaint in federal court, alleging that the three jurisdictions violated the voting rights of Hispanic voting-age citizens who were unable to speak or understand English well enough to participate in the electoral process.<sup>197</sup> A month later, a three-judge panel entered the Consent Decree to oversee the remedies to which the parties had agreed.<sup>198</sup> The defendants did not admit the allegations in the Complaint, but stated a “mutual interest to implement procedures that will protect the rights of Hispanic and Spanish-speaking voters to fully participate in the electoral process in compliance with [federal law].”<sup>199</sup>

The Consent Decree included several components. The defendants agreed to recruit at least two bilingual poll workers fluent in Spanish for each of the 140 designated Spanish Election Districts in the County<sup>200</sup> and

192. Santiago Dep. 456:23-458:23, Oct. 18, 2000.

193. Tina Fiorellino Dep. 176:17-177:21, Dec. 14, 2000 (on file with author) (agreeing with the statement that she had heard similar comments at the polls); *see also* Santiago Dep. 74:24-78:3, Oct. 5, 2000 (describing racist comments he has heard at the polls).

194. *See, e.g.*, Moore, *supra* note 190, at 27; Fernandez Dep. 118:20-119:2; Hare Dep. 174:23-176:25.

195. *See* Kraut, *supra* note 189; Dan Kraut, *Latino Voters Promised More Access, Passaic, County Respond to U.S. Stance*, BERGEN RECORD, Apr. 15, 1999, at L1.

196. *See* Letter from Bill Lann Lee, Acting Assistant Att’y Gen. of the Civil Rights Division, to Counsel for the State of New Jersey, Passaic County, and Passaic City (Apr. 8, 1999) (on file with author).

197. *See* Complaint at 2, United States v. Passaic City, (D.N.J. 1999) (No. 99-2544)

198. *See* Consent Decree at 1, United States v. Passaic City, (D.N.J. 1999) (No. 99-2544) [hereinafter Passaic Consent Decree].

199. Passaic Consent Decree, *supra* note 198, at 3.

200. *See* Memorandum from the Passaic County Bd. of Election Comm’rs, (Feb. 4, 2000) [hereinafter Spanish Election Districts Memorandum] (on file with author) (noting

to try to secure a number of Hispanic poll workers proportionate to the number of Hispanic registered voters in each election precinct.<sup>201</sup> The defendants had to reach out to Hispanic organizations and to place advertisements in Spanish media outlets as part of their recruitment efforts.<sup>202</sup> The defendants further had to ensure all written election materials were available in Spanish.<sup>203</sup> They also agreed to ensure that voters received assistance from the person of their choice.<sup>204</sup> In addition, the parties agreed to target the language assistance to those voting precincts in which 10 percent or more of the registered voters had Spanish surnames.<sup>205</sup> The defendants agreed to implement a comprehensive Spanish language information program in consultation with the Justice Department and the County's Hispanic citizens.<sup>206</sup> To monitor compliance with the Consent Decree, the Court authorized the appointment of federal observers through December 31, 2003.<sup>207</sup>

Lack of compliance soon became apparent. During the June 8, 1999 primary election, twenty-five federal observers<sup>208</sup> documented that designated Spanish Election Districts had few, if any, bilingual Hispanic poll workers, some Hispanic poll workers and voters continued to be treated rudely at the polls, and Spanish language materials and assistance were inadequate.<sup>209</sup> In September 1999, the County Democratic Party chairman renewed his earlier allegations that the County Superintendent of Elections, who was a Republican, was suppressing the minority vote in the County.<sup>210</sup> To make matters worse, a political maelstrom consumed Passaic

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that 140 election districts in Passaic County were required to have at least two bilingual board workers, including 26 election districts in Clifton, all six election districts in Haledon, all thirty-three election districts in Passaic City, all seventy-one election districts in Paterson, and all four election districts in Prospect Park). The parties used Spanish surname analysis to make these determinations. *See id.*; *see also* Tucker, *supra* note 168, at 252-53 (describing surname analysis).

201. Passaic Consent Decree, *supra* note 198, at 6.

202. *Id.* at 6-7.

203. *Id.* at 7-8, 10.

204. *Id.* at 8-9.

205. *Id.* at 11.

206. *Id.* at 12-14.

207. *Id.* at 15.

208. *See* Kraut, *supra* note 184.

209. *See* Letter from Angela Hart-Edwards to Defendants, *United States v. Passaic City*, No. 99-2544 (June 22, 1999). More than half of designated Spanish Election Districts in Passaic City did not have at least two bilingual board workers. *Id.* at 2. In Paterson, only seven bilingual workers were present at nine election districts. *Id.* In Clifton, only one of the several election districts observed had a bilingual poll worker, despite the fact that over twenty election districts in the city were designated to have Spanish language assistance available. *See id.* at 3.

210. Maia Davis, *Democrats Want Probe of County Elections Office, Say Leader is Hindering Minority Votes*, BERGEN RECORD, Sept. 16, 1999, at L1. The Democratic chairman made his allegations after learning that 60 percent of the registered voters on the County's voter

County's elections office when the County should have begun implementing provisions of the Consent Decree.<sup>211</sup> The turmoil came to a head as both parties prepared for the general election, which would determine political control over the County's governing Board of Freeholders.<sup>212</sup>

On September 16, 1999, the parties jointly filed a Spanish Language Election Information Program.<sup>213</sup> Passaic County agreed to assign or hire two employees to act as bilingual coordinators to fully implement the Program.<sup>214</sup> The bilingual coordinators had several responsibilities. They were required to be bilingual in Spanish and English and fully trained on all election procedures.<sup>215</sup> They were responsible for ensuring that all of the designated Spanish Election Districts in the County had at least two bilingual poll workers.<sup>216</sup> In addition, they were asked to establish a comprehensive Outreach and Publicity Plan with the input of the parties and members of the Hispanic community. The bilingual coordinators were to implement the Plan by disseminating translated election information, recruiting and retaining Hispanic and bilingual poll workers and translators, using Spanish language media outlets, and ensuring that voting machine demonstrations were translated into Spanish and made accessible to the Hispanic community.<sup>217</sup>

The Spanish Language Program also required the defendants to take other steps to make their election process fully accessible to limited-English proficient Spanish-speaking citizens. The Passaic County Board of Elections had to appoint twenty-two general community liaisons in the

confirmation list were from the predominately Hispanic and African American cities of Passaic City and Paterson, which tended to vote overwhelmingly for Democratic candidates. See *id.*; Maia Davis, *Chief Judge Stays Out of Election Fray, Refuses to Rule on Vote Suppression*, BERGEN RECORD, Sept. 28, 1999, at L1; see also Rich Calder, *Democrats Claim GOP is Hindering Minority Vote*, NORTH JERSEY HERALD & NEWS, Sept. 16, 1999, at B1 (stating that State Superior Court Judge Robert Passero declined to rule on the allegations because of concerns that a ruling would be used as "a political weapon.").

211. Two of Passaic County's chief elections officers sued the County and the Superintendent of Elections, alleging that the Superintendent had disciplined them not only for raising questions about the alleged suppression of minority votes, but also that he had sexually harassed them and carried a shotgun and other weapons into work. Maia Davis, *Workers Suing Elections Chief, Say County Official Harassed Them*, BERGEN RECORD, Sept. 23, 1999, at L1; Maia Davis, *State May Defend County Elections Chief, Judge Sees Link to Minority Vote Case*, BERGEN RECORD, Sept. 24, 1999, at L1.

212. See Maia Davis, *Plot Thickens at County Elections Office; Top Democrat May Ask for a Monitor*, BERGEN RECORD, Sept. 14, 1999, at L1.

213. See Joint Spanish Language Election Information Program, *United States v. Passaic City*, (D.N.J. 1999) (No. 99-2544) [hereinafter "Spanish Information Program"]; see also Passaic Consent Decree, *supra* note 198, at 13-14 (requiring that the parties jointly submit a Spanish language information program with the Court).

214. Spanish Information Program, *supra* note 213, ¶ A(1).

215. *Id.* ¶¶ A(1)-(2).

216. *Id.* ¶ A(3).

217. *Id.* ¶¶ A(4)-(5).

five covered municipalities who were bilingual in Spanish and English to identify election-related concerns within the Hispanic community.<sup>218</sup> The County was required to recruit volunteer community liaisons to serve as ombudsmen between County election officials and the Hispanic community by disseminating voter information in Spanish and communicating voter concerns.<sup>219</sup> The County had to ensure each designated Spanish Election District had at least two bilingual poll workers. If it was unable to do that, it would have to hire enough bilingual translators to ensure that they were in compliance with the Consent Decree.<sup>220</sup> Poll officials and election personnel had to be sufficiently trained on Spanish language election procedures.<sup>221</sup> All election-related materials, instructions, signs, and announcements had to be fully available in Spanish.<sup>222</sup> All translated materials had to be disseminated to the public through notices in English and Spanish media before elections, and voter registration and election information had to be available through dedicated Spanish language phone lines.<sup>223</sup> Certain election-day procedures had to be implemented to ensure that Spanish language voters had full access to the election process.<sup>224</sup> Finally, the defendants had to maintain records of their efforts and materials prepared under the Program to facilitate enforcement by the Court and the Justice Department.<sup>225</sup>

#### D. Observers' Documentation of Violations of the Court Orders

Federal observers documented the defendants' widespread violations of the federal court orders. Passaic County failed its first major test of implementing the Spanish Language Program during the "highly charged atmosphere" of the November 1999 general election, despite the presence of a large contingent of federal and state observers at the polls and several months of preparation.<sup>226</sup> One-third of all designated Spanish Election

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218. *Id.* ¶ B(1)-(3). The twenty-two general community liaisons were allocated among the five municipalities according to their relative number of Hispanic heritage registered voters, with eight from Paterson, six from Passaic City, four from Clifton, and two each from Haledon and Prospect Park. *See id.* ¶ B(1).

219. *See id.* ¶ C(1)-(2). The community liaisons were required to attend meetings at least yearly with the bilingual coordinators and the general community liaisons to ensure that the Program was being implemented effectively. *Id.*

220. *Id.* ¶ D(1)-(3). The Program established specific deadlines for recruiting bilingual Hispanic poll workers. *Id.*

221. *See id.* ¶ E(1)-(3).

222. *Id.* ¶ F(1).

223. *Id.* ¶ G(3).

224. *See id.* ¶ H(1)-(6).

225. *See id.* ¶ I(1).

226. Maia Davis, *Passaic Polls Under Intense Scrutiny; Federal, State Monitors Aiding Latinos*, BERGEN RECORD, Nov. 2, 1999, at L1 (noting that the Justice Department had

Districts did not have any bilingual poll workers, and most had less than the two required by the Consent Decree.<sup>227</sup> Many signs and written instructions in the polling places only were available in English.<sup>228</sup> Four Spanish Election Districts in Passaic City were changed without adequate notice shortly before the election,<sup>229</sup> causing numerous Hispanic voters to go to the wrong polling site. Polling sites in some Spanish Election Districts opened late.<sup>230</sup> Twenty-five of the thirty-three voting machines in the predominately Hispanic community of Passaic City were inoperative for several hours after the polls opened,<sup>231</sup> which was exacerbated by the lack of Spanish language assistance for filling out emergency ballots.<sup>232</sup>

Federal observers also documented rude treatment of Hispanic voters by poll workers and others at the polls.<sup>233</sup> In several polling sites in Passaic City, bilingual poll workers and student translators<sup>234</sup> were told to leave by poll workers who had no authority to do so.<sup>235</sup> Spanish-speaking

stationed twenty-five federal observers and Department attorneys in Passaic County's polling places, along with seven attorneys from the New Jersey Attorney General's Office).

227. See Spanish Election Districts Memorandum, *supra* note 200.

228. See Memorandum from Victor Santiago, Bilingual Coordinator, to the Passaic County Bd. of Election Comm'rs (Nov. 7, 1999) (on file with author).

229. See *id.* At least a dozen voters who went to one polling site were turned away without being offered provisional ballots, as required by New Jersey law and the 1986 Consent Decree. See *id.*; see *supra* notes 175-78, 183 and accompanying text (describing the consent decree and use of provisional ballots).

230. See Letter from Tina Fiorellino, Mun. Clerk, City of Passaic, to Maria Havasy, Chairwoman of the Passaic County Bd. of Election Comm'rs, (Nov. 8, 1999)(on file with author).

231. See Ratisch, *supra* note 150, at A1; Fiorellino Dep. 285:7-286:14; Santiago Dep. 450:13-451:4, Oct. 18, 2000. The County later determined that there was nothing mechanically wrong with the machines, and that it appeared they had been tampered with. See Rich Calder, *FBI to Eye Tampering in Election*, NORTH JERSEY HERALD & NEWS, Feb. 11, 2000, at A1. The keys for the voting machines, which were over fifty years old, had been left in the machines in an unsecure warehouse. See Maia Davis, *Voting-Machine Report Questioned in Passaic*, BERGEN RECORD, Feb. 12, 2000, at A3; Editorial, *Investigate the Board of Elections: FBI's Probe Must Cover More Than Just Machines*, NORTH JERSEY HERALD & NEWS, Feb. 17, 2000, at A18; Rich Calder, *Official Calls Vote Machine Warehouse Security Risk*, NORTH JERSEY HERALD & NEWS, Mar. 8, 2000, at A1.

232. See Fiorellino Dep. 129:16-131:16; Santiago Dep. 361:8-20, Oct. 18, 2000.

233. See Fiorellino Dep. 309:20-310:11; Santiago Dep. 74:7-23, Oct. 5, 2000.

234. Passaic County recruited many of its translators from high school and Passaic County Community College to fill bilingual poll worker vacancies. See *Passaic Polls Under Intense Scrutiny*, *supra* note 226.

235. See Fiorellino Dep. 290:3-292:6, 295:8-297:19; Santiago Dep. 379:5-382:11, Oct. 18, 2000. Passaic City's city clerk described the problem in the following manner:

The problem with some of the older board workers who've been on there for so long, they feel that they're the ones that control that board and that polling district. It's like their territory. And they'll actually come out and say, well, you don't belong here, we don't want you here. . . . [This problem] happens often. If they feel you haven't worked with us before, we don't want

voters were denied assistance from the person of their choice, or were given erroneous instructions for preparing write-in ballots.<sup>236</sup> Many poll workers refused to provide assistance or allow voters to be assisted by the person of their choice.<sup>237</sup> Intimidation of Hispanic voters and poll workers by County sheriff's officers violating state statutes restricting law enforcement activities at the polls<sup>238</sup> was reported in Paterson, including a man wearing a law enforcement shirt who served as a challenger at one polling site and seven plainclothes officers who spent two hours at another polling site challenging only the Democratic poll workers.<sup>239</sup> At one polling site in Clifton, an armed sheriff's officer beat and injured a Democratic campaign worker as he was taking campaign signs from his car.<sup>240</sup> Federal observer reports were key to identifying and investigating these civil rights violations.

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you. You have to understand, they're their own breed. They're interesting people.

Fiorellino Dep. 297:20-299:7.

236. See Fiorellino Dep. 303:25-306:17; Santiago Dep. 61:13-63:18, Oct. 5, 2000; Santiago Dep. 313:19-314:18, 386:17-390:21, October 18, 2000; *Violence Mars Election*, *supra* note 150.

237. See Memorandum from Victor Santiago, Bilingual Coordinator, to the Passaic County Bd. of Election Comm'rs (Nov. 7, 1999) (on file with author).

238. Under New Jersey law, it is a fourth-degree crime for either a full or part-time law enforcement officer serving as a poll worker or challenger to wear a police officer's uniform or to carry an exposed weapon. N.J. STAT. ANN. § 19:6-15.1 (West 2007). Furthermore, law enforcement officers assigned to polling places in their official capacity are prohibited from serving as poll workers or challengers. N.J. STAT. ANN. § 19:6-16.

239. See *Violence Mars Election*, *supra* note 150, at A1. In addition, a Democratic campaign worker in Paterson alleged that two men pushed him and threatened him in front of a city polling place. See Maia Davis, *FBI Probing Election Day Attacks: Reviewing Incidents for Civil Rights Violations*, BERGEN RECORD, Feb. 5, 2000, at A3.

240. See *Violence Mars Election*, *supra* note 150; Mitchel Maddux, *Democrats Vow to Pursue Case in Assault*, NORTH JERSEY HERALD & NEWS, Nov. 4, 1999, at A1. The victim identified sheriff's officers, including George Rosario, who was indicted for federal civil rights violations. See Mitchel Maddux, *Sheriff's Men ID'd in Assault*, NORTH JERSEY HERALD & NEWS, Nov. 10, 1999, at A1; Robert Rudolph, *Sheriff's Officer Faces Trial for Election Tactics—Indictment: He Strongarmed Party Workers*, NEWARK STAR-LEDGER, Feb. 23, 2001, at 33. Rosario was cleared of the charges after the judge determined that he was not acting in his capacity as an officer at the time of the assault. See William Kleinknecht, *Scrutiny of Passaic Corruption Intensifies—State's Searches Linked to Ex-Sheriff's Actions*, NEWARK STAR-LEDGER, Feb. 28, 2002, at 13; *Sheriff Settles GOP Campaign Suits*, NEW JERSEY RECORD, May 10, 2005, at L1. A separate civil suit proceeded, and was settled in 2005 for over \$100,000. See *id.*; Josh Gohlke, *Charges Against Sheriff Stand*, BERGEN RECORD, Apr. 2, 2002, at L3. There was evidence that the Republican sheriff tracked the political activities of his officers, forced officers to work on Republican campaigns while on duty, and retaliated against officers who declined to do so. See *id.*; Mitchel Maddux, *Ideals Meet Realities in Passaic GOP Politics: Ex-Prosecutor Talks About Long Probe*, BERGEN RECORD, Apr. 8, 2002, at A1. Sheriff's officers later admitted they voted for the Sheriff and his candidates in County elections after moving out of the County. See Josh Gohlke, *Officers May Move But Votes Stay Put: Politics v. Law in Passaic County*, BERGEN RECORD, Nov. 3, 2001, at A1.



Furthermore, federal observers documented hostility towards Spanish-speaking voters in Clifton, a predominately white community bordering the largely Hispanic communities of Passaic and Paterson. Clifton officials were opposed to efforts to provide Spanish language assistance in the city's twenty-six designated Spanish Election Districts.<sup>241</sup> Clifton had a history of resisting the growing influx of Hispanics into the city.<sup>242</sup> The hostility of Clifton officials spilled over to the polling places, where observers documented that non-Hispanic poll workers screamed at two high school students acting as Spanish language translators and forced them to leave the site during an April 2000 school board election.<sup>243</sup> The New Jersey Attorney General's office responded to Clifton's resistance by notifying the city that the use of bilingual poll workers and translators was a "mandated, not discretionary expense."<sup>244</sup> The local press also chided

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241. See John Chadwick, *Clifton Opposes Ruling on Interpreters*, BERGEN RECORD, Feb 8, 2000, at L1. Municipal officials in Clifton claimed that they had conducted an independent survey of poll workers in the twenty-six Spanish Election Districts and that "the results showed few voters needed help in Spanish." *Id.*

242. Among other things, Clifton residents petitioned to remove Spanish language instruction from the city's elementary schools, the Clifton City Council enacted an ordinance making English the city's official language and passed two resolutions denouncing the federal court orders, and residents of Clifton wrote editorials decrying the bilingual elections mandate. See Chadwick, *supra* note 241; John Chadwick, *Clifton Polls Will be Bilingual Despite Vote*, BERGEN RECORD, Sept. 17, 1999, at L8; Jason Paneque, *Poll Workers Not Needed*, BERGEN RECORD, Mar. 30, 2000 at L10; Res. of Objection to Bilingual Polling Dists. Selection Process (Clifton, N.J. 2000); Res. Seeking Support for the Re-evaluation of the Selection Process for Bilingual Voting Dists. (Clifton, N.J. 2000).

243. See Ernie Garcia, *Abuse of Interpreters is Alleged at Clifton Board Election: Incident Reported at School 12*, NORTH JERSEY HERALD & NEWS, Apr. 20, 2000, at A1. In response, Clifton's municipal clerk disclaimed responsibility for the incident because the poll workers were provided and trained by the County Board of Elections, and chided members of the Board of Elections for "making prejudicial and inflammatory remarks" about the incident to the press. Letter from Richard C. Moran, Clifton City Clerk, to the Passaic County Bd. of Elections Comm'rs (Apr. 24, 2000)(on file with author). Less than a month before the election, the Clifton city council passed a resolution that "endorses the use of Student Translators in Bilingual Polling Districts and opposes the use of Certified Translators in Bilingual Polling Districts of the City of Clifton." Letter from Richard C. Moran, Clifton City Clerk, to the Passaic County Bd. of Elections Comm'rs (Mar. 23, 2000) (on file with author). The harassment complaint of the student translators initially was not investigated. See Josh Gohlke, *Polling Harassment Won't Be Probed*, BERGEN RECORD, July 12, 2000, at L3. Later, the County Superintendent of Elections confirmed after a lengthy investigation that the "altercation between poll workers and interpreters during the April [2000] school board election not only was true, but was replicated in the June [2000] primary." Josh Gohlke, *County Confirms Clifton Translators Ballot Battles*, BERGEN RECORD, Aug. 10, 2000, at L1.

244. Letter from John J. Farmer, Jr., N.J. Att'y Gen., to Richard C. Moran, Clifton City Clerk (Mar. 2, 2000) (on file with author). On March 21, 2001, the Clifton City Council voted unanimously to petition the federal court to remove the Spanish Election District designation from the city's twenty-six covered precincts. See John Chadwick, *Clifton Digs in Against Mandate for Spanish at Polls*, BERGEN RECORD, Mar. 22, 2000, at L1;

Clifton for its intransigence, noting that Clifton was the only municipality in Passaic County refusing to comply with the court orders, despite the fact that compliance required only the \$5,200 per election already required under state law.<sup>245</sup>

On March 3, 2000, the federal court entered a supplemental order implementing a specific time line for Passaic County to recruit and train bilingual poll workers and translators to fill bilingual vacancies before each election as required by the Consent Decree.<sup>246</sup> Nevertheless, in the April, May, and June 2000 elections that followed, Passaic County repeatedly fell short of having the required number of bilingual poll workers and translators in covered Spanish Election Districts.<sup>247</sup> County election officials cited inadequate pay—one hundred dollars for a fourteen to sixteen hour day—as one of the major reasons they were unable to fill vacancies.<sup>248</sup>

Much of the blame for Passaic County's failure to retain enough bilingual poll workers also was attributable to the dysfunctional nature of the County's Board of Elections. New Jersey law requires that each County's elections board be comprised of two members from each major political party and appointed by the Governor.<sup>249</sup> Although the law was designed to have a bipartisan election board in place to protect the integrity of the elections process, the Passaic County Board of Elections was so deeply divided along party lines that board members actually worked against one another in "pitched combat."<sup>250</sup> Board meetings often were

Ernie Garcia, *Clifton Plans to Fight Order for Bilingual Poll Workers*, NORTH JERSEY HERALD & NEWS, Mar. 23, 2000. Despite the city council's vote, Clifton never brought the issue before the court.

245. See Editorial, *Provide Bilingual Election Workers: Clifton Must Meet, Not Fight, Federal Mandate*, NORTH JERSEY HERALD & NEWS, Apr. 2, 2000, at A8. The costs resulted from New Jersey law requiring two additional bilingual poll workers in designated Spanish Election Districts. See N.J. STAT. ANN. § 19:6-1 (West 2007).

246. See *United States v. Passaic City*, No. 99-2544 (D.N.J. Mar. 3, 2000) (order implementing the outreach and publicity plan of the consent decree).

247. See Garcia, *supra* note 243, at A4 (noting that nearly half of all poll workers failed to show up for the April 2000 school board elections); Michael Casey, *Barnes Control Bid Thwarted in Paterson: 5 of His 6 Candidates Lose in Council Race*, BERGEN RECORD, May 10, 2000, at A1 (reporting shortages of poll workers for the May 2000 Paterson municipal election, as well as a bomb threat at one polling place); Elizabeth Moore, *Problems Persist for Hispanic Voters in Passaic Towns: County Says it Lacks Bilingual Poll Workers*, NEWARK STAR-LEDGER, June 2, 2000, at 26 (stating that "despite aggressive recruiting," Passaic County election officials could not "find enough bilingual poll workers" for the June 2000 primary election).

248. See Moore, *supra* note 247, at 26.

249. See N.J. STAT. ANN. § 19:6-17 (West 2007).

250. See generally Third Report of the Election Monitor at 5, 19-27, *United States v. Passaic City*, (D.N.J. Jan. 2001) (No. 99-2544) [hereinafter Third Report] (describing "political maneuvers" on the Board of Elections that resulted in a "rift between the commissioners and staff members of opposite parties" and created "an office that is disjointed and dysfunctional").

characterized by combative verbal tirades and ethnic insults, commissioners throwing things at one another, kicking chairs, setting “procedural roadblocks” for completing election tasks, and abruptly ending meetings because the commissioners could not even agree on accepting minutes from previous meetings.<sup>251</sup> These divisions carried over to the Board’s efforts to recruit bilingual poll workers and translators. The Board selected one Republican and one Democrat to serve as bilingual coordinators,<sup>252</sup> who were made responsible for filling one bilingual poll worker position at each designated Spanish Election District.<sup>253</sup> The bilingual coordinators chose to recruit a bilingual person from their own party to fill poll worker positions, causing the County to have numerous vacancies because Hispanic registered voters in the County were overwhelmingly Democratic.<sup>254</sup> The Board also divided on the use of translators, resulting in translators hired too late to be trained for the Paterson municipal election held in May 2000.<sup>255</sup> Board members could not even agree on the proper Spanish translations for the County’s Voter’s Rights Pamphlet, which delayed distribution of the pamphlet for several months.<sup>256</sup> Federal observers

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251. See Donna Knipp, *Elections Official Tells of Being ‘Terrorized’*, NORTH JERSEY HERALD & NEWS, Mar. 13, 2001, at D1; see also Dan Kraut, *Judge Told of Chaotic Election Board Meetings*, BERGEN RECORD, Mar. 13, 2001, at L3. For example, one Democratic commissioner charged that a Republican commissioner referred to her as a “low-rent putona,” which is a Spanish slang term for prostitute. See *id.*

252. See Maia Davis, *Election Board Hires Latino Outreach Aide, Completes Team to Boost Passaic Voter Participation*, BERGEN RECORD, Aug. 19, 1999, at L3; Dan Kraut, *Passaic Seeing Balance in Latino Poll Coordinators*, BERGEN RECORD, July 6, 1999, at L2.

253. The Board of Elections decided to fill bilingual poll worker positions along party lines in an effort to comply with a state elections law that requires poll workers to be “equally apportioned” between the two major political parties. N.J. STAT. ANN. § 19:6-3 (West 2007). Apparently, Board members did not contemplate other ways of complying with both the Consent Decree and state law, such as having both bilingual poll workers appointed by one party, and non-bilingual poll workers appointed by the other.

254. See generally Maia Davis, *U.S. is Monitoring School Elections, Seeks Full Access for Spanish Speakers*, N.J. RECORD, Apr. 18, 2000, at L2 (reporting that for the April 2000 school board elections, “Democrats had filled their 140 [poll worker] slots while Republicans were 103 short”); Dan Kraut, *Democrats Seeking to Oust Two GOP Election Officials*, BERGEN RECORD, Sept. 13, 2000, at L2 (reporting that one of the Republican members of the Board of Elections complained that “it was more difficult for the Republicans to find bilingual workers because of the small amount of Latino Republicans”); see also Dan Kraut, *Bilingual Poll Official Resigns in Passaic, Federal Monitor Vows to Restructure Program*, BERGEN RECORD, Sept. 19, 2000, at L3 (describing the use of Democratic and Republican bilingual coordinators as a “blunder” because it entrenched partisanship).

255. See Knipp, *supra* note 251.

256. See Memorandum from Comm’r Mary Guzman to Comm’r Maria Havasy (July 5, 2000) (on file with author); Memorandum from Comm’rs Maria Havasy and John Currie to Comm’rs John Krautheim and Mary Guzman (Sept. 11, 2000) (on file with author). The purpose of the pamphlet was to inform Spanish-speaking voters of their rights to assistance and election materials in their own language and their right to equal treatment at the polls.

documented the County's failure to comply with the federal court orders at every level.

### E. Federal Court Takeover of the County's Elections

In June 2000, the United States filed a contempt application as a result of the County's numerous violations of court orders identified from federal observer reports and the County's own elections records.<sup>257</sup> On July 25, 2000, the parties resolved the United States' contempt application by agreeing to have the three-judge federal Court appoint an independent elections monitor for Passaic County's elections. On September 6, 2000, the three-judge Court appointed Walter Timpone, a well-respected attorney from outside the County, as the monitor, and entered a separate order granting him sweeping authority to bring Passaic County into compliance with the Consent Decree.<sup>258</sup> On September 8, 2000, a New Jersey Superior Court judge appointed Mr. Timpone as the monitor in a separate state court action brought by the state Attorney General's Office, granting him broad discretion to remedy violations of New Jersey's elections law.<sup>259</sup> The monitor's appointment marked the first time that the federal government took over a jurisdiction's elections process for failing to comply with Section 203 of the Voting Rights Act.<sup>260</sup> The monitor's

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257. See United States' Application for an Order to Show Cause and Order for Expedited Discovery, *United States v. Passaic City*, No. 99-2544 (D.N.J. June 26, 2000). The application cited numerous violations of the Consent Decree, including: (1) untimely and inadequate efforts to recruit and train Hispanic and bilingual poll workers; (2) untimely and inadequate acts to retain and train qualified translators to fill bilingual poll worker vacancies; (3) failure to provide all Election Day materials and signs in Spanish; (4) disparate treatment of Hispanic voters in the registration and voting process; (5) ineffective recruitment and training by the bilingual coordinators; and (6) failure to timely and fully provide the United States with required election records and descriptions of efforts to recruit bilingual poll workers. See *id.*

258. See *United States v. Passaic City*, No. 99-2544 (D.N.J. Sept. 6, 2000) (three-judge panel) (order naming elections monitor); *United States v. Passaic City*, No. 99-2544 (D.N.J. Sept. 6, 2000) (three-judge panel) (order appointing an independent elections monitor in Passaic County) [hereinafter Order Appointing Independent Elections Monitor].

259. See *In re Appointment of an Interim Election Monitor in Passaic County*, No. L-4434-00 (N.J. Super. Ct. Law Div., 2000). Dante DiPirro, Senior Deputy Attorney General for the State of New Jersey, said that the state proceeding was initiated so that the monitor would have the authority to "ensure that requirements were met for basic elections duties such as certification of election results." Jennifer V. Hughes, *Passaic Election Monitor to Have Additional Duties*, BERGEN RECORD, Sept. 9, 2000, at A3. In the May 2000 Paterson municipal elections, the two Republican members of the County's Board of Election Commissioners had defied a judge's order to certify the results of the election, nearly preventing the timely swearing-in of new members of the Paterson City Council. *Id.*

260. See Steve Strunsky, *Spanish Voted Here; Effort in Passaic to Get Hispanic Representation*, N.Y. TIMES, Oct. 29, 2000, at NJ6.

initial term was until December 31, 2000, which subsequently was extended on various occasions until May 31, 2002.<sup>261</sup> The monitor had extensive experience as a former assistant United States Attorney in prosecuting public corruption cases, and enthusiastically assumed his new role of changing “the culture of the county” to ensure that all voters had equal access to the political process.<sup>262</sup>

With the assistance of federal observer reports, the new elections monitor quickly discovered that changing the culture of Passaic County would not be an easy task. In his first report to the federal court, the monitor recognized that the “acrimony” between members of the Board of Elections carried over to elections clerks, who refused to take instructions from Board members of the opposite party, and made poll worker training less effective.<sup>263</sup> The monitor accepted the resignation of the Republican bilingual coordinator, a leader of the Hispanic community whose effectiveness had been hampered by the divisive politics on the Board of Elections, replacing him with another Hispanic activist.<sup>264</sup> The monitor de-politicized the process of filling bilingual poll worker vacancies, allowing the bilingual coordinators to fill all of their poll worker vacancies and begin building a list of stand-by workers for the November 2000 general election.<sup>265</sup> The monitor also put into place a rapid-response procedure to use taxi shuttles to get stand-by poll workers and translators without access to transportation to polling places where poll workers failed to show up.<sup>266</sup> At the request of the monitor, the County Board of

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261. See Order Appointing Independent Elections Monitor, *supra* note 258, at 13 (ordering the monitor’s initial appointment to be effective until December 31, 2000); *United States v. Passaic City*, No. 99-2544 (D.N.J. Apr. 16, 2001) (order temporarily extending the term of the independent elections monitor in Passaic County) (extending the monitor’s term until July 31, 2001); *United States v. Passaic City*, No. 99-2544 (D.N.J. Aug. 29, 2001) (three-judge panel) (order extending term of the independent elections monitor) (extending the monitor’s term until December 31, 2001); *United States v. Passaic City*, No. 99-2544 (D.N.J. Mar. 12, 2002) (three-judge panel) (order extending term of the independent elections monitor) (extending the monitor’s term until May 31, 2002).

262. David Voreacos, *Former Prosecutor Faces Toughest Job—At the Polls*, BERGEN RECORD, Sept. 23, 2000, at A1.

263. See First Report of the Election Monitor at 3, 8, *United States v. Passaic City*, No. 99-2544 (NHP) (D.N.J. Oct. 24, 2000) [hereinafter First Report].

264. See *id.* at 3–4; Kraut, *supra* note 254.

265. See First Report, *supra* note 263, at 6. A few days before the November 2000 general election, The monitor reported that the bilingual coordinators had recruited over 130 standby poll workers, nearly half of whom were bilingual, and had retained 25 additional Spanish interpreters. See Second Report of the Election Monitor at 1, *United States v. Passaic City*, No. 99-2544 (D.N.J. Nov. 2, 2000) [hereinafter Second Report]. In addition, The monitor reported making arrangements for Arabic and Polish interpreters to be available in areas of the County where they were needed. *Id.*

266. See Elizabeth Moore, *Monitors at Polls in Passaic County to Assist Spanish-speaking voters—Federal, State, and Local Officials Respond to Federal Investigation of Past Intimidation*, NEWARK STAR-LEDGER, Nov. 7, 2000, at 21.

Freeholders ordered that off-duty law enforcement officers be barred from working as poll workers.<sup>267</sup> The monitor engaged in an ambitious campaign to inform Spanish-speaking voters about the availability of language assistance and efforts to stamp out voter intimidation that had kept them from the polls in the past.<sup>268</sup> As part of these community outreach efforts, the monitor finally had the County's Voter's Rights Pamphlet translated into Spanish and distributed to Spanish-speaking voters.<sup>269</sup> The monitor anticipated the election to run smoothly with the active cooperation of federal, state, and local authorities closely monitoring the County's polling sites on Election Day.<sup>270</sup> Federal observer reports were critical to his efforts.

Notwithstanding the monitor's well-laid plans, Passaic County continued to have problems complying with the Consent Decree during the November 2000 general election. About one hundred poll workers failed to show up to their designated polling places, at the same time allegations were circulating that they had been paid two hundred dollars—double their daily pay—to stay away.<sup>271</sup> At least four poll workers were dismissed for inappropriate behavior, including one elderly poll worker at a site in Passaic who made a derogatory remark about Puerto Ricans and a poll worker in Paterson who refused to cooperate with federal observers.<sup>272</sup> Federal observers also reported that many of the poll workers “were simply inexperienced and inadequately trained,” had problems opening and closing voting machines, were confused about procedures for using provisional and emergency ballots, and did not understand “the kind of help they should be providing to those voters needing language assistance.”<sup>273</sup>

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267. See First Report, *supra* note 263, at 7; Dan Kraut, *Vote Could End Use of Police at Polls, Freeholders Take Cue From Election Overseer*, BERGEN RECORD, Oct. 12, 2000, at L1. The monitor subsequently barred off-duty law enforcement officers only from working as poll workers, but not as challengers, because of the large presence of federal and state monitors in the polls. See Second Report, *supra* note 265, at 3; Passaic County Election Monitor, Order Regarding Off-Duty Law Enforcement Officers at the Polls (Oct. 17, 2000).

268. See First Report, *supra* note 263, at 9.

269. *Id.* at 9–10.

270. *Id.* at 12–13; Second Report, *supra* note 265, at 2. During the November 2000 general election, the Department of Justice sent 50 observers to monitor Passaic County, along with approximately 150 lawyers, judges, and law enforcement officers from the State of New Jersey. See Dan Kraut, *Justice Sends 50 Election Observers, Anti-Latino Bias to be Prevented*, BERGEN RECORD, Nov. 7, 2000, at L3; Dan Kraut, *Monitors to Descend on Passaic*, BERGEN RECORD, Nov. 6, 2000, at A1.

271. See Dan Kraut, Monsy Alvarado, & Jennifer V. Hughes, *Latinos Access to Polls “Better,” Passaic Monitor Calls Effort Partial Success*, BERGEN RECORD, Nov. 8, 2000, at L1 (reporting that all stand-by poll workers had been used up by 9 a.m. on Election Day).

272. *Id.* New Jersey law permits the removal of poll workers for cause, which includes “an illegal act,” such as discriminatory treatment of voters. N.J. STAT. ANN. § 19:6-4 (West 2007); see also 42 U.S.C. § 1973 (2000) (the general non-discrimination provision of the Voting Rights Act).

273. Third Report, *supra* note 250, at 8–9.

Even with these problems, things actually had improved significantly since the November 1999 election. One Hispanic voter remarked that the increased presence of bilingual poll workers and Spanish language materials made it “better than previous years. Before they would ask your name in English. Now, they ask you in Spanish.”<sup>274</sup>

New Jersey’s Attorney General’s Office took an active role to supplement the Justice Department’s efforts to help the monitor bring Passaic County into compliance with the federal Consent Decree. The State Attorney General joined the United States in getting the monitor’s term extended until his presence no longer was needed.<sup>275</sup> The State also supported the monitor’s efforts in state court to remove three of the County’s four commissioners on the Board of Elections, who continued to work against one another.<sup>276</sup> Although the state court ultimately rejected efforts to remove the three commissioners, it found that the dysfunctional nature of the Board mandated continued oversight by the monitor.<sup>277</sup> Three weeks before the state order was issued, the term of one of the Republican commissioners expired. He was replaced by a former mayor of Little Falls and retired United States marshal who immediately began to work with the other members of the Board of Elections to bring the County into compliance with the Consent Decree.<sup>278</sup>

In his Third Report to the federal court, the monitor proposed a number of changes to break Passaic County’s dependency on the monitor and federal and state observers to comply with statutory bilingual election mandates.<sup>279</sup> He suggested that the County hire a full-time election office administrator and implement written office procedures to hold elections personnel accountable for violations of the Consent Decree.<sup>280</sup> Furthermore, he recommended that the County use specially trained “master

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274. Kraut, *supra* note 271. Another Hispanic voter commented, “A lot of people . . . need help. And God forbid I’m not around, at least there’s someone who is going to help my dad,” who only spoke Spanish. *Id.*

275. See Dan Kraut, *State Favors Keeping Passaic Vote Monitor*, BERGEN RECORD, Feb. 1, 2001, at L3.

276. See Dan Kraut, *Election Monitor Gets State Support, Attorney General Urges Longer Term*, BERGEN RECORD, Feb. 3, 2001, at A4. For example, one of the Republican elections commissioners commented about her Democratic antagonist, “I don’t care if Mr. Timpone throws me off the Board, so long as I take you with me.” Third Report, *supra* note 250, at 23.

277. See Transcript of Decision, *In re Appointment of an Interim Election Monitor in Passaic County*, No. L-4434-00 (N.J. Super. Ct. Law Div. 2001); see also Dan Kraut, *Judge Declines to Remove Election Board Members*, BERGEN RECORD, Mar. 21, 2001, at A1 (describing Judge Passero’s decision).

278. See John Chadwick, *Election Monitor Notes Passaic Strides, Says Board is Working More Collegially*, BERGEN RECORD, Apr. 28, 2001, at A4; see also Robert Ratish, *Ex-Mayor Named to Board of Elections, Monitor Defends Ouster Attempts*, BERGEN RECORD, Mar. 2, 2001, at L1.

279. See Third Report, *supra* note 250.

280. *Id.* at 5–7.

board workers” to supervise operations at their designated voting precincts to ensure that they were in compliance with federal and state law on Election Day.<sup>281</sup> In addition, he proposed completely overhauling the County’s poll worker instruction program by hiring professional instructors to provide effective training regarding federal and state requirements and the proper election-day procedures.<sup>282</sup> He also encouraged elections officials to increase poll worker compensation to combat the recurring problem of “no show” poll workers that exacerbated the lack of sufficient language assistance at the polls.<sup>283</sup> Finally, he urged the County to purchase new voting machines that could accommodate bilingual ballots and thereby reduce the potential for Spanish-speaking voters to be disenfranchised because of mechanical problems with the existing fifty-year old machines.<sup>284</sup> On September 21, 2001, the federal court entered an order implementing the monitor’s recommendations,<sup>285</sup> some of which already had been put into effect.<sup>286</sup>

Nevertheless, federal observers continued to document several problems in the County’s four elections in 2001. In the April school board elections, some poll workers in Passaic City and North Haledon told Hispanic voters they “should all go back to Mexico” and “should learn English.”<sup>287</sup> In the June primary election, a Passaic City police officer made derogatory remarks towards an Indian poll worker and detained a Hispanic federal observer, as the County continued to have inadequate numbers of bilingual poll workers.<sup>288</sup> In the November general election,

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281. *Id.* at 9–10.

282. *Id.* at 11–13.

283. *See id.* at 7–9, 11.

284. *See id.* at 13–15; Josh Gohlke, *County Junks 150 Old Voting Machines, “Good Rid-dance,” Election Monitor Says*, BERGEN RECORD, July 18, 2001, at L1; *see also supra* note 231 and accompanying text (describing voting machine breakdowns in predominately-Hispanic Passaic City during the November 1999 general election).

285. *See* Supplemental Consent Order Implementing Passaic County Elections Monitor Recommendations, *United States v. Passaic City*, No. 99-2544 (D.N.J. Sept. 21, 2001). After signing the order, Judge Nicholas Politan issued a stinging rebuke for Passaic County’s elections officials, who were present at the hearing, noting in the wake of the September 11th terrorist attacks that “[w]e may be going to war because of the right to vote. I’ll appoint 10 monitors if I have to” in order to bring Passaic County into compliance with federal law. Josh Gohlke, *Judge Talks Tough to Passaic Officials; Lays Down the Law on Election Duties*, BERGEN RECORD, Sept. 22, 2001, at A19.

286. *See* Josh Gohlke, *County Junks 150 Old Voting Machines*, *supra* note 285 at L1; Josh Gohlke, *Monitor Sees Panel Enact One Reform, Board of Elections Hires Administrator*, BERGEN RECORD, July 11, 2001, at L1.

287. Chadwick, *supra* note 278.

288. *See* Josh Gohlke, *Cop Accused of Slurs at Passaic Polls, Allegedly Detained Federal Observer Too*, BERGEN RECORD, June 27, 2001, at L3; Sixth Report of the Election Monitor at 6–8, *United States v. Passaic City*, No. 99-2544 (D.N.J. July 30, 2001) [hereinafter Sixth Report]. In one particularly bizarre incident, another Passaic City polling site was burdened with what the monitor described as “the poll worker chanteuse.” *Id.* at 7. The



threatening post cards were sent to Hispanic and African American voters in Passaic City in an apparent effort to intimidate them and keep African American voters away from the polls.<sup>289</sup> In Passaic City and Paterson, minority voters received phone calls attempting to discourage them from turning out to vote.<sup>290</sup> At the same time, the monitor reported that Passaic County also had some “bright spots,” including sufficient bilingual staffing at most of the designated Spanish Election Districts in the November 2001 election after poll worker pay was doubled to two hundred dollars per day.<sup>291</sup> Problems continued, but significant progress had been made.

F. *Epilogue: The Impact of Federal Observers on  
Hispanic Voter Participation*

By the time the election monitor’s term ended in May 2002, Passaic County had experienced dramatic changes in its treatment of Spanish-speaking voters and the effect it had on the County’s politics since the Justice Department initially intervened. In February 2000, the County appointed its first Hispanic member to the four-member Board of Elections.<sup>292</sup> In March 2000, the first Hispanic was appointed to a senior position in the County’s elections office to serve as deputy superintendent of elections.<sup>293</sup> The monitor and community activists registered thousands of new Hispanic voters.<sup>294</sup> As language materials and assistance increasingly became available at the polls for limited-English proficient Spanish-speaking voters, Hispanic voters started turning out in record numbers.<sup>295</sup>

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worker repeatedly broke into song at the top of her lungs every seven minutes until she “collapsed into sleep across three chairs in the arms of a fellow poll worker who had too much to drink at lunch.” *Id.*

289. See Editorial, *Ugly Politics*, BERGEN RECORD, Nov. 6, 2001, at L14; *Passaic Voters Cautioned to Disregard Mailers*, NEWARK STAR-LEDGER, Nov. 5, 2001, at 21; Barbara Williams, *Threatening Postal Cards Denounced*, BERGEN RECORD, Nov. 5, 2001, at A3. The postcards were printed in English and Spanish and purported to be sent by election officials to warn of the presence of “‘armed law enforcement officers’ at the polls and fines and prison for anyone violating voting laws.” *Id.*

290. See Josh Gohlke, *Polling System Called Much Improved; But Intimidation of Voters Still Occurs*, BERGEN RECORD, Dec. 4, 2001, at L1.

291. See Seventh Report of the Election Monitor at 16–17, *United States v. Passaic City*, No. 99-2544 (NHP) (D.N.J. Dec. 3, 2001)[hereinafter Seventh Report].

292. See Maia Davis, *Latino Activist Nominated for Elections Post*, BERGEN RECORD, Feb. 6, 2000, at N3.

293. See Maia Davis, *Election Officials Closer to Approval, Senate Panel OKs Passaic Nominees*, BERGEN RECORD, Mar. 24, 2000, at L1.

294. Dan Kraut, *Poll Monitor Vows Fairness for Latinos, Prohibits Hiring of Cops as Workers*, BERGEN RECORD, Oct. 18, 2000, at L1 (reporting that community outreach programs registered four thousand new Latino voters).

295. See Elizabeth Moore, *Passaic Sees Increase in Hispanics at the Polls*, NEWARK STAR-LEDGER, Jan. 17, 2001, at 21; Ernie Garcia, *Economic, Political Clout Growing for Dominicans*, NORTH JERSEY HERALD-NEWS, May 7, 2000.

In November 2000, Passaic County voters elected the first Hispanic member of the County Board of Freeholders.<sup>296</sup> In May 2001, Passaic City voters elected the city's first Hispanic mayor, who congratulated his cheering supporters in English and Spanish outside a pub named, quite appropriately, "*El Neuvo Milenio*," or "The New Millennium."<sup>297</sup> Truly, a new day had arrived in Passaic County's election system as the federal government's "extraordinary oversight of county elections" was coming to a close.<sup>298</sup>

The lengthy federal involvement in Passaic County illustrates the difficulties that can occur in addressing sustained, systemic exclusion of language minorities from the electoral process. The federal Court's active engagement with these problems and willingness to vigorously enforce its orders played a key role in remedying the County's violations of federal, and even state, law. Dozens of federal observers were critical in acting as the eyes and ears of the United States, the Court, and later the elections monitor, to identify and document areas of concern during elections.<sup>299</sup> The Court and the parties also had to be flexible in continuously using supplemental orders to tailor remedies to address developing problem areas that existing Court orders failed to resolve. Without the presence of federal observers in the County, it would have been impossible to prevent voting discrimination, enforce the Voting Rights Act, and measure progress under federal court orders.

## CONCLUSION

Federal observers are an important part of the VRA's comprehensive framework to prevent and remedy voting discrimination in places such as Passaic County. Although observers are limited to observing and documenting discriminatory conduct, their role is critical to eliminating

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296. See Elizabeth Moore, *First Hispanic is Sworn in as Passaic Freeholder*, NEWARK STAR-LEDGER, Jan. 5, 2001, at 52; Elizabeth Moore, *Freeholder Wins in Passaic Linked to Voter Backlash*, NEWARK STAR-LEDGER, Nov. 9, 2000, at 31.

297. See Josh Gohlke, *Passaic Elects Latino Mayor, Rivera Wins by a Wide Margin*, BERGEN RECORD, May 9, 2001, at A1.

298. Josh Gohlke, *Election Monitor Keeps Job for Now; County Officials Win Concession*, BERGEN RECORD, Mar. 13, 2002, at L1.

299. Typically, between twenty-five and fifty federal observers have monitored Passaic County's elections since June 1999. See generally *U.S. Will Monitor School Voting—Observers to Guard Rights of Spanish-Speakers*, NEWARK STAR-LEDGER, Apr. 16, 2002, at 28 (six Justice Department attorneys and over two dozen observers for April 2002 elections); Gohlke, *supra* note 297 (twenty-eight federal observers and Justice Department Personnel during May 2001 Passaic City election); Kraut, *supra* note 270 (fifty federal observers and Justice Department personnel for November 2000 general election); Casey, *supra* note 247 (twenty-five federal observers and Justice Department personnel for May 2000 Paterson city election); Kraut, *supra* note 184 (thirty federal observers and Justice Department personnel for June 1999 primary election).

disenfranchisement. Often, their mere presence deters discrimination. Where it does not, “observations and reports of observers . . . most often provide the factual basis on which the Department of Justice proceeds to prosecute acts of harassment, intimidation, and discrimination.”<sup>300</sup> In places where voting discrimination is more entrenched, observers help document the progress towards remedying that discrimination. The power of observation can be substantial, benefiting all Americans. The presence of federal observers in elections, like a person in the forest, avoids the rhetorical quandary of whether discrimination can be proven to have occurred if no one saw it happen.

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300. H. R. REP. NO. 109-478, at 62 (2006).