

PUBLIC INTEREST

— LEGAL FOUNDATION —

**Testimony of
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**Before the United States House Subcommittee on the Constitution, Civil Rights and Civil
Liberties**

Evidence of Current and Ongoing Voter Discrimination

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I am President and General Counsel for the Public Interest Legal Foundation, a non-partisan charity devoted to promoting election integrity and preserving the constitutional decentralization of power so that states may administer their own elections. I also served as an attorney in the Voting Section at the Department of Justice. I have brought multiple enforcement actions under the Voting Rights Act and federal guarantees of the right to vote.

I am presenting evidence today of two clear instances of voting discrimination and disenfranchisement that I have helped combat.

The first case was recently decided by the Ninth Circuit in July. The Ninth Circuit Court of Appeals affirmed a summary judgment ruling by the United States District Court that a territory under the exclusive jurisdiction of this Congress was imposing race-based voter qualifications. Namely, **Guam imposed voter qualifications based on blood ancestry** much like the Oklahoma grandfather clauses struck down by the Supreme Court over a century ago.

Congress has required Guam to adhere to civil rights obligations of the 15th Amendment and other federal statutes. But Guam's legislature gave the right to vote on an important plebiscite only to those of a preferred race. Ironically, Guam also received over \$300,000 in federal funds from the Department of the Interior to conduct education campaigns about this racially discriminatory voting process.¹ That is something Congress can fix.

The second example I will discuss involves the **Commonwealth of Virginia cancelling the voter registrations of citizens by declaring them non-citizens**. Our organization discovered this problem after we sought records related to the cancellation of non-citizens. We have since given Virginia the statutory notice required by the National Voter Registration Act that they are in violation of the law by removing citizens from the voter rolls improperly.

Proving that no good deed goes unpunished, when we reported on Virginia's removal of non-citizens on the voter rolls based on government documents entitled "declared non-citizens," our organization was sued for reporting these facts, republishing government documents, and making reasonable inferences about them. Ultimately, it was revealed that the Commonwealth of Virginia has been removing citizens from the voter rolls improperly as non-citizens. Our organization –

¹ See, <https://www.doi.gov/oia/interior-approves-15-million-fy-2016-funds-guam>.

despite being sued for reporting these circumstances – has been steadfast in trying to fix the problem of Virginia cancelling citizen voters as non-citizens. Congress can fix this problem by refining the Motor Voter process. Motor Voter itself instigated this mess, and it can be fixed.

Guam: Racial Tests to Vote Struck Down

I represent retired Air Force Major Arnold “Dave” Davis.² Major Davis served on Guam and decided to live there upon retirement. Guam is governed by the Organic Act of 1950.³ The Organic Act bans racial discrimination in voting and explicitly incorporates the protections of the Fifteenth Amendment. Nevertheless, the legislature of Guam passed an election law confining the right to vote in a status plebiscite to a preferred racial group – so called “native inhabitants.”

When Dave Davis sought to register to vote at the government office, his registration form was marked “VOID” by election officials. I have attached the form. Even in the Jim Crow south of the early 1960’s, southern registrars weren’t brazen enough to deny the right to vote explicitly on having the wrong racial blood. They were craftier, erecting a variety of barriers that were fluid, arbitrary and difficult to enjoin until the passage of the Voting Rights Act of 1965. But for Mr. Davis, his voter application was void because he was the not the preferred race, explicitly.

We filed suit in federal court way back in 2011. The case is still continuing because Guam has been zealous in defending their racially discriminatory laws. Congress, having exclusive jurisdiction over the territories, might take note of the zeal that a territory has defended blatant racial discrimination in voting. It is so blatant that the United States District Court on Guam granted Mr. Davis summary judgment in 2017. In July of this year, 2019, the Ninth Circuit Court of Appeals affirmed the summary judgment finding that Guam was engaging in racial discrimination in voting.⁴

The unanimous Ninth Circuit panel ruled:

Here, the parallels between the 2000 Plebiscite Law and previously enacted statutes expressly employing racial classifications are too glaring to brush aside. The near

² Co-counsel in the case include Michael Rosman at the Center for Individual Rights, Doug Cox and Lucas C. Townsend at Gibson Dunn and Crutcher and local counsel Mun Su Park.

³ Pub. L. No. 81-630, 64 Stat. 384 (1950) (codified at 48 U.S.C. §§ 1421–24) (“Organic Act”).

⁴ The Ninth Circuit in 2015 had already ruled that the case was ripe and that real substantive issues were at stake in the plebiscite election. *Davis v. Guam*, 785 F.3d 1311, 1314 (9th Cir.2015).

identity of the definitions for “Native Inhabitants of Guam” and “Chamorro,” the lack of other substantive changes, and the timing of the 2000 Plebiscite Law’s enactment all indicate that the Law rests on a disguised but evident racial classification.⁵

Despite the brazen racial discrimination, not a single organization sitting at this table today has even spoken about the racial discrimination on Guam, much less offered to help Mr. Davis. Mr. Davis attempted to interest organizations in his vote denial but none of the usual “civil rights groups” would help. They haven’t even filed a single amicus case to help the plaintiff in the case.

All of this is most strange considering the hefty endowment that groups like the ACLU and NAACP LDF enjoy. In some voting cases – such as challenges to South Carolina voter ID laws – these same groups manage to duplicate or triplicate each other’s work, despite the fact that not a single person was disenfranchised by the South Carolina voter ID law.

I took Mr. Davis’ case *pro bono* in 2011 spending my own uncompensated time for multiple trips back and forth to Guam to help Mr. Davis. For reasons I cannot guess, the brazen racial discrimination in voting on Guam has never managed to appear in any of the materials these groups have so zealously submitted to Congress to bolster the Congressional record related to the Voting Rights Act.

To add insult to injury, Mr. Davis could not even get the United States Justice Department to help him in 2011. His pleas were largely ignored by the Civil Rights Division. No case was filed on his behalf. No amicus was filed to help him. No nothing. Even after the Ninth Circuit Court of Appeals ruled in 2015 that Mr. Davis had a ripe case and had standing, the Justice Department failed to act. Oddly, ripeness had been cited by the Chief of the Voting Section to an internal Inspector General investigation as the excuse why the Justice Department did not act to help Mr. Davis.⁶ The Voting Section Chief also told the Inspector General that there was a higher priority for “traditional minority victims,” at the Department in 2011 despite the fact that the victims of the racial discrimination struck down on Guam included “traditional minorities.”

⁵ The Ninth Circuit opinion in *Davis v. Guam* ___ F.3d ___ (9th Cir. 2019), No. 17-15719 is attached to this testimony.

⁶ A Review of the Operations of the Voting Section of the Civil Rights Division, March 2013, available at <https://oig.justice.gov/reports/2013/s1303.pdf>, pages 76-78.

These excuses by Department of Justice employees, of course, were revealed to be a pretext after the Ninth Circuit in 2015 ruled that Mr. Davis had a ripe case. Yet the Department of Justice Civil Rights Division still continued to ignore the brazen racial discrimination on Guam in 2015 and 2016.

Finally, on November 28, 2017, the Justice Department did what it should have done six years earlier, appeared in court seeking to strike down the racially discriminatory voting law. The amicus filing by the Civil Rights Division states, the “Department of Justice has substantial responsibility for the enforcement of the CRA and Section 2 of the VRA, which prohibit racial discrimination in voting. See 52 U.S.C. 10101(c), 10308(d). . . . Guam’s plebiscite law purposefully discriminates against non-Chamorros based on race in violation of the Fifteenth and Fourteenth Amendments.”

The “substantial responsibility” to protect the right to vote was ignored until 2017. That’s a shame, and this Congress should wonder why all of the resources of the Civil Rights Division, and all of the resources of the groups now before you sounding the alarm about widespread discrimination in voting did nothing about the brazen denial of Mr. Davis’ right to vote on the basis of race.

Congress can do something. For one, stop funding public information campaigns about the racially discriminatory election process on Guam. Second, Congress – as having exclusive power over the territories - can side with the Ninth Circuit and uphold the principle that no election should ever take place in the United States or territories where blood ancestry is a voting prequalification. Racial blood tests for voting were struck down by the Supreme Court over a century ago and it is unfortunate that in 2019, they still have not gone away.

Virginia is Cancelling Citizens as Alien Voters

Virginia has been cancelling the voter registrations of American citizens, mistakenly cancelling them as “declared non-citizens.” This is happening because the Motor Voter law passed in 1993 is outdated. It has not been examined carefully since its passage almost three decades ago.

My organization was the impetus for discovering Virginia’s mistake. We routinely collect public information about non-citizens who have been registering to vote and have been voting.⁷ As part of that broader inquiry, we asked the Commonwealth of Virginia to provide lists of all such cancellations. We also asked various county election officials for the same records. Amazingly, some counties refused to provide the information despite Congress making all list maintenance records public as part of the National Voter Registration Act of 1993.⁸

Nevertheless, the Commonwealth of Virginia as well as various counties provided public documents of non-citizen cancellation reports entitled “declared non-citizen.” The state elections director confirmed in writing that none of the individuals on these reports eventually re-registered affirming United States citizenship.

Virginia’s reports were later revealed to be a mess. For starters, the Commonwealth of Virginia is cancelling American citizens as non-citizens. Second, some of those who appeared on the report eventually re-registered, affirming citizenship despite the guarantees to the contrary given to us by state election officials. The National Voter Registration Act, in my view, does not permit this.

Our organization learned of these problems after three individuals sued not state election officials who improperly removed them from the rolls, but rather our organization for reporting the fact that they were declared non-citizens on public list maintenance records. That case has since settled and we apologized for overly relying on the government list maintenance records and repeated statements by election officials that the cancelled registrants were declared non-citizens. We have also since provided statutory notice to Virginia election officials that they are in violation of the National Voter Registration Act for improperly wiping from the voter rolls American citizens, declaring them “non-citizens.”

Yet as in Guam, the improper cancellation of American citizens on the voter rolls has not seemed to draw the attention of any of the traditional civil rights groups who so zealously catalog

⁷ See, *Steeling the Vote: Allegheny County Reveals How Citizenship Verification Protects Citizens and Immigrants Alike*, at <https://publicinterestlegal.org/blog/steeling-the-vote-allegheny-county-reveals-how-citizenship-verification-protects-citizens-and-immigrants-alike/>.

⁸ Even more amazingly, the Public Interest Legal Foundation has had to take the State of North Carolina, Commonwealth of Pennsylvania and Harris County (TX) to federal court for refusing to provide public list maintenance records related to non-citizen cancellations of registrants. Those three cases are ongoing.

the latest threat to voting. Indeed, when we sought to add the Commonwealth of Virginia to the lawsuit I mentioned, the Protect Democracy Project and the Southern Coalition for Social Justice opposed our effort.⁹ Simply, they opposed the entity most responsible for the entire chain of improper removal and our reporting on those removals from being held responsible. As far as I know, the Public Interest Legal Foundation is the only organization who has sought to hold the Commonwealth of Virginia responsible for these improper removals of American citizens as non-citizens.

This should command the full attention of Congress because there are ways to solve this problem. The answer is not to stop states from addressing citizenship defects in the Motor Voter registration process.

First, Congress should reexamine the interplay between state motor vehicle departments and state election officials charged with administering voter registration. In many cases, the motor vehicle employees are ambivalent, accepting as proof of identification documents *used by aliens such as green cards*, yet allowing that voter registration application to be passed on to election officials.

Second, Congress has shielded state motor vehicle departments from the obligation to disclose list maintenance records, thus making it more difficult for parties to ascertain where the failures are occurring.

Third, Congress should strengthen obligations for election officials to be transparent. That it requires federal court cases to pry loose public information about our election systems is a disgrace.

Fourth, Congress should expressly allow states to verify citizenship of new registrants so that non-citizens don't unwittingly jeopardize their immigration status by ending up on voter rolls, something that is happening.

Fifth and perhaps most important, Congress should ensure that federal agencies work cooperatively with state election officials to allow states to effectively and efficiently verify citizenship. These steps would protect our elections by ensuring non-citizens do not vote, and

⁹ See, United States District Court, Eastern District of Virginia, Case 1:18-cv-00423-LO-IDD, ECF Document 83.

would also protect non-citizens by eliminating weak points in the motor vehicle departments' process that is putting them on the voter rolls and their immigration status at risk.

Thank you again for the opportunity to submit testimony on this very important matter.

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Respectfully submitted,
J. Christian Adams