

ONE HUNDRED SEVENTEENTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON THE JUDICIARY

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August 12, 2021

The Honorable Merrick B. Garland
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dear Attorney General Garland:

On July 28, 2021, on behalf of the Department of Justice (DOJ), you issued new guidance regarding state efforts to remove temporary, emergency voting procedures implemented last year during the unprecedented COVID-19 pandemic.¹ The Biden Administration's new guidance bizarrely suggests that states may not return to voting laws and procedures that existed prior to the pandemic, saying those laws and procedures may not be "presumptively lawful."² We have serious concerns about the Department's radical attempt to politicize enforcement of the Voting Rights Act of 1965 (VRA).

The Election Clause of the U.S. Constitution gives state legislatures the authority to prescribe "[t]he Times, Places and Manner of holding Elections" within their jurisdictions.³ Article II of the U.S. Constitution grants state legislatures the power to determine the manner of appointing presidential electors.⁴ Thus, in our system of government, state legislatures "bear primary responsibility for setting election rules,"⁵ and this responsibility extends to federal elections.⁶

In 2020, state and local governments were tasked with administering elections in a safe manner during a once-in-a-lifetime pandemic. Many states adopted temporary voting procedures to reduce public health risks, despite prominent public health officials saying that in-person voting was safe.⁷ Recognizing the temporary nature of these voting procedure changes, Attorney General William Barr directed the Civil Rights Division to adopt an enforcement policy that

¹ Press Release, U.S. Dep't of Justice, Justice Department Issues Guidance on Federal Statutes Regarding Voting Methods and Post-election "Audits" (Jul. 28, 2021).

² U.S. DEP'T OF JUSTICE, GUIDANCE CONCERNING FEDERAL STATUTES AFFECTING METHODS OF VOTING 1 (2021).

³ U.S. CONST. art I § 4, cl. 1.

⁴ U.S. CONST. art. II, § 1, cl. 2.

⁵ *Democratic Nat'l Comm. v. Wisconsin State Legislature*, 141 U.S. 28, 29 (2020) (Gorsuch, J., concurring).

⁶ See U.S. CONST. art I § 4, cl. 1; U.S. CONST. art. II, § 1, cl. 2.

⁷ Nsikan Akpan, *What Fauci says the U.S. really needs to reopen safely*, NAT'L GEOGRAPHIC (Aug. 13, 2020).

would “presume[] lawful” a state’s re-adoption of prior election laws or procedures.⁸ Attorney General Barr explained:

Both the Constitution and federal statutory law recognize that state and local jurisdictions can and will address changing circumstances, sometimes-unique local issues, and different policy preferences related to voting, and that their voting-related laws and processes will change from time to time.

* * *

This care [to respect state and local authority] is particularly important when a state or local jurisdiction maintains a voting-related procedure that is lawful, then changes to another lawful procedure, then changes back to the original procedure. The Department of Justice will presume that enactment of a state or local voting-related procedure that reverts back to or adopts a state or local jurisdiction’s prior lawful voting procedures complies with federal law.⁹

On February 3, 2021, then-Acting Attorney General Monty Wilkinson abruptly rescinded Attorney General Barr’s guidance.¹⁰ Then, on July 28, you issued a new guidance that upended the constitutional balance between state and federal governments with respect to voting-related laws. You wrote:

The Department’s enforcement policy does not consider a jurisdiction’s re-adoption of prior voting laws or procedures to be presumptively lawful; instead, the Department will review a jurisdiction’s changes in voting laws or procedures for compliance with all federal laws regarding elections, as the facts and circumstances warrant.¹¹

The new guidance is misguided and contrary to Congressional intent. Many of the changes that state and local governments made to voting procedures in 2020 were temporary, emergency changes to “promote both the safety of their citizens and robust democratic participation” during the pandemic.¹² These jurisdictions should be allowed to evaluate the changing circumstances and their experiences in 2020 and make appropriate lawful changes, without the threat of litigation from the federal government. With your new guidance, the Department instead takes the position that these temporary, emergency measures are the new

⁸ Memorandum from Hon. William P. Barr, Atty Gen., U.S. Dep’t of Justice to Assistant Atty Gen. of the Civil Rights Division (Dec. 22, 2020).

⁹ *Id.* at 2-3.

¹⁰ Memorandum from Hon. Monty Wilkinson, Acting Atty Gen., U.S. Dep’t of Justice, to U.S. Attys (Feb. 3, 2021).

¹¹ U.S. DEP’T OF JUSTICE, GUIDANCE CONCERNING FEDERAL STATUTES AFFECTING METHODS OF VOTING 1 (2021).

¹² *Id.*

baseline from which to judge compliance with the VRA—contrary to Congress’s intention in passing the legislation.¹³

Whether wittingly or not, your new guidance makes you complicit in a broader effort by elected Democrats to politicize federal voting rights laws. Democrats allege that recent lawful state voter integrity measures, such as Georgia’s S.B. 202 and proposed Texas legislation, constitutes “Jim Crow 2.0” and “voter suppression.”¹⁴ In reality, these states are enacting commonsense voter integrity measures, many of which *increase* voting access beyond what is available in Democrat-run states. For example, Georgia’s new law provides 17 days of early voting while President Biden’s home state of Delaware will only have ten days beginning in 2022.¹⁵ New York only provides ten days of early voting.¹⁶ In addition, the pending Texas legislation would prohibit drive-through and 24-hour voting, which local jurisdictions implemented temporarily due to the pandemic and the practices were not implemented by the whole state.¹⁷ Both Delaware and New York currently do not allow drive-through or 24-hour voting.¹⁸

Although it is easier to vote in Georgia than some Democrat-run states, the Department filed suit against the state to enjoin several provisions of S.B. 202.¹⁹ Notably, the Department did not file suit against Delaware or New York. These facts make it appear that you are attempting to enforce the VRA based on partisan considerations rather than blindly applying the facts to the law. One commentator rightly noted that your complaint against Georgia read “more like a press release from the Democratic National Committee than a serious lawsuit by an apolitical Justice Department.”²⁰

You and the Justice Department are sadly playing into the hands of the baseless and partisan Democrat opposition to state voting reform efforts by politicizing VRA enforcement and making it the policy that any change from temporary, emergency COVID-19 voting methods is presumed to be evidence of voter suppression.²¹ At a time when Congressional Democrats are considering unprecedented and brazen attempts to federalize our nation’s election processes, we strongly urge you to rescind the July 28, 2021 guidance and to reimplement Attorney General Barr’s thoughtful guidance. In addition, we request that you provide the following information:

¹³ See generally S. REP. NO. 109-295, at 2 (2006).

¹⁴ See Karl Rove, *Biden’s election-reform deception*, WALL ST. J. (Mar. 31, 2021); Chandelis Duster, *Abrams on GOP efforts to target voting: ‘It is a redux of Jim Crow in a suit and tie’*, CNN (Mar. 14, 2021); Kathryn Watson, *Biden denounces ‘21st century Jim Crow assault’ on voting access*, CBS NEWS (Jul. 13, 2021).

¹⁵ S.B. 202, 2021 Gen. Assemb., Reg. Sess. (Ga. 2021). See also Nat’l Conference of State Legislatures, *State Laws Governing Early Voting*, <https://www.ncsl.org/research/elections-and-campaigns/early-voting-in-state-elections.aspx> (last visited Jul. 29, 2021).

¹⁶ *Id.*

¹⁷ ‘No constitutional right to have 24-hour voting,’ *Gov. Abbott speaks to KHOU II about voting rights, results of 2020 election*, KHOU-11 (Jul. 14, 2021).

¹⁸ Karl Rove, *Texas Democrats Suppress the Vote*, WALL ST. J. (Jul. 14, 2021).

¹⁹ Erin Doherty, *Justice Department sues Georgia over GOP voting restrictions*, AXIOS (Jun. 25, 2021).

²⁰ Hans A. von Spakovsky & Zack Smith, *In the feds versus Georgia’s voting law, bet on Georgia*, Heritage Found. (Jul. 6, 2021).

²¹ See generally Editorial Board, *Biden Justice Plays Election Politics*, WALL ST. J. (Jun. 27, 2021).

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1. All documents and communications referring or relating to the memorandum entitled “Guidance Concerning Federal Statutes Affecting Methods of Voting” and dated July 28, 2021;
2. All documents and communications referring or relating to the complaint filed by the Department of Justice against the State of Georgia in the Northern District of Georgia on June 25, 2021; and
3. All documents and communications between or among the Department of Justice and the Executive Office of the President referring or relating to state reforms to voting laws.

Please provide this information immediately but no later than 5:00 p.m. on August 23, 2021.

Americans deserve free, fair, and accurate elections—and ones in which all Americans have confidence in the results. To achieve this ideal, enforcement of the VRA and other federal statutes protecting the right to vote must be apolitical. Thank you for your attention to this serious matter.

Sincerely,



Jim Jordan
Ranking Member



Mike Johnson
Ranking Member Subcommittee on Constitution,
Civil Rights, and Civil Liberties

cc: The Honorable Jerrold Nadler, Chairman

The Honorable Steve Cohen, Chairman, Subcommittee on Constitution, Civil Rights, and Civil Liberties