

**THE FLORIDA ELECTION REPORT:
DISSENTING STATEMENT BY COMMISSIONER ABIGAIL THERNSTROM
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Final Revision, August 17, 2001

The United States Commission on Civil Rights, charged with the statutory duty to investigate voting rights violations in a fair and objective manner, has produced a report that fails to serve the public interest. *Voting Irregularities Occurring in Florida During the 2000 Presidential Election* is prejudicial, divisive, and injurious to the cause of true democracy and justice in our society. It discredits the Commission itself and substantially diminishes its credibility as the nation's protector of our civil rights.

The Commission's report has little basis in fact. Its conclusions are based on a deeply flawed statistical analysis coupled with anecdotal evidence of limited value, unverified by a proper factual investigation. This shaky foundation is used to justify charges of the most serious nature—questioning the legitimacy of the American electoral process and the validity of the most recent presidential election. The report's central finding—that there was “widespread disenfranchisement and denial of voting rights” in Florida's 2000 presidential election—does not withstand even a cursory legal or scholarly scrutiny. Leveling such a serious charge without clear justification is an unwarranted assault upon the public's confidence in American democracy.

The statistical analysis in the report is superficial and incomplete. A more sophisticated regression analysis by Dr. John Lott, an economist at Yale Law School, challenges its main findings. Dr. Lott was unable to find a consistent, statistically significant relationship between the share of voters who were African Americans and the ballot spoilage rate.

Furthermore, Dr. Lott conducted additional analysis beyond the report's parameters, looking at previous elections, demographic changes, and rates of ballot spoilage. His analysis found *little relationship between racial population change and ballot spoilage*, and the one correlation that is found runs *counter* to the majority report's argument: An *increase* in the black share of the voting population is linked to a slight *decrease* in spoilage rates, although the difference is not statistically significant.

Nothing is more fundamental to American democracy than the right to vote and to have valid votes properly counted. Allegations of disenfranchisement are the fertile ground in which a dangerous distrust of American political institutions thrives. By basing its conclusion on allegations that seem driven by partisan interests and that lack factual basis, the majority on the Commission has needlessly fostered public distrust, alienation and manifest cynicism. The report implicitly labels the outcome of the 2000 election as illegitimate, thereby calling into question the most fundamental basis of American democracy.

What appears to be partisan passions not only destroyed the credibility of the report itself,

but informed the entire process that led up to the final draft. At the Florida hearings, Governor Jeb Bush was the only witness who was not allowed to make an opening statement. The Chair, Mary Frances Berry, was quoted in the Florida press as comparing the Governor and Secretary of State to “Pontius Pilate... just washing their hands of the whole thing.” On March 9, six commissioners voted to issue a “preliminary assessment”—in effect, a verdict—long before the staff had completed its review of the evidence.

The report claims that “affected agencies were afforded an opportunity to review applicable portions”; in fact, affected parties were never given a look at the preliminary assessment, and had only ten days in which to review and respond to the final report, in violation of established procedures and previous promises.

Most recently, a request for basic data to which we—and indeed, any member of the public—were entitled was denied to us. The Commission hired Professor Allan Lichtman, an historian at American University, to examine the relationship between spoiled ballots and the race of voters. We asked for a copy of the machine-readable data that Professor Lichtman used to run his correlations and regressions. That is, we wanted his computer runs, the data that went into them, and the regression output that was produced. The Commission told us that it did not exist—that the data as he organized it for purposes of analysis was literally unavailable. Professor Lichtman, who knows that as a matter of scholarly convention such data should be shared, also declined to provide it.

Even now, five weeks after our first request, we still have not received the multiple regressions and the machine-readable data that were used in them. They are the foundation upon which the Commission's report largely rests.

At the June 13 monthly Commission meeting, members of the commission staff and some commissioners argued that this document is not a proper “dissent” but a “dissenting report,” and that the commission cannot allow the preparation of a dissenting report. In a July 10 memo, the staff director stated that the Commission “does not envision any Commissioner “engag[ing] in a complete reanalysis of the staff's work.” But it is obviously impossible to write a thorough dissent without reanalyzing the quantitative and other evidence upon which important claims have been based.

Perhaps no previous member of the commission has felt the need to write quite such a lengthy critique of a report endorsed by the majority. But the explanation may be that the Commission has never written an important report that so demanded elaborate critical scrutiny. In any event, it is curious that an agency devoted to the protection of minority rights should show so little respect for the freedom of expression of its own members who happen to disagree with the majority on an issue.

Process matters. And that is why it is important to examine, with integrity, possible violations of the electoral process in Florida and other states. When the process is right, participants on another day can revisit the outcome—use the procedures (fair and thus

trusted) to debate policy or to vote again. But when the process is corrupt, the conclusions themselves (current and future) are deeply suspect. The Commission investigated procedural irregularities in Florida; it should have gotten its own house in order first.

Had the process been right, the substance might have been much better. The Commission's staff would have received feedback from Florida officials, commissioners, and other concerned parties, on the basis of which it might have revised the report. It should be consulting with commissioners in the course of drafting a report, including those who do not share the majority view. As it is, at great expense, the Commission has written a dangerous and divisive document. And thus it certainly provides no basis upon which to reform the electoral process in Florida or anywhere else.

SUMMARY

I. The statistical analysis done for the Commission by Dr. Allan Lichtman does not support the claim of disenfranchisement.

The most sensational "finding" in the majority report is the claim that black voters in the Florida election in 2000 were nine times as likely as other residents of the state to have cast ballots that did not count in the presidential contest. Dr. Lichtman's work does not establish this dramatic claim.

(a) Disenfranchisement is not the same thing as voter error. The report talks about voters likely to have their ballots spoiled; in fact, the problem was undervotes and overvotes, some of which were deliberate (the undervotes, particularly). But the rest are due to voter error. Or machine error, which is random, and thus cannot "disenfranchise" any population group. It was certainly not due to any conspiracy on the part of supervisors of elections; the vast majority of spoiled ballots were cast in counties where the supervisor was a Democrat.

(b) The ecological fallacy: The majority report argues that race was the dominant factor explaining whose votes counted and whose were rejected. But the method used rests on the assumption that if the proportion of spoiled ballots in a county or precinct is higher in places with a larger black population, it must be African American ballots that were disqualified. That conclusion does not necessarily follow, as statisticians have long understood. This is the problem of what is termed the ecological fallacy.

We have no data on the race of the individual voters. And it is impossible to develop accurate estimates about how groups of individuals vote (or misvote) on the basis of county-level or precinct-level averages.

(c) The failure to consider relevant explanatory variables: The Commission's report assumes race had to be the decisive factor determining which voters spoiled their ballots.

Indeed, its analysis suggests that the electoral system somehow worked to cancel the votes of even highly educated, politically experienced African Americans.

In fact, the size of the black population (by Dr. Lichtman's own numbers) accounts for only one-quarter of the difference between counties in the rate of spoiled ballots (the correlation is .5). And Dr. Lichtman knows that we cannot make meaningful statements about the relationship between one social factor and another without controlling for or holding constant other variables that may affect the relationship we are assessing.

Although Dr. Lichtman claims to have carried out a "more refined statistical analysis," neither the Commission's report nor his report to the Commission display evidence that he has successfully isolated the effect of race per se from that of other variables that are correlated with race: poverty, income, literacy, and the like. A complex model applied to the Florida data by our own expert, Dr. John Lott, enables us to explain 70 percent of the variance (three times as much as Dr. Lichtman was able to account for) without using the proportion of African Americans in each county as a variable.

In fact, using the variables provided in the report, Dr. Lott was unable to find a consistent, statistically significant relationship between the share of voters who were African American and the ballot spoilage rate. Further, removing race from the equation, but leaving in all the other variables only reduced ballot spoilage rate explained by his regression by a trivial amount. In other words, the best indicator of whether or not a particular county had a high or low rate of ballot spoilage is not its racial composition. Other variables were more important.

(d) The obvious explanation for a high number of spoiled ballots among black voters is their lower literacy rate. Dr. Lichtman offers only a perfunctory and superficial discussion of the question, and fails to provide the regression results that allegedly demonstrate that literacy was irrelevant. This claim is impossible to reconcile with the Commission's own recommendation that more "effective programs of education for voters" are needed to solve the problem. Moreover, the data upon which he relies are too crude to allow meaningful conclusions. They are not broken down by race, for one thing.

(e) First time Voters: An important source of the high rate of ballot spoilage in some Florida communities may have been that a sizable fraction of those who turned out at the polls were there for the first time and were unfamiliar with the rules of the electoral process. Impressionistic evidence suggests that disproportionate numbers of black voters fell into this category. The majority report's failure to explore—or even mention—this factor is a serious flaw.

(f) The Time Dimension: Most social scientists understand that the interpretation of social patterns on the basis of observations at just one point in time is dangerously simplistic. But that is all the majority report offers. It focuses entirely on the 2000 election returns.

Dr. Lott, by contrast, did two analyses that take the time dimension into account. He looked at spoilage rates by county for the 1996 and 2000 presidential races, and compared them with demographic change. A rise in a county's black population did not result in a similar rise in spoilage rates, suggesting, again, that race was not the causal factor at work.

Dr. Lott also examined data from the 1992, 1996, and 2000 races, and found that the "percent of voters in different race or ethnic categories is never statistically related to ballot spoilage."

(g) County-level Data v. Precinct Data: The Commission's report, as earlier noted, estimates that black ballots were nine times more likely to be spoiled than white ballots. And it presents some precinct-level data, providing estimates based on smaller units that are likely to be somewhat closer to the truth than estimates based on inter-county variations. The report ignores the fact that the county-level and precinct-level data yielded quite different results. Ballot rejection rates dropped dramatically when the precinct numbers were examined, even though comparing heavily black and heavily nonblack precincts should have sharpened the difference between white and black voters, rather than diminishing it. Dr. Lichtman obscures this point by shifting from ratios to percentage point differences.

Dr. Lichtman's precinct analysis is just as vulnerable to criticism as his county-level analysis. It employs the same methods, and again ignores relevant variables that provide a better explanation of the variation in ballot spoilage rates. No variables other than race and the type of voting system were even considered in this analysis.

(h) Whose Fault Was It? The majority report lays the blame for the supposed "disenfranchisement" of black voters at the feet of state officials—particularly Governor Jeb Bush and Secretary of State Katherine Harris. In fact, however, elections in Florida are the responsibility of 67 county supervisors of election. And, interestingly, in all but one of the 25 counties with the highest spoilage rates, the election was supervised by a Democrat—the one exception being an official with no party affiliation.

The majority report argues that much of the spoiled ballot problem was due to voting technology. But elected Democratic Party officials decided on the type of machinery used, including the optical scanning system in Gadsden County, the state's only majority-black county and the one with the highest spoilage rate.

(i) The Exclusion of Florida's Hispanics: Hispanics are a protected group under the Voting Rights Act. Moreover, the majority report speaks repeatedly of the alleged disenfranchisement of "minorities" or "people of color." One section is headed "Votes in Communities of Color Less Likely to be Counted." And yet the crucial statistical analysis provided in Chapter 1 entirely ignores Florida's largest minority group—people of Hispanic origin. The analysis in the Commission's report thus excluded more Floridians

of minority background than it included.

The analysis conducted by Dr. Lichtman treats not only Hispanics, but Asians and Native Americans as well as if they were, in effect, white. He dichotomizes the Florida population into two groups, blacks and “nonblacks.”

In the revised report, Dr. Lichtman did add one graph dealing with Hispanics in the appendix, but this addition to his statistical analysis is clearly only an afterthought. At the June 8 Commission meeting, Dr. Lichtman stated he looked at this issue only at the last minute. This is a strange and regrettable omission.

II. The Testimony of Witnesses Fails To Support the Claim of Systematic Disenfranchisement

Based on witnesses’ limited (and often, uncorroborated) accounts, the Commission insists that there were “countless allegations” involving “countless numbers” of Floridians who were denied the right to vote. This anecdotal evidence is drawn from the testimony of 26 “fact witnesses,” residing in only eight of the state’s 67 counties.

In fact, however, many of those who appeared before the Commission testified to the absence of “systemic disenfranchisement” in Florida. Thus, a representative of the League of Women Voters testified that there had been many administrative problems, but stated: “We don't have any evidence of race-based problems... we actually I guess don't have any evidence of partisan problems.” And a witness from Miami-Dade County said she attributed the problems she encountered not to race but rather to inefficient poll workers: “I think [there are] a lot of people that are on jobs that really don't fit them or they are not fit to be in.”

Without question, some voters did encounter difficulties at the polls, but the evidence fails to support the claim of systematic disenfranchisement. Most of the complaints the Commission heard in direct testimony involved individuals who arrived at the polls on election day only to find that their names were not on the rolls of registered voters. The majority of these cases were due to bureaucratic errors, inefficiencies within the system, and/or error or confusion on the part of the voters themselves.

III. The Commission's Report Failed to Distinguish Between Bureaucratic Problems and Actual Discrimination

Other witnesses did offer testimony suggesting numerous problems on election day. But the Commission, in discussing these problems, failed to distinguish between mere inconvenience, difficulties caused by bureaucratic inefficiencies, and incidents of possible discrimination. In its report, the complaint from the voter whose shoes were muddied on the path to his polling place is accorded the same degree of seriousness as the case of the seeing-impaired voter who required help in reading the ballot, or the African American voter who claimed she was turned away from the polls at closing time while a white man

was not.

There were certainly jammed phone lines, confusion and error, but none of it added up to widespread discrimination. Many of the difficulties, like those associated with the “butterfly ballot,” were the product of good intentions gone awry or the presence of many first-time voters. The most compelling testimony came from disabled voters who faced a range of problems, including insufficient parking and inadequate provision for wheelchair access. This problem, of course, had no racial dimension at all.

IV. The Report's Interpretation of the Voting Rights Act Distorts the Law

The report essentially concludes that election procedures in Florida were in violation of the Voting Rights Act, but the Commission found no evidence to reach that conclusion, and has bent the 1965 statute totally out of shape.

The question of a Section 2 violation can only be settled in a federal court. Plaintiffs who charge discrimination must prevail in a trial in which the state has a full opportunity to challenge the evidence. To prevail, plaintiffs must show that “racial politics dominate the electoral process,” as the 1982 Senate Judiciary Committee Report stated in explaining the newly amended Section 2.

The majority's report implies that Section 2 aimed to correct all possible inequalities in the electoral process. Had that been the goal, racially disparate registration and turnout rates—found nearly everywhere in the country—would constitute a Voting Rights Act violation. Less affluent, less educated citizens tend to register and vote at lower rates, and, for the same reasons, are likely to make more errors in casting ballots, especially if they are first time voters. Neither the failure to register nor the failure to cast a ballot properly—as regrettable as they are—are Section 2 violations.

Thus, despite the thousands of voting rights cases on the books, the majority report cannot cite any case law that suggests punch card ballots, for instance, are potentially discriminatory. Or that higher error rates among black voters suggest disenfranchisement.

There is good reason why claims brought under Section 2 must be settled in a federal court. The provision requires the adjudication of competing claims about equal electoral opportunity—an inquiry into the complex issue of racial fairness. The Commission is not a court and cannot arrive at verdicts that belong exclusively to the judiciary. Yet, while the majority report does admit that the Commission cannot determine if violations of the Voting Rights Act have actually occurred, in fact it unequivocally claims to have found “disenfranchisement,” under the terms of the statute.

V. The Report Mistakenly Holds Florida State Officials Responsible for the Conduct of Elections

The report holds Florida's public officials, particularly the governor and secretary of state

responsible for the discrimination that it alleges. “State officials failed to fulfill their duties in a manner that would prevent this disenfranchisement,” it asserts. In fact, most of the authority over elections in Florida resides with officials in the state’s 67 counties, and all of those with the highest rates of voter error were under Democratic control.

The report charges that the governor, the secretary of state and other state officials should have acted differently in anticipation of the high turnout of voters. What the Commission actually heard from “key officials” and experts was that the increase in registration, on average, was no different than in previous years; that since the development of “motor voter” registration, voter registration is more of an ongoing process and does not reach the intensity it once did just prior to an election; and that, in any event, registration is not always a reliable predictor for turnout.

The majority report also faults Florida state officials with having failed to provide the 67 supervisors of elections with “adequate guidance or funding” for voter education and training of election officials. What the report pointedly ignores is that the county supervisors are independent, constitutional officers who make their budget requests to the boards of county commissioners, not to the state.

VI. The Commission's Analysis of the Felon List is Slanted

The report asserts that the use of a convicted felons list “has a disparate impact on African Americans.” “African Americans in Florida were more likely to find their names on the list than persons of other races.” Of course, because a higher proportion of blacks have been convicted of felonies in Florida, as elsewhere in the nation. But there is no evidence that the state targeted blacks in a discriminatory manner in constructing a purge list, or that the state made less of an effort to notify listed African Americans and to correct errors than it did with whites. The Commission did not hear from a single witness who was actually prevented from voting as a result of being erroneously identified as a felon. Furthermore, whites were twice as likely as blacks to be placed on the list erroneously, not the other way around.

The compilation of the purge list was part of an anti-fraud measure enacted by the Florida legislature in the wake of a Miami mayoral election in which ineligible voters cast ballots. The list for the 2000 election was over-inclusive, and some supervisors made no use of it. (The majority report did not bother to ask how many counties relied upon it.) On the other hand, according to the *Palm Beach Post*, more than 6,500 ineligible felons voted.

Based on extensive research, the *Miami Herald* concluded that the biggest problem with the felon list was not that it wrongly prevented eligible voters from casting ballots, but that it ended up allowing ineligible voters to cast a ballot. The Commission should have looked into allegations of voter fraud, not only with respect to ineligible felons, but allegations involving fraudulent absentee ballots in nursing homes, unregistered voters, and so forth. Across the country in a variety of jurisdictions, serious questions about voter fraud have been raised.

VII. The Report's Criticism of Florida Law Enforcement Officials is Unwarranted

Despite clear and direct testimony during the hearings, as well as additional information submitted by Florida officials after the hearings, the report continues to charge the Florida Highway Patrol with behavior that was “perceived” by “a number of voters” as “unusual” (and thus somehow “intimidating”) on election day. In fact, only two persons are identified in the report as giving their reactions to activities of the Florida Highway Patrol on election day. One testified regarding a police checkpoint, and the other testified that he found it “unusual” to see an empty police car parked outside of a polling facility. Neither of these witnesses’ testimony indicates how their or others’ ability to vote was impaired by these events.

VIII. Procedural Irregularities at the U.S. Commission on Civil Rights

Procedural irregularities have seriously marred the report. The Commission ignored not only the rules of evidence, but the agency's own procedures for gathering evidence. By arguing that “every voice must be heard,” while in fact stifling the voice of the political minority on the Commission itself, it is guilty of gross hypocrisy.

Among the procedural problems in the drafting of the report:

- Republican-appointed commissioners were never asked for any input in the composition of the witness list or in the drafting of the report itself. In fact, at one point, we were denied access to the witness lists altogether prior to the hearing. An outside expert with strong partisan affiliations was hired to do a statistical analysis without consultation with commissioners.
- At the hearings in Florida, the secretary of state and other Republican witnesses were treated in a manner that fell far short of the standard of fair, equal and courteous.
- The majority reached and released its verdict, in the form of a “preliminary assessment,” long before the analysis was complete/
- Florida authorities who might be defamed or degraded by the report were not given the proper time to review the parts of the report sent to them—to say nothing of their right to review the report in its entirety.
- Affected agencies were not given adequate time to review applicable provisions, and a draft final report was made available to the press that included no corrections or amendments on the basis of affected agency comments.
- Commissioners were given only three days to read the report—one less day than three major newspapers had—before its approval by the Commission at the June 8

meeting. This and other aspects of the process were contrary to the schedule, and made careful, detailed feedback at the time literally impossible.

In its efforts to investigate procedural irregularities in Florida, the Commission has clearly engaged in serious procedural irregularities of its own. By consistently violating its own procedures for fair and objective fact-finding, the Commission undermines its credibility and calls into question the validity of its work.

I. The Statistical Analysis Done for the Commission by Dr. Allan Lichtman Does Not Support the Claim of Disenfranchisement

The most sensational “finding” in the majority report, and the one that received most attention in the press, is the claim that black voters in the Florida election in 2000 were allegedly nine times as likely as other residents of the state to have cast ballots that did not count in the presidential contest, and that 52 percent of all disqualified ballots were cast by black voters in a state whose population is only 15 percent black. This charge made the headlines, but it is nothing more than a wild guesstimate

Dr. Lichtman's statistical analysis is badly flawed, strongly slanted to support preconceived conclusions that cannot withstand careful scrutiny. The assertion that votes by African Americans were nine times as likely to be rejected as those by whites, we will show in detail below, is completely unsubstantiated. Dr. Lichtman's other estimates are not much more reliable, and he fails to examine the impact of variables that were of great importance in determining the outcome.

Below we provide a broader and more sophisticated regression analysis prepared for us by an econometrician, an analysis which clashes with that provided in the majority report on virtually every important point.

Disenfranchisement is not the same as voter error.

It is important to note at the outset that the majority report's account of Dr. Lichtman's findings employs language that serves to obscure the true nature of the phenomenon under investigation. These pages are filled with references to the “disenfranchisement” of black voters, as if African Americans in Florida last year were faced with obstacles comparable to poll taxes, literacy tests, and other devices by which southern whites in the years before the Voting Rights Act of 1965 managed to suppress the black vote and keep political office safely in the hands of candidates committed to the preservation of white supremacy.

Black votes, we are told again and again, were “rejected” in vastly disproportionate numbers. “Countless Floridians,” the report concludes, were “denied... their right to vote,” and this “disenfranchisement fell most harshly on the shoulders of African Americans.”¹ In a particularly masterful bit of obfuscation, the majority report declares that, “persons living in a county with a substantial African American or people of color population are more likely to have their ballots spoiled or discounted than persons living in the rest of Florida.” This alleged fact, the reader is told, “starts to prove the Florida election was not 'equally open to participation' by all.”²

¹ Report, 154

² Report, 18.

Let us be clear: According to Dr. Lichtman's data, some 180,000 Florida voters in the 2000 election, 2.9 percent of the total, turned in ballots that did not indicate a valid choice for a presidential candidate and thus could not be counted in that race. Six out of ten of these rejected ballots (59 percent) were "overvotes" – ballots that were disqualified because they indicated more than one choice for president. Another 35 percent were "undervotes," ballots lacking any clear indication of which presidential candidate the voter preferred.³ (The other 6 percent were invalid for some other unspecified reason. Since they are ignored in the majority report, they will be here as well.)

Hence the chief problem in Florida was voters who cast a ballot for more than one candidate for the same office, and the second most common problem was voters who registered no choice at all. Ballots were "rejected," in short, because it was impossible to determine which candidate – if any – voters meant to choose for president.

Some of these overvotes and undervotes, it should be noted, may have been the result of deliberate choices on the part of voters. In fact, Chair Mary Frances Berry remarked at the hearing in Miami that she herself has sometimes "over-voted deliberately."

Chair Berry cannot be the only voter in the United States to make such a choice. According to the exhaustive investigation of the ballots conducted by the *Miami Herald*, 10 percent of all the overvotes in the state showed votes for both Bush and Gore.⁴ Some of these voters, it is reasonable to assume, were attempting to convey the message that either candidate would be equally acceptable. Some voters in Citrus County put giant X's through the names of all presidential candidates, perhaps to indicate "none of the above."⁵

Similarly, some of the undervotes under discussion here must have been recorded by people who could not settle on a choice for president but who turned up to register their preferences in other contests. We know from the *Miami Herald's* inspection of the 61,111 undervoted ballots in the state that almost half – 46.2 percent – had no markings at all for president.⁶ It seems reasonable to assume that many of them did not intend to register a choice among the presidential candidates, and had come to the polls to vote for other offices. According to exit polls in Miami-Dade County, 1 percent of the voters made choices for other offices, but not in the presidential race.⁷ If so, that would account for 56 percent of all the undervotes in Miami-Dade.

³ Report, 21. Note that later in the report, on page 148, the majority asserts that it was highly anomalous that 63 percent of spoiled ballots in Palm Beach County were overvotes, and blames the alleged anomaly on the infamous butterfly ballot. The pattern, according to the report, was "just the opposite of what we normally observe, which is five percent or less of the spoiled ballots." How could the author of this passage possibly think that 5 percent or less was the norm for overvotes in Florida when the Lichtman figures cited earlier in the report reveals that fully 59 percent of all the spoiled ballots in the state were overvotes?

⁴ Martin Merzer, *The Miami Herald Report: Democracy Held Hostage* (New York: St. Martin's Press, 2001), 194

⁵ *Ibid.*, 195.

⁶ *Ibid.*, 230-231

⁷ Richard A. Posner, *Breaking the Deadlock: The 2000 Election, the Constitution, and the Courts* (Princeton, N.J.: Princeton University Press, 2001), 61.

If half of these unmarked ballots in Florida were produced by voters who really did not want to make a choice for president, that would reduce the number of so-called “spoiled ballots” in the state from 180,000 to less than 150,000. It would be interesting if we could make a similar statistical estimate of the proportion of overvoters who did it deliberately; unfortunately that is impossible.

What is clear is this: In these instances, overvoting and undervoting are not “problems” that require “remedies.” And they certainly are not evidence that anyone is being “disenfranchised.” They represent the actual preferences of the voters in question, and it is misleading to label them “spoiled” ballots at all.

The majority would have us believe that “countless” numbers of Floridians who were legally entitled to vote had their ballots “spoiled.” In fact, we are not talking about “countless” ballots. We are talking about 180,000 invalid ballots, *minus* those that did not indicate a clear presidential choice because the voter had not decided on a presidential preference. Thus the 180,000 figure, 2.9 percent of the total, is an upper bound estimate of the true figure, which is undoubtedly smaller by an unknown amount. The county-by-county figures on so-called spoiled ballots are likewise exaggerations, biased upward to an unknown amount.

Still, there are overvotes and undervotes that undoubtedly did not reflect the will of the voters. What accounts for them? The opening paragraph of the introduction to the majority report suggests that the issue is whether “votes that were cast were properly tabulated.”⁸ What does this mean? Are we to believe African Americans cast their ballots correctly on election day, but that many of their ballots were incorrectly tabulated by the machines, or the people who conducted manual recounts in some counties? There is no evidence whatsoever to support that implication.

Some of the 180,000 rejected ballots may have the result of machine error, of course – but very few. Machine error, according to experts who have studied it, is rare, involving at most 1 in 250,000 votes cast.⁹ And machine error is obviously random, and thus cannot “disenfranchise” any population group. No one has yet shown that a VotoMatic machine can be programmed to distinguish black voters from others and to record votes by African Americans in such a way as to facilitate their rejection.

There is only one other explanation of what the Commission tendentiously describes as “disenfranchisement.” The problem is *voter error*, a term that astonishingly appears nowhere in the majority report. This is the central fact the majority report attempts to

⁸ Report, 1

⁹ According to the Caltech/MIT Voting Project, “state and federal voting machine certifications tolerate very low machine failure rates: no more than 1 in 250,000 ballots for federal certification and no more than 1 in 1,000,000 in some states.” The problem, according to these investigators, has to do with “how people relate to the technologies....” See the Caltech/MIT Voting Project, “A Preliminary Assessment of the Reliability of Existing Voting Equipment,” February 1, 2001, 13.

obscure. Some voters simply did not fill out their ballots according to the instructions. They failed to abide by the very elementary rule that you must vote for one and only one candidate for the office of president of the United States, and therefore their attempt to register their choice failed. Their ballots were rejected, and their votes did not count.

The Ecological Fallacy

Did African American voters in the 2000 Florida election have more difficulty completing their ballots correctly than did other citizens of the state, and hence have a higher rate of ballot rejection? Quite possibly so, but Dr. Lichtman's estimates upon which the Commission relied are open to very serious doubt. At best, they are highly exaggerated, and strong evidence (Dr. Lott's research, discussed below) suggests they are entirely wrong.

How can we figure out whether there were major racial differences in the rate of voter error or ballot spoilage in the 2000 election? We have no data whatever on the race of those individuals who cast invalid ballots. We have secret ballots in the United States, and accordingly cannot know how any individuals actually voted. Thus we cannot know with any precision how particular ethnic or racial groups voted, or at what rate their ballots were actually counted.¹⁰ Whatever conclusions we draw about the matter must be based on estimates that will be susceptible to error. The question is whether the analysis and interpretations offered in the majority report are at least pretty good approximations of reality. There are many reasons to doubt that they are.

The majority report attempts to draw conclusions about this important matter by examining county-level, and to a limited extent, precinct-level data. It argues that race was the dominant factor explaining whose votes counted and whose votes were rejected. The method employed to reach that conclusion rests on the assumption that if the proportion of spoiled ballots tends to increase across counties or across precincts as the proportion of black residents in those counties increases, it must be African American voters whose ballots were disqualified. This simple methodology may seem intuitively appealing – but it is well established that it is often wrong.

Statisticians have long understood the difficulty of making such inferences due to a phenomenon that is known in the social science literature as the “ecological fallacy.” The classic discussion of this issue is in an article that was published half a century ago in the *American Sociological Review*.¹¹ In that paper, W.G. Robinson reported that he had examined the correlation between the proportion of a state's population that was foreign-born and the state's literacy rate. He found, surprisingly, a *positive* correlation between the

¹⁰ Exit polls are commonly used to estimate how particular groups voted, and even they are far from perfect. One flaw is that absentee voters are not represented at all. In any event, we can't tell from an exit poll whether someone failed to complete a valid ballot; if they thought they had erred, presumably they would have had it invalidated and have received another.

¹¹ W.G. Robinson, "Ecological Correlations and the Behavior of Individuals," *American Sociological Review*, vol. 15 (June, 1950), 351-357.

literacy rate and the proportion of immigrants in the population. Contrary to the conventional wisdom, the larger the foreign-born population, the higher the overall literacy rate was in a state. The correlation was .53, a bit higher than the one found by Dr. Lichtman between race and ballot spoilage rates.

Did that really prove that Americans born abroad were more literate, on the average, than those born within the United States? Robinson chose this case because he had reliable data against which to check the ecological estimate; census data were available for *individuals*. When Robinson analyzed it, he found that country of birth was *negatively* correlated with literacy; the actual figure was -.11. Immigrants were actually significantly less likely than natives to be literate, despite the strong state-level correlation suggesting just the opposite.

The state-by-state correlation gave a completely false picture, because it happened that the states with highly literate populations were also more developed economically and attracted more immigrants because jobs were available there. New York, for example, was more literate than Arkansas. It also had a higher fraction of immigrants in its population, but not enough to pull the state average literacy rate down very much.

A more recent example derives from the work of an eminent mathematical statistician at the University of California at Berkeley, David A. Freedman.¹² Using data from the 1995 Current Population Survey, Freedman found that the correlation between the proportion of immigrants in the population of the 50 states and the proportion of families with incomes over \$50,000 in 1994 was .52. Foreign-born Americans, judging from this ecological correlation, were considerably more affluent than their native-born neighbors. But the evidence also allowed Freedman to look at incomes on the individual level. When you do that, it turns out that in the nation as a whole, 35 percent of native-born American families were in the \$50,000 and over income bracket – but only 28 percent of immigrant families were. The true correlation between being foreign-born and having a high family income was not the .52 estimated from state-level data; it was instead a mildly *negative* correlation of -0.05.

In this instance, too, estimates based on ecological correlations were not just a bit off, a little imprecise but still close enough to the truth for most purposes. They were way off the mark, and indeed had falsely transformed relationships that were actually negative into positive ones.

The problem of the ecological fallacy afflicts all of the statistical analyses Dr. Lichtman did for the majority report. We must remember that counties do not vote. Precincts do not vote. Only individuals vote. It is impossible to develop accurate estimates about how groups of individuals vote (or misvote) on the basis of county-level or precinct-level averages.

¹² D.A. Freedman, "Ecological Inference and the Ecological Fallacy," University of California at Berkeley Department of Statistics Technical Report No. 549, Oct. 15, 1999, This paper will appear as a chapter in the forthcoming International Encyclopedia of the Social Sciences.

In his appearance before the June 8, 2001 meeting of the Commission on Civil Rights, Dr. Lichtman sounded a note of caution about his findings. He declared that a correlation does not “by itself prove” that there were “disparate rates” at which ballots by African Americans and “non-African Americans” were rejected.¹³ That is certainly true. But he went on to claim that the “more advanced statistical procedures” he employed could reliably do so. Unfortunately, that is not true. The use of ecological regression techniques does not solve the problem of the ecological fallacy, because it depends upon exactly the same aggregated data as simple correlational analysis, and makes the same, often incorrect, “constancy assumption.” It assumes that there is no relationship between the composition of geographical areas and the relationship in question, when in fact there often is.

If the information utilized in an analysis is based on averages for geographical units, whether they are counties or precincts, the results will necessarily be imprecise and they may be just plain wrong, as in the example of immigrant literacy levels given above. When David Freedman did an ecological regression of state-level data to assess the relationship between immigration and family income, he found that it estimated that fully 85 percent of foreign-born American families had 1994 family incomes above \$50,000. But the true figure, from individual-level data, was really only 28 percent.¹⁴ Ecological regression, in this case, yielded results that were wildly mistaken. In another paper, Freedman provided a similar critique of ecological regression estimates of political behavior specifically, in instances in which individual-level data happened to be available, and he found ecological regression estimates to have been highly unreliable.¹⁵

In sum, inferences about individual behavior on the basis of the average distribution of some characteristic across geographical units are sometimes wildly inaccurate. They must be examined with great caution and skepticism. The majority report does not display the necessary caution about what the facts reveal. A more searching analysis, summarized below and spelled out in Appendix I, demonstrates how misleading Dr. Lichtman’s findings are.

The Commission's Failure to Analyze Factors Other Than Race

Was race itself a decisive factor in determining which voters spoiled their ballots in the 2000 election in Florida, as the majority report contends? Did the electoral system somehow work in such a way that even highly educated, politically experienced African Americans, for example, cast ballots that were somehow spoiled in some unspecified and

¹⁶ Transcript of June 8, 2001 meeting, 42.

¹⁴The explanation is that immigrants tend to be attracted to the richer states--California and New York rather than Tennessee and Mississippi. Thus their presence is associated with high average incomes at the state level, but that does not mean that their average incomes are especially high.

¹⁵ D. A. Freedman, S. P. Klein, M. Ostland, and M. Robert, "On 'Solutions' to the Ecological Inference Problem," Journal of the American Statistical Association, vol. 93 (December 1998), 1518-1523.

mysterious way? The majority report claims that the answer was yes, though it provides no indication of how the process worked to produce that result. Dr. Lichtman's statistical analysis, the report claims, demonstrates that such was the case.

It does nothing of the sort, even if we set aside for the sake of argument the serious doubts most statisticians have about the accuracy of any estimate based on an ecological regression or correlation. The report begins with the simple correlation between the percentage of African American registered voters in Florida's counties and the percentage of spoiled ballots. That correlation is .50.¹⁶ Speaking in statistical shorthand, that "explains" 25 percent of the total variance across the counties. (It doesn't necessarily "explain" anything in ordinary language, we shall see later).

In other words, if you want to know why some Florida counties have a high and some a low rate of spoiled ballots, knowing their racial composition only accounts for *one quarter* of the difference.

Social scientists know that a simple correlation of about .5 between two variables has very little meaning. We cannot make meaningful statements about the relationship between one social factor and another without *controlling for* or *holding constant* other variables that may affect the relationship we are assessing. Since no other variables are included in this correlation, anyone who ever took Statistics 101 would realize that it is of just about zero value.

The Commission's report acknowledges the need for "a more refined statistical analysis" of this matter. It notes that "an obvious question" was "presented" by the findings of the simple correlation. "Is there some other factor that better explains this disparity of ballot rejection rates?" That certainly is a crucial question. "The answer," the commission assures us, "is no."

The first thing to note about this key passage is that it doesn't sound like anything a sophisticated social scientist would write. To say that the issue is whether "some other factor better explains" a disparity implies that the analyst, like a voter casting a ballot for president, must pick one and only one candidate. The question that a "refined statistical analysis" would ask is not whether some of other single factor "better explains" something. It would ask what combination of factors best explains the phenomenon, and what causal weight may be attributed to each of these factors. Such a complex determination is precisely the purpose of multivariate regression analysis.

Furthermore, the claim that there "no other factor...better explains" the disparity in ballot rejection rates implies that many possibly relevant factors have been analyzed by Dr. Lichtman. The report states explicitly that he did a regression that "controlled for the percentage of high school graduates and the percentage of adults in the lowest literacy category." It also claims that he did a similar regression analysis for counties that used

¹⁶ Report, 21,

punch card or optical scanning technology recorded centrally. The discussion clearly implies that various other factors were also considered, but were found to be of no significance—not worth mentioning. Appendix I of Dr. Lichtman's report gives county-level values for such variables as median income and percent living in poverty, and the reader naturally assumes that all of these were examined in his "more refined statistical analysis." Perhaps they were, but since Dr. Lichtman does not provide the actual results of the regression analyses, it is impossible to tell.

This failure to spell out necessary details is in striking contrast to a new book about the Florida election by Judge Richard Posner. Although *Breaking the Deadlock* is aimed at a general audience, unlike Dr. Lichtman's report, Judge Posner nonetheless includes seven tables that provide the complete details of the regression analyses that he performed to determine the sources of the undervotes and overvotes in Florida.

The "refined statistical analysis" provided by Dr. Lichtman, we conclude after careful study, consists of nothing more than adding two measures of education (very inadequate measures, we shall argue below) and controlling for voting technology. And we have to take Dr. Lichtman's word about even those results, since he does not supply the details. Competent social scientists can have long arguments about the interpretations of the results of a regression analysis. It is regrettable that the Civil Rights Commission expects us to take its claims on faith.

What about all the other variables that might have influenced rates of ballot spoilage? Poverty levels would be one good example. Senator McConnell asked Dr. Lichtman specifically about the possible role of poverty at the June 27 hearing of the Senate Committee on Rules and Administration, and received a completely non-responsive answer that dealt not with poverty but with education. This seemed puzzling to us. Dr. Lichtman, after all, is no absent-minded professor who has never learned to listen to questions carefully. He has served as an expert witness in federal court on more than five dozen voting rights cases. We could be wrong, but we suspect that the honest answer to the question was that Dr. Lichtman had no idea whether poverty influenced ballot spoilage rates because he had failed to include it as a variable in his regression analysis.

The supposed refinements in Dr. Lichtman's regression analysis did not include using poverty rates as a variable, as far we can tell. Nor did they include measures of median family income, population density, proportions of first-time voters, or age structure, to name a few about which census data is readily available. So when the report declares that the answer to the question of whether other factors could have produced the ballot is "no," it is deceptive. In fact, Dr. Lichtman has no idea what role "other factors" like poverty may have played, because he did not take them into account in his analysis.

Although the commission refused--and still refuses--to provide us the machine readable data Dr. Lichtman used in his analysis, we were able to assemble the necessary material for our own analysis. We were fortunate in being able to enlist the help of a first-rate economist, Dr. John Lott of the Yale Law School. Dr. Lott agreed to evaluate the work

of the commission and of Dr. Lichtman, and even to gather additional data of his own to further extend the analysis. Dr. Lott's report, with accompanying figures and tables, appears as an appendix to this statement.

Dr. Lott ran a series of regressions, varying the specifications in an effort to replicate Dr. Lichtman's results. Using all the variables reported in Appendix I in the majority report, he was unable to find a consistent, statistically significant relationship between the share of voters who were African American and the ballot spoilage rate. He found that the coefficient on the percent of voters who were black was indeed positive, but it was statistically insignificant. The chance that the relationship was real was only 50.3 percent, just about the chance of getting tails to come up on any one coin toss and far below the 95 percent significance level commonly demanded in social science.

Furthermore, when Dr. Lott analyzed the data using a specification that implied that the share of African American voters in a county *was* significantly related to the level of ballot spoilage, he found that it explained hardly any of the overall variance. Removing race from the equation but leaving in all the other explanatory variables only reduced the amount of ballot spoilage explained by his regression from 73.4 percent to 69.1 percent, a mere 4.3 percentage point reduction (see Lott's Table 3 in the attachment).

Indeed, in none of the other specifications provided in Dr. Lott's Table 3 did taking racial information out of the analysis but leaving in other variables reduce by more than 3 percent the amount of variance in the spoiled ballot rate that is explained. *Consequently, it simply is not true that the best indicator of whether or not a particular county had a high or low rate of ballot spoilage is its racial composition.* Dr. Lichtman's claims to the contrary appear to be based on a very narrow and incomplete analysis that failed to control for hardly any variables but race.

Was Education the Problem?

Although it does not take a high level of literacy to follow the instruction, "Vote for ONE of the following," or "Fill in the box next to the name of the candidate you wish to vote for," it does take some reading ability. We know that some Americans today, regrettably, find it extremely difficult to understand even the simplest written instructions. And, unfortunately, this group is disproportionately black. The U.S. Department of Education's 1992 Adult Literacy Study found that 38 percent of African Americans – but only 14 percent of whites – ranked in the lowest category of "prose literacy," which was defined as being unable to "make low-level inferences based on what they read and to compare or contrast information that can easily be found in [a] text."¹⁷

Black Americans, the study found, were 2.7 times as likely as whites to have the lowest level of literacy skills. Likewise, the 1998 National Assessment of Educational Progress

¹⁷ National Center for Education Statistics, Adult Literacy in America: A First Look at the Results of the National Adult Literacy Survey, National Center for Education Statistics (Washington, D.C.: U.S. Government Printing Office, 1993), 18, 113.

found that 43 percent of African American 12th-graders had reading skills that were “Below Basic,” as compared to just 17 percent of whites.¹⁸ Black students were 2.5 times as likely as whites to lack elementary reading skills. Among adults employed full-time, blacks are 4.1 times more likely than whites to be in the lowest prose literacy category.¹⁹

National studies provide no data on Florida specifically. However, we know from the National Assessment of Educational Progress that black 4th- and 8th-graders in Florida (no state-level data is available for 12th-graders) are no better readers than their counterparts elsewhere. Indeed, their scores are below the national average for African Americans.²⁰ No fewer than 57 percent of Florida's black 8th-graders in 1998 were Below Basic in reading, 10 points above the national average for African Americans, and 2.7 times as high as the white figure.

The majority report, though, denies that racial differences in literacy levels could be the source of the problem. It devotes only a brief paragraph to the matter, claiming that “a multiple regression analysis that controlled for the percentage of high school graduates and the percentage of adults in the lowest literacy category failed to diminish the relationship between race and ballot rejection.”²¹

But the regression results themselves are not provided for the critical reader to assess. When one turns to Dr. Lichtman's actual report for greater illumination, one finds nothing more than the exact language used in the commission report. This is a cavalier way to treat an issue as serious as this one. We have specifically and repeatedly asked the commission to provide us with the details of this regression analysis performed by Dr. Lichtman and the data on which it was based. But our requests have been denied.

Anyone uncomfortable with being asked to take at face value Dr. Lichtman's claim that literacy is irrelevant in explaining ballot spoilage should examine the very different analysis of the question presented in Judge Richard Posner's new study. Describing the results of his regression analysis in full detail, Judge Posner reaches the conclusion that it was “not because black people in Florida are racially distinct, but because they are poorer and less literate on average, that they are likely to encounter greater difficulty than whites in coping with user-unfriendly voting systems.”²²

The claim that the incidence of ballot spoilage or voter error is unrelated to education is counter-intuitive. It is also extremely puzzling, because just a few pages later in the same chapter the report addresses possible solutions to the problem. It urges the adoption of optical scanning systems with immediate feedback, what the report terms a “kick out”

¹⁸ National Center for Education Statistics, NAEP 1998 Reading Report Card for the Nation and the States, NCES 1999-500 (Washington, D.C.: U.S. Department of Education, 1999), 70.

¹⁹ National Center for Education Statistics, Literacy in the Labor Force: Results from the National Adult Literacy Survey, NCES 1999-470 (Washington, D.C.: U.S. Department of Education, 1999), 57.

²⁰ NAEP 1998 Reading Report Card, 260, and data from the NAEP website.

²¹ Report, 22; Lichtman Report, 6.

²² Posner, Breaking the Deadlock, 81.

feature to advise the voter that the ballot is not complete--that it gave no vote or too many votes for president, for example.²³ The point of a "kick out" system is thus to reduce *voter error*, although the Commission Report studiously avoids any mention of that term. Voters who are able read and follow the simple directions on the voting machine do not need any "kick out" system to advise them of their mistakes.

The report then goes on to say that even this reform would not completely "eliminate the disparity between the rates at which ballots cast by African Americans and whites are rejected." It estimates that it would only cut the disparity by about half. What else could be done? The Commission's answer is "effective programs of education for voters, for election officials, and for poll workers."²⁴

The commission majority seems to be declaring both that:

1. The lower average level of literacy among Florida's blacks has nothing to do with the allegedly higher rate of voter error by blacks; and
2. The solution to this problem is for the state of Florida to launch a huge new program designed to educate black voters on how to vote successfully, and to better instruct election officials and poll workers how to assist them.

The logic eludes us.²⁵

²³ Report, 37.

²⁴ Report, 34.

²⁵ It should be noted that the data that are available on literacy are so crude that it is hard to draw any solid conclusions by looking at variations across counties. The data are "synthetic estimates of adult literacy proficiency" derived from the U.S. Department of Education's 1992 National Adult Literacy Survey, available in National Institute for Literacy, The State of Literacy in America: Estimates at the Local, State, and National Levels (Washington, D.C.: 1998), and on a number of web sites. The best electronic source for them is <<http://www.casas.org>>, where they may be found by doing a search for adult literacy. The estimates for Florida counties are "synthetic," because the 1992 NALS did not include enough sample members living in Florida to allow for any conclusions about the state, much less about individual counties. They have wide confidence intervals – an average of 6 percent. More important, the literacy data are not broken down by race. So they cannot tell us anything about whether the small fraction of a county's voters who failed to cast a ballot successfully were people who had difficulty reading and *what the racial composition of that group might be*. Remember that the highest rate of ballot spoilage in any county was 12.4 percent, and that it was below 5 percent in nearly two-thirds of the counties. So we are talking about a very small group, and one whose presence is not likely to show in county-wide averages. Palm Beach County, for example, led the state in the number of spoiled ballots – nearly 30,000. Some 6.4 percent of all the ballots cast there were invalid. The proportion of Palm Beach residents who ranked in the bottom literacy category was 22 percent, a little below the state average of 25 percent. And the proportion who had attended college was 48 percent, again above the state average. But this does not allow us to conclude that the 6.4 percent of Palm Beach voters who failed to complete their ballots successfully were not primarily people who had difficulty in reading, comprehending, and following ballot instructions. The only reliable way of assessing the impact of literacy on ballot spoilage would be to administer the 45-minute NALS test to a representative sample of voters in each geographic unit used in the analysis.

How Many of the Spoiled Ballots Were Cast by First-time Voters?

A closely related and complementary explanation of what the majority report claims was a racial difference in rates of ballot spoilage is that an unusually high proportion of the blacks who voted in Florida in 2000 were first-time voters. According to estimates widely cited in the press, as many as 40 percent of the African Americans who turned up at the polls in Florida in November had never voted before.

It is not clear whether this was indeed true. Recently released figures from Florida's Division of Elections indicate that 10 percent of the voters who cast a ballot in November 2000 were African American, up only slightly from the 9.5 percent in 1996²⁶ Earlier estimates that blacks accounted for as much as 15 percent of the electorate were based on exit polls conducted by the Voter News Service, yet another indication of the fallibility of estimates coming from that organization. This evidence suggests that if an unusually large number of blacks voted for the first time in 2000, their numbers must have been largely offset by a unusually large drop in the numbers of more experienced black voters turning out, which seems unlikely.

Nevertheless, Dr. Lichtman did not know what the figures only released in July of 2001 would show. He must have been aware of widespread reports in the press that a flood of inexperienced black voters came to the polls in Florida last year, and that many had problems figuring out how to cast their ballots. It is thus startling and revealing that neither the majority report nor Dr. Lichtman's report even mention this as a possible source of voter error, much less choose to investigate it. Certainly, it was a variable of possible relevance, and there were data available that could have been used in a regression analysis.

The Missing Dimension: The Failure to Analyze Change Over Time

All of the statistical analysis developed by Dr. Lichtman concerns one moment in time—election day, November 2000. It is purely “cross-sectional” analysis. Most social scientists and historians recognize that the interpretation of social patterns on the basis of observations at just one point in time is fraught with peril. Relationships suggested by such analyses often do not hold up when the dimension of change over time is added. Earlier data concerning the same phenomenon should be examined. It is curious that a professional historian like Dr. Lichtman did not choose to place the 2000 election results in broader perspective by examining prior Florida elections. Surely he did not think that there was never an undervote or an overvote in Florida before Bush v. Gore.

Dr. Lott did two analyses that take the time dimension into account. First, he looked at spoilage rates by county for the 1996 and 2000 presidential races and asked how they might have been affected by changes in the racial demographics of those counties.

²⁶ Frank J. Murray, "Florida's Black Voter Turnout Grossly Overstated," Washington Times, July 11, 2001.

If the Commission's report's simple link between race and "disenfranchisement" were true, counties that had a sharp rise in the proportion of African American residents would be expected to also see a strong increase in rates of ballot spoilage, and those in which the black population was shrinking proportionally would be expected to have a declining rate of ballot spoilage.

But when you look at the scatter plots in Dr. Lott's report (Figures 1-4), the picture looks quite different. There appears to be *little relationship at all between racial population change and ballot spoilage*, and the one correlation that he finds runs *counter* to the majority report's argument: An *increase* in the black share of the voting population is linked to a slight *decrease* in spoilage rates, although the difference is not statistically significant.

For a second analysis, Dr. Lott compiled data on voting in the 1992 and 1996 as well as 2000 presidential elections. In the set of regressions he provides in his Table 5, the "*percent of voters in different race or ethnic categories is never statistically related to ballot spoilage.*" In the analysis supplied in his Table 6, which groups voters by age and sex and well as race, he found a very complex picture, with a positive link between the size of black population in five of ten age and sex categories, but just the opposite with the other five. To explain this strange pattern would require further research. Suffice it to say here that it is hard to imagine how discrimination could work against African American females in the 30-39 age bracket but in favor of black males of the same age.

Are the Precinct-level Estimates Any More Reliable? And What Do They Reveal?

Dr. Lichtman devotes considerable space to a discussion of precinct-level variations of in rates of ballot spoilage for three of the Florida's largest counties. His machine-readable data was not made available to us, regrettably, despite our repeated requests for it, and neither were we provided the details of his regression analysis. We suspect that if we had been able to reanalyze Dr. Lichtman's treatment of precinct-level data, we would have found it just as problematic as his work at the county level. But even in its absence we can offer a number of critical observations.

First, the only variables considered in this analysis are race (crudely dichotomized into the categories "black" and "nonblack") and voting technology. Dr. Lichtman has no precinct-level data at all on poverty rates, literacy levels, years of school completed, or other socioeconomic variable. So what he is really doing is the equivalent of his county-level simple correlations of race with rates of ballot spoilage, with no controls for any of the many other variables that could have influenced the pattern observed. The method is too simplistic to yield meaningful results with county-level data, and the same objection applies when it is employed with precinct-level data.

The precinct-level analysis presented in the majority report, we have already noted, can

yield mistaken and misleading results, because it also depends upon averages calculated for geographic units and yields findings tainted by the ecological fallacy. However, precincts are much smaller units than counties and are usually more homogeneous, so the results are likely to be somewhat closer to the truth than estimates based on intercounty variations. The report claims that the precinct-level analyses Dr. Lichtman conducted for Duval, Miami-Dade, and Palm Beach counties simply confirm the estimates derived from county-level data. A careful comparison of the figures, however, yields a quite different conclusion.

If the results of the precinct-level regression analysis in three counties are assumed to be accurate—and we repeat the caution that they too are open to serious question—we note that they show something quite interesting. They indicate that the *racial disparity in rates of ballot rejection was apparently much smaller* than it appeared from the county-level analysis.

As the table below indicates, using county-level data produces the estimate that black ballots were *nine times* as likely to be rejected as those cast by non-blacks. This estimate was given much play in the report and in press reports about it. But when you apply a more high-powered microscope to the election returns, and examine the evidence as reported by precinct, it turns out that this disparity was nowhere near nine to one. Instead, it ranged from 2.7 to 4.3. Thus it was from 52 percent to 70 percent *lower* than the statewide estimate about which so much was made in the report.

Estimated Racial Disparities in Ballot Rejection Rates: Percent Votes Rejected by Race and Ratio of Black to Non-Black Rejection

County-level estimates

	<u>Black</u>	<u>Non-Black</u>	<u>Ratio</u>
Florida	14.4	1.6	9.0

Precinct-level

Duval	23.6	5.5	4.3
Miami-Dade	9.8	3.2	3.1
Palm Beach	16.3	6.1	2.7

Extreme Case Precincts (90%+ black vs. 90%+ non-black precincts)

Duval	22.1	5.8	3.8
Miami-Dade	9.1	3.2	2.8
Palm Beach	16.1	6.2	2.6

[Derived from Tables 1-2 and 1-3 of Majority Report]

Further, the racial disparity ratios are narrower still in the precincts Dr. Lichtman examined as “extreme cases”—precincts that were 90 percent black (or 90 percent “non-black”). This is noteworthy. First, extreme case analysis should get us closer to the truth

because it gets us closer to measuring the variable of interest—in this case, race. If almost everyone in these select precincts is black, the problem of the ecological fallacy intrudes much less. *That the relationship of ballot spoilage with race weakens instead of growing stronger is very telling.*

In addition, extreme case analysis tends to sharpen and exaggerate estimated group differences. Blacks who live in all-black or virtually all-black neighborhoods are likely to be poorer and less educated, for example, than African Americans in precincts that have a broader racial mix, and are thereby more likely to spoil their ballots. And nonblacks who live in areas with few black neighbors may be above average in their income and educational levels, and less likely to make a mistake voting for that reason. If these factors were taken into account in the analysis, the racial difference might well vanish altogether.

Remarkably, Dr. Lichtman managed to discuss the relationship between his county-level and his precinct-level findings at the June 8, 2001 meeting of the Commission without ever calling attention to these striking (and inconvenient) facts. After mentioning the much publicized nine-to-one estimate that was so prominently featured in the report, he declared before turning to the precinct-level results that he didn't "like dealing with ratios because they don't tell you about people."²⁷ This is a very curious statement, since the report's best sound bite--that blacks were nine times as likely as nonblacks to cast ballots that were rejected--is a statement about a ration. Dr. Lichtman's report is filled estimates of the alleged relationship between race and ballot rejection rates without reference to a shred of evidence about the experience of any individual person.

Instead of considering the *ratio* of estimated ballot spoilage for black and non-black voters, Dr. Lichtman chose to look at percentage point differences. The estimated difference for the state as a whole was 12.8 points (14.4-1.6); for Duval it was 18.1; for Miami-Dade it was 6.6; for Palm Beach it was 10.2. Dr. Lichtman apparently averaged these when declared that the difference was "about 13 percent. It was a "double digit difference," he declared.²⁸ However, Miami-Dade's 6.6 percentage points is not a "double digit difference." More important, shifting the focus from *ratios* (9 to 1) to *percentage point differences* served to obscure a crucial fact: If precinct-level analysis yields better estimates than county-level estimates, the *actual* racial disparity in rates of ballot spoilage in Florida as a whole was far below nine to one. In fact, it was about three to one, and thus corresponded closely with the racial gap in literacy rates that we called attention to earlier.

Whose Fault Was It?

A reader of the majority report would be led to think that many tens of thousands of Floridians tried to register their vote for president and failed to have it count because

²⁷ Transcript of June 8, 2001 Meeting, 44.

²⁸ Ibid, 44.

Governor Jeb Bush and Secretary of State Katherine Harris didn't want their votes to count and failed in their responsibility to ensure that they did. "State officials," the report declares, "failed to fulfill their duties in a manner that would prevent this disenfranchisement." Chair Berry, introducing the report at the June 8 meeting of the Commission, charged that the Governor and Secretary Harris had been "grossly derelict" in fulfilling their responsibilities.

But which officials were responsible for the conduct of elections in Florida's constitutionally decentralized system of government? Power and responsibility were lodged almost entirely in the hands of county officials, the most important of them the 67 county supervisors of elections. If anyone was intent on suppressing the black vote or to "disenfranchise" anyone else, it would have required the cooperation of these local officials.

Thus, it seems natural to inquire about the political affiliations of Florida's supervisors of elections. If the U.S. Commission on Civil Rights seeks to show that the presidential election was stolen by Republicans, led by the governor and the secretary of state, it would be logical to expect that they had the greatest success in those counties in which the electoral machinery was in the hands of fellow Republicans. Conversely, it is very difficult to see any political motive that would lead Democratic local officials to try to keep the most faithful members of their party from the polls and to somehow spoil the ballots of those who did make it into the voting booth.

The report never asks this question, though it seems an interesting hypothesis to explore. The data with which to explore it are readily available. When we examined the connection between rates of ballot spoilage across counties and the political affiliation of the supervisor of elections, *we found precisely the opposite of what might be expected*. There was indeed a relationship between having a Republican running the county's election and the ballot spoilage rate. But it was a *negative* correlation of $-.0467$.

Having a Democratic supervisor of elections was also correlated with the spoilage rate – by $+0.424$. Dr. Lott has found that the ballot spoilage rate in counties with Democratic supervisors were three times as high as in those with Republican supervisors (see Lott's Table 3). Should we conclude that Republican local officials were far more interested than Democrats in making sure that every vote counted?

Of the 25 Florida counties with the highest rate of vote spoilage, in how many was the election supervised by a Republican? The answer is *zero*. All but one of the 25 had Democratic chief election officers, and the one exception was in the hands of an official with no party affiliation.

Dr. Lott provides a fuller examination of the possible impact of having a Democratic supervisor of elections in his Table 3, and adds another related variable—whether or not the supervisor was African American. Having Democratic officials in charge increases the ballot spoilage rate substantially, and the effect is stronger still when that official is

African American. (All African American supervisors of elections are Democrats.) Lott estimates that a 1 percent increase in the black share of voters in counties with Democratic election officials increases the number of spoiled ballots by a striking 135 percent.

We do not cite this as evidence that Democratic officials, for some bizarre reason, sought to disenfranchise blacks, and that black Democratic officials were even more eager to do so. That is manifestly absurd. It is worth noting for two reasons. First, it nicely illustrates the limitations of ecological correlations. Would anyone want to draw the conclusion from this correlation that the solution was to elect more Republican supervisors of elections?

Second, it has important bearing on the question of *who is to blame* for the large numbers of spoiled ballots in minority areas. The majority report argues that much of the problem was due to voting technology—the use of punch card machines or optical scanning methods that did not provide feedback to the voter produced a higher rate of ballot spoilage. But *who decided* that the voters of Gadsden County (the state's only black-majority county and the one with the highest rate of spoiled ballots) would use an optical scanning system in which votes were centrally recorded? *Who decided* that Palm Beach and Miami-Dade county voters would use punch card machines? Certainly it was not Jeb Bush or Katherine Harris. Nor was it Lawton Chiles. It was *Democratic local officials in those heavily Democratic counties who made those choices*.

It is worth noting that after these findings were mentioned at the June 27, 2001 hearing of the Senate Committee on Rules and Administration, the Chair of the Commission on Civil Rights professed to feeling no surprise. The Commission's Report, she maintained, had noted that local as well as state officials had responsibility for the conduct of the election. The report, though, devotes far more attention to Governor Jeb Bush and Secretary of State Katherine Harris than to county supervisors of elections who have primary responsibility for election day procedures. Furthermore, there is no hint in the report that the local officials in those counties that accounted for a large majority of the spoiled ballots were Democrats who had no conceivable interest in suppressing the black vote. It is true that the party affiliation of Governor Bush and Secretary of State Harris are not mentioned either. But that hardly matters because everyone knows what party they belong to, while few are aware of the fact that Florida's electoral machinery is largely in the hands of county officials who are Democrats.

It is easy, of course, to say with hindsight that Florida should have had a uniform system of voting and a common technology for all elections. The Commission recommends that. But if Governor Bush and Republican legislators had proposed adopting such a system before the 2000 election, we can imagine the outcry from their political opponents, who would have seen such a move as an improper attempt by the governor to control election procedures. Indeed, it might well have been argued that such a decision would have had a disparate impact on minority voters, since centralizing the electoral system would have diminished the power of the Democratic local officials they had chosen to put in office. It

could even have been argued that this transfer of power from officials who had the support of most minority voters would be a violation of the Voting Right Act, yet another attempt to deprive minorities of their opportunity to exercise political power!

Furthermore, it is inappropriate to be playing the blame game when there is no evidence that anyone understood that the use of certain voting technologies might increase the rate of voter error for some groups. Those who charge that African Americans were "disenfranchised" in Florida have never asked why it is that no one raised this issue before the election. If punch card balloting, for instance, has a racially discriminatory effect, why had not the NAACP, the Urban League, or any other organization belonging to the Leadership Conference on Civil Rights ever uttered a peep about it before November 2000? If civil rights leaders had understood that different voting systems are conducive to different rates of voter error, and that some can serve to disadvantage groups with below-average literacy skills, why didn't they raise the issue publicly and demand electoral reforms? If they did not grasp this fact, it is hard to see why we should assume that public officials did.

The Exclusion of Hispanics

The majority report speaks repeatedly of the alleged "exclusion" and "disenfranchisement" of "minorities" or "people of color." One section is headed "Votes in Communities of Color Less Likely to be Counted."²⁹ But what information are we actually given about all those "communities of color"? We were amazed and disturbed to find that the crucial statistical analysis provided in Chapter 1 is narrowly focused on just *one* of the state's "communities of color"—African Americans. The discussion completely ignores *Florida's largest minority group*—people of Hispanic origin.

This is revealing of the Commission's constricted vision. The 2000 Census counted 2.3 million African Americans in Florida, approximately 15 percent of the total population. But the state had 2.7 million Latinos, almost 17 percent of its population.³⁰

Astonishingly, Hispanics hardly get a mention in the majority report. How many Hispanics in Miami cast ballots that were "rejected"? An obviously important question that the authors of the report never asked. They include a few hasty references to correlations between the total minority population of the counties and the rate of ballot spoilage. But they provide no separate analysis at all of the state's largest minority group, or of any other minority group except African Americans.

Indeed, the analysis conducted by Dr. Lichtman treats not only Hispanics but Asians and Native Americans as well as if they were, in effect, part of the majority. He dichotomizes

²⁹ Report, 141

³⁰ U.S. Census Bureau, Profiles of General Population Characteristics, 2000 Census of Population and Housing: Florida, May 2001, Table DP-1. We state that the black population was approximately 15 percent of the total because its exact size depends upon the definition you use. Some 14.6 percent of Floridians reported that their sole race was black. If you add in people who considered themselves both black and something else, the figure increases to 15.5 percent, still substantially smaller than the Hispanic population.

the Florida population into two groups, blacks and “nonblacks.” The “nonblack” population includes, in addition to whites, the 2.7 million Hispanics, and almost half a million other residents who listed their race as Asian American or American Indian.³¹

A federal agency devoted to the protection of minority rights and to the inclusion of all thus seems to have an extraordinarily narrow and exclusive conception of who belongs in the minority population. In this report, the Commission majority in fact has *excluded more Floridians of minority background—quite a lot more—than it has included*. Whenever the report speaks broadly about “minorities,” it must be remembered that the supporting statistical analysis it provides ignores *all* minorities but blacks, and indeed merges most Floridians of minority background into the “nonblack” category along with the white majority.

An examination of the role of race in election procedures in the Florida 2000 election that completely ignores the voting experience of Hispanics, Asian American and Native Americans cannot be considered a valid investigation. From the perspective of the majority report, anyone who is not African American is just an undifferentiated part of the vast “nonblack” population, which comprises 85 percent of the total.

In presenting his findings at the June 8, 2001, meeting of the Commission, Dr. Lichtman remarked that after he concluded his report he had made an effort to examine the Hispanic vote. But, as of this date, the statistical analysis in the majority report still ignores Hispanics completely and retains its simplistic dichotomy between black and “nonblack” Floridians. It includes in an appendix one new graph produced by Dr. Lichtman (Appendix II-F), and yet makes no comment on it. Dr. Lichtman’s revised report includes only one new paragraph on the subject. In sum, any attention given to Florida’s Latinos was only as an afterthought.

II. The Testimony of Witnesses Fails To Support the Claim of Systematic Disenfranchisement

The report includes anecdotal evidence based on the testimony of a handful of individuals. It maintains that it has made a prima facie case that many Floridians were denied the right to vote, African Americans in particular.

These claims are not supported by the testimony the Commission received in Florida. The Commission heard from a total of 26 fact witnesses, representing only 8 of Florida’s 67

³¹ Ibid. In addition to the 2.7 million Hispanics and the 450,000 Asians or American Indians, another 697,000 Floridians reported that they were of “other race,” meaning other than white, black, American Indian, Asian, or Pacific Islander. Most of these “other race” respondents were, in all likelihood, Latinos, and thus cannot be fairly added to the total excluded from attention because it would entail double counting. All Hispanics were excluded from the Commission’s analysis unless they identified as African Americans on the census race question, which hardly any did.

counties. During the post-hearing review, local election officials provided information which discredited significant portions of that testimony, but those corrections and clarifications were usually ignored in the final report.

Nonetheless, based on witnesses' limited (and mostly, uncorroborated) accounts, the Commission majority insists that there were "countless" allegations involving "countless numbers" of Floridians who were denied the right to vote. Without verifiable and quantifiable evidence to support its predetermined conclusion that "disenfranchisement" took place, the report falls back on vague assertions that, "it is impossible to determine the total number of voters who were unable to vote on election day."

There is no question that some voters did encounter difficulties at the polls, as would doubtless be the case with any election in which six million people cast a ballot. But not a shred of evidence found by the Commission suggests any systematic attempt to deprive any voter, minority or otherwise, of his or her right to vote.

Most of the complaints the Commission heard in direct testimony at the two hearings involved individuals who arrived at the polls on election day to find that their names were not on the rolls of registered voters. The majority of these involved bureaucratic errors (a lack of proper assistance from misinformed or understaffed poll workers); inefficiencies within the system (insufficient phone lines to verify registration status); and/or error or confusion on the part of the voters themselves. Some voters did not know the location of their precinct before going to vote. Some did not bring proper identification to the polling station. Others were confused or uncertain about their right to request and receive assistance or to ask for another ballot if they believed they had made a mistake.

According to the testimony of a majority of the witnesses at the hearings, there was no "systematic disenfranchisement or widespread discrimination" in Florida. Although the following facts are either buried in the text of the report or omitted altogether, they are representative of the testimony the Commission heard throughout the three days of hearings:

- Florida's Attorney General testified that of the 2,600 complaints his office received on the election, 2,300 were related to the confusing butterfly ballot, and only three alleged discrimination on the basis of race.
- An expert on voting rights and election law, Professor Darryl Paulson, testified that the problems in Florida were due to "a system failure without systemic discrimination." He also observed that "across the United States, there were 2.5 million votes that were not counted. And whenever you have an election system that requires 105 million people to vote essentially in a span of 12 hours, you have created a system guaranteed to have voting problems."
- Professor Paulson later added: "If the intent of state officials was to discriminate against African-Americans, I would argue it was a dismal failure. The 1990s

have ...seen a tremendous explosion in the number of black elected officials throughout the state. We now have a record number of African-Americans in the state legislature [and on] city councils, school boards, [and] county commissions. Florida now has a competitive two-party structure that... in many ways makes it extremely difficult for a systematic type of discrimination to occur.”

- A representative of the League of Women Voters testified that there had been many administrative problems, but stated: “We don’t have any evidence of race-based problems, well actually I guess don’t have any evidence of partisan problems.”
- Florida’s Commissioner of Agriculture, a designee to the Elections Canvassing Commission, testified regarding the relationship of voting problems to race and ethnicity: “I don’t think it’s a party issue or a racial issue. I think it’s a breakdown in the system.”
- A witness from Miami-Dade County, who said she attributed the problems she encountered not to race but rather to inefficient poll workers, stated: “I think [there are] a lot of people that are on jobs that really don’t fit them or they are not fit to be in.”
- Another witness from Miami-Dade claimed she could not vote because poll workers were unable to find her name on the voter list: “In light of everything that’s come out it’s kind of hard for me to say whether or not it was discriminatory or whether or not it was just an inadvertent mistake.”
- A witness from Broward County who alleged she was not allowed to vote by affidavit because her name was not on the list of registered voters said : “I don’t think it was a racial situation. [The poll workers] were mostly white and they were still trying to help me. [The system] was just not equipped to handle the job that we had over there a lot of people were misinformed and were not being helped. It was like a big chaotic place over there. It was not about a racial thing.”

III. The Commission's Report Failed to Distinguish Between Bureaucratic Problems and Actual Discrimination

Other than the “quantitative evidence” of its flawed statistical analysis, the report claims that, “the only evidence that exists is the testimony of those who have stated publicly that they were denied the right to vote and the credibility of their testimony.” However, while the first-hand accounts of witnesses were helpful in describing election-day problems, they did not point to what the majority report calls a “disturbing trend of disenfranchisement.”

The majority of those witnesses who experienced problems and who came before the Commission testified that they were ultimately able to cast their vote, despite the problems they described; only a handful were not. The majority report fails to distinguish between mere inconvenience, difficulties caused by bureaucratic inefficiencies, and instances of possible discrimination. For instance, a complaint from a white male voter who got mud on his shoes

on the path to his polling place is accorded the same degree of seriousness as the case of the seeing-impaired voter who required – but was denied – assistance in reading the ballot, or the African American voter who claimed she was turned away from the polls at closing time while a white man was not.

For the most part, those who testified before the Commission told of problems in voting, not of being prevented from voting. The most frequent problems mentioned included the following:

1. Inability of some poll workers to confirm eligibility status

The report argues that in the last election, “many people arrived at their polling places expecting to cast their ballots for the candidates of their choice, but many left frustrated after being denied this right.” To support this charge, the report points to “consistent, uncontroverted testimony regarding the persistent and pervasive inability of election poll workers to verify voter eligibility during the November 7 presidential election.”

It is true that the Commission heard several complaints about jammed phone lines that, in many cases, prevented poll workers from getting through to headquarters to confirm the eligibility of voters whose names did not appear on the rolls. Some voters found that their names had been left off the voting lists because of bureaucratic error and through no fault of their own. In a perfect world, things like this would never happen. But we know of no state in which problems of this kind are utterly unknown.

Furthermore, many of these complaints were from voters who failed to verify the location of their assigned precinct or polling place before going to vote on election day. Some had failed to notify their elections board of a change in address. Some neglected to bring the necessary proof of eligibility to vote, and still others did not correctly fill out their mail-in applications through “motor voter” registration.

Neither voters nor poll workers testified that the problems they experienced amounted to widespread disenfranchisement in Florida. In fact, according to researchers at the *Miami Herald*, some poll workers who struggled with insufficient phone lines admitted that they erred on the side of including, rather than excluding voters. When they were unable to get through to headquarters, they simply went ahead and let the person vote despite the questions about their status.

What we learned in Florida was that all of these factors can contribute to an overloaded

communications system on election day, and that there is no substitute for greater voter awareness and better trained elections staff to handle inquiries.

2. Polling places closed early or moved without notice

The Commission received no evidence that this was more than a trivial problem. There is absolutely no evidence upon which to conclude, or even suggest, that there was a pattern of closings or movement designed to disenfranchise voters. One county supervisor testified that in some cases there are urgent reasons for moving a polling facility—for example, one polling place had burned down on the Saturday before election day. But the public is notified of the change in all such cases. The Palm Beach County supervisor testified that, “Nobody has come to me to give me specifics on which precinct they were turned away from so that I could do the investigation to see what exactly happened.”

The Commission did hear testimony from one poll worker about a gated community where the gates had shut automatically at 6:15 p.m. and had to be reopened by police officers. The Palm Beach supervisor asserted that this incident was “never reported” to her but that it did not seem likely, given that the facility in question was located at a water works facility that would have had a government staff person there to open the gates. As the supervisor explained, “I’ve heard many people tell me things and then I asked them whether they themselves experienced it and they said, no, they heard it from somebody else. And I wonder if this person [the witness about the gated community] actually experienced that themselves.”

In a letter to the General Counsel during the affected agency review, David Leahy, the Supervisor of Elections for Miami-Dade has challenged the testimony of several witnesses, including one (Felix Boyle) who insisted that his voting place had been changed without prior notice. After investigating this matter, Mr. Leahy affirmed in a letter that “Felix Boyle stated that the polling place for Precinct #36 was in a different building than was used in the 2000 primary election. The same building was used for both elections.” Ignoring this rebuttal altogether, the report cites Mr. Boyle’s case as an instance of “polling places moved without notice.”

If the Commission had been truly interested in the important issue of uniform polling-place hours, it might have made more than a single, passing mention of one of the more widely-publicized problems that emerged during the last election: the announcement by all five television networks at 7:00 p.m. Eastern time that the polls in Florida had closed, when the polls in the Panhandle counties were still open for another hour. There is no way of knowing exactly how many voters were discouraged from going to the polls because of this misinformation, but a close review of the turnout figures by John Lott estimates that it likely cost George W. Bush at least 10,000 votes.³² The majority’s lack of interest in exploring this issue suggests that its research was shaped by its preconceptions and political predispositions.

³² John R. Lott, Jr., “Documenting Unusual Declines in Republican Voting Rates in Florida’s Western Panhandle Counties in 2000,” unpublished paper, May 2001.

3. Accessibility issues

Some of the most compelling and direct testimony in Florida were accounts of the problems of accessibility for disabled voters. Although the disabled voters who testified before the Commission claimed that they themselves ultimately voted, they described a range of difficulties facing the disabled on election day, including insufficient parking, inadequate provision for wheelchair access, and other difficulties involving ballots and voting technology. The barriers they described appear to constitute a long-standing problem that was not just confined to Florida or to this presidential election. It is unfortunate that the report does not examine the ongoing efforts of Florida state officials Governor Bush's ADA working group and a task force working under the Secretary of State to address these concerns.

In the same chapter on "accessibility issues," the report addresses allegations that an "overwhelming number" of Haitian-American voters, "many Latino voters," and "many persons who were not literate" were "denied adequate assistance" in casting their ballots. Here, the discussion of accessibility problems is much less clear. Much of the testimony was from advocacy group and based on second-hand, anecdotal information.

For instance, the Commission heard from a representative of a Haitian-American organization in Miami-Dade that, in addition to the problems of long lines and understaffed polling facilities, there were problems regarding a lack of bilingual ballots. However, few details were presented to help gauge the extent of this problem, and no attempt was made to properly investigate the seriousness of these alleged problems.

When the Miami-Dade County supervisor was questioned about the allegations of this witness, he referred to a county ordinance that requires the supervisor to determine which precincts have a significant Haitian American voter population and to provide bilingual ballots in those precincts. He testified that, for purposes of the November 2000 election, he determined there were 60 precincts with a significant Creole population. In addition to providing bilingual ballots, Miami-Dade also did sample ballots in English and Creole and publicized those in Haitian-American newspapers. The Miami Dade supervisor maintained that the earlier witness might have lived in a precinct that did not have a significant Haitian American population. The report makes no attempt to explore the issue more deeply.

4. "Motor Voter" Problems

The report asserts that "[m]any Floridians alleged that they registered to vote through the Department of Motor Vehicles (DMV) and learned later that they were not registered. Many of these disappointed citizens filed complaints with the attorney general's office and/or the Democratic Party." The allegation here appears to be that Republicans in Florida somehow engineered a "motor voter" conspiracy. There is no evidence to support that claim. The report itself concedes that, according to the testimony of the director of

the Division of Driver Licenses, problems arose because voters failed to complete their motor/voter applications correctly and/or in a timely manner. References to one such individual were stricken from the report when the affected agency's responses determined that this individual had submitted an incomplete registration form. The report does not mention the concern that the "motor voter" system frequently tends to err on the side of letting voters vote when in fact they are not be eligible.

5. Confusing Ballots

Although some witnesses testified about the confusion caused by the "butterfly ballot" in Palm Beach County, no evidence was presented that the butterfly ballot was targeted to particular groups, as the Commission originally suggested in its "preliminary" report of March 9. During the hearings, the Commission heard varying accounts regarding "defective" ballots. A rabbi from Palm Beach County testified that when he spoke with a group of 500 people within his congregation in Palm Beach County, about 20 percent complained that they had problems with the butterfly ballot ("their arrows did not line up with the holes"); the rest of the group experienced no such problems and "simply laughed."

The supervisor of elections for Palm Beach County later testified that, in some cases, it appeared that voters using the butterfly ballot failed to properly line up the ballot in the voting machine. The supervisor also explained that certain community groups may have mistakenly instructed voters to "punch the second hole" for Gore "when he was not the second hole; he was the third hole." Others had been told to "vote for Lieberman," but "if they followed the line where Lieberman's name was, it punched another hole down because the President and Vice President are grouped together."

The supervisor also testified that, "In Palm Beach, sample ballots were sent out to all registered voters," and she contested earlier charges regarding defective ballots. She explained that she herself had never been alerted to or received any complaints about the actual card not fitting into the machine properly: "The ballot cards are all purchased from the same company and they're all printed at the same time. They all come off the same press. They're all printed on the exact same size paper. You've got the candidate's name, the arrow pointing to the number and then the hole if you follow straight across then you'll hit the hole."

In Palm Beach County, the major problem was a ballot printed in large type for the benefit of older voters. In Duval County, a major problem was faulty instructions to voters by Democratic party workers, provided with the intention of maximizing Democratic votes lower down on the ballot. The biggest problem with ballots of all kinds was the fact that there were ten candidates on the ballot for President, compared with only three or four in previous years.

Another significant issue, which the report virtually ignores, concerns the problems of first-time voters, many of whom received faulty how-to instructions from the very groups

that urged them to vote in the first place. As Isiah Rumlin, head of the NAACP in Duval County, has recently stated: “We didn’t do any voter education. We didn’t know we needed to. In retrospect, we should have done a better job.”

As a result of the election-day confusion in Florida and many other states, there is a new emphasis on voter education initiatives and the role that can be played by advocacy groups and community organizations. In Broward County, for example, the new supervisor of elections, Miriam Oliphant, has launched a program to involve local churches in the efforts to better educate voters, recruit new ones, and prevent many of the difficulties that occurred during the 2000 election.

IV. The Majority Report's Interpretation of the Voting Rights Act Distorts the Law

The majority report argues that election procedures in Florida violated the Voting Rights Act. Its interpretation bends the 1965 statute totally out of shape.

It is absolutely correct, as the Commission report asserts, that violations of the 1965 Voting Rights Act do not need to involve intentional disenfranchisement. Section 2 of the act was amended in 1982 in an effort to circumvent the Supreme Court's decision in *Bolden v. City of Mobile*, 1980. *Bolden*, in insisting that plaintiffs in an equal protection suit demonstrate discriminatory intent, had brought the statute in conformity with Fourteenth Amendment standards in general. The amended provision allowed minority voters nationwide to challenge methods of election on grounds of discriminatory "result."

The concern at the time was that plaintiffs, in the wake of *Bolden*, would have to find a smoking gun—unmistakable evidence that public officials deliberately, knowingly set out to deprive minority voters of the Fourteenth and Fifteenth Amendment rights.

No witness, however, from the civil rights community argued that all voting mechanisms or procedures with a disparate impact on black or Hispanic voters would violate the law. Thus, the 1982 Senate Judiciary Committee Report, in explaining the newly amended Section 2, defined a jurisdiction in violation of the law as one in which “racial politics dominate[d] the electoral process.” At the 1982 Senate Hearings, a distinguished civil rights attorney testified that claims of voter dilution would rest on "evidence that voters of a racial minority are isolated within a political system... 'shut out,' i.e. denied access... [without] the opportunity to participate in the electoral process."

If all voting procedures with a disparate impact on minority voters violated the statute, then all registration processes, in jurisdictions with black and Hispanic residents, would be legally questionable. As you know, less affluent, less educated citizens tend to register and vote at lower rates, and many of those educationally and economically disadvantaged citizens are members of those minority groups.

Voter error is analogous to low registration rates; it is more likely to occur among the less educated and the less affluent. And thus, despite the thousands of voting rights cases on the books, the majority report cannot cite any case law that suggests punch card ballots, for instance, are potentially discriminatory. Or that higher error rates among black voters suggest disenfranchisement.

The disparate impact test is actually very complicated, and always has been. For instance, a multimember district in which whites are a majority may have a disparate impact on minority voters. But as the Supreme Court has said (*Whitcomb v. Chavis*, 1971), the candidates supported by black voters may consistently lose, but that disparate impact upon black representation (and officeholding) is not necessarily a violation of minority voting rights. In *Whitcomb*, black voters were Democrats in a Republican County. It was not exclusion, but the process of party competition and the principle of majority rule that denied blacks the representation they sought. Political party, not race, determined the electoral outcome.

This same logic still runs through the complicated process by which a judicial determination is made in a section 2 Voting Rights Act case. Courts must determine whether minority voters have had "less opportunity" to participate in the electoral process, a finding that requires plaintiffs to meet a multifaceted test. Plaintiffs must show, for instance, that there has been "a significant lack of responsiveness of the part of elected officials to the particularized needs of the members of the minority group"; that "political campaigns have been characterized by overt or subtle racial appeals; and that voting is "racially polarized." These are just a few items off the list of so-called "factors" to which courts are instructed to refer in judging the merits of a vote dilution suit; disparate impact alone never settles the "equal opportunity" question.

There is another important point. The question of a Section 2 violation can only be settled in a federal court. Plaintiffs who charge discrimination must prevail in a trial in which the state has a full opportunity to challenge the evidence. There is a reason why, in contrast to Section 5 in the Act, Section 2 requires a trial in a federal court. Section 5 claims can be settled in the Justice Department itself, through the process of administrative review. That is because they pose simpler questions – namely, whether a new election procedure or practice is clearly intentionally discriminatory, or whether its impact is such as to leave minority voters worse off than they had been. A typical Section 5 question would thus be: Are newly drawn redistricting lines likely to result in fewer black officeholders than before?

Section 2, on the other hand, demands an inquiry into the complex issue of racial fairness. Adjudicating competing claims about equal electoral opportunity, as the Supreme Court has noted, requires an "intensely local appraisal" – the specific, detailed knowledge that only a court can obtain. And it demands the chance that only a trial can provide for the challenged jurisdiction to answer the charges. As the Chair herself has conceded many times, the Commission is: "not a court" and cannot arrive at verdicts that belong exclusively to the judiciary. Yet, while the majority report does admit that the

Commission cannot determine whether violations of the Voting Rights Act have actually occurred, in fact it unequivocally claims to have found “disenfranchisement,” under the terms of the statute.

The Commission’s findings are likely to inspire some people to call for federally-mandated election procedures of one sort or another. This would be a grievous error. The architects of the Constitution left matters of suffrage almost entirely in state hands, although subsequent Amendments prohibited a poll tax and denial or abridgment of the right to vote on account of race, gender, or age (after eighteen). It is true that in 1965 the Voting Rights Act broke with constitutional tradition, but that was a uniquely draconian response necessitated by the persistent and egregious infringements of basic Fifteenth Amendment rights that pervaded the Jim Crow South.

None of the Commission’s findings establish that we are confronting a national emergency in any way resembling that in 1965. Florida itself (unlike the states of the Deep South in the 1960s) has readily acknowledged the need for reforms to its voting procedures, and has already acted to remedy problems evident in the November election. State action is appropriate; federal intrusion is not.

More voter education is clearly needed—a job for the states themselves, for political parties, and for other interested organizations. Donna Brazile, Al Gore's campaign manager, recently lamented the inadequate voter education in preparation for the last election. "I take full responsibility for the lack of voter education resources that could have helped us," she said.³³ While we think Ms. Brazile blames herself excessively, we do look forward to a greater effort to prepare voters to cast their ballots in the future. That effort is not mandated by the Voting Rights Act, but is certainly much to be desired.

V. The Report Mistakenly Holds Florida State Officials Responsible for The Conduct of Elections

The Commission's report makes a highly politicized attack against Florida state officials. As previously noted, the report asserts that “State officials failed to fulfill their duties in a manner that would prevent this disenfranchisement,” and calls on the U.S. Department of Justice to “institute formal investigations... to determine liability and to seek appropriate remedies.”

The charges the majority has directed against the Governor and the Secretary of State and other officials in Florida are particularly disturbing. At the Commission’s interrogation in Tallahassee, the Governor was *the only witness* during the entire set of hearings to be denied the opportunity to make an opening statement. The report criticizes the Governor for giving too much deference to local authorities. If, instead, Governor Bush had before the election had called for a more centralized electoral system with greater power for state

³³ Stan Simpson, "Report Inspires Gore Aide," Hartford Courant, June 11, 2001,

officials, he undoubtedly would have received criticism from the same political quarters for trying to grab power in order to manipulate the election returns to favor his brother.

The majority report admits grudgingly that it found no “conclusive evidence” of a state-sponsored conspiracy to keep minorities from voting. But as several independent observers have pointed out, this is maliciously misleading phrasing, since there was in fact *no evidence whatsoever* of a conspiracy at all, conclusive or otherwise.

Contrary to what the majority has asserted, state and local officials have refuted in detail the serious allegations the Commission has made against them.

The testimony in Florida clearly explained and delineated the delegation of authority and decentralized responsibility for elections, under Florida’s constitution. Testimony from all the public witnesses with jurisdiction over these matters provided no evidence of criminal misconduct in connection with the Florida 2000 elections. Testimony also revealed the seriousness accorded to the work of the Governor’s bipartisan task force on election reform. Ignoring all of this available evidence, the Commission insists that Florida state officials are guilty of “gross neglect” in fulfilling their responsibilities regarding election matters. This charge in the majority report again violates fundamental concepts of due process. Not only are its conclusions not based upon evidence contained in the record of the hearings. They are in direct conflict with the testimony of the witnesses who were most knowledgeable about such matters.

The report refuses to accept a key point that emerged in testimony during the hearings – that the elections supervisors are “independent, constitutional officers.” That is why, as a recent piece in *The Economist* points out, “laying so much blame on the governor and secretary of state is unrealistic.”³⁴ The article goes on to explain that, “Most of the key decisions were made in Florida’s 67 counties rather than in Tallahassee,” and, “Many of the counties with the highest number of voter errors were under Democratic control.” Indeed, our statistical analysis reported above makes plain that the problem the Commission report focuses on was very largely confined to counties in which the electoral machinery was in Democratic hands.

The majority report criticizes Governor Bush for having “apparently delegated the responsibility” for the conduct of the election. It fails to grasp that this is precisely what Florida law provides. The Secretary of State is criticized for having taken a “limited” role in election oversight, supposedly contradicting the position she took before the Supreme Court” in *Bush v. Gore*. The majority report fails to explain, however, that *Bush v. Gore* (which addressed the issue of “recounts” and the certification of the results of the election) had *nothing to do* with the authority of county officials over the conduct of elections at the local level in Florida. The report glosses over the inconvenient fact that, under Florida law, Governor Bush has virtually no authority over the voting process, and the Secretary of State’s role is mainly to provide non-binding advice to local officials.

³⁴ “Unfair, Again,” *The Economist*, June 9, 2001.

The report's claim that the governor and other officials are to be blamed (and investigated) for not having taken full responsibility for all of the problems that occurred during the Florida election cannot be reconciled with the actions of Commission's own general counsel in conducting the "affected agency" review. On June 8, when questioned as to why state officials were given only portions of the report to review, the general counsel explained that, "we selected the portions that are relevant... based on activities and responsibilities." The general counsel went on to say that, "we just thought it would be a bad idea [to send the full report] because there are responsibilities and activities that don't pertain to the governor's office...." Since the general counsel sent the governor only about 30 pages of a 200-page report, this would seem a tacit recognition that in fact the governor's responsibilities for the conduct of elections are quite limited .

It is also ironic that the Chair chose to berate Secretary Harris during the Tallahassee hearing for not having assumed more responsibility for the problems that occurred on election day. At the hearing, the Chair explained that, even though Commission on Civil Rights delegates to the staff director the authority to run the day-to-day operations of the Commission, she herself – as Chair – must assume ultimate responsibility for *everything* that happens at the Commission. That explanation stands in stark contrast to the statements issued by the Chair in the wake of the unauthorized leak of this report, when the Chair asserted that she was "only one vote" on the Commission.

The report charges that the governor, the secretary of state and other state officials should have acted differently in anticipation of the high turnout of voters. What the Commission actually heard from "key officials" and experts was that the increase in registration, on average, was no different than in previous years; that since the development of "motor voter" registration, voter registration is more of an ongoing process and does not reach the intensity it used to just prior to an election; and that, in any event, registration is not always a reliable predictor for turnout.

One expert who has studied voter turnout and participation for 25 years testified that, "The Florida turnout was not particularly high" – only 2.2 percent over 1996. Several supervisors of elections testified that the highest turnout occurred in 1992 (which had an 80 percent turnout compared to the 64 percent turnout in 2000).

The majority report also faults Florida state officials with having failed to provide the 67 supervisors of elections with "adequate guidance or funding" for voter education and training of election officials. It fails to mention the Commission also learned that, under Florida's Constitution, requesting and allocating resources is a local responsibility, one which belongs to the supervisors of elections. The county supervisors are independent, constitutional officers who make their budget requests to the Boards of county commissioners. It is up to the county commissioners to approve or reject those requests, and there is currently no process for appealing to the state government. The majority of the supervisors of elections who came before the Commission testified that they themselves did not request additional resources prior to the election but, that even if they

had, such a request would have properly been directed to their county commissioners, not to the governor or to the Division of Elections.

VI. The Commission's Analysis of the Felon List Question is Slanted

The Majority Report suggests that one important instrument of black “disenfranchisement” was the so-called “purge list,” a list of persons who should be removed from the voting rolls because they had a felony conviction. Regrettably, the list supplied to state officials by the firm hired to do the work mistakenly included the names of some persons who had no felony convictions.

The Majority Report implies that this was no innocent mistake, but another effort to suppress the black vote. The sole piece of supporting evidence it cites is a table with data on Miami-Dade County. Blacks were racially targeted, according to the report, because they account for almost two thirds of the names of the felon list but were less than one-seventh of Florida’s population.

This might seem a striking disparity. But it ignores the sad fact that African Americans are greatly over-represented in the population of persons committing felonies--in Florida and in the United States as a whole. The Majority Report never bothers to ask what the proportion is. Without demonstrating that considerably less than two-thirds of the previously convicted felons living in Miami-Dade County were African American, the racial disproportion on the felon list is completely meaningless.

It is not only meaningless but irrelevant. The vast majority of the people on the felons’ list were properly listed. It was illegal for them to vote according to Florida law. The Commission may not like that law, but it is not its business to opine on the matter.

The only possible civil rights violation here is the allegation that disproportionately large numbers of African Americans were put on the felon list falsely. Had the Commission bothered to examine its own data supplied in the report, it would have found that the truth was just the opposite of what it claims.

The table reveals that 239 for the 4,678 African Americans on the Miami-Dade felons’ list objected when they were notified that they were ineligible to vote and were cleared to participate. They represented 5.1 percent of the total number of blacks on the felons list. Of the 1,264 whites on the list, 125 proved to be there by mistake-- which is 9.9 percent of the total. Thus, the error rate for whites was almost double that for blacks.

If we accept the conspiratorial view that the errors on the felons list must have been targeted so as to reduce the voting strength of some group, it was whites, not blacks, who were targeted. The error rate for Hispanics was almost as high as that for whites---8.7 percent. Since the data are from Miami-Dade, with its huge Hispanic population, one might conclude that someone hoped to suppress both the the non-Hispanic white vote and

the Hispanic vote.

Why was a "purge list" created in the first place? At the hearing in Miami, the Commission received testimony from DBT/Choicepoint, Inc., the company which provided the state with a list of individuals who might be convicted felons, registered in more than one county or even deceased. The compilation of the list was part of an anti-fraud measure enacted by the Florida legislature in the wake of Miami's 1997 mayoral election, in which at least one dead voter and a number of felons cast ballots.

The Commission heard from DBT that approximately 3,000 to 4,000 non-felons (out of approximately 174,000 names) were mistakenly listed on this so-called "purge" list provided to the state. The list identified 74,900 potentially dead voters, 57,770 potential felons, and 40,472 potential duplicate registrations. Under Florida law, the supervisors of elections were required to verify the ineligible-voter list by contacting the allegedly ineligible voters. Some supervisors believe the list to be unreliable, and did not use it to remove a single voter. It is regrettable that the Commission made no effort to determine how many of the 67 supervisors of elections did or did not use the list. According to recent studies, the total number of wrongly-purged alleged felons was 1,104, including 996 convicted of crimes in other states and 108 who were not felons at all. This number contradicts the Commission's claim that "countless" voters were wrongly disenfranchised because of inaccuracies in the list.

Most notably, the Commission did not hear from a single witness who was prevented from voting as a result of being erroneously identified as a felon. One witness did testify that he was erroneously removed from the voter list because he had been mistaken for another individual on the felon list whose name and birth date were practically identical to his. However, he was able to convince precinct officials that there had been a clerical error, and he was allowed to vote.

In pursuing its attack on the purge list, the Commission completely ignored the bigger story. Approximately 5,600 felons voted illegally in Florida on November 7, approximately 68 percent of whom were registered Democrats. On June 8, General Counsel Hailes was asked why the report failed to address the issue of ineligible voters who cast ballots on election day. His response was: "That's not part of the scope of our report."

Based on extensive research, the *Miami Herald* discovered that, "among the felons who cast presidential ballots, there were "62 robbers, 56 drug dealers, 45 killers, 16 rapists, and 7 kidnapers. At least two who voted were pictured on the state's on-line registry of sexual offenders." According to the *Herald*, the biggest problem with the felon list was not that it wrongly prevented eligible voters from voting, but rather that it ended up allowing ineligible voters to cast a ballot:

Some... claim that many legitimate voters--of all ethnic and racial groups, but particularly blacks--were illegally swept from the rolls through the state's

efforts to ban felons from voting. There is no widespread evidence of that. Instead, the evidence points to just the opposite--that election officials were mostly permissive, not obstructionist, when unregistered voters presented themselves.³⁵

The *Palm Beach Post* conducted its own extensive research into the problems with the flawed exceptions list.³⁶ The Post's findings, which corroborate the major conclusions of the Herald's investigation, include the following:

- Most of the people the state prevented from voting probably were felons.
- Of the 19,398 voters removed from the rolls, more than 14,600 matched a felon by name, birth date, race and gender.
- More than 6,500 were convicted in counties other than where they voted, suggesting they would not have been found by local officials without the DBT list.
- Many of these felons were convicted years ago, and they had no idea that they did not have their civil rights [to vote].
- Many had been voting and unwittingly breaking the law for years.

The report's message is that nobody in authority did enough data verification. But the Commission itself failed to verify key arguments made in its report. The letter (submitted per the affected agency review) from Michael R. Ramage, General Counsel for the Florida Department of Law Enforcement, provides a lengthy clarification of the FDLE's role in verifying the felon status of voters whose names had been forwarded by the local supervisor. (Note that, according to Mr. Ramage's letter to Mr. Hailes, the FDLE was allowed to review *only three pages* of the 200-page report, despite the prominence the report gives to this controversial issue.) In his letter to General Counsel Hailes, dated June 6, 2001, Mr. Ramage maintains that the Commission's findings are "wrong and based on erroneous assumptions," and places undue emphasis on "anecdotal examples of problems." His letter later goes on to detail FDLE's efforts regarding verification of the "exceptions" list:

[I]t is important to note that during the pertinent time frame, FDLE responded effectively to nearly 5,000 voters whose names matched those of convicted felons in Florida's criminal history records. (It is not unusual for criminals when arrested to use a name, date of birth, address, social security number, etc., other than their own.)... A number of those who believed they had been wrongfully identified as not being able to vote were ultimately found to be

³⁵ Merzer, *Miami Herald Report*, 105,

³⁶ Palm Beach Post, "Felon Purge Sacrificed Innocent Voters," May 27, 2001.

incorrect. They were, in fact, not eligible to vote. Likewise, a number of those who raised a concern were ultimately found to be eligible to vote. The process worked to resolve issues. Of those voters who contacted FDLE to appeal the notice from a local supervisor of elections that they were ineligible to vote, approximately 50 percent were confirmed to be Florida convicted felons, and 50 percent were determined not to have a conviction in Florida for a felony.

While the General Counsel on June 8 indicated that some revisions would be made to acknowledge the “extraordinary efforts” by the FDLE, no revision has been made in the conclusions, which are still wrong and based on erroneous assumptions. Certainly, no eligible voter should be wrongly prevented from doing so, but at the same time, election officials have a compelling interest in preventing voter fraud committed by convicted felons. The Commission majority failed to look at all the facts regarding the felon list. Instead of focusing on what it calls “the reality” of list maintenance, it uses anecdotes to support its call for an extensive and unwarranted investigation by the U.S. Department of Justice.

There is also the additional question of voter fraud. On June 8, the Chair explained that the report did not look at the issue of voter fraud, since “fraud does not appear to be a major factor in the Florida election,” and that, in any event, this was “beyond the scope” of the Commission’s investigation. Thus, the report single-mindedly pursues only one kind of vote dilution (allegations that eligible voters were denied the right to vote) while completely ignoring the other (allegations that ineligible voters were allowed to vote).

Only in the report’s introduction is there a brief mention of Complaints of Voter Fraud, “listed along with the Western Florida Time Zone Controversy and Absentee Military Ballots as “other factors” that “could have contributed to voter disenfranchisement in Florida.” (In other words, the main concern is with voting irregularities that could be interpreted as having a disparate impact on Democratic voters. Factors that were more likely to have had a disparate impact on Republican voters were simply shoved aside.) The report then goes on to explain that, “while recognizing that the above factors do raise concerns of voting irregularities, the Commission did not receive many complaints or evidence during its Tallahassee and Miami hearings pertaining to how these issues created possible voter disenfranchisement in Florida.”

This explanation is incorrect and disingenuous.. First of all, at the Commission’s meeting of December 8, 2000, when the Commission reached its decision to conduct an investigation of the Florida election, there was lengthy discussion of the Commission’s statutory responsibility to investigate “any patterns or practice of fraud.” Chair Berry herself explained that “if there are people who engaged in fraud or violated the laws, we would hand them over for prosecution.” The Chair assured Commissioners that, “[e]very single allegation should be systematically pursued.”

Second, if the Commission “did not receive” evidence regarding fraud, it is because,

contrary to the Chair's assurances in December, it chose not to seek any testimony on the widely-publicized allegations of fraud. Given the report's emphasis on the so-called purge list, this is an egregious omission. In Florida, there were various reports regarding thousands of ballots cast by ineligible felons and unregistered voters, fraudulent absentee ballots in nursing homes, and precincts where more ballots were cast than the number of people who were registered. That the Commission made no effort to look at these problems is unconscionable.

VII. Unwarranted Criticism of Florida Law Enforcement

The Commission report discusses at length a motor vehicle check conducted in Leon County on election day, and portrays the police presence there as an effort to intimidate prospective black voters in the area and keep them from going to the polls. This is a wildly distorted interpretation of what actually happened.

As the chief of the Florida Highway Patrol, Colonel Charles C. Hall, testified in Tallahassee, there was one motor vehicle checkpoint, in Leon County on election day. That checkpoint was not adequately authorized and resulted in one complaint. The equipment checkpoint operation lasted about 90 minutes (between 10:00 a.m. and 11:30 a.m.) and occurred more than two miles away and on a different roadway from the nearest polling facility. Of the approximately 150 cars stopped at the checkpoint, a total of 18 citations or notices of faulty equipment were issued to 16 different individuals, 12 of whom were white. The citizen who lodged the complaint testified that she had contacted the NAACP after she returned from voting, but she refused to meet with the FHP to assist their investigation. Despite this one highly publicized incident, there has been no evidence whatsoever of police intimidation of voters.

Writing in response to the affected agency review, the general counsel for the State of Florida's Department of Highway Safety and Motor Vehicles, Enoch J. Whitney, has supported the account given by Colonel Hall at the hearing:

Colonel Hall's testimony conclusively demonstrates that there was no intent by members of the Florida Highway Patrol to delay or prohibit any citizen from voting on Election Day. All pertinent evidence shows that in fact no one was delayed or prohibited from voting by virtue of the equipment checkpoint operation.

The Commission majority's willingness to perpetuate a gross misperception of this issue is a disservice to the public's confidence in America's electoral and law enforcement systems, and an insult to the dedicated officers of Florida's law enforcement community.

VIII. Procedural Irregularities at the U.S Commission on Civil Rights

In writing this report, the Commission majority has ignored not only the rules of evidence, but the agency's own procedures for gathering evidence. The procedural issues are important to the extent they relate to the policy and politics driving this report. By pretending to investigate procedural irregularities while engaging in procedural irregularities of its own, the Commission majority undermines its credibility and diminishes the value of its work. By arguing that "every voice must be heard" while in fact stifling the voice of others, the Commission is guilty of hypocrisy.

Republican and Independent Commissioners were never asked if they would like to call witnesses. Hearings were completely controlled by the Chair and the General Counsel, and commissioners did not even know who the witnesses were to be at one Miami hearing; thus they could not properly prepare questions.

When the hearings failed to provide any evidence of widespread voter disenfranchisement, the Chair unilaterally approved a last-minute procurement of the services of an outside "statistician," Professor Allan Lichtman. Commissioners were never asked to approve this arrangement, nor were they contacted regarding any suggestions they might have for additional or alternate experts.

At its June 8, 2001 meeting the Commission voted that Dr. Lichtman would be asked to prepare a rejoinder to any dissent that was filed, and that the dissent was not to be made available on the commission's web site until it could be accompanied by Dr. Lichtman's response. It is astonishing and unprecedented that the commission would take the position that the views of its minority members could not be circulated to the public until a rebuttal of them was prepared. Is the dissent a document that is too dangerous for the public to read unless accompanied by an immediate rebuttal? Furthermore, to date, Dr. Lichtman's rejoinder has not materialized, and it was stated at the July 13, 2001 meeting of the commission that it was not clear whether he would be writing any response to this dissenting opinion, with unclear consequences for the fate of the dissent.

At the July 13 monthly Commission meeting, members of the commission staff and some commissioners argued that this document is not a proper "dissent," and that the commission should not allow its publication. One commissioner asserted that a "two or three or five page statement" would be an acceptable dissent, but something more than that would be out of bounds. In a July 10 memo, the staff director stated that the Commission "does not envision any Commissioner "engag[ing] in a complete reanalysis of the staff's work." But it is obviously impossible to write a thorough dissent without reanalyzing the quantitative and other evidence upon which important claims have been based.

As a result of such objections, at its July 13, 2000 meeting the Commission majority refused to authorize the publication of our work pending further negotiation. Whether it will actually appear under the Commission's imprimatur remains an open question at this time. Astonishingly, many of the commissioners seem to believe that it is appropriate for them to dictate the form any disagreement with their views should take.

We feel fortunate to be living in a time in which technological progress renders futile the attempts of those in power to silence the expression of minority views. Any interested member of the public can already find our a full draft on our dissenting opinion on the Web, on both the Manhattan Institute and the National Review web sites. And of course it will be available in print in the published hearings of the Senate Committee on Rules and Administration. But it is nonetheless deeply troubling that a body whose mission is to explore unpopular truths would keep from public scrutiny a dissenting opinion written by two of its duly-appointed members.

1. Failure to follow statutory requirements for fair and objective proceedings

Under the Commission's regulations, all proceedings are to be conducted in a fair and objective manner. During its hearings in Florida, however, the Commission failed to ensure fair, equal and courteous treatment of witnesses. The secretary of state was treated in an insulting manner, and the governor was the only witness during the proceedings who was denied the opportunity to deliver an opening statement.

2. Conclusions issued before all of the evidence was received

The Commission reached its verdict long before it had even completed its review of the evidence. On March 9, the Chair introduced a "preliminary assessment" that was not shared with Commissioners beforehand and that did not provide Florida officials with an opportunity to respond to the charges against them. These procedures are sadly reminiscent of Alison in Wonderland's court of the Red Queen: "Verdict first, trial later!"

3. Denial of "defame and degrade" review

Section 702.18 of the Code of Federal Regulations requires the Commission to give parties that might be defamed or degraded by its reports a chance to respond. The majority report states that "the Commission followed its procedures by conducting a defame and degrade review." It fails to state that the Commission's general counsel denied the governor's request to be given the requisite 30 days, under defame and degrade, to review the report in its entirety (instead of select portions) and the requisite 20 days to submit a "timely, verified response." The general counsel's explanation on June 8 was that there was "no statement [in the report] that would constitute defame and degrade." In light of the Chair's statement on June 8 that the governor, the secretary of state, and other state officials were "grossly derelict in fulfilling their responsibilities," the general counsel's decision appears to indicate that the Commission has been "grossly derelict" in its treatment of those who assist its investigations.

4. Inadequate affected agency review and consideration of affected agency comments

The report also claims that “affected agencies were afforded an opportunity to review applicable portions.” The Commission’s project management system normally requires at least 30 days for affected agency review, yet the governor and other officials were given only 10 days to review the report, and the report was given to the press before affected parties could respond. In an interview with the *New York Times*, the general counsel claimed that anyone wishing to respond to the Florida report would have 20 days to do so. Few of the affected agency comments have actually been factored into the final report.

To compound the seriousness of these procedural improprieties, the Commission handed out copies of the draft report at the June 8 meeting and posted the draft on its web site, thereby widely disseminating a version of the report that included none of the affected agency comments or any of the corrections and amendments discussed at the June 8 meeting.

Affected agency review is an essential procedure to ensure fairness and accuracy of Commission reports. Contrary to the Chair’s statement on June 8, it is not a mere “courtesy” that is granted or denied at the whim of the Chair or the staff. In this case, the procedure was mooted by the leak to the press and the public dissemination of a preliminary, uncorrected draft.

5. No management controls for this agency in disarray

A 1997 investigation by the GAO found the Commission to be an “agency in disarray” and cited, in particular, the lack of communication and effective management controls regarding the Commission’s projects. Pursuant to the GAO investigation, the Commission implemented its management information system to specify timelines for completion of the Commission’s work product. In the case of the Florida report, however, no clear or consistent timeline has been maintained for this project and Commissioners’ inquiries to both the Chair and the staff director have been routinely ignored.

For example, at the March 9 meeting, instead of taking up a status report on the project (as the agenda announced), Commissioners were asked to approve, without any advance notice at all, the Chair’s own personal statement of preliminary findings. At the same meeting, the Chair advised Commissioners that, “in April we expect to have the draft of the voting rights in Florida, the actual draft, in front of us.” In April, however, Commissioners were given only an “Outline of the Final Document” and were advised that the draft report would be considered at the June 8 meeting. At no time were Commissioners advised they would be given only three days to read the report prior to the June 8 vote. The Chair dismissed any criticism in this regard, asserting that Commissioners should have known “that we would receive it when we did receive it.”

Instead of taking responsibility for the question of agency leaks, the Chair now proposes

to legitimize the premature disclosure of Commission reports, by suggesting a change in policy for Commission reports. Specifically, the Chair proposes, for future reports, “that we release the draft of the report publicly as soon as it’s available without waiting [until] even when we give it to the Commissioners.” While releasing drafts of a report as they are written makes much sense, since it would allow commissioners to discuss the findings with the staff before the document is finished, it’s not clear why the Chair would give the press, but not the commissioners themselves, copies of such a draft.

6. Selection of Allan Lichtman as the Commission’s Sole Statistical Analyst for the Florida Report

As we have argued, we believe that a rigorous statistical analysis of the available data clearly and convincingly contradicts Dr. Lichtman’s alleged findings. Dr. Lichtman’s conclusions are so unsupported, in fact, that it is first worth pausing to discuss the Commission’s selection of him as its sole statistical analyst to carry out such crucial work.

The choice of Dr. Lichtman to carry out this work is problematic. When he appeared at the June 8, 2001, meeting of the commission to present his findings, he took pains to present himself as a scholar above party, who had “worked for Democratic interests... and for Republican interests.”³⁷ At the time, the American University web site identified him as a “consultant to Vice-President Albert Gore, Jr.”³⁸ His partisan commitment was evident in his media appearances throughout the campaign and the period of post-election uncertainty.

Moreover, although Dr. Lichtman claimed (at the June 8 Commission meeting) that he began his study of possible racial bias in the Florida election with an open—even “skeptical”—mind, in fact, evidence suggests the contrary. As early as January 11, at the very beginning of his investigation and prior to conducting any detailed statistical analysis of his own, Dr. Lichtman stated publicly that he was already convinced, on the basis of what he had read in the *New York Times*, that in Florida “minorities perhaps can go to the polls unimpeded, but their votes are less likely to count because of the disparate technology than are the votes of whites.” He concluded: “In my view, that is a classic violation of the Voting Rights Act.”³⁹ Long before he examined any of the statistics, Dr. Lichtman had already concluded that Florida had disenfranchised minority voters and violated the Voting Rights Act.

A social scientist with strong partisan leanings might conceivably still conduct an even-handed, impartial analysis of a body of data. Unfortunately, that is not the case in the present instance.

³⁷ Transcript of United States Commission on Civil Rights meeting, Washington, D.C., June 8, 2001, 46.

³⁸ <<http://www.american.edu/cas/faculty.shtml#HISTORY>. WMA>

³⁹ Transcript of U.S. Commission on Civil Rights hearing, Tallahassee, Florida, January 11, 2001.

Conclusion

America's journey on the road to racial and ethnic equality is far from over. We have traveled far, and still have far to go. But the Commission's majority report positively sets us back. By crying "disenfranchisement" where there was confusion, bureaucratic mistakes, and voter error, the report encourages public indifference. Real civil rights problems stir the moral conscience of Americans; inflated rhetoric depicting crimes for which there is no evidence undermines public confidence in civil rights advocates and the causes to which they devote themselves.

The U.S. Commission on Civil Rights was once the moral conscience of the nation. Under the direction of the Chair, Mary Frances Berry, it has become an agency dedicated to furthering a partisan agenda. After six months of desperately searching for widespread disenfranchisement in Florida, the Commission produced a 200-page report based on faulty analysis and echoing vague and unsubstantiated claims.

The shoddy quality of the work, its stolen-election message, and its picture of black citizens as helpless victims in the American political process is neither in the public interest nor in the interest of black and other minority citizens. Do we really want black Americans to believe there is no reason to get to the polls; elections are always stolen; they remain disenfranchised? There is important work the Commission can do. But not if its scholarly and procedural standards are as low as those in this Florida report.