Testimony of John J. Park, Jr.
Before the Senate Judiciary Committee
Regarding S. 1994 "Prevention of Deceptive Practices and
Voter Intimidation in Federal Elections"
June 26, 2012

Mr. Chairman, Senator Grassley, and Members of the Committee:

My name is John Park, and I am of counsel with the Atlanta law firm of Strickland Brockington Lewis, where my practice includes work on election law and redistricting matters. The views I express are my own.

In my more than 30 years of practice, I have done substantial work on cases involving voting rights, redistricting, and election law. In addition, while an Assistant Attorney General in Alabama, I served for a time as one of the attorneys who advised the Alabama Judicial Inquiry Commission. Alabama uses partisan elections to select its judges, and its Canons of Judicial Ethics address the conduct of election campaigns in ways that are pertinent to this hearing.

I appear before you in opposition to the bill S. 1994, "Prevention of Deceptive Practices and Voter Intimidation in Federal Elections." I oppose this bill because it raises serious constitutional questions and because it is under-inclusive, not because I approve of or condone the use of deceptive practices, voter intimidation, or both.

At the outset, I would note that the Congressional Research Service has been unable to count the number of federal crimes. Some estimate that there are more than 4,500 statutory crimes and many that are created by federal regulations. Before creating new federal crimes, Congress should first consider what remedies are presently available and ask why they are inadequate. Voter intimidation and deceptive practices can be pursued under 18 U.S.C. § 241, 42 U.S. C. § 1971(b), or Section 11(b) of the Voting Rights Act, 42 U.S.C. § 1973i(b), so the U.S. Department of Justice should explain why those tools, which are already at its disposal, are insufficient. In addition, I note that there was a federal prosecution under existing law in one of the deceptive practices cases, and a state prosecution in another.

S.1994 would prohibit the making of materially false statements with specified intent regarding certain matters within 90 days of an election. Significantly, the matters involved are political, and, because political speech is at the core of the First Amendment, S. 1994 raises constitutional issues that cannot be avoided.

I note that the United States Supreme Court is considering *United States v. Alvarez*, which presents a challenge to the constitutionality of the Stolen Valor Act. That law makes it a federal crime to lie about having received a military award or decoration. While the text of 18 U.S.C. § 704(b) does not allow for exceptions or require proof of harm, the Solicitor General suggested in oral argument that the Stolen Valor Act be read to require the lie to be knowing and that several exceptions be read into it. I know that it

is risky to predict a court's decision from an oral argument, but the transcript suggests that the Stolen Valor Act may not be held constitutional unless the Court accepts the Solicitor General's attempts to limit the broad scope of the Act, and perhaps not even then. However it comes out, though, the Court's decision in *Alvarez* will be instructive with respect to the power of Congress to punish statements that are untrue.

Even though S. 1994 requires both knowing falsehoods and specified intent, it will still raise constitutional concerns because it will necessarily have a chilling effect. Anyone who contemplates speaking about the qualifications of voters (and there are some people who cannot vote) or endorsements that a candidate has received (and candidates get endorsements) will have to think about the possibility that the U.S. Department of Justice or a private individual will take exception to it. As the Supreme Court, unremarkably, noted in *Citizens United v. FEC*, "As additional rules are created for regulating political speech, any speech arguably within their reach is chilled."

Clearly, speakers should try to speak truthfully, but S. 1994 subjects that effort to second-guessing. One need only think about the hair splitting exercise that Politifact engages in to determine whether a statement is true. What about statements that are "mostly true?" What about those that are "half true?" What about statements that are true as far as they go, but some who hear them deem them incomplete? Will S. 1994 be read to create a private right of action to seek to prohibit or force the rewriting of statements like those?

S. 1994 applies to statements made 90 days before a federal election. In almost all instances, it will also be in effect for state elections because federal and state offices often appear on the same primary or general election ballot. Any enforcement action brought during that blackout period could have an effect on the outcome of the election. Congress should hesitate before giving private individuals a tool a tool to use against their political opponents in a way that could affect an election's result.

With respect to the private right of action, I note that during the time I served as one of the attorneys for the Alabama Judicial Inquiry Commission, the Commission charged one candidate for Chief Justice of the Alabama Supreme Court, who was then an Associate Justice on that court, with making statements about another candidate "either knowing that information to be false or with reckless disregard of whether that information was false" and statements "knowing that the information [disseminated] would be deceiving or misleading to a reasonable person." The effect of filing those charges was to disqualify the charged associate justice from serving on the court until the charges were resolved. Ultimately, the Alabama Supreme Court held that the Canons regulating false and deceptive statements were unconstitutionally overbroad and narrowed their scope by construction. *Butler v. Judicial Inquiry Commission*, 802 So. 2d 207 (Ala. 2001).

Empowered by those Canons and by the prospect of disqualifying a candidate, though, people fly-specked the speeches and advertisements of Alabama judicial candidates looking for opportunities to complain that something stated was false or

misleading. Those complaints could require a campaign to expend energy responding to an inquiry from the Judicial Inquiry Commission. Congress can expect no less if it creates a private right of action. Private parties will pore over the statements of their opponents, looking for an opportunity to expose them to the heavy costs of defending against a lawsuit.

Furthermore, even though S. 1994 requires both knowing falsehood and specified intent, it is not unreasonable to expect that the private parties will use their new private right of action against statements which they believe will have a prohibited effect. They will then work backwards to the specified intent and from there to the knowing falsity.

Given these concerns, we should first encourage the U.S. Department of Justice to use the remedies presently available.

With respect to under-inclusion, I note that S. 1994 does not address (1) fraudulent registration; (2) multiple registrations; or (3) compromised absentee ballots. Peter Kirsanow, a member of the U.S. Commission on Civil Rights, pointed this out in 2007 when he testified on S. 453, the predecessor version of this bill. He pointed to, among other things, the magnitude of the multiple registration problem, noting that approximately 140,000 Florida residents were then registered in multiple jurisdictions.

Recent events suggest that the problems Peter Kirsanow pointed to in 2007 are still an issue. For example, Wisconsin election officials struggled to verify the signatures supporting the recent, unsuccessful attempt to recall Governor Scott Walker. The Department of Justice is fighting with Florida over its effort to remove non-citizens from its voting rolls. In 2011, in Alabama, an illegal alien who voted for many years in state and federal elections was prosecuted for social security fraud and theft of public money, but not for voting illegally.

I encourage Congress to address the deceptive practices that are not included in S.1994.

Thank you for the opportunity to testify. I will be happy to answer any questions the Committee might have.