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Lessons Learned From the 2004 Presidential Elections.

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Chairman Nadler, and Ranking member, thank you for the invitation and opportunity to appear before this Subcommittee today to discuss the lessons learned from the 2004 Presidential elections. I would like to touch on several topics this afternoon.

But before I do, let me say at the outset that in general, and largely as a result of the experiences from the 2000 Presidential election and the decision in *Bush v. Gore*, our nation is much more informed today about what can go wrong with elections than perhaps at any time in our history. As a former Department of Justice prosecutor in the Voting Section of the Civil Rights Division who now practices in the area of election law, and has taught voting rights and election law at three law schools during the last 15 years, I can assure you that there is much more available information about the conduct of elections than ever before. Congress's enactment of the Help America Vote Act (HAVA) with its various mandates to the states, and the establishment of the Election Administration Commission (EAC), have helped ensure that a public record is available for those who want to study how we conduct our elections and to propose fixes when they are needed. Unfortunately, despite extensive data and information, the administration of our elections has not improved as much as many of us hoped they would when the HAVA was enacted six years ago.

I plan to discuss today the following areas of concern: 1) the continuing problem of states' indiscriminate purges of statewide voter rolls; 2) the continuing problem of election officials imposing voter ID requirements under the erroneous belief that HAVA requires them to do so, and often in a discriminatory manner; 3) the disproportionate allocation of voting machines such that heavily populated polling places lack sufficient voting equipment, resulting in long delays and some voters leaving the poll site without

casting ballots; and 4) the ongoing threat of vote caging, an illegal voter suppression technique used to keep minorities (mostly blacks) from voting; and 5) the role that DOJ will play in the upcoming elections.

Purging of Voters and the Creation of Statewide Voter Lists

States were obligated by HAVA to establish a computerized statewide voter registration list by January 1, 2004 (or January 1, 2006 if the state received a waiver). Previously, voter registration data was compiled and maintained at the local level. HAVA now requires that a computerized voter registration list be defined and administered at the State level, that it contain the name and registration information of every legally registered voter in the State, that it assign a unique identifier to each legally registered voter in the State, and that it be immediately and electronically accessible to all State and local election officials. 42 U.S.C. § 15483(a)(1)(A). HAVA further specifies that this computerized registration list "shall serve as the official voter registration list for the conduct of all elections for Federal office in the State," and that the list be continuously and accurately updated such that "only voters who are not registered or who are not eligible to vote are removed from the computerized list." 42 U.S.C. § 15483(a)(1)(A)(viii); 42 U.S.C. § 15483(a)(2)(B)(ii). Finally, HAVA's minimum standards for accuracy require that the State election system include "[s]afeguards to ensure that eligible voters are not removed in error from the official list of eligible voters." 42 U.S.C. § 15483(a)(3)(B). To verify the accuracy of voter registration data, HAVA requires State officials to match information in the statewide voter registration system with DMV or Social Security Administration databases. 42 U.S.C. § 15483(a)(5).

One of the largest potential problems on Election Day 2008 may result from inadequate or improper implementation of computerized voter registration lists in each State.

As one might expect, the extent to which the States have been able to successfully develop and implement computerized statewide voter registration lists has varied greatly across the country. In 2006, the Department of Justice sued New York, Alabama, New Jersey, and Maine for failing to implement statewide lists.[1] The Justice Department has since reached agreements with those states, most in the form of requiring the creation of an interim database.[2] California agreed to update its existing system in order to avoid being sued by the Justice Department. Records indicate that states such as Iowa and South Carolina currently have statewide computerized voter registration systems in use, but many other states are still behind schedule, and it is unclear whether they will be able to resolve problems with their election administration systems before November.[3]

One of the most significant challenges that States have encountered while implementing HAVA has been matching voter registration data to DMV and social security records. In addition to data entry errors, slight differences between data sets – such as the inclusion or exclusion of a middle initial, a changed last name as a result of a marriage or divorce, or minor differences in spacing or hyphenation of names – have resulted in a large number of mismatches between records, and consequently, there is a real danger that, come Election Day 2008, many registered voters will show up at the polls only to find that their names have been inadvertently purged from the statewide registration list. It is important to note, however, that HAVA "does not require that

[1] http://www.commondreams.org/headlines06/1026-01.htm
[2] http://www.commondreams.org/headlines06/1026-01.htm
[3] State-by-state breakdown of implementation of HAVA statewide voter registration lists: http://www.pewcenteronthestates.org/uploadedFiles/voter%20reg%20db%20status.pdf

voters be denied registration (and a regular ballot) if there is no successful match."[4] The matching provision relates to internal recordkeeping and was not "intended to penalize voters when the state cannot match the information on their application."

The tendency of some states toward purging the rolls when there is a mismatch in the databases appears to have been helped along, in part, by the U.S. Department of Justice's Civil Rights Division, the unit charged with enforcing federal election laws. Back in 2003, Hans von Spakovsky, then one of the Division's lawyers, wrote an opinion letter to officials in Maryland. According to Mr. von Spakovsky, "Congress obviously intended that…where the results indicate the registrant is not eligible, has provided inaccurate or fraudulent information, or information that cannot be verified, then the application must be denied." This interpretation is not only incorrect, it is inconsistent with the whole purpose of HAVA. After all, the statute is entitled "Help America Vote Act," not "Help the States Make It Harder For Voters to Vote Act."

HAVA (Section 303) does not require a person be denied registration (or denied a regular ballot at the polls) if there is no successful match of information. This provision of HAVA instructs states on how to maintain and manage their internal voter registration database. Nothing in HAVA contemplates penalizing a prospective voter when the state is unable to match the information on their voter registration application. Section 303(b) of HAVA, for example, imposes an ID requirement on certain unmatched voters (those first-time voters who registered by mail) and when such voters produce the required ID, they then are entitled to cast a regular ballot (not a provisional ballot). Such voters are required to instead cast a provisional ballot only if they cannot produce an ID. Congress thus prescribed an ID requirement for a limited category of voters and did not require all

voters whose information could not be matched, or who lack an ID when they arrive at the polls, to cast a provisional ballot. Indeed, for a state to interpret HAVA in a way that forces ALL voters lacking an ID, or whose information cannot be matched in a DMV or Social Security database, to choose either not to register or to require a provisional ballot may violate the Constitution. *See Fla. Conference of the NAACP v. Browning*, 522 F. 3d 1153 (11th Cir. 2008). Indeed this was precisely the argument recently made by the Brennan Center and Professor Dan Tokaji at Ohio State's Moritz College of Law: "[t]he fact that Congress prescribed an identification requirement on a limited category of voters [only first-time voters who registered by mail, *see* 42 U.S.C. § 15483(b)] indicates that it didn't mean to require ALL voters whose information can't be matched, and who lack identifying information when they appear at the polls, to be relegated to provisional voting status."[5]

Although some states, such as Wisconsin, have backed away from rules requiring voters to cast provisional ballots unless the State registration system verifies a "complete match" of their name, and have instead decided to wait and see how many voters are affected by mismatches in the system, other states might yet adopt procedures that make it difficult for mismatched voters to cast regular ballots. California has promulgated regulations regarding "Deficient Registration Records" which specify that, in cases where the "substantive information required to determine eligibility to vote," including the registrant's name, citizenship, address or place of residence, birth date, state or country of birth, and statement of eligibility (i.e. registrant is not a felon), is deficient, the registration record will be automatically returned to the elections official who submitted

[5] The Brennan Center-Tokaji letter may be found here: http://moritzlaw.osu.edu/blogs/tokaji/BC&TokajiLtr-WIGAB.pdf

it and must be corrected and resubmitted within five business days of receipt of a deficiency notice. 2 CCR § 20108.25. Section 20108.25 further states that an individual who is the subject of the deficient registration record shall not be registered to vote until the deficient registration record is corrected and accepted by Calvoter, the State's computerized registration system. *Id.* If an individual is not registered to vote pursuant to this section of the California Code, he or she may only vote by provisional ballot. *Id.*

Florida recently passed a law which bars any Florida citizen from registering to vote if the state cannot match or otherwise validate the voter's driver's license or Social Security number on a registration form. That law is currently being challenged in the courts. The Brennan Center at NYU Law School has led the way in this suit, and in a similar lawsuit that successfully challenged a Washington State law in 2006. See *Washington Association of Churches v. Reed*, 492 F. Supp. 1264 (W.D. Wash. 2006).

The extent of the voter registration mismatch problem remains unclear, but the problem does appear to have potential significance.[6] Due to matching problems, up to 25 percent of submitted registrations in California were rejected during the first three months of 2006. As of July 18, 2008, *The Wisconsin Journal Sentinel* reported that "Wisconsin doesn't know yet how well voter registration data will line up with driver records." The *Journal Sentinel* article also noted that in Pennsylvania, "15% of the [voter registration] records didn't match, but two-thirds of the problems were caused by data entry errors."[7]

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[6] *See* Justin Levitt, *Making the List: Matching and Verification Processes for Voter Registration*, Brennan Center 2006 Report, *available at*: http://www.electiondefensealliance.org/files/Brennan_MakingList_DatabaseMatching.pdf; *see also* Wendy Weiser testimony regarding the EAC before Congress, 2/2008: http://www.brennancenter.org/content/resource/testimony_before_congress_regarding_the_eac/; regarding California specifically, *see also* http://www.opednews.com/articles/genera_dan_ashb_080131__22fatal_pending_22_erro.htm.

[7] *Wisconsin Journal Sentinel*: http://www.jsonline.com/story/index.aspx?id=774257

Attorney Adam Skaggs of the Brennan Center has "said that matching in other states failed about 20% to 30% of the time." Another source noted that, in the State's September primary, "some [Maryland] precincts couldn't access the state database because of computer software glitches, and there were no printouts to consult. Some machines mysteriously rebooted without warning. Both issues caused voting delays. State officials have said those problems will be rectified by Nov. 7."

The National Academy of Sciences, which has done extensive work on the difficulties of database matching, has urged caution in relying on matching due to the types of problems outlined above. States would be wise not to purge voters due to mismatching and likewise should not use HAVA as an excuse for requiring voters who are unable to be matched to cast provisional ballots.

New Voter Registration and Voter Identification Requirements

HAVA's voter ID requirements are easily the most misunderstood and misapplied of its provisions by election officials. HAVA provides that new registrants must provide their driver's licenses or the last 4 digits of their Social Security Number with their voter registration application in order to become registered. (If the person does not have either of these, HAVA mandates the state to assign the voter an identification number).

HAVA requires that those voters who appear to vote for the first time and who registered to vote by mail after January 1, 2003 must show identification before they will be allowed to vote. Note that not all first time voters must present an ID under HAVA; *only first time voters who registered by mail*. In states that do not require a form of ID at the polls, poll officials sometimes mistakenly require all voters to show an ID (apparently under the flawed assumption that HAVA mandates it) or require all those who are voting

for the first time to present some form of identification before casting a ballot. Yet HAVA contains no such requirement.

Moreover, HAVA does not contain any requirement that first time voters who register by mail produce a particular ID or a photo ID. The ID required under HAVA need not be a photo ID or a government issued ID. Rather, "a current and valid photo identification; or…a copy of a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the voter" is sufficient. *See* 42 U.S.C. §15483.

Despite these clear requirements, some election officials continue to insist on a driver's license as the only acceptable form of voter ID. Indeed, despite state law provisions to the contrary some officials require an ID even when state law does not require one. In Virginia, for example, in 2006, a voter who lacked an ID (but who was a duly registered qualified voter) was denied the right to vote. He was denied the right at the polls to execute an affidavit and cast a ballot, which he had the right to do under state law. He brought suit in federal court and the County settled the suit. *Gillette, v. Weimer and Prince William County, Virginia Electoral Board, No. 1-08cv188-LMB (E.D. Va.)*

Another problem which has surfaced in recent elections stems from election officials selectively asking minority voters to produce an ID. A study of the implementation of New Mexico's voter identification law in the 2006 election found that—despite receiving training from election administrators—polling places and even individual poll workers varied widely in their application of that law.[8] And the

[8] R. Michael Alvarez, Lonna Rae Atkeson & Thad E. Hall, The New Mexico Election Administration Report: The 2006 November General Election (Aug. 2, 2007), available at http://www.vote.caltech.edu/reports/NM_Election_Report_8-07.pdf.

New Mexico law provided the occasion for racial and ethnic discrimination at the polling place level—voters who self-identify as Hispanic or who have Hispanic surnames were significantly more likely to be asked by poll workers for identification than were other voters. I have received reports from the Asian American Legal Defense and Education Fund indicating such disparate treatment with regard to IDs has been directed at Asian American voters as well. It is extremely important that all election officials, particularly those working at the polls on Election Day 2008, are clearly informed of what, if anything, state law requires with regard to voters providing an ID and that election officials carry out those provisions in a nondiscriminatory manner.

Problems such as the misapplication of voter ID laws and the failure to find registered voters on the rolls lead to delays and long lines at the polls, which are exacerbated by the difficulties in recruiting and training poll workers. These problems may fall disproportionately on minority communities. The problems compound themselves in minority communities: they sometimes get the most inexperienced poll workers, the worst polling locations, an inadequate number of machines, and have the most problematic voter registration rolls (voters who have moved, who don't vote regularly, who don't have ID, and those who have health or other problems). The long lines on Election Day are usually the result of a culmination of these problems rather than a single cause.

State officials since 2004 have continued to take steps with regard to purging the voter registration rolls, but sometimes the procedures chosen can have dire consequences for voters. Take, for example, the State of Alabama.

The Justice Department sued Alabama in 2006 and the then-Democratic Secretary of State (SOS) Nancy Worley for failure to implement HAVA. The Republican Governor was appointed a special master by the U.S. District Court Judge (Keith Watkins), a Bush appointee, to take over responsibility for implementation of HAVA. The State hired Election Systems & Software (ES & S) to develop the database. The Governor's office developed a list of felonies and sought the agreement of the Administrative Office of Courts (AOC) (controlled by the Chief Justice) that this list be used to purge the voter rolls. The AOC did not agree with the Governor's list and proposed a different, much shorter list of felonies. ES&S nevertheless implemented the database using the longer list of felonies and its impact was apparent in the June 2 primary that year.

In the 2006 elections, Democrat SOS Worley was defeated and was replaced by Beth Chapman (R). As a result of the application of a flawed list of convictions, there were instances of qualified voters being denied the right to vote in the 2006 elections. For example, one voter who was denied the right to vote in Alabama in 2006 was a man previously convicted of a felony, but who had his voting rights restored and had voted for a number of years prior to 2006. In another case, a man was denied the right to vote even though he had never been convicted of a felony (but had been convicted of a misdemeanor), and even though he had voted several times after his misdemeanor conviction. The danger that undeserving voters will be disenfranchised on Election Day continues to loom large.

Just this week, the ACLU on behalf of several voters has filed suit in Montgomery, Alabama, against state officials. *Baker v. Chapman.* According to its state

constitution, Alabama may deny voting rights to individuals who have been convicted of felonies involving "moral turpitude." Although this term is not defined, the Alabama Constitution states that only the legislature can decide which felonies qualify under this category. In its lawsuit, the ACLU charges that the state is disfranchising thousands of Alabamians under a much broader category of convictions than is permissible under the constitution, relying in part on an opinion issued by Alabama's Attorney General.[9]

The ACLU is seeking an injunction that would stop the state "from discouraging, interfering with, or preventing any person who has not been convicted of a crime listed in the Alabama Code (§ 15-22-36.1(g)) from registering to vote in all state and federal elections." The plaintiffs have also asked the court to require the state "to disseminate public service announcements throughout the State of Alabama that inform citizens convicted of felonies which do not appear in Ala. Code 15-22-36.1(g) of their right to register and vote."

Misallocation of Voting Machines:

A *New York Times* story earlier this week entitled, "Influx of Voters Expected to Test New Technology," quoted an election expert from the Pew Center on the States as follows:

> Election officials are unanimous in their commitment to ensuring every eligible American's right to vote, but in many places the system they oversee simply isn't designed to handle anywhere near the number of voters that may turn out, said Doug Chapin, director of electionline.org, a

[9] According to the ACLU's press release announcing the suit, "The Alabama legislature adopted a list of about 15 serious felonies that fit the moral turpitude definition for disenfranchisement, including murder, impeachment, treason, rape and various sex related offenses. But in 2005, Alabama Attorney General Troy King developed his own broader list of disfranchising felonies, as well as a short list of those that do not fall into this category. The Attorney General's list includes 16 felonies that are disqualifying, including passing a bad check,, and six that are not disqualifying, such as possession of controlled substances and DUI-related offenses. Other felonies were simply not addressed. In addition, election administrators across the state are currently disqualifying citizens from voting for felony convictions that neither the legislature nor the attorney general has ever listed as disfranchising offenses."

> project of the Pew Center on the States. In previous elections, the question has been, 'Will the system work for each voter?' But this year the real question is whether the system can handle the load of all these voters.

I share the concern that the current system may not be able to handle the record voter turnout that many anticipate this fall. A report being issued next month by the nonpartisan group FairVote, for example, notes there is a risk that election officials may not allocate a sufficient number of extra ballots or voting machines to precincts experiencing heavy turnouts. Indeed, the FairVote report will note that, consistent with the *New York Times* article, "[t]he swing states that experienced the longest lines, including Florida, Michigan, Missouri, Ohio and Pennsylvania, lack uniform rules for distributing machines and ballots[.]" What we saw in Ohio in 2004 was that state and local officials failed to take adequate steps to ensure that there were sufficient numbers of voting machines in certain precincts. As a result, undue delays were created, often lasting several hours, and many voters left polling places in frustration, and without casting their votes.[10] In Franklin County, Ohio, a DOJ review completed in June 2005 found that "it was not uncommon for voters to have to wait three or more hours to cast their ballots." The long lines and exceptionally long delay, DOJ found, was "due to the lack of sufficient machines to serve a dramatically enlarged electorate[.]"[11]

DOJ's review acknowledged that there were more registered voters per voting machine in predominantly black precincts than white precincts. What is particularly unsettling, however, is that DOJ also concluded that the allocation of voting machines

[10] Critics might say "if these people really wanted to vote and it was important to them, they would have stood in line and voted." But such a response fails to take into account the reality that many voters face and the wide variety of circumstances why a person cannot stay for several hours at the polling place to cast a ballot: the need for a single parent to pick up their child at day care, the inability of an elderly or disabled person to wait in line for such a long period, etc.

[11] The letter may be found here: http://www.talkingpointsmemo.com/docs/tanner-franklin-letter/

actually favored black voters because more white voters were voting on each machine, on average, than black voters. Of course, since many black voters were unable to vote due to the inadequate number of machines and long lines, it follows that fewer blacks voted per machine than voters in the predominantly white precincts. Moreover, in order for DOJ to make a determination about the allocation of machines and the number of voters by race who cast ballots on those machines, it would have needed data on the flow of voters in black and white precincts; but no such data were available. The DOJ conclusion is even more absurd when one considers that it was thousands of black voters, not white voters, who complained about being unable to vote.[12] No one in Franklin County disputed that predominantly black precincts lacked enough machines to adequately administer elections, as compared to predominantly white ones.[13]

Distinguished voting rights expert Tova Wang, now Vice President for Research at Common Cause, recently made the point that the allocation of voting machines could prove problematic in 2008: "Allocating enough ballots and machines is tricky science under any circumstances, but especially when turnout is proving to be so unpredictable."[14]

The misallocation of voting machines is a greater concern this year because of the spike in registrations in minority communities with an African-American leading a ticket. Many states and localities will experience different patterns of turnout and may

[12] At Kenyon College in Knox County, Ohio, DOJ found that "there were long delays in voting at the Gambier/Kenyon site, where the majority of the registered voters are college students. Some voters chose to wait until approximately 4:00 a.m. to cast their ballots on Knox county voting machines instead of using available paper ballots." http://www.usdoj.gov/crt/voting/misc/knox.htm

[13] As a former DOJ official, I was struck by the exculpatory nature of the language used in the letters sent to Franklin County and to Knox County. Traditionally, the Department's policy is not to discuss the reasons why the Department decided not to take a certain action, but rather briefly to let the subject of an investigation know that the investigation had been completed and no further action would be taken.

[14] Influx of Voters Expected to Test New Technology, *NY Times*, July 21, 2008.

not be prepared for it. Already there is substantial evidence of increased registration that should be a warning signal to local officials.

Thus, what happened in Franklin County in 2004 might very well happen again in numerous counties throughout the U.S. this fall: administrative failure to prepare for the high turnout combined with a failure to allocate voting machines in high turnout areas, particularly in predominantly minority areas and other areas that have seen a surge in voter registration numbers. The lesson to be learned from those places that saw a failure to allocate sufficient voting machines in 2004 is this: the allocation of machines should be made to ensure ease of voting for all voters, and not according to a mathematical formula that results in hours-long lines in some precincts and minutes in others.

Vote Caging Efforts: Lessons from Ohio in 2004

Vote caging is an illegal voter suppression technique used to keep minorities (mostly blacks) from voting. It's a relatively-unknown cousin in the nefarious family of vote suppression techniques. The practice has been adopted and perverted from a practice utilized by direct-mailers to clean up their mailing lists by sending out mail to specific individuals and seeing what comes back. The real problems start when political operatives start cherry picking areas likely to vote against their candidates.

"Caging" is a direct mail technique used to describe cleaning up a mailing list. A political organization sends first class mail to a list of voters (or donors) marked "do not forward." Sometimes, the mail is sent return receipt requested. Voters whose mail comes back undeliverable, or who do not return the receipt, are removed from the list – caged, in direct mail parlance.

"Vote caging" is when a political organization, typically a political party, compiles a "caging list" of voters whose mail came back undeliverable or who did not return the receipt, and uses that list to challenge those voters as not being validly registered. These registration challenges can occur prior to Election Day or at the polls.

The problem with using a caging list to challenge voters is simple. First, the list is most often produced using criteria aimed at a particular racial group (there have been documented instances of caging in African-American precincts, for example). Second, there are plenty of reasons why mail sent to a validly registered voter might be returned as undeliverable or without the signed return receipt requested, especially because political organizations usually make sure that their mailers are non-forwardable. For instance, the voter may be serving abroad in the military or away at college. Address errors, especially in urban areas, are common. A voter may have forgotten to put his or her apartment number on the voter registration form. Typographical errors in preparing the list of voters to whom mail will be sent – Gonzalez becomes Gonzales – can also result in a piece of mail being returned as undeliverable when in fact the individual lives and resides at the listed address. Such typographical errors on registration rolls can also lead one to conclude, in error, that an individual is not registered to vote when in fact he or she is validly registered.

Most commonly, the mailer is returned because the voter has moved. Still, many voters who have moved are still validly registered and eligible to vote. In vote caging schemes where a return receipt is requested, voters simply may not want to accept mail from that particular political party. Reportedly, this was the case in Ohio in 2004, when African-American voters did not want to accept mail from the GOP.

Despite the fact that many voters who might end up on a caging list are validly registered, there is nothing illegal *per se* about compiling a list of voters. What is illegal under the Voting Rights Act and the U.S. Constitution is vote caging that targets minority voters, *i.e.*, directing mail to them, and only selectively challenging their attempts to vote on Election Day.

When former Deputy Attorney General Paul McNulty testified before Congress in 2006, he offered to have DOJ look into the issue of vote caging ("If you're raising with me as Deputy Attorney General the question of caging votes, I'm very happy to work with you on that concern."). To my knowledge, DOJ never responded to Congress on what DOJ found about its review of vote caging. DOJ did not even offer a progress report on how its inquiry into vote caging was going. I would recommend that this Subcommittee inquire about the DOJ's their findings and about whether many vote caging or voter intimidation investigations are presently underway. That should give us a clear indication of whether DOJ will take as seriously the prosecution of those who intimidate voters, as they do those who allegedly commit voter fraud.

I do know about a clear example of vote caging/intimidation that took place in Dallas, Texas in the 2006 election cycle. An anonymous mailer was sent to voters in predominantly African-American precincts informing black voters that if they were recently registered to vote, they could be arrested when they went to polling places. I have attached a copy of the mailer to my testimony. Despite this obvious effort to intimidate black voters and suppress their voting rights, when the matter was immediately brought to the attention of the FBI, the Bureau determined, *without conducting any investigation*, that no action would be taken. Recently, I again brought this complaint to

the attention of DOJ, and I have been informed that the Civil Rights Division has it under review. What "under review" means is not clear, but I am hopeful that the Civil Rights Division attorneys are permitted to do their jobs free from political interference and therefore that the DOJ will at least conduct an investigation of this attempt at voter intimidation and take appropriate action.

Conspiracies to stop African-Americans from exercising their constitutional right to vote aren't new – and neither is vote caging. The Republican National Committee has been under a federal consent decree not to engage in the practice since getting caught in the 1981 gubernatorial election in New Jersey. Despite the injunction, which remains in effect, vote caging schemes continue to be used as an integral part of an ongoing campaign to suppress minority voting rights. We need to be on the watch for them in 2008.

To bring these schemes to an end will require vigorous prosecution by the United States Department of Justice. But the Department's priorities have shifted over the years, with the Bush-Ashcroft-Gonzales Justice Department not only ignoring vote caging schemes, but actively working to give vote-cagers a boost in the courts. Contrast, for example, the Department of Justice's efforts in 1990 in North Carolina, under President George W. Bush's father, to the Department's actions in the 2004 election cycle in Ohio. In 1990, the North Carolina Republican Party and the Jesse Helms for Senate campaign engaged in vote caging by sending black voters 44,000 postcards, giving targeted individuals incorrect information about voting and threatening them with criminal prosecution. The plan was to use the mailing to compile a caging list. In response, the Bush I Justice Department, where I served at the time as a federal prosecutor of voting

discrimination cases, filed a federal lawsuit against the GOP and Helms' campaign and obtained declaratory and injunctive relief.

The 2004 Ohio GOP Vote Challenge Scheme

Ohio was ground zero for the hotly contested 2004 election – and also a hotbed of voter intimidation. The Ohio Republican Party developed a caging scheme and identified 35,000 newly registered voters in urban areas, mostly black, who either refused to sign for letters from the Republican Party or whose letters came back undeliverable. An attorney for the Ohio Republican Party even admitted that the plan was to use the returned letters from minority neighborhoods to challenge voters.

Prior to Election Day, when the caging list would be used to challenge voters at the polls, the caging scheme was challenged in court on two fronts. In New Jersey, voters filed suit against the RNC for violating a 1982 consent decree. The RNC argued that the consent decree only applied to it, not the Ohio Republican Party, which planned to supply the challengers, and therefore the consent decree was inapplicable to the Ohio election. The federal court rejected that argument, and, on Nov. 1, 2004, ordered Republicans in Ohio not to proceed with the caging scheme on Election Day. Meanwhile, in Ohio, voters filed suit (*Spencer v. Blackwell*) to challenge the Ohio law permitting political parties to post challengers (armed with caging lists) in polling places on Election Day.

While the court battles were playing out in New Jersey and Ohio in the days and hours leading up to the 2004 election, with the rights of minority voters hanging in the balance, did the Department of Justice step in to enforce the Voting Rights Act? Unsurprisingly for anyone who has followed the ongoing scandal over the politicization of the Civil Rights Division, the answer is "of course they didn't." Perversely, the Justice

Department sent a letter to the Ohio federal judge overseeing the lawsuit to tell her that the challenged statute that was used to justify the vote caging scheme was perfectly fine.

Then Assistant Attorney General Alex Acosta's Oct. 29, 2004 letter to District Judge Susan Dlott was unusual not just in that it attempted to offer legal cover for the same practices that 12 years earlier DOJ had sued to stop, but also because it was nearly unprecedented for DOJ to intervene in a case on the eve of Election Day in which it had not previously participated, because its involvement was unsolicited, and because it was not a party. Mr. von Spakovsky was directly involved in drafting this letter to Judge Dlott.

Judge Dlott refused to heed the advice of the Assistant Attorney General, and found that permitting the challenges would have a racially discriminatory impact. The court's decision cited the fact that Hamilton County Republican Party filed to have 251 additional challengers at the polls and that of the 251 challengers listed, two-thirds of them filed to be challengers in predominantly African-American precincts. The federal court issued an injunction that blocked the racially targeted challenges, noting that "[t]he evidence presented at the hearing reflects that 14% of new voters in a majority white location will face a challenger… but 97% of new voters in a majority African-American voting location will see such a challenger." *Spencer v. Blackwell*, No. 1-04-738-SJD (Order of November 1, 2004).

In the end, the caging scheme was stymied but not due to any action by the DOJ, which did its best to insinuate itself into the controversy and defend the scheme. (For a thorough discussion of other voter intimidation techniques that succeeded, see *Preserving*

Democracy: What Went Wrong in Ohio, Status Report of the House Judiciary Committee Democratic Staff, January 5, 2005 ["the Conyers Report"].)

Insufficient Numbers Of Poll Officials And The Lack Of Training:

HAVA does not mandate poll worker training, but the Act does require states to spell out in their HAVA implementation plans how the state plans to train its poll officials and to educate other election officials (such as general registrars). Information pertaining to voting must also be posted at every polling place on Election Day, including the posting of a sample ballot, instructions on how to vote (including the casting of a provisional ballot), and information about ID requirements for first-time voters who registered to vote by mail.

Provisional Voting Issues

HAVA mandated that provisional voting be offered to all voters to ensure that every eligible voter who is registered or who believes they are registered can cast a ballot in federal elections with the knowledge that a fair process will be followed to determine if the provisional ballot is eligible to be counted. In October 2004, the United States Election Assistance Commission (EAC) issued a Resolution on Provisional Voting. EAC also urged all States and election officials to utilize federal funds received under HAVA to conduct voter education campaigns that would enable voters to become familiar with their rights to cast a provisional ballot, and to make sure those provisional ballots are cast at a location where they stand the best chance to be counted. This latter recommendation was made because some states deemed a provisional ballot to be validly cast only when cast at the voter's assigned polling place or precinct. In such states, EAC urged state election officials to make information available to poll workers at all precincts and/or

polling places that would allow the poll workers to determine the voter's assigned precinct and polling place. This could be done, the EAC noted, by giving poll workers information (such as the entire list of eligible voters for that jurisdiction) or a means of communication (telephone service to election headquarters or maps of adjoining precincts) that would help to insure that a voter is sent to the correct precinct to vote and thus have their ballot counted. States were also obligated under HAVA to set up toll free numbers or websites where voters who cast provisional ballots could later determine if their vote got counted and, if it was rejected, the reasons for invalidation.

Where is the Department of Justice in 2008?

One of the biggest differences between 2004 and 2008 is the fact that DOJ has been purged of a number of officials who misused Department resources to pursue a political agenda. Indeed, in the Civil Rights Division, two officials notorious for blatantly using their positions to advance a partisan agenda were Brad Schlozman and Hans von Spakovsky. Minority voters are far better off today with these two persons off the Justice Department payroll, because these former DOJ officials will no longer be in a position to thwart minority voting rights and use voting rights laws to advance their political goals.

But it is curious, if not troubling, that the Department of Justice is not at this hearing today to offer its plans for enforcement of voting rights during this election year. The Department needs to be forthcoming about its election year activities, from pre-election criminal law enforcement efforts to the assignment of federal poll watchers and attorneys. What steps will the Department take to ensure that there are no pre-election

indictments of individuals for a relatively minor alleged voter fraud offense, pursued simply to affect the outcome of an election?

And shouldn't the Department of Justice openly explain how it will assign federal watchers, particularly given the Department's 2004 program of assigning Bush loyalists to monitor elections in battleground states? From discussions with the Voting Section Chief in 2004, Joseph Rich, I learned that in assigning election monitors (attorneys) and observers in 2004, DOJ official Brad Schlozman personally reviewed every single assignment and vetoed many of the Voting Section's recommended assignments. In Ohio, where DOJ's career attorneys felt DOJ did not need a federal presence on Election Day, Schlozman informed Mr. Rich early on that there would federal attorneys sent to Ohio. According to Mr. Rich, Schlozman dispatched loyalists in three cities – Cleveland, Columbus and Cincinnati. While there were civil rights issues that surfaced closer to the election (after the decision had already been made to send DOJ attorneys to Ohio), the two person monitoring teams sent to Ohio did little beyond sitting in hotel rooms and taking telephone calls. There was no monitoring by these attorneys to check on racially-based challenges or intimidation, according to Joseph Rich.

Furthermore, Schlozman himself monitored the election in Miami on Election Day. In short, it was clear to Voting Section management that political appointees at DOJ and in the Civil Rights Division wanted to have loyalists on the ground in that key state. This is yet another example of politicization of the voting section responsibilities, as well as inefficient use of personnel and resources.

The DOJ should only assign monitors and observers to those places where there is evidence of possible civil rights violations, or as part of an ongoing investigation into

election practices. Another lesson learned from the widespread public suspicion that political reasons were behind monitor/observer placement decisions in 2004 is the following: the Department of Justice, when it announces the locations where the Department will be deploying federal observers, should also make public in a general way the civil rights concerns that underlie their decisions. Such a pronouncement should emphasize the fact that the Department (Criminal Division) has a longstanding policy of not monitoring for election fraud purposes and indeed does not conduct such investigations until after the election. This has been a long-standing practice of the election crimes branch of the Criminal Division.

There a serious need for enhancing the transparency of DOJ's activities, especially given the prevalence of partisan-driven activity by DOJ in the 2004 and 2006 election cycles. Little came out at the annual Civil Rights Division/Criminal Division voting symposium this summer about DOJ plans for monitoring this year's election– and Congress should insist that everyone – from Attorney General Mukasey, to Civil Rights Division Acting Assistant Attorney General Grace Chung Becker, to Voting Section Chief Christopher Coates – explain in some detail their monitoring plans at least a month before the election. And DOJ officials should be required in advance of the election to follow up with more detailed information when they announce where federal attorneys and federal poll watchers will be assigned.

Thank you for the opportunity to testify and to offer these views.