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SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS
AND CIVIL LIBERTIES

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Thank you, Mr. Chairman, for the opportunity to testify this morning before this Subcommittee on the important issue of vote suppression.

My name is J. Gerald Hebert. I am the Executive Director and Director of Litigation at the Campaign Legal Center in Washington, DC. From 1973 to 1994, I served as an attorney in the Civil Rights Division of the Justice Department, with 15 of those years in Voting Section, where I served in a number of supervisory capacities, including Acting Chief and Deputy Chief for Litigation. I am here today to talk about two issues in particular. First, vote caging and how it has been used to suppress minority votes; and second, steps that can be taken now to ensure that the U.S. Department of Justice avoids using its law enforcement machinery to advance partisan goals, as it did in 2004 and 2006.

Vote Caging: The Vote Suppression Weapon Of Choice In 2004

Conspiracies to stop African-American and Latino voters 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 caging votes on a massive scale 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.[1]

Vote Caging, in this context, involves sending out non-forwardable or registered mail to targeted groups of voters and compiling "caging lists" of voters whose mail is

[1] In Attachment A to this written statement, I have set forth a list of vote caging activities over the past three decades.

returned for any reason. Although the National Voter Registration Act (NVRA) prohibits election officials from canceling the registration of voters merely because a single piece of mail has been returned, Republican operatives have used the lists for many years in caging operations to challenge the voting rights of thousands of minority and urban voters nationwide on the basis of the returned mail alone.

With these lists in hand, operatives use the media for aggressive campaigns to create the illusion that the returned mail is evidence of mass voter fraud. In fact, mail can be returned for many reasons having nothing to do with fraud. They then use these caging lists to challenge the voting eligibility of thousands of African Americans and Democrats.

To bring these schemes to an end will require vigorous prosecution by the United States Department of Justice. But the Justice Department's priorities have shifted over the years, with the Department under the current Administration not only ignoring vote caging schemes, but actively working to give them a boost in the courts.

Contrast, for example, the Department of Justice's efforts in 1990 in North Carolina under President George H.W. Bush to the current Bush Justice 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 44,000 postcards to black voters, giving them incorrect information about voting and threatening them with criminal prosecution. The plan was designed to intimidate and threaten black voters, and the postcards that came back as undeliverable could easily have been used to compile a caging list. Fortunately, the scheme was uncovered just prior to the election as DOJ took swift action, sending the FBI out immediately to investigate. Even though the

perpetrators of this vote suppression scheme were exposed before the election, DOJ went ahead with a post election prosecution. 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 in the form of a consent judgment and decree.

Contrast the aggressive nonpartisan law enforcement action in North Carolina with what the current Bush Justice Department did about such voter suppression efforts in Ohio in 2004. That year, when the Ohio Republican Party was sued by voters prior to the election to stop what appeared to be a similar vote caging scheme in progress, the Bush II Justice Department took immediate action. But they did not file a lawsuit to protect voting rights and stop the vote caging. Instead, led by now highly controversial attorneys Hans von Spakovsky and Brad Schlozman, DOJ intervened in a highly unusual manner, coming to the defense of the Ohio GOP's efforts and by writing a letter to the federal judge overseeing the case and coming to the defense of the Ohio's GOP efforts. The federal judge appears to have ignored the letter, which was totally unsolicited and contrary to the Department's tradition of avoiding intervention in pre-election litigation.

It's one more example of how, under this Administration, with the likes of Hans von Spakovsky and Brad Schlozman calling the shots, the Justice Department's law enforcement program became overtly political. Even worse, this politicization perverted its mission of defending the right to vote.[2]

[2] Most disturbing has been the brazen insertion of partisan politics into the decision-making under Section 5 of the Voting Rights Act. Section 5 decisions in the Mississippi and Texas redistricting matters in 2002 and 2003 and the Georgia voter id matter in 2005 were made for clear partisan political reasons over the strong recommendations of career staff. The Georgia matter is especially illustrative of the serious problems in the Division. The decision was made only one day after the near unanimous recommendation by staff to object. After the Georgia decision, a decades old procedure by which career Section 5 staff made written recommendations about whether to object or not to a Section 5 submission was ordered to be ended.

It is disturbing to note that most of the Department of Justice's litigation efforts in 2004 were undertaken for political purposes. For example, shortly before the Presidential election in November 2004, the DOJ's Civil Rights Division filed a series of briefs as *amicus curiae* in three cases addressing a contentious political issue raising legal questions about the provisional ballot provisions of the Help America Vote Act (HAVA). In each case, the brief supported the position of the Republican Party on this issue. Career attorneys in the voting section of DOJ's Civil Rights Division were not informed of these briefs until shortly before filing and had no input into them. The government's participation in these cases was not necessary or required. These filings were of significant concern to career attorneys because inserting the Justice Department unnecessarily into such a sensitive partisan political issue on the eve of a national election was unprecedented and sent a clear political message. Historically, the Department has resisted efforts to draw it into partisan battles on the eve of an election; but under this Administration, that policy changed.

The new Attorney General has quite a task on his hands, because what we have seen in recent years has been unprecedented: the resources of the federal government being used to thwart and attack the voting rights of Americans, and doing so to advance partisan goals.

Vote Caging In Other Battleground States

Ohio was not the only place where the GOP attempted to use vote caging in 2004. There is evidence that caging lists were assembled in Florida, Ohio, and Pennsylvania during the 2004 elections, possibly intended as the basis for massive voter eligibility

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All four career staff who recommended an objection to Georgia voter id law have been removed or left the Department. In the end, the priority, indeed obsession, of this Administration was not to protect the rights of American voters but with the politically charged pursuit of chasing the ghosts of voter fraud.

challenges. The Florida incident made headlines again last year during Congress's investigation into the firing of several U.S. Attorneys, when allegations resurfaced that Tim Griffin, the former RNC opposition researcher then serving as an interim U.S. Attorney in Arkansas, had been involved in an effort to cage voters in Jacksonville.

In Ohio, Florida, Wisconsin, Pennsylvania, and Nevada – all battleground states with significant minority populations living in urban communities – vote caging was the voter suppression method of choice for Republicans in 2004. Despite the sworn declaration of Deputy RNC Chair Maria Cino that the RNC has not "been involved in any efforts to suppress voter turnout," e-mails circulated among top RNC and Bush-Cheney campaign officials suggest otherwise. A document for use by state GOP officials in developing campaign plans worked on by Bush-Cheney campaign lawyer Christopher Guith provides a template of plans for vote caging. An e-mail from Guith declares "we can do this in NV, FL, PA, and NM because we have a list to run," referring to a plan to challenge absentee ballots using a caging list. Terry Nelson, Political Director of the 2004 Bush/Cheney campaign, was included on the e-mail.[3]

In June 2007, Senators Whitehouse and Kennedy called for a Justice Department investigation into allegations that Griffin and others at the RNC may have engaged in caging during the 2004 elections. To my knowledge, DOJ has failed to respond to these inquiries. Even more troubling, DOJ does not appear to have undertaken a single prosecution, or even an investigation, of any of the 2004 vote caging schemes. One would think that the best antidote for stopping future vote caging schemes would be

[3] These emails and documents are available at: http://i172.photobucket.com/albums/w31/drational/Cino2.jpg, and http://www.epluribusmedia.org/features/2007/images/Allstates.jpg, and http://www.epluribusmedia.org/features/2007/documents/State%20Implementation%20Template%20III.doc.

vigorous prosecution of those who perpetrated them in 2004. Unfortunately, DOJ has shown a real penchant for prosecuting the few individual cases of vote fraud rather than dealing with more widespread abuses and intimidation that have occurred during the last few election cycles. One has to ask this Administration's Justice Department: why aren't the votes of African Americans, Latinos, the poor and the elderly worth the same amount of protection from DOJ that the vote of white Republicans has been?

Pending Vote Caging Legislation

Legislation was recently introduced by Chairman Conyers of this Committee that would make vote suppression through vote caging illegal. The bill, entitled "The Caging Prohibition Act of 2007" provides that the right to register to vote or vote shall not be denied by election officials if the denial is based on voter caging and other questionable challenges not corroborated by independent evidence. The bill would also prohibit persons other than election officials from challenging a voter's eligibility based on voter caging and other questionable challenges.

I have seen first hand that voters, particularly the poor and the elderly, can be easily intimidated when someone challenges their right to vote. It can have the effect of discouraging that voter from casting a ballot or returning to vote again in the next election. And of course, that's precisely the aim of those who engage in vote caging. So I am pleased to see that Chairman Conyers' legislation would require that if a voter is being challenged by someone other than an election official, the challenger must have personal, first-hand knowledge in order to make a challenge.

Perhaps most importantly, Chairman Conyers' bill takes vote caging and deals with that pernicious practice in a way that will severely punish those who target certain

groups for disfranchisement. Thus, the Conyers' bill designates vote caging and other questionable challenges intended to disqualify eligible voters as felonies, crimes eligible for fines up to $250,000, five years imprisonment, or both.

Similarly, under a Senate bill introduced last fall by U.S. Senator Sheldon Whitehouse (D-R.I.) and 12 other senators, legislation was introduced aimed at preventing the long-recognized voter suppression tactic known as "voter caging." Challenging a person's right to vote because a letter sent to him or her was returned as undeliverable would be illegal under the bill.

Senator Whitehouse's "Caging Prohibition Act" would prohibit challenges to a person's eligibility to register to vote, or cast a vote, based solely on returned mail or a caging list. The bill would also mandate that anyone who challenges the right of another citizen to vote must set forth the specific grounds for their alleged ineligibility, under penalty of perjury.

Vote Caging Schemes Involve The Intentional Suppression of Voting Rights

Because vote caging is targeted to racial and ethnic minorities, those who perpetrate these caging schemes know full well the racially discriminatory nature of their efforts. That's why they make every effort to cover their tracks and distance themselves from the vote suppression schemes they unleash. Thus, in another e-mail chain involving the vote caging in Ohio in 2004 later enjoined by a federal judge, Bush-Cheney lawyer Guith, Tim Griffin, and others discussed "the risk of having GOP fingerprints" on the vote caging lists. Clearly, they did not want the public to know the party was targeting black voters with the goal of trying to knock them off the voter rolls and intimidate them into not voting.

As we enter another hotly-contested, high stakes election cycle, there is reason to believe vote caging will once again be used illegally to suppress the black vote or the vote of other minority voters, especially Latinos, for partisan gain. The recommendations of the Conyers report from last year on how to stop vote caging have yet to be heeded. The RNC has shown that federal consent decrees are inadequate to stop vote caging from again and again rearing its ugly head.

A legislative fix is clearly needed, but what is also needed is aggressive enforcement by DOJ. Not only has this Administration been remiss at enforcement, DOJ officials took positions in 2004 that actually supported the vote cagers and the vote suppressors.

DOJ Officials Who Supported Vote Suppression Schemes Have Not Been Held Accountable

Unfortunately, those at the DOJ who failed to stop – and in some cases actually supported – the voter suppression efforts in 2004 through vote caging and other schemes have not been held accountable. None has even been reprimanded for their abuses.

Instead, they've been rewarded with promotions for their partisan misdeeds. Alex Acosta, the Assistant Attorney General who, along with Hans von Spakovsky and Brad Schlozman, was responsible for sending the letter to the Ohio federal judge in defense of the vote caging scheme there, was appointed in May 2005 to the post of U.S. Attorney for the Southern District of Florida – a past and possibly future site for voting rights controversies. And the DOJ political appointee who likely drafted the letter to the Ohio federal court in support of the 2004 vote caging scheme, Hans von Spakovsky, has been

nominated for the Federal Election Commission, the agency charged with overseeing the fair administration of our election laws.[4]

With the stakes in the upcoming 2008 elections being so high, both major political parties have once again directed their efforts at combating alleged voter fraud (the GOP) and fighting alleged vote suppression schemes (the Democrats). Given the politicization of the DOJ, it is highly unlikely that we will see efforts to stop vote caging among the enforcement priorities of the Civil Rights Division. That's unfortunate, because it means that once again the burden to put an end to these tactics will fall on private litigants.

Congress can and should do something: for one, hearings should be held promptly on Conyers' bill that would criminalize racially discriminatory vote caging schemes. Party officials should be brought in and asked about past vote caging schemes. And they should be queried also about ongoing or planned vote caging operations this year. Such hearings might have a chilling effect on those who were otherwise planning a new round of vote caging activities aimed at minority voters. That would be a good outcome.

Caging voters will continue to be an issue unless Congress enacts legislation making it clear what constitutes illegal vote caging, and prescribes severe penalties for those who unfairly target voters using that technique. Failure to do so will only encourage continued vote suppression and voter intimidation efforts in 2008 through vote caging and other methods, and this will likely suppress the voting rights of minorities, active military serving overseas, and students registered at a parent's address.

[4] Fortunately, the von Spakovsky nomination stalled once Senators learned the details of his DOJ partisan shenanigans and other misdeeds.

Is DOJ Still Steeped in Politics?

Some of the details of actions by some in the Bush Administration to politicize the Justice Department's law enforcement efforts are now well known, due in large measure to Senate and House Judiciary hearings held last year. Those hearings should continue in the year ahead for a couple of reasons.

First, we have yet to learn fully about misconduct and possible crimes committed by DOJ officials and White House personnel during this period. Second, the current election cycle presents yet another opportunity for DOJ partisans to use law enforcement machinery to affect the outcome of this year's elections. So there is some urgency to get to the bottom of all this and ensure that the problem is corrected going forward.

Now some will claim that the purging of a number of appointees and appointee hires last year has eliminated all the concerns about partisanship at DOJ and there is no longer a need to worry. After all, Alberto Gonzales, Karl Rove, Harriet Miers, Monica Goodling, Kyle Sampson, Brad Schlozman, and Hans von Spakovsky have all left Government. Presumably, they no longer pose a threat. But the politicization of DOJ runs both broad and deep. As a former DOJ prosecutor, I know it will take more than a new Attorney General and the resignations of a few bad apples to restore DOJ's integrity, credibility, and reputation for evenhanded, nonpartisan law enforcement. What can or should happen?

Hearings such as this are a good occasion to call DOJ officials before the Committee and determine the steps that they are taking this year to ensure that the Justice Department will not use its vast law enforcement resources to play politics again this year. If the answer is that nothing has changed from 2004, then that's a source for great

concern. That seems particularly important not only because it is an election year, but because DOJ has been investigating itself over this matter for many months now and has yet to tell Congress what it found and or even when the investigation will finish. There is also reason to wonder if the Inspector General at DOJ or the Office of Professional Responsibility will be blocked from obtaining all of the facts. Recall that in 2006 the Justice Department's Office of Professional Responsibility was foiled in its efforts to investigate the Bush Administration's domestic eavesdropping program when investigators were denied security clearances to do their work. This points up the need for continued oversight hearings.

For those who wonder why many of us remain concerned about politicization at DOJ, let me give you some recent examples of DOJ actions that suggest partisan politics continues to drive litigation decisions at DOJ. Consider the Indiana voter ID case heard last month by the Supreme Court. The case is steeped in politics, with Democrats claiming the law was enacted by Republicans to deprive certain voters of the right to vote. And who are those certain voters? In the words of the only Democratically-appointed federal judge to rule on the Indiana voter ID law, those voters "skew Democratic." The Indiana voter ID law challenged in the case was voted into law by a Republican-controlled Legislature and signed into law by a Republican Governor. Not a single Democratic legislator supported it.

The issue of voter ID is seen today as one of the most politically polarizing issues in the election law arena. Indeed, in the handful of states that have enacted voter ID laws since the infamous *Bush v. Gore* decision, all have been states where Republicans control the Legislature and have been enacted largely along party lines. In Texas last year, where

Republicans control the Legislature, a voter ID law only lost because one Democratic state senator, Senator Mario Gallegos, literally risked his life (he had undergone a liver transplant) and defied his doctor's orders to return home, instead staying on the senate floor in a hospital bed to help block a vote on the measure.

Given the politically polarizing issue of voter ID laws, I find it troubling that DOJ made a decision to participate in the Indiana case before the Supreme Court. But DOJ not only filed a brief in the case, they asked to participate in oral argument and even had their 'top gun', Solicitor General Paul Clement, present the argument. It also struck me as unusual that among the signatories to the Government's brief in the case, there were no career attorneys from the Division's Appellate Section listed. That is a procedural departure from the norm (particularly when an attorney from the Voting Section is listed on the brief as was the case here), and it suggests to me that an attorney in the Appellate Section likely asked to have her/his name left off the brief. It is clear to me and several other former DOJ attorneys that the current Solicitor General's office will essentially serve as the de facto legal counsel to the GOP in any election law case that reaches the Supreme Court and has partisan implications.

If Attorney General Mukasey is going to do more than give mere lip service to his confirmation hearing promise to eliminate partisanship from DOJ decisionmaking, then fully disclosing the results of the ongoing investigations to the public, particularly about partisan misdeeds in 2004, would be a good place to start. And announcing that the Justice Department would stay out of pre-election partisan litigation skirmishes would be another positive step, unless the Department's participation is necessary to protect minority voting rights.

Attorney General Mukasey also needs to establish a timetable for the completion of the current investigations, so they don't disappear into the black hole at Justice where so many other public corruption investigations have fallen. Remember Tom DeLay and his involvement with convicted felon Jack Abramoff? Even with Abramoff singing to federal prosecutors for months, it doesn't appear DOJ is any closer to prosecuting DeLay or any other Members of Congress than they were a year ago.

What is happening at DOJ? Public corruption cases are seen by the public, correctly in my view, as indicators of whether DOJ is going to enforce the law wherever the evidence leads. It's the one area where the Attorney General, by pursuing cases vigorously, can be most influential in restoring integrity to Justice. And in that same vein, Mr. Mukasey needs to give priority to matters where the actions of Departmental attorneys suggest partisan bias, as we have seen in 2004 when officials were guided by partisan concerns rather than evenhanded law enforcement goals.

Attorney General Mukasey should also take action in light of what was learned about the firings of the U.S. Attorneys last year. You may recall, for example, that in one case, former U.S. attorney in New Mexico, received a pre-election call from U.S. Senator Pete Dominici about a pending investigation and if indictments were imminent. Iglesias testified that indictments were not imminent to which Domenici replied, I'm very sorry to hear that" Iglesias told the Senate he felt "pressured" and "leaned on by the unprecedented" call. He also reported that Congresswoman Heather Wilson called him two weeks earlier to ask about sealed indictments in an ongoing public corruption probe. Both Domenici and Wilson admitted to making the calls. Wilson was involved in a tight re-election race at the time against former state Attorney General Patricia Madrid.

Iglesias perceived the calls from these two Members as an attempt to influence him to "speed up" the indictments and the publicity over them that would surely ensue, in an attempt to sway the election in Wilson's favor. (Wilson ended up winning by around 900 votes.)

What is most interesting to me about this whole episode is that these Members saw no wrongdoing in contacting a federal prosecutor about a pending public corruption investigation and putting pressure on him to speed up or unseal indictments. The reason for this is that, by 2006, the politicization of DOJ had taken root and the Department was widely known as a haven for partisan law enforcement. Thus, members like Wilson and Domenici (neither of whom have been prosecuted or reprimanded, as far as I know) felt no compunction about contacting a federal prosecutor in such circumstances.

Here again, this is an area where Attorney General Mukasey can take reform measures. He could inform all federal prosecutors that in the pre-election period, say sixty days before an election, all contacts with the Department of Justice from members of Congress must go through the Department's Office of Legislative Affairs. It should be Departmental policy that DOJ attorneys may not discuss any ongoing federal investigation or possible investigation with any Member of Congress during this time. (To me, it is highly doubtful that direct contact between a member of Congress and a U.S. Attorney about a pending case is ever appropriate).

Also, if existing House rules do not make clear that contact with a federal investigator or prosecutor is forbidden in any pending investigation or case, then the Rules should be amended in clear and unambiguous language. After all, House rules already make clear that Members may not engage in ex parte – or "off the record" –

conversations with agency officials on matters under formal consideration. The need to guard against political interference is even greater in ongoing criminal matters, especially those involving public corruption.

If we don't see action by the Attorney General or the Justice Department soon in these areas, then there will be little reason to believe that much has changed at Justice since 2004. More importantly for those of us in the election law field, it does not bode well for the election year decisions that will soon be made at DOJ.

Conclusion

Since its creation in 1957, the Civil Rights Division has been the primary guardian for protecting our citizens against illegal racial, ethnic, religious and gender discrimination. Through both Republican and Democratic Administrations, the Division developed a well-earned reputation for expertise and professionalism in its civil rights enforcement efforts. Partisan politics was rarely, if ever, injected into decision-making, in large measure because decisions usually arose from career staff and were normally respected by political appointees. The career staff played a central role in recommending new career hires and those recommendations were almost always respected. Unfortunately, since this administration took office, that professionalism and non-partisan commitment to the historic mission of the Division has been replaced by unprecedented, political decision making. The result is that the essential work of the Division to protect the civil rights of all Americans is not getting done.

This Committee is right to try and shine a light on the vote suppression schemes that have infected our elections. And it is right to attempt to legislate in this area, to ensure that voters are not intimidated and prevented from voting.

If we are going to try and spread democracy throughout the world, we should first make sure that we correct our own election inadequacies here at home. Vote suppression and racially targeted vote caging schemes threaten the integrity of our elections and undermine our democracy. They have no place in a just society. I look forward to working with Members of the Committee to put an end to this abhorrent practice.

Thank you again for the opportunity to testify before the Committee.

Attachment A

Vote Caging Activities in the 1980's:

New Jersey 1981

The notorious 1981 New Jersey gubernatorial election between Republican Tom Kean and Democrat Jim Florio provided a window into voter intimidation and suppression techniques, vote caging in particular. The Republican National Committee used vote caging to compile a list of more than 45,000 voters, mostly Black and Latino, to challenge at the polls. Republican "ballot security" teams hired armed guards with armbands to police polling places.

Kean won by less than 2,000 voters, but only after an almost month-long recount. Both state and county prosecutors launched investigations into voter intimidation. A federal court eventually entered a consent decree that prohibited the RNC from engaging in vote caging.

Louisiana 1986

In the 1986 election, the RNC used vote caging to compile a list of 31,000 voters, mostly black, that it attempted to have thrown off the voter rolls. At the time, Kris Wolfe, the Republican National Committee Midwest political director, wrote Lanny Griffith, the committee's Southern political director, "I know this is really important to you. I would guess this program would eliminate at least 60,000 to 80,000 folks from the rolls. If this is a close race, which I assume it is, this could keep the black vote down considerably." Following this caging scandal, both parties agreed to amend the original 1982 consent decree to require that the RNC would submit to the court any ballot security plan for approval.

The 1990's: Vote Suppression Through Caging Continues

North Carolina 1990

In October of 1990, when the black Democratic candidate for U.S. Senate, Harvey Gantt, was leading incumbent Jesse Helms in the polls, the Helms for Senate Committee and the North Carolina Republican Party developed a vote caging scheme.
As described above, according to a lawsuit brought by the Bush I Justice Department, on October 29, 2004, at least 44,000 postcards were sent, without a disclaimer that they were paid for by a political party, exclusively to black voters in North Carolina. The postcards served two purposes; first, they were intended to directly intimidate and threaten black voters and to give them false information about voting; second, and more insidiously, the undelivered postcards would be used to create a caging list of black voters with the intent of challenging them at the polls. According to the suit, "This effort was terminated shortly before the election and subsequent to the initiation of an investigation … by the United States Department of Justice." Later a consent decree was entered against defendants that allowed the court oversight until 1996.

The 2004 Elections: Vote Caging Suppression At Full Bore

Florida 2004

The 2000 election in Florida raised the stakes and also showed the effectiveness of disenfranchising black voters in a close election. Both parties trained their sights on the state again in 2004 and vote caging became an integral part of the Republican Party plan in the Sunshine State.

In the late summer and fall of 2004, the Republican National Committee developed a caging list of voters in predominantly black areas of Jacksonville, Florida. The scheme came to light when Tim Griffin, then the Research Director and Deputy Communications Director for the RNC, mistakenly sent an e-mail with the subject line "caging" to an e-mail address at georgewbush.org, a political parody website whose operators sent it to the press. Griffin had meant to send the list to a Republican operative with an e-mail address at georgewbush.com, the official Bush campaign e-mail suffix. Griffin's e-mail contained an Excel spreadsheet "Caging-1.xls" containing the names of 1,886 Florida voters, mostly black, including the names of black soldiers deployed abroad.

As the BBC reported, "An elections supervisor in Tallahassee, when shown the list, told Newsnight: 'The only possible reason why they would keep such a thing is to challenge voters on Election Day.'" A recent analysis of the names on the caging list showed that the Jacksonville caging preferentially selected blacks and excluded whites. Griffin was later appointed an interim U.S. Attorney in Arkansas. The White House refused to submit him to the Senate for confirmation out of concerns over his involvement in vote caging, as Monica Goodling verified in her testimony before the Senate Judiciary Committee.

Nevada 2004

In Clark County Nevada, the former state Republican Party executive director, Dan Burdish, attempted to cage 17,000 voters weeks prior to the 2004 election. The voters had been put on an "inactive" list when mail sent to their addresses was returned. The *Las Vegas Review Journal* reported, "Burdish said he only targeted Democratic voters because 'I'm a partisan Republican, I admit it."

Local election administrators objected to the challenge, including Registrar of Voters Larry Lomax. As reported by the *Review Journal*, "Lomax said he can see no legitimate reason why Burdish would challenge the voters. 'The law already tells us what to do with inactive voters,' Lomax said. 'The law provides a remedy for these people, and I'd guess that the only point in a challenge would be an attempt to intimidate voters.'"

Ohio 2004

More so than Florida, 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 the 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 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 to challenge the Ohio law permitting political parties to post challengers in polling places on Election Day – challengers armed with caging lists.

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's followed the ongoing scandal over the politicization of the Civil Rights Division, the answer is "of course not." Perversely, the Justice Department sent a letter to the Ohio federal judge overseeing the lawsuit to tell her that the challenge statute that was to be used as part of the vote caging scheme was perfectly fine.

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 an election eve case in which it had not previously participated, its involvement was unsolicited, and it was not a party,. (Acosta's letter was sent just a few days after then-U.S. Attorney Bradley Scholzman filed the now-infamous indictments against the four ACORN workers in Missouri.)

Judge Dlott refused to heed the advice of the Assistant Attorney General, found that permitting the challenges would have a racially discriminatory impact, and issued an order enjoining the Republican Party from placing challengers at the polls.In the end, the caging scheme was stymied. (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 [a.k.a. "the Conyers Report"].)

Pennsylvania 2004

The Pennsylvania GOP targeted for caging only voters in Philadelphia, which is approximately 45% black, according to Census data. Voters in other parts of the state, which is 85% white, were not caged.

The party compiled a caging list of 10,000 returns from a Republican mailing purporting to welcome new registrants in Philadelphia to the political process, and then announced plans to challenge those 10,000 voters on Election Day. The Republican speaker of the state House admitted the campaign tactics were intended to "keep down" the vote in Philadelphia.

As *The Inquirer* reported, "State Republicans released additional details yesterday from their list of 10,000 letters to Philadelphia voters that they said were returned as undeliverable. They said they would use this list to challenge voters at the polls today - a type of challenge similar to one that federal judges have barred Republicans from using today in Ohio."[25]

According to the *Bucks County Courier Times*: "Election officials and other observers, however, say the 7.6 percent rate of returned letters isn't surprising in a large city with many transient, low-income neighborhoods. 'This is a mobile population,' said Randall Miller, who teaches a course on elections at St. Joseph's University. 'Some people are living in places where they don't really have addresses, [such as] shelters. They have every right to vote.'" When the media asked the GOP for the list, the party initially refused but later provided just six names and addresses.

Wisconsin 2004

The Wisconsin Republican Party announced the Saturday before the 2004 election plans to challenge 37,180 voters on a caging list developed by the party. The Wisconsin GOP targeted for caging only voters in Milwaukee, which is approximately 40% black and 55% minority (black and Hispanic), according to Census data. Voters in all other parts of the state, which is 91% white, were not caged.

In this caging scheme, the party used a commercial software program to compare addresses on voter registration cards to a postal service database of known addresses, and then announced plans to challenge 37,180 voters at the polls whose addresses, the party claimed, didn't match.

The non-partisan City Attorney called the plan "outrageous." It was. Of the caged list, 13,300 of the addresses simply listed incorrect apartment numbers. Some 18,200 more cases stemmed from the lack of an apartment number for a resident of an existing building.

Of the remaining 5,000 or so addresses, the City Attorney's office found hundreds actually did exist, and many of the other non-matches were likely due to clerical errors. Had the plan been allowed to go forward, thousands of legally-registered, apartment-dwelling black voters would have been challenged because of a clerical error involving apartment numbers. The attempt was stopped by the City Attorney and Election Commission.