

September 2007



CAGING DEMOCRACY: A 50-Year History of Partisan Challenges to Minority Voters

by Teresa James, J.D.



Washington DC Office
739 8th Street SE, Suite 202 • Washington, DC 20003

Arkansas Office
2101 South Main Street • Little Rock, AR 72206

1-800-546-8683 • www.projectvote.org

TABLE OF CONTENTS

EXECUTIVE SUMMARY	3
INTRODUCTION	5
THE POST RECONSTRUCTION ORIGINS OF VOTER CHALLENGE LAWS	7
VOTER SUPPRESSION	10
CAGING OPERATIONS BEFORE 2004	12
CAGING OPERATIONS- 2004 AND BEYOND	16
OTHER METHODS OF DEVELOPING CAGING LISTS	21
CAGING LITIGATION	26
RECENT CHANGES TO STATE VOTER CHALLENGE LAWS	32
RECOMMENDATIONS	34
CONCLUSION	36

EXECUTIVE SUMMARY

Voter caging is a term that drew public attention as a result of testimony provided by Monica Goodling, former White House liaison to the Department of Justice, to a 2007 House Judiciary Committee hearing on the firings of eight US Attorneys. Although public interest in voter caging is relatively recent, the practice is not new. Republicans have engaged in voter caging on the national and state level since the late 1950's. According to many election observers, voter caging is a controversial political tactic that typically targets minority voters to directly disenfranchise them or suppress their vote by intimidation. Republican officials, on the other hand, maintain that voter caging is part of what they describe as "ballot security" measures necessary to combat voter fraud.

The following report reviews Republican voter caging operations during the last 50 years, culminating with the unprecedented number of large voter caging operations conducted across the nation in the 2004 presidential election. The report briefly covers the origins and history of voter caging and follows with a survey of individual caging operations during this 50-year period. The key findings are as follows:

- Voter caging is a practice of sending non-forwardable direct mail to registered voters and using the returned mail to compile lists of voters, called "caging lists," for the purpose of challenging their eligibility to vote. In recent years, other techniques, such as database matching, have been used to compile challenger lists.
- State voter challenge statutes permit partisan individuals to challenge and disqualify voters, frequently without providing clear standards. These statutes often have their origins in post-Reconstruction laws that were enacted to deprive African American voters of their franchise.
- These voter caging campaigns, as noted by three researchers at Rice University, arose simultaneously with the development of the Republican "Southern Strategy" in the 1960's. Under that strategy, the Party decided to woo disaffected white voters in the South through rhetorical appeals to "states rights."
- Documents submitted during civil litigation have established that voter caging operations were directed consciously and specifically at jurisdictions with large numbers of minority voters. At least one public statement by a state Republican office-holder and private communication between party officials evidence an unambiguous intent to suppress Black votes. Precincts that had historically high percentage of voters supporting Democratic candidates, which were often minority precincts, were also targeted for voter caging operations.
- Media campaigns immediately before elections were a key part of voter caging operations. Part of the strategy was to call a press conference to announce the filing of mass challenges on the eve of the filing deadline. The challenges were billed as evidence of massive voter fraud although the voter caging lists were, in fact, only evidence of returned mailings. Frequently, the pre-election media campaigns alleging voter fraud were as vigorously, or more vigorously, carried out than the challenges themselves.
- After an initial voter caging operation in Arizona in 1958, a nationwide voter caging campaign dubbed "Operation Eagle Eye" was conducted in 1964 by the RNC and state

Republican parties in major metropolitan areas. Voter caging and other voter challenge operations continued in isolated states during the 1980s and early 1990 and re-emerged on the political scene as nationwide campaign strategy in 2004.

- In 2004, political operatives targeted more than half a million voters in voter caging campaigns in nine states. At least 77,000 voters had their eligibility challenged between 2004 and 2006.
- At least five states with competitive political environments enacted changes to their voter challenge statutes just before and after the 2004 election. Three states with Republican-controlled legislatures, Florida, Pennsylvania and Ohio, made it easier for private individuals to challenge a voter's eligibility while Washington and Minnesota passed laws making it harder for private persons to challenge voters. Minnesota specifically outlawed the use of caging lists compiled from returned mail sent by a political party.

INTRODUCTION

Recent Congressional inquiries into the firings of United States Attorneys for purportedly partisan reasons have sparked interest in the esoteric term “caging.” The term drew attention after former Justice Department White House liaison Monica Goodling raised it in her May 2007 testimony to the House Judiciary Committee that is investigating the firings. Ms. Goodling testified that Tim Griffin, former interim US Attorney for Arkansas, had not been forthcoming to the committee about his involvement in “voter caging” operations when he worked for the Republican National Committee (RNC). The committee members were unfamiliar with the term and did not pursue the matter beyond asking for a definition.

Ms. Goodling responded that caging is a direct mail term, and she was correct as far as she went. The term “caging” refers to a direct mail industry practice of sending out mass mailings and culling the responses according to categories that are useful to the sender, such as positive responses, no responses, or returned mail. What the committee did not ask Ms. Goodling, and what she did not volunteer, was that caging is an important first step in challenging the eligibility of voters during a political campaign. It is a component of many Republican self-described anti-fraud campaigns that historically target heavily minority and Democratic voting populations.

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 was 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,¹ 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 returned mail alone.

With their caging lists in hand, Republican officials and operatives take the second step in their caging operations, using the lists as the basis for media campaigns to create the impression that the returned mail is evidence of mass voter fraud. Having raised the chimera of a voter fraud, Republican parties and operatives move into the third phase of caging operations. Operatives use the caging lists to challenge the voting eligibility of thousands of people of color and Democrats.² The caging process, couched in racially neutral terms, is described in one party campaign document under the heading, “Pre-Election Day Operations - New Registration Mailing.” The use of such lists by the Republican Party to challenge voters in heavily Republican precincts has not been reported.

The Democratic Party, election experts, and civic organizations, charge that the intended effect of voter caging operations is to suppress minority votes. Several court decisions and occasional public comments by Republican officials lend support to this conclusion. In response, national and

¹ The NVRA, at 42 U.S.C. 1973gg 6(d), provides that election officials can not remove a voter’s name from the registration list for federal elections on the grounds that the voter has changed residence unless (1) the voter confirms in writing that he or she has moved outside the registrar’s jurisdiction or (2) the voter fails to respond to a notice mailed by the elections official and then does not vote in two consecutive federal elections. The notice to the voter must be in the form of a postage prepaid and pre-addressed return card, sent by forwardable mail. Partisan voter caging operations use non-forwardable mail. Voter challenge laws in many states, as applied by elections officials, have permitted private entities to challenge the eligibility of voters merely on the basis of residence, and, to prevail on that basis. Minnesota passed legislation to prohibit challenges on the basis of returned mail sent by a political party. Mn. Stat § 204C.07.

² The caging lists are also used to demand that voters be purged from the registration rolls, as opposed to directly challenging voter eligibility at the polls.

state Republican party entities defend caging operations as necessary ballot security measures. At least one federal court disagrees. The RNC is bound by a U.S. District Court consent decree ordering it to obtain court approval before it engages in any type of ballot security program.³ Yet, Republican-led caging operations continue unabated.

Caging operations are relevant to the US Attorney dismissals because at least three of the fired US Attorneys refused to pursue voter fraud charges that could be used by Republicans to paint Democrats as perpetrators of fraud despite being pressured to do so by Republican Congress members and officials immediately before the 2006 elections. The US Attorneys are John McKay,⁴ Western District of Washington, David Iglesias, California, and Todd Graves of the Western District of Missouri. Mr. Graves' interim successor, Bradley Schlozman, brought voter fraud charges against four former employees of a community organization in the week before the 2006 election.⁵ All three fired US Attorneys had exemplary records of service in office. The common thread in their performance was that they did not respond to external pressure to prosecute weak voter fraud cases.⁶

As Republican caging operations often use state voter challenge laws to prevent targeted electors from casting their ballots, the discussion will begin with a brief overview of the history of state voter challenge laws and their roots in the post-Reconstruction era during which laws and procedures were adopted to demobilize and limit political participation by newly freed African Americans. The report will outline statements by Republican officials in which they admit that caging operations suppress the "Black vote." We will then survey two caging operations conducted by the RNC and state Republican parties. We divide our survey into periods, the years before 2004 and the years 2004 and after. This section will address other means of compiling caging lists in addition to returned mail, such as using existing state databases and private software to compile the lists.

Litigation arising from voter caging and challenges will be discussed during the survey of state challenge campaigns and in a detailed litigation section that follows. The Democratic National Committee and state Democratic parties fought against illegal caging and challenge campaigns by the GOP in state and federal courts. Two of the most important cases stemmed from GOP caging efforts in New Jersey during the 1980's and led to consent decrees that are still in effect. Under the consent decrees, the RNC has agreed to restrictions to bring its activities into compliance with the Constitution and federal law. As the RNC has pointed out in subsequent lawsuits, only the RNC is bound by the decrees, not the state Republican parties.

This report will conclude with recommendations to suggest means to avoid burdening our election system and our minority voting community with ill-conceived and unlawful caging operations, mass challenges, and partisan-inspired mass purges of voting rolls.

³ Democratic National Committee v. Republican National Committee, Civil Action No. 86-3972, (D.N.J. 1986).

⁴ Attorney John McKay, in his testimony before the Senate Judiciary Committee, May 29, 2007.

⁵ Morris, Frank "Attorneys Scandal May Be Tied to Missouri Voting" NPR [All Things Considered](#), May 3, 2007.

⁶ Attorney General Alberto Gonzalez testified before the House Judiciary Committee on May 3, 2007 that there had been outside complaints regarding Mr. McKay's handling of voter fraud cases.

THE POST RECONSTRUCTION ORIGINS OF VOTER CHALLENGE LAWS

Challenge laws are currently on the books in many states, although they were rarely utilized until the relatively recent ascendance of pre-election voter caging operations by Republican state and national entities, particularly in 2004. The state challenge laws are racially neutral, but they can and have been widely used to disenfranchise minority voters.

The Fifteenth Amendment of 1869 prohibited states from denying men the vote on the basis of race, color, or previous condition of servitude (women were not guaranteed the right to vote until 1920 with the passage of the Nineteenth Amendment). During the Reconstruction Era, Republicans actively sought to expand their political base in the South by legislation and by actively registering African-American freemen to vote.⁷ At that time, it was Southern Democrats who resisted enfranchising freedmen. During this era, African American registration rates were higher than or equal to that of whites in seven of the eleven former Confederate States. African Americans in former Union states continued to have less access to the polls.⁸

In the 1890s, former Confederate states reacted to strong political participation by African American voters and candidates by instituting the “Southern system”, implementing poll taxes, literacy tests, and other mechanisms aimed at disenfranchising African Americans. The Southern system “had five salient features: burdensome residency requirements, periodic registration, imposition of poll taxes, literacy or “understanding” requirements, and stringent disqualification provisions”⁹ Many of the state challenge laws have their roots in the post-Reconstruction Era and are relics of the Jim Crow laws intended to deprive African Americans of their franchise.¹⁰

The origin of Florida’s voter challenge statute, for example, illuminates the racial bias behind its passage. In 1865, the Florida legislature wanted to deny African Americans the franchise and restrict the vote to white men only. In 1887, federal law pre-empted Florida law and extended the right to vote to African American men. The newly re-enfranchised African American voters responded by voting in large numbers. In response, one year later, the Florida legislature enacted a challenge voters statute that extended the power to challenge to private poll watchers.¹¹

The current Florida statute on voter challenges permits poll watchers to challenge a voter merely by signing an oath that states they have “reason to believe” that the voter is ineligible to vote and stating the reasons for the challenge. Acceptable grounds for challenges are not specified in the statute. Challengers are subject to a first-degree misdemeanor charge if they file “frivolous” challenges, but this penalty is not imposed for “any action taken in good faith and in furtherance

⁷ Cunningham, Dayna L. “Who are to be the Electors? A Reflection on the History of Voter Registration in the United States,” 1991 Yale Law and Policy Review, , Vol. 9., 370-404, 373.

⁸ Id.

⁹ Id.

¹⁰ Advancement Project, Report to State and Local Election Officials on the Urgent Need for Instructions for Partisan Poll Watchers,” Oct. 27, 2004.

¹¹ Advancement Project, supra n. 10.

of any activity or duty permitted of such electors or poll watchers by law.”¹² The bar for Florida challenges is set low, and the challenged voter is not given an opportunity to oppose the challenge at the polls. He or she is merely given a provisional ballot.

According to an Advancement Project report, the Florida challenge statute in effect during the 2004 election required a poll watcher to write out the reasons he or she challenged a voter on a form. The challenged voter could then present evidence supporting her eligibility. Election workers had to resolve the issue at the polls before the challenged person could vote. (Former Fla. Stat. § 101.111(d) and (3)).¹³ Although this procedure had a high potential to cause delays, at least a challenged voter had an opportunity to overcome the challenge.

In Ohio, the general assembly granted polling place election judges the authority to challenge a person’s right to vote in 1831. Ten years later, that authority was greatly expanded in a law titled, “An Act to Preserve the Purity of Elections.” Lest anyone be unsure of the exact intent of the act, the statute was again amended in 1859 to provide for challenges based upon a voter’s possession of a “visible admixture of African blood.” [42 Rev. Stat. Ohio §§ 104-07.] By 1868, the law stated:

“it shall be the duty of judges of elections to challenge any person offering to vote at any election held under any law of this state, having a distinct and visible admixture of African blood, and shall tender to him the following oath or affirmation...”¹⁴

A series of questions apparently designed to determine the degree to which the person was African American followed. The questions were:

1. What is your age?
2. Where were you born?
3. Were your parents married, and did they live together as man and wife?
4. Had your parents, or either of them, a visible and distinct admixture of African blood?
5. In the community in which you live are you classified and recognized as a white or colored person, and do you associate with white or colored persons?
6. Are there schools for colored children in operation in the township, village or ward in which you live; and if you have children, do they attend the common schools organized for white children, under the laws of the State?¹⁵

The questions were struck down by the Ohio Supreme Court and the 15th amendment later superseded this law.

Nevertheless, Ohio retains a challenge statute that permits private citizens - operating on behalf of political parties - to challenge the right of fellow citizens to vote. The statute does not require personal knowledge on the part of the challengers or even good faith, as will be discussed further below in regard to Ohio caging operations.

Whether a particular state’s challenge statute has the same negative effect as post-Reconstruction laws depends on the standards and limitations the respective laws place on the challenge process. Many challenge statutes are so broadly written that challengers operate under a toothless “good faith” standard (or no standard at all) coupled with vague or unspecified grounds for making challenges. In addition, broad discretion is afforded to poll-workers. Pollworker discretion, and its abuse, is a hallmark of the “Southern” system adopted to disenfranchise African Americans. while allowing whites to vote.

¹² Fla. Stat. § 101.111.

¹³ Advancement Project, *supra* n. 10.

¹⁴ Advancement Project, *supra* n. 10 at pages 5-6.

¹⁵ *Id.*

One state, however, has taken an exemplary step to prevent partisan political caging. Minnesota passed legislation on May 31, 2006, prohibiting the use of challenge lists based upon mail sent by a political party. The new law states:

Prohibited challenges. Challengers and the political parties that appointed them must not compile lists of voters to challenge on the basis of mail sent by a political party that was returned as undeliverable or if receipt by the intended recipient was not acknowledged in the case of registered mail. This subdivision applies to any local, state, or national affiliate of a political party that has appointed challengers, as well as any subcontractors, vendors, or other individuals acting as agents on behalf of a political party. A violation of this subdivision is a gross misdemeanor.¹⁶

¹⁶ 2006 Minn. Laws 204C.07 Subd.5. (ch. 242 s. 21)

VOTER SUPPRESSION

Republican officials, to suppress Democratic votes, have focused on clearly identifiable often physically segregated groups racial and ethnic minorities. Before the mid-1960's the southern Democrats were the group most actively involved in suppressing the African American vote. With the advance of the Civil Rights movement, during the 1964 presidential campaign of Barry Goldwater, a radical change took place in United states politics. Republican conservatives adopted the "Southern strategy," in which they decided to pursue the votes of alienated white Southern Democrats and forgo competing with the opposition for the votes of African Americans following their remobilization in the Civil Rights Era . GOP ballot security programs originated in conjunction with the GOP's Southern strategy.¹⁷ Some contemporary RNC and state Republican officials have even admitted, privately and publicly, that caging and similar so-called "ballot security campaigns" are intended to suppress the African American vote.

In a 1986 Louisiana caging operation, the Midwest RNC political director, Kris Wolfe sent a memo to the Southern RNC political director, Lanny Griffith, saying "I would guess this program will eliminate at least 60,000 to 80,000 folks from the rolls...If it's a close race...this could keep the black vote down considerably."¹⁸ This memo, which was released during a 1986 New Jersey District Court lawsuit opposing RNC caging operations, also acknowledged that the deputy political director of the National Republican Senatorial Committee had approved the caging operation.

During a 2004 Detroit election campaign, Michigan State Representative John Pappageorge told a meeting of Oakland County Republican Party members that "if we do not suppress the Detroit vote, we're going to have a tough time in this election."¹⁹ Detroit's population is 83 percent African American and overwhelmingly supports Democratic candidates. Apparently unaware that profiling a minority group for voter suppression violates the Voting Rights Act (VRA), Pappageorge apologized for his comment, calling it a bad choice of words. However, he felt that the comment was not racist. Minority vote suppression is a tactic that some Republican party officials see as perfectly legitimate. They are wrong.

Challenging an elector's right to vote on the basis of racial or ethnic profiling violates the First, 14th and 15th Amendments. In addition it violates the Voting Rights Act of 1965 (VRA),²⁰ which prohibits voting practices and procedures that discriminate on the basis of race or membership in a language minority group. Section II of the VRA prohibits persons acting under color of law from refusing to permit eligible persons from exercising their right to vote.²¹

¹⁷ Chandler Davidson, Tanya Dunlap, Gale Kenny, and Benjamin Wise. "Republican Ballot Security Programs: Vote Protection or Minority Vote Suppression—or Both". September 2004. Available at http://www.votelaw.com/blog/blogdocs/GOP_Ballot_Security_Programs.pdf. Last visited July 18, 2007. This report is a seminal, exhaustive review of Republican ballot security programs, including voter caging operations, from the late 1950s through 2002.

¹⁸ Edsall, Thomas B. "'Ballot Security' Effects Calculated - GOP Aide Said Louisiana Effort 'Could Keep The Black Vote Down,'" Washington Post, Oct. 25, 1986.

¹⁹ Associated Press, July 21, 2004, "Democrats Blast GOP Lawmaker's 'Suppress the Black Vote' Remark."

²⁰ See also, The Avalon Project at Yale Law School, "The Voting Rights Act of 1965," at www.yale.edu/lawweb/avalon/statutes/voting_rights_1965.htm. Last visited July 16, 2007.

²¹ Project Vote, *Supra*. N. 7, citing 42 U.S.C. § 1973i (a).

The VRA was enacted in 1965 to do away with the Jim Crow laws that prevented African Americans and other minority groups from gaining equal access to the polls. Yet, as discussed above, a remnant of the restrictions imposed by Jim Crow legislation still exist in most states in the form of statutes that allow private citizens to challenge voter eligibility right to vote.

State Republican Party members and the RNC contend that caging and challenges are necessary to combat fraud by private non-profit organizations.²² Such groups registered significantly more than one million new voters nationwide in minority and urban communities, particularly before the 2004 election. According to one report, approximately ten million new registrations were submitted in 2004 by larger non-profit groups alone, representing more than 20% of registration applications that year.²³ Media campaigns, intended to give the impression that voter fraud is widespread, are a hallmark of the challenge program. The resulting sensational headlines don't reflect the facts. Actual convictions for ballot fraud are rare.²⁴ Where they do occur, they are by no means the exclusive province of one particular party and they rarely relate to third party registration drives.

On the other hand, Democrats and civic organizations charge that voter challenges in targeted urban, minority areas are part of a systematic nationwide Republican effort to suppress minority and Democratic votes. The charges of voter suppression are supported by the paucity of evidence of voter fraud arising from urban voter registration drives and the blanket challenges issued by Republicans in heavily minority polling places.

Statements by Republican officials lend support to the view that the immediate impetus for recent mass challenges is the increased number of newly registered voters who don't fit the Republican demographic. James P. Trakas is one example. Trakas, a Republican Party official in Cuyahoga County, Ohio, maintained before the 2004 presidential election that challenges were in response to successful third party registration drives: "The organized left's efforts to, quote unquote, register voters - I call them ringers - have created these problems."²⁵

²² New York Times, Oct. 23, 2004, "Big G.O.P. Bid to Challenge Voters," quoting Ohio Republican Party official, James Trakas.

²³ Brennan Center for Justice at NYU School Of Law, "Restrictions on Voter Registration Drives," available at www.brennancenter.org/dynamic/subpages/download_file_38283.pdf, last visited Sept. 10, 2007.

²⁴ Minnite, Lori, "The Politics of Fraud," available at: http://projectvote.org/fileadmin/ProjectVote/Publications/Politics_of_Voter_Fraud_Final.pdf. Last visited September 10, 2007.

²⁵ Id.

CAGING OPERATIONS BEFORE 2004

Direct mail is one of several methods used to develop voter caging lists. Another method is using election agency lists of voters from whom election notices have been returned. Another is the use of mapping and software to identify voters in targeted areas with “suspicious” addresses. A state-by-state survey of direct mail caging and other methods to develop challenge lists follows in this section and in the next.

Arizona Caging Operation: 1958

One of the earliest mass caging operations was conducted in Arizona in 1958. The Arizona Republican Party mailed campaign literature to 18,000 Democrats marked “do not forward.” With no further attempt to verify recipients’ addresses or eligibility, the party used the returned mail caging list to launch blanket challenges. With the caging lists as their sole evidence, Republican challengers attempted to disqualify Democratic voters and voters in heavily minority precincts. Responding to charges that the Republican Party was trying to disenfranchise eligible minority voters, the state chairman attempted to defend the party’s actions with now familiar allegations of voter fraud, claiming that Democrats in Maricopa County tried to “crowd into the polls at the last minute people who were not qualified to vote.”²⁶

The intimidation of voters in minority districts in Arizona in prior years came into focus during the 1971 Judiciary Committee’s hearings on the nomination of Chief Justice William H. Rehnquist to the Supreme Court. Opponents of the nomination asserted that Justice personally intimidated minority voters at an Arizona precinct. Justice Rehnquist maintained that he only acted as counsel for the state Republican Party. Although he admitted to training GOP challengers, he denied ever having challenged a voter himself.

James Brosnahan, an Arizona Assistant U.S. Attorney in 1962, and later a U.S. Attorney, refuted Rehnquist’s sworn statements. Brosnahan testified that he received complaints of voter intimidation at a polling place in 1962. He went to the site and saw Rehnquist, whom he knew personally. Rehnquist was the only challenger at the polling place when Brosnahan arrived. Brosnahan testified that the atmosphere was very tense. Voters in line complained that Mr. Rehnquist had been aggressively challenging voters. When he spoke to Rehnquist about the challenges, Rehnquist did not deny that he had been challenging witnesses.²⁷

In reaction to the Republican 1958 caging operation, some members of the Arizona Democratic Party sent non-forwardable mail to Republican voters in 1960. They did not, however, challenge the eligibility of the 349 voters on the returned mail list. The Democrats mailed postcards to voters on the list, warning them of “punishments” such as perjury charges if the recipients voted in their old precincts after they had moved.

²⁶ Davidson, *Supra*. n 17.

²⁷ *Id.* at page 22.

Operation Eagle Eye: 1964

After John F. Kennedy's defeat of Richard Nixon in the 1962 presidential election, an election that Republicans alleged was stolen, the RNC developed and implemented a nationwide caging campaign dubbed "Operation Eagle Eye." Buoyed by Republican caging operations in several states, especially in Arizona, Operation Eagle Eye was made a formal part of the 1964 RNC ballot security manual in an effort to organize and coordinate state caging programs.

The operation was directed from RNC headquarters under a clear, hierarchical command structure.²⁸ Harlington Wood, the head of the operation, encouraged state Republican volunteers to compile caging lists for challenge purposes by sending non-forwardable mail to targeted areas and by canvassing certain areas. Mr. Wood informed state operatives that this method had been used to "revise" voter lists to the "advantage" of the Republican Party. In 1964, the goal of Operation Eagle Eye was to place poll-watchers in every precinct in the nation. Although the program fell short of this goal, the GOP enlisted thousands of volunteers to monitor elections in metropolitan areas across the nation where Democrats were poised to overcome Republican leads in other parts of their respective states. It was reported at the time that the Republican Party sent out 1.8 million letters in its caging operations nationwide, at significant expense through its national headquarters and state operations.²⁹

Volunteer Republican state regional directors were at the heart of Operation Eagle Eye. As Republican caging and challenging operations evolved in ensuing years, it became clear that the party would have to switch to professional organizers if it were to achieve its goals, public and private.³⁰

An integral part of the caging operation was to hold press conferences to publicize Republican plans to heavily monitor polling places. This was seen by Democrats as part of a strategy to discourage targeted groups from going to the polls. As will be seen, not all efforts to suppress the minority vote - or as Republicans asserted, to monitor Democratic voter fraud - succeeded. Some attempts were prevented by court injunctions, some by too few volunteers, and others elicited a strong minority and Democratic get-out-the vote backlash.

New Jersey Caging Operation: 1981

The Republican National Committee (RNC) and the New Jersey Republican Party sent a mass mailing to predominantly African American and Hispanic neighborhoods in 1981. Approximately 45,000 letters were returned as undeliverable. The RNC compiled a caging list from the returned mailings that it used to request that the voters' names be purged from the rolls before the election, thereby making election day challenges unnecessary.³¹ The Commissioner of Registration advised the party that it had used an outdated and inaccurate registration list and declined to purge the names. Undeterred by this information, the RNC announced plans to challenge voters who were on its caging list at the polls on Election Day.

In addition to the caging operation, the RNC posted off-duty law enforcement officials at the polls in the targeted areas and placed intimidating posters in heavily African American neighborhoods warning that violating election laws is a crime.³² The posters warned: "This area is being patrolled by the National Ballot Security Task Force."³³

The Democratic National Committee (DNC) filed suit in the New Jersey District Court, contending that the RNC program harassed and intimidated African-American and Hispanic voters

²⁸ Davidson, *Supra*. n 17 at p. 7.

²⁹ *Id.* p. 28.

³⁰ *Id.* at pp. 25-47.

³¹ N.J. Stat. § 19:7-5, gives broad powers to challengers and provides no criteria for issuing a challenge. § 19:7-5.

³² Associated Press, Oct. 29, 2004, "GOP Challenging Voter Registrations."

³³ Davidson, *supra* n. 17, p. 50.

in violation of their constitutional right to vote and Section 11(b) of the VRA. In a settlement to the suit, the RNC entered into a consent decree in which it agreed, among other matters, to:

“Refrain from undertaking any ballot security activities in polling places or election districts where the racial or ethnic composition of such districts is a factor in the decision to conduct, or the actual conduct of, such activities there and where a purpose or significant effect of such activities is to deter qualified voters from voting; and the conduct of such activities disproportionately in or directed toward districts that have a substantial proportion of racial or ethnic populations shall be considered relevant evidence of the existence of such a factor and purpose.”³⁴

The consent decree was modified in 1986 as a direct result of RNC caging operations in Louisiana. The RNC consent decrees are discussed in more detail in the section on litigation.

Louisiana Caging Operations: 1986

The United States Senate election in Louisiana was of critical importance to the Republican Party in 1986. Democratic Senator Russell Long, son of the controversial Governor Huey Long, was retiring and the Republicans felt it was their opportunity to win the Senate seat. The RNC had hired a private contractor out of Chicago to run caging operations nationwide that year. The contractor sent 350,000 non-forwardable registered letters to Louisiana voters, targeting districts that voted more than 75 percent for the Democratic candidate in the 1984 presidential election, a pattern rarely matched except in African American districts.

The state Democratic Party filed suit in a Louisiana state court and successfully prevented the Louisiana Republican Party from taking the next step in its caging operation, which would have been to send letters to voters on the caging list advising them of a challenge to their eligibility. If there had been no reply to those letters, notice would have been placed in the district official journal. If there had been no response to these general forms of notice, the voters' names would have been purged from the voting rolls.³⁵

The Louisiana Republican caging operation prompted the DNC to reopen case in the New Jersey District court, asserting that the RNC had violated the terms of its prior consent decree. As a result of this action, the RNC agreed to yet another consent order. This order appeared to have more teeth in that it required the RNC to obtain approval from the District Court before embarking on any ballot security program. Furthermore, the RNC agreed to give the DNC 20 days notice of any such program. Essentially, RNC ballot security plans were placed under a pre-clearance order, not unlike the VRA pre-clearance requirement placed on southern states that had historically disenfranchised African Americans after the Civil War. Though useful to curb nationally organized caging campaigns, the consent decrees in *DNC v. RNC* only apply to caging operations and other ballot security programs conducted by or with the assistance of the national organization. It did not apply to voter caging operations conducted by state Republicans without RNC support. Although there is documentary evidence that the RNC has been involved in subsequent state caging operations, the RNC has yet to seek court approval for caging operations in any state.

North Carolina Caging Operation: 1990

In 1990, the RNC successfully defended itself against DNC charges that voter suppression tactics used in a North Carolina campaign had violated the New Jersey consent decrees. In this case, caging was part of a larger voter suppression plan. In the last days of the campaign, the North Carolina Republican Party mailed postcards to 125,000 or 150,000 voters, 97 percent of whom were African Americans. The postcards misinformed the recipients about voter eligibility

³⁴ Davidson, *supra* n. 17, p. 55.

³⁵ Davidson, *supra* n. 17, pp. 60-61.

requirements and warned them of criminal penalties for voter fraud.³⁶ The mailing was sent to “high performance” Democratic precincts, which in North Carolina often means precincts with high percentages of black voters, according to a Washington Post article. The article reported that the chairman of the North Carolina Republican Party claimed that the party sent the postcards to voters who had recently moved, but “acknowledged that an indeterminate number were sent to voters -- many of them African American -- who had not moved in years.”³⁷

The RNC argued that it did not oversee the North Carolina caging operation, and that the New Jersey District Court did not have jurisdiction to hear the case. U.S. District Judge Dickinson R. Debevoise agreed that the tactics violated the consent decrees, but ruled that the North Carolina campaign had been a state operation. He dismissed the case on the ground that he did not have jurisdiction in the matter.

Democrats did not have enough time before the election to seek an injunction in North Carolina, but U.S. Assistant Attorney General for Civil Rights, John Dunne, stepped in and obtained a pledge from the chairman of the North Carolina Republican Party that it would not use information that it gathered from the postcards, such as information that the address was incorrect, to challenge voters at the polls.³⁸ The Department of Justice sent two attorneys to monitor the election and assure that the Republican Party did not use information from the postcards to disqualify Democratic voters. The lawyers answered telephone hotlines to record election complaints and reported that all remained quiet.³⁹

After the election, the Justice Department filed suit against the North Carolina Republican Party for violating the VRA by attempting to intimidate African American voters and by attempting to keep eligible African Americans from the polls.⁴⁰ The party entered into a consent decree similar to the New Jersey consent decrees. The agreement required the North Carolina Republican Party to refrain from ‘ballot security’ programs targeted at African Americans and to obtain prior approval from the court for any future ballot security programs.⁴¹

In November 1990, the Department of Justice sent 212 federal election observers to polling places in five states, including the Carolinas, to ensure that African Americans and American Indians were not disenfranchised. Most of the observers were sent to counties in Arizona, New Mexico and Utah that had large populations of American Indians.⁴²

³⁶ U.S. Department of Justice, “The Civil Rights Division at Thirty-five, A Retrospective,” at <http://www.usdoj.gov/crt/overview.html>, last visited July 15, 2007.

³⁷ Edsall, Thomas B. “Bush Takes No Stand on Ballot Plan: Program Targeted N.C. Black Voters,” Washington Post, November 9, 1990.

³⁸ Davidson, *supra* n. 5, p. 74.

³⁹ Foon Rhee and Robb Urban, “Disputes Mark N.C. Election Court Orders Keep Polls Open,” The Charlotte Observer, IA., November 7, 1990.

⁴⁰ United States v. North Carolina Republican Party Civ. Action No. 92-161-CIO-5-F, U.S. Dist. Ct., E.D. of North Carolina.

⁴¹ Davidson, *supra* n. 17, p. 74

⁴² Williams, Rhonda (AP staff writer contributed to article), “RNC Role in Mailing is Rejected: Election Observers Bound for Five States,” The Charlotte Observer, November 6, 1990. IC.

CAGING OPERATIONS- 2004 & BEYOND

Ohio 2004 Caging Operations

The Ohio Republican Party mailed approximately 232,000 letters to all newly registered Ohio voters in 2004, welcoming them to the voter rolls and inviting them to vote Republican. Around 30,000 of the letters were returned as undeliverable. The caging list was supplemented by lists of voters whose election notices had been returned to county boards of elections. In a familiar process, the returned letters were used to form the basis of a caging list used to challenge voters. The RNC and Ohio Republican Party joined forces to launch a media campaign alleging voter fraud.⁴³ Edward Gillespie, then Chairman of the RNC, joined Ohio Republican officials in a press conference announcing the returned mails and alleging that they were evidence of massive fraud.⁴⁴ As in other caging campaigns, the lists targeted largely minority, urban, and traditionally Democratic populations. The caging lists and the county lists were used to challenge about 35,437 voters in predominantly minority metropolitan areas simply on the basis of the returned mail.⁴⁵ As in other caging operations, the Republican Party filed its challenges just under the state deadline.

Ohio challenge statutes provide for pre-election challenges under which any qualified voter can challenge the eligibility of any other voter.⁴⁶ If the county election board cannot determine from its records whether the challenged voter is eligible to vote, the voter is summoned to a hearing with a little as three days notice. The factors that determine whether a voter is eligible to vote are not adequately outlined in the challenge law and there is no legal requirement for the challenger to act in good faith, much less upon personal knowledge that the challenged voter is ineligible. Ohio election law in 2004 provided that all pre-election challenges were to be heard no later than two days before the election.

Election Day challenges are also permitted in Ohio. The standards for polling place challenges are implied in the law, which sets forth questions that are asked of the challenged voter relating to citizenship, age and residence. However, the 2004 polling place challenge law left the door open to disenfranchisement for virtually any cause. The law permitted election officials to deny a voter a ballot "if for any other reason a majority of the [precinct] judges believes the person is not entitled to vote."⁴⁷ Moreover, the statute did not require the challengers to act upon any personal knowledge.

The Ohio precincts in which approximately 91 percent of the state's African American population resided - including urban areas like Cleveland, Cincinnati, Dayton, Toledo, and Akron - were targeted for challenges.⁴⁸ The state Republican Party recruited about 3,600 challengers statewide to carry out the plan.

⁴³ Niquette, Mark, "GOP Challenges Voters – Party Challenges Validity of Thousands in Ohio," Columbus Dispatch, Oct. 2004.

⁴⁴ Becker, Jo, "GOP Challenges 35,000 Voters," Washington Post, Oct. 23, 2004, A1.

⁴⁵ Plain Dealer, Oct. 23, 2004. "Ohio GOP challenges 35,000 on voter rolls."

⁴⁶ O.R.C. Ann. § 3505.24, amended since 2004 by Ohio House Bill 3.

⁴⁷ O.R.C. Ann. § 3505.20

⁴⁸ Op Ed, Spencer Overton and Daniel Tojaki, *Profiling at the Polls in Ohio: Presence of Partisan Challengers in Swing States a Threat to Democracy*, October 31, 2007.

Cuyahoga County, the state's most solidly Democratic stronghold was earmarked for the most challenges. Over 14,000 voters, primarily in minority and inner urban precincts, were targeted for challenges. Republican operatives enlisted about 1,400 challengers in Cuyahoga County alone in preparation for Election Day. Democrats countered by enlisting about 2,000 election watchers to try to protect legitimate voters. The challenges posed a significant burden to county election officials in the last week before the hotly contested 2004 presidential election.⁴⁹

Democracy South, at the request of the community organization ACORN, performed a geocoding analysis of the challenged voters in Cuyahoga County. It showed that 45 percent of the targeted voters lived in communities that were majority African Americans, although Cuyahoga County was only 27 percent African American. By matching the challenge list with phone numbers, ACORN was able to contact many of the voters on the caging lists and found that they had not changed their residence.⁵⁰

A report from the American Association of People with Disabilities quoted Jim Trakas, (the Cuyahoga County Republican official who objected to large voter registration drives), as saying that Republican challenges would be trained to challenge voters who appeared to be mentally incompetent to vote.⁵¹ Ohio law, like most states, does not permit voters to be disenfranchised on the basis of mental incompetence unless they have been adjudged to be incompetent by a court.

Republican operatives in Summit County, (Akron) used caging lists to challenge 976 voters. The county election board commenced a challenge hearing. After just four cases were heard, Republican board members moved to reject the challenges without further hearing after the challengers failed to provide evidence that the challenged voters were ineligible. The caging lists were evidence of nothing except that mail sent to the voter's registration address was returned. Election board member Alex Arshinkoff, the head of the county Republican Party called the process "a train wreck" caused by the state GOP.⁵² Even in heavily Republican Warren County, officials threw out all of the county's 23 challenges.⁵³

Franklin County, home of the state capital, Columbus, also experienced a high rate of challenges. In addition to challenging thousands of voters in heavily minority and Democratic areas of Columbus, the Republican Party sent letters challenging thousands of college students. Columbus is home to Ohio State University and several other colleges. Republican Board of Elections Director Matt Damschroder arranged a mass challenge hearing in the Veteran's Memorial Auditorium, coincidentally on the same night that John Kerry arrived in town with Bruce Springsteen. Students were advised to attend the hearing or face the loss of their votes.

Individual voters and the Summit County Democratic Party filed lawsuits in the U.S. District Courts in Hamilton (Cincinnati) and Summit (Akron) Counties to enjoin the massive Republican caging operation. The district judges in both cases, John Adams, a Republican appointee, and Susan Dlott, a Democratic appointee, granted the relief and enjoined the Ohio Republican party from carrying out its challenges, finding that they imposed an unconstitutional burden on the right to vote. The GOP appealed the decisions to the U.S. Court of Appeals for the Sixth Circuit, which at first upheld the decisions, but ultimately overturned them on Election Day 2004, permitting the Republican Party to resume its plan to challenge voters en masse.

⁴⁹ Hiassen, Scott, "Ohio GOP challenges 35,000 on voter rolls Cuyahoga board struggles to solve workload problem," The Cleveland Plain Dealer, October 23, 2004 A1.

⁵⁰ ACORN Newsletter, Oct. 2004, "Cleveland Fights Voter Suppression."

⁵¹ Association of People with Disabilities, <http://www.aapd-dc.org/dvpmain/preparation/votesurppress.html> Oct. 23, 2004. Last visited Sept. 10, 2007.

⁵² Atlanta Journal-Constitution, November 1, 2004.

⁵³ *Supra*, n. 40, Overton and Tojaki (Warren is the Ohio county that conducted the 2004 presidential election ballot count behind closed doors, claiming officials received notice from the FBI about an alleged terrorist threat. The FBI denied giving such notice.)

The appellate court granted its last minute reversal of the decisions prohibiting the caging operation in the hours before dawn on Election Day. This left the Ohio Republican Party making “calls at 4:00 a.m.,” and scrambling to get its challengers to the polls. The result was that many of the more than 1,400 Cuyahoga county challengers did not show up.⁵⁴ Those who did show up did not issue many challenges. That may be due in part to the action of Bill Mason, the Democratic Cuyahoga County Prosecutor. Mason sent a letter to challengers from all groups on the Friday before the 2004 election explaining election law and the penalties for violations, including possible criminal charges.⁵⁵

With all the attention on the issue, pollworkers may also have been particularly careful to guard against unwarranted interference. Two men with government credentials showed up to observe the voting in Cleveland’s Ward 5, but a suspicious poll worker threw them out. As it turned out, they were with the Election Assistance Commission. EAC commissioner Ray Martinez was quoted as saying “The precinct inspector was simply doing his job, two folks from a federal agency were not on his list.”⁵⁶

The Lawyers’ Committee for Civil Rights and People for the American Way filed suit to challenge a directive issued by Republican Secretary of State J. Kenneth Blackwell that permitted one challenger to be present in each precinct. The plaintiffs contended that state law only permitted one challenger per polling place. Since most polling places contained more than one precinct, the directive would have violated Ohio law. The district court ruled in the plaintiffs’ favor but the Republican-dominated Ohio Supreme Court reversed the case in the secretary’s favor on the day before the 2004 election.

Republicans challenged about 3,000 voters in Montgomery County (Dayton) and 900 in Lucas (Toledo). In Montgomery County, the local leaders for the Republicans and Democrats sensibly agreed to trust one another and to avoid putting challengers in polling places. That plan failed when Robert Bennett, then Ohio GOP chairman and chair of the Cuyahoga County Elections Board overruled the Montgomery County Republican chairman. The Republicans filed a challenger list in 191 Montgomery County precincts - many of them in largely African American neighborhoods around Dayton.

In response to the Ohio caging program, two Ohio voters filed suit in the New Jersey District court to reopen the DNC v. RNC case and enforce the consent decree. The plaintiffs argued that the Republican mass caging and challenge efforts in Ohio and elsewhere violated the 1980s consent decree prohibiting the RNC from engaging in “ballot security programs” without prior court approval. The RNC argued that it had nothing to do with the caging campaign; they were being conducted by the state Republican Party. Judge Debevoise of the New Jersey District Court ruled in favor of the DNC, but the Third Circuit Court of Appeals ultimately overturned that decision on Election Day and ruled in favor of the RNC.

Florida Caging Operations: 2004

In Florida, a 2004 presidential election battleground state, the Republican Party waged a direct mail caging operation using the same methods that were used in Ohio. The Florida Republican Party sent a non-forwardable mailing to Democratic and African American voters and compiled the returned mail into a caging list used to challenge voters. A Democratic Party analysis of U.S. Census data and Republican Party plans filed in five counties revealed that the Republican caging list disproportionately challenged minorities. In Miami-Dade, 59 percent of the predominately African American precincts were scheduled to have at least one GOP poll watcher, compared with only 37 percent of predominantly white precincts.⁵⁷

⁵⁴ Plain Dealer, Nov. 2, 2004, “Court OKs poll challenges, a major blow to state Democrats.”

⁵⁵ Plain Dealer Oct. 31, 2004, “Parties prepare voter challengers.”

⁵⁶ Plain Dealer Nov. 3, 2004, “Long waits biggest problem at most polling places.”

⁵⁷ Becker, Jo, [Judge Rebuffs GOP Effort to Contest Voters in Ohio](#), Washington Post, Oct. 28, 2004 A01.

In Broward County, Republican officials claimed to have a list of voters with flawed registrations which they intended to use to challenge voters on Election Day. County election officials who wanted to verify the list in advance were denied access.

The current Florida statute on challenges permits poll watchers to challenge a voter merely by signing an oath, stating they have “reason to believe” that the voter is ineligible to vote and giving the reason for the challenge. The grounds for challenges are not spelled out in the statute. Challengers are subject to a first-degree misdemeanor conviction if they file “frivolous” challenges, but they are not liable for “any action taken in good faith and in furtherance of any activity or duty permitted of such electors or poll watchers by law.”⁵⁸ The bar for Florida challenges is low, and the challenged voter is not given an opportunity to contest the challenge at the polls. The voter is merely given a provisional ballot.

The Florida challenge statute in effect during the 2004 election set up a time-consuming process. It required a poll watcher to write down the reason for his or her challenge on a form. The challenged voter was then permitted to present evidence supporting his or her eligibility. The election workers had to resolve the issue on the spot at the polls before the challenged person could vote. (Former Fla. Stat. § 101.111(d) and (3)).⁵⁹

In the 2004 election, the RNC was still subject to the terms of the 1987 DNC v. RNC consent decree, which prohibited the RNC from engaging in any ballot security program, or “assisting or participating in” any ballot security program in any state without prior approval by the New Jersey District Court.⁶⁰ The RNC claimed, however, that all state programs were being conducted by state Republican Parties independently of the RNC.

Ironically, it was the RNC headquarters and the Florida Republican Party that held the light of truth up to this claim and showed it to be false. Florida Republican Party staffers sent emails to the RNC headquarters which revealed that the RNC was closely involved in the Florida caging operation, and most likely directing it. The emails were not produced in response to Judiciary Committee subpoenas in their investigation of U.S. Attorney firings. They were uncovered when Florida GOP staffers and RNC officials inadvertently sent hundreds of emails to a parody web site, www.georgewbush.org instead of the web site www.georgewbush.com.⁶¹

This information was first released when British journalist Greg Palast had the opportunity to question Florida Republican officials about the emails during a BBC interview in October 2004. The officials did not deny that the emails were authentic and that they had been sent between back and forth between the Florida Republican Party and the RNC. At first, the officials claimed that the lists of voters in two of the emails, labeled “caging.xls” and “cagingl.xls” were campaign donors. When it was pointed out that addresses included a homeless shelter, a spokesperson for the 2004 George W. Bush campaign, Mindy Tucker Fletcher, admitted that the lists were of voters “where letters came back with bad addresses.” She did not deny that the lists may be used to challenge voters.⁶²

The Florida caging lists contained 1,886 names⁶³ and included voters at the Jackson Naval Base. Deployed military personnel, some of whom were in Iraq, were on the caging “bad addresses” lists. Consequently soldiers away on duty were subject to voter challenges under the GOP ‘ballot security’ program.

⁵⁸ Fla. Stat. § 101.111.

⁵⁹ Advancement Project, *supra* n. 6.

⁶⁰ Democratic National Committee v. Republican National Committee, Judge Dickinson R. Debevoise, Settlement Stipulation and Order of Dismissal. July 27, 1987.

⁶¹ The emails can be accessed at www.georgewbush.org, <http://2004.georgewbush.org/deadletteroffice/index.asp>, last visited July 17, 2007.

⁶² Palast, Greg, June 16, 2006, [Buffalo Soldiers Scrubbed](#).

⁶³ Palast, Greg, “New Florida vote scandal feared,” BBC News, Oct. 26, 2004, last visited at <http://news.bbc.co.uk/1/hi/programmes/newsnight/3956129.stm> on July 16, 2007.

On receiving the Florida caging lists, then RNC Research Director and Deputy Communications Director, Tim Griffin enthused: "Thank you, perfect." The caging emails were received August 25th and 26th, 2004 from the Florida Republican party headquarters to Mr. Griffin at the RNC headquarters in Washington, D.C., Ms. Goodling was referring to Mr. Griffin when she told the Judiciary Committee that her colleague was not forthcoming about his role in caging operations. After the 2004 elections, Attorney General Albert Gonzales requested the resignation of U.S. Attorney Bud Cummins and appointed Mr. Griffin as the interim U.S. Attorney for Arkansas in his place.

The Wall Street Journal revealed RNC involvement in ballot security programs (in flagrant disregard of the 1987 federal consent decree) and the coordinated involvement of the U.S. Department of Justice in this October 2004 report:

"The Republican antifraud campaign is being shepherded by the Republican National Committee headquarters, with help from throughout the party. Attorney General John Ashcroft has asked U.S. attorneys to meet with top election officials and make themselves available for fraud investigations on Election Day if necessary."

Pennsylvania Caging Operations: 2004

Pennsylvania Republicans sent a mailing to about 130,000 voters in Philadelphia, a city with a large African American population and a city in which three-fourths of the voters are Democrats.⁶⁴ Up to 10,000 of the letters were returned undelivered. The Pennsylvania Republican Party, taking advantage of relaxed restrictions on poll watchers, announced that it was prepared to send 1,000 challengers to the polls to challenge the voters on the list compiled by its caging operation. Previously, poll watchers were restricted to the polling place in which they were officially enrolled. Under the new law, they could travel from poll to poll within the county at will.⁶⁵

Republican charges of fraud in this case were as meritless as those made in other states. Operatives alleged that the addresses on returned mail were often found to be non-existent, vacant lots, or abandoned buildings. Yet when the Philadelphia Inquirer asked for the list of the bad addresses, the party could only produce six names and addresses.⁶⁶ Out of the 63 precincts in which the Republican Party placed poll watchers, 53 were predominately African American.⁶⁷

Despite the Republican media campaign alleging voter fraud, the claims to have amassed evidence of thousands of fraudulent registrations, and the threat to challenge 10,000 voters at the polls, Philadelphia news accounts indicated that few voters were actually challenged in the 2004 presidential election.

⁶⁴ Infield, Tom, "Both Parties Complain of Vote Fraud," Philadelphia Inquirer, Oct. 25, 2004. B-1

⁶⁵ Infield, Tom, "Election changes could cause snarls on Nov. 2," Philadelphia Inquirer, Oct. 27, 2004 B-1.

⁶⁶ "Lawyers preparing for election tangles." Philadelphia Inquirer, Oct. 31, 2004.

⁶⁷ Infield, supra. n. 39.

OTHER METHODS OF DEVELOPING CAGING LISTS

Wisconsin 2002- 2004 Virtual Caging

In lieu of an expensive and time-consuming direct mail caging operation, the 2004 Wisconsin Republican operation was unique in that it used a computer program to identify and scrutinize registered voters. The Republican group first used freedom-of-information laws to obtain the names of new voters, and then ran background checks on them, according to a contemporary Wall Street Journal report.⁶⁸ Republicans checked the addresses of more than 300,000 people registered to vote in Milwaukee with a software program used by the U.S. Postal Service to determine if addresses were valid. Armed with the results of the virtual caging operation, the Republican Party filed challenges against the registrations of about 5,600 Milwaukee voters just three minutes before the deadline.⁶⁹ As in other states, the party then launched a major media campaign to disclose its findings and lodge charges of voter fraud.

The Milwaukee Republican Party did a “dry-run” of its self-described anti-fraud campaign in 2002. Volunteers “contested the residency of some black voters and in the Hispanic communities they questioned the nationalities of others.”⁷⁰ They came up empty handed. Even the Wisconsin Republican Party Chairman Rick Graber had to admit “few reports of trouble.” Oblivious to the logical conclusion to be drawn from the 2002 political experiment, Mr. Graber opined that it had helped prepare the Wisconsin Republican Party for its 2004 caging operation.⁷¹

The city attorney’s office reviewed the 2004 list of challenged voters and found that hundreds of the addresses that the GOP claimed were incorrect or nonexistent did in fact exist.⁷² Milwaukee’s bipartisan election board rejected the challenges in a unanimous decision.⁷³ In a last-minute agreement between the Republican party and the city, however, a list of about 5,500 voter addresses that were deemed suspicious by the Republican Party were sent to polling places in the city. Anyone on the list who appeared to vote was to be asked for identification. According to the Milwaukee Journal Sentinel, the list “apparently produced few challenges to voters.”⁷⁴

Wisconsin voter challenge laws are extremely broad. Any elector may challenge another if he “knows or suspects” that the individual is not qualified to vote.⁷⁵ Such challenges are permitted even on the basis of allegations that the challenged elector is not mentally competent to vote.⁷⁶ On

⁶⁸ Cummings, Jeanne, “Poll Monitors Brace for Nov. 2; Parties Marshal Lawyers for Possible Suits Over Election Fraud.” Wall Street Journal. Oct 22, 2004. p. A.1

⁶⁹ Washington Post, Oct. 29, 2004, “GOP Challenging Voter Registrations.”

⁷⁰ Cummings, supra. n. 43.

⁷¹ Id.

⁷² Associated Press, Oct. 30, 2004.

⁷³ Jones, Meg, “Republicans challenge 5,600 Addresses That May Not Exist.” Milwaukee Journal Sentinel, Oct. 28, 2004.

⁷⁴ Schultze, Steve, Election 2004 Big Turnout Brings Glitches but Not Feared Chaos Long Lines Are Chief Complaint at Polling Places,” Milwaukee Journal Sentinel, Nov. 3, 2004 p. 14.

⁷⁵ Wisconsin Statutes 6.95

⁷⁶ Wisconsin Statutes 6.935

the other hand, the state permits Election Day registration. If the elector “fully” and satisfactorily answers questions on her eligibility and she signs an oath attesting to her eligibility she may vote so long as she “fulfills the applicable registration requirements.”⁷⁷

Michigan: 2004

In the 2004 presidential election cycle, thousands of Republican poll watchers descended on Detroit and other metropolitan areas with significant numbers of minority voters with the intent to challenge voters they deemed ineligible. While it is not clear whether the Michigan Republican Party used caging lists to identify voters subject to challenge, or what criteria the Republican poll watchers were using to challenge voters, the poll watchers literally hovered over the backs of the poll officials to observe the process and to witness the voters’ signatures.⁷⁸

While Michigan State Representative John Pappageorge was willing to admit that Republicans would need to “suppress the vote in Detroit,” in order to win Michigan, the official party statement was that the Republican poll watchers were there to prevent election fraud. In order to have as many poll watchers on hand as possible, the party brought in Republicans from other parts of the state to monitor Detroit’s heavily African American precincts.

In response, the Democratic Party and non-profit organizations such as the NAACP and People for the American Way recruited volunteer attorneys to watch the watchers in hopes of preventing voter intimidation. The Republicans had a large number of attorneys at hand as well. The result, according to a post-election report, was an unprecedented degree of tension and confrontation in many metropolitan polling places.⁷⁹ Accusations flew on both sides, each accusing the other of causing the chaos that ensued.

City election officials and the Detroit branch of the NAACP accused the poll watchers of aggressive tactics and trying to intimidate voters. The Michigan Republican Party accused election monitors from Moveon.org of overstepping their bounds and disrupting polling stations. The Director of Detroit’s Department of Election, Gloria Williams, reported that challengers monitored every one of the 254 locations. In one case, she saw up to five Republican challengers working in one place.⁸⁰

Nevada 2004

In a one-man Las Vegas challenge operation, Dan Burdish, the former Nevada Republican Party Executive Director, hauled four boxes of voter challenges into the Clark County elections office on October 6, 2004. The 17,000 challenged voters were all Democrats. Burdish acknowledged that his motives were partisan. “I’m looking to take Democrats off the voter rolls,” he said.⁸¹

Mr. Burdish did not send out a direct mailing and collect returned cards. Instead he challenged the voters on the grounds that they were listed as inactive on the county’s registration rolls. Under Nevada law, voters who moved without updating their registrations were still permitted to vote. Inactive voters simply had to vote at their old precincts or at any early voting site.

⁷⁷ Wisconsin Statutes 6.94

⁷⁸ Montemurri, Patricia, ET AL. “Tension in Michigan: Tempers Boil Amid Partisan Challenges at Detroit Polls,” Detroit Free Press November 3, 2004. 6A

⁷⁹ Id.

⁸⁰ Montemurri, Patricia and Bello, Marisol, “Aftermath In Michigan: Parties’ Voting-Place Monitors Keep Challenging Each Other,” Detroit Free Press, November 4, 2004 A 10.

⁸¹ Staff, “Sides Debate Registrations,” Las Vegas Review-Journal, October 10, 2004 2B

The Clark County Registrar of Voters, Larry Lomax, said he could see no legitimate reason for the voter challenges. “The law already tells us what to do with inactive voters,” Mr. Lomax reported. “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.”⁸²

Mr. Lomax rejected the challenges.⁸³ The head of the Nevada Republican Party asserted that the party had nothing to do with Mr. Burdish’s efforts.

North Carolina 2004

The Mexican American Legal Defense and Education Fund (MALDEF), a Latin-American civic organization, reported blanket challenges to the Latino vote in several states in 2004, including North Carolina. Challenge lists were apparently compiled by scouring the registration rolls for voters with Hispanic names. In one example, the sheriff of Alamance County submitted a list of registered voters with Spanish surnames to the U.S. Bureau of Immigration and Customs Enforcement in an attempt to determine whether or not they were U.S. citizens. There could be no other reason for compiling such a list except to challenge Latino voters.⁸⁴

Executive Director North Carolina State Board of Elections, Gary Bartlett, was quoted as saying that he expected “plenty of scrutiny in areas with concentrations of college students, racial minorities and nonnative English speakers.”⁸⁵

Since Latino voters were not strongly Democratic in 2004, this suppression attempt may have more to do with anti-immigrant attitudes than seeking partisan advantage. Regardless, the effect was to impermissibly target minority voters.

South Carolina 2004

According to an October 2004 report in the Charlotte Observer, Republicans and Democrats planned to have observers at metropolitan polling places.⁸⁶ Republicans were expected to challenge voters, while Democrats intended to see that legitimate voters were not denied the franchise. There is no report of how the challenge lists were developed, whether by direct mail caging operations or the use of public election records, or any other means. News reports noted that the South Carolina Republican Party planned to have volunteers in most precincts across the state and at least one lawyer in each county. Republican Executive Director Luke Byars said “The size and scope of the effort is much more dramatic this time around,” he said. “We learned our lessons in 2000, that you’ve got to be prepared.”⁸⁷

Georgia 2004

Three residents in rural Atkinson County, Georgia conducted a caging operation that challenged most of the Hispanic voter registrations in their precinct, alleging that the voters’ registrations were fraudulent because they were allegedly not U.S. citizens. Eschewing the traditional direct mail campaign, an Atkinson county resident took a shortcut and went to the board of elections to ask for all voters with Hispanic names. He was given 123 names and proceeded to challenge 95 of them.

Most of the challenged voters responded by going to the board and providing proof of their citizenship. But one, Tony Hernandez, fought back against the unsupported challenge to his eligibility. Mr. Hernandez demanded a public hearing to challenge the challengers. He pointed out

⁸² Id.

⁸³ Associated Press, Oct. 13, 2004.

⁸⁴ San Francisco Chronicle, Oct. 27, 2004. “Coalition of Latino Groups Sounds Alarm Over Intimidation of Voters.” A13

⁸⁵ Rubin, Richard and Helms, Ann Doss, “Election Day Voters May Feel Eyes on Them,” The Charlotte Observer, October 27, 2004 IA.

⁸⁶ Id.

⁸⁷ Id.

that the burden was on the challengers to show that he was not a citizen. The burden was not on him to prove that he was a citizen.⁸⁸

Republican officials in Atlanta conducted a similar though larger operation. MALDEF sent a letter to Georgia county elections officials charging that pre-election challenges had targeted Hispanics. In Long and Atkinson counties, the organization charged, local candidates and individuals challenged voters with Hispanic surnames or voters who identified themselves as Hispanic on their voter registration applications. Other than the voters' Hispanic names or self-reported ethnicity, the challengers offered no other evidence whatsoever to support their challenges.⁸⁹

MALDEF pointed out that challenging a voter based solely on race or ethnicity is an unlawful means of harassment and intimidation, and that it had a chilling effect, causing Latino voters to refrain from voting.⁹⁰

Kentucky 2004

The Jefferson County, Kentucky Republican Party gave an early warning in the summer before the 2004 federal election that it planned a mass challenge program. The GOP announced in July that it would place Republican vote challengers in predominantly African American precincts during the November elections, just as they had done the previous year (in 2003, Jefferson County Republicans placed challengers at 18 polling places in predominantly black districts).

The party went too far for some of its members. In August 2004, about a dozen Republicans gathered outside the Jefferson County Board of Elections to call for the resignation of the Jefferson County Republican Chairman, Jack Richardson. About half of the protesting Republicans were African American. An African American Republican candidate objected to the challengers, saying they would keep some of his supporters from the polls.

An African American Republican poll worker who had worked the polls for 13 years was angry that she had been replaced in the last election by a white Republican who did not live in the precinct. She reported that she visited several precincts to see who was working the polls and was surprised to find that virtually all of the locations were manned by white Republican poll workers.⁹¹

King County, Washington: 2005

Republican Party officials compiled a list of about 1,943 voters in King County who purportedly listed their residence addresses at mailbox-rental facilities, which was unlawful in Washington. As in prior caging operations, the Republican Party held a press conference to announce its plans in advance of filing the challenges, alleging that the registrations were illegal.⁹² As in prior operations, the caging methods used by the Republican Party cast a very broad net, and no efforts were made to test the validity of their initial findings before the voter challenge gauntlets were thrown.

The challenge list included (1) voters who lived in apartments or houses on the premises of the mail-box businesses, (2) voters who registered at their home addresses but had their election notices mailed to private mail-box locations, and, most egregiously, (3) voters who had the same street address as mail-box businesses but not the same city address.

Lori Sotelo, the senior county Republican Vice Chairman signed the challenges attesting "under penalty of perjury" that she had "personal knowledge" that the challenged voter did not live at the address on her registration. As in other caging operations, significant numbers of the challenges were found to lack merit. Ms. Sotelo withdrew 140 of her challenges days before the election,

⁸⁸ National Public Radio broadcast, "All Things Considered," October 27, 2004

⁸⁹ "Election 2004: On the Campaign Trail," Atlanta Journal-Constitution, Oct. 21, 2004. C4.

⁹⁰ Id.

⁹¹ Associated Press, July 30, 2004, "Kentucky Republicans Will Place Vote Challengers in African American Precincts."

⁹² Sharon Pian Chan, "GOP Questions More Registrations - Some Illegally List Mailbox Facilities," The Seattle Times, B2.

another 76 were duplicate names. On a day set for hearing 48 challenges, Ms. Sotelo withdrew 12 of them late in the day.⁹³

Washington Republican Party Chairman Chris Vance was forced to acknowledge that, while the Republican Party had created its challenge list by comparing the street addresses of voters with those of private mailbox businesses and storage complexes, its database expert had not included the city in the address match. In other words, a person who registered to vote at 123 Main St on one of King County's cities would , be tagged for a voter challenge simply because her address "matched" a mail-box business address at 123 Main St. in another King County city. The so-called expert address match did not control for the complete address. Republicans, Mr. Vance also acknowledged, had not been thorough in "screening for on-site storage-complex managers."

Westchester County, New York: 2006

Westchester County Republicans challenged the residencies of 5,929 registered voters in the bitterly contested New York State 35th district senatorial election in 2006. Two years earlier, the Democratic candidate lost by 18 votes when the election was finally decided in court three months after the election. Tensions from that race continued into the 2006 race. A law required that the challenges had to be investigated through physical checks of voters' addresses carried out by local police departments in Yonkers, Greenburgh and Mount Pleasant. Democrats charged that the challenges were racially motivated. In this case, however, county officials reported that the challenges appeared to affect both Democratic and Republican voters. Democrats countered that police visits before the elections were intended to intimidate minority voters.⁹⁴

As in other mass challenge operations, the challengers filed their complaints close to the election. The large number of residential challenges contrasted sharply with previous elections in which few, if any challenges were filed. In the entire 2004 election cycle, for example, only 100 challenges were issued.

The Republican candidate, Nick Spano, initially distanced himself from the challenge operation, then defended the challenges, citing election fraud. Ultimately, the candidate again distanced himself from the challenges, requesting that the police checks not take place before the elections because he too believed the checks could intimidate voters. Election officials reported that it was unlikely that the police visits could take place before the election.⁹⁵ Mr. Spano stated that he did not know of the plan to issue the unprecedented number of challenges. The final outcome of the challenges is not reported in contemporaneous news accounts of the elections. Mr. Spano lost his state Senate seat to his opponent.

⁹³ Eric Pryne, "Voter-challenge Errors Mount,"

⁹⁴ Gannon, Michael, "GOP wants 6,000 voters confirmed," *The Journal News* (Westchester County, New York), 3A.

⁹⁵ Gannon, Michael, "Nick Spano: Hold off on police checks," *The Journal News* (Westchester County, New York), Nov. 2, 2006 5A.

CAGING LITIGATION

The Democratic and Republican parties waged key legal battles over caging and other Republican pre-election operations in New Jersey. Although the Republican Party ran caging operations as early as the 1950s, litigation over the conduct of caging operations nationally was not filed until 1981 in *Democratic National Committee v. Republican National Committee* (hereafter *DNC v. RNC*), New Jersey District Court.⁹⁶ The case resulted in a consent decree that applied to RNC caging operations in every states and territory of the United States. In 1986 the DNC filed suit to enforce the decree in response to RNC caging activity in Louisiana and other states. More recently, the case was re-opened in 2004 when two minority Ohio voters intervened in the New Jersey case to oppose a caging operation conducted by the Ohio Republican Party in conjunction with the RNC according to the complaint.

This section will review of the New Jersey federal court cases on voter caging operations addressed in the *DNC v. RNC* litigation. It will follow with a review of the Ohio litigation on Republican caging operations during the 2004 presidential elections.

1981 New Jersey Litigation

In the 1981 New Jersey District Court complaint, the DNC charged the RNC and the New Jersey Republican Party with operations intended to “intimidate, threaten, and coerce” eligible African American and Hispanic voters in an effort to keep them from voting and encouraging other minority voters to vote. The complaint sought (1) a declaratory judgment the Republican actions violated the Fourteenth and Fifteenth Amendments and the Voting Rights Acts as well as other federal civil rights statutes; and (2) an injunction prohibiting the defendants from intimidating, threatening or coercing minority voters in the future.

The facts alleged in the complaint were that in the 1981 New Jersey gubernatorial election, the state Republican Party and the RNC sent mailers to voters in predominately African American and Hispanic neighborhoods, using outdated voter registration rolls. The letters were stamped with ‘do not forward’ notices. The defendants compiled a caging list based solely on the returned letters and demanded that New Jersey election officials remove the names.

New Jersey law provided procedures for dealing with returned mail, which did not include summary removal from the registration rolls. New Jersey commissioners of registration denied the Republicans’ request, informing the defendants that their caging list was old and inaccurate. Disregarding this information, the Republicans proceeded to challenge these same voters at the polls on Election Day. In addition to the caging operation, the Republican Party posted off duty police with armbands at or in the polls, posted threatening signs in minority neighborhoods, and questioned voters in minority precincts even before they entered the polls. The complaint charged that the caging operation and the voter intimidation tactics violated the Fourteenth and Fifteenth Amendments, the VRA, and other applicable federal statutes.⁹⁷

⁹⁶ *Democratic National Committee v. Republican National Committee*, Civil Action No. 81-3876. N. J. District Court

⁹⁷ See *DNC v. RNC*, Plaintiffs’ Amended Complaint and Consent Order, 1982 Exhibit A

The case did not go to trial. Instead, the parties entered into a consent decree in March 1982 with the following key provision:

2. The RNC and RSC (New Jersey Republican Party) agree that they will in the future, in all states and territories of the United States: (*emphasis added*) ... (e) refrain from undertaking any ballot security activities in polling places or election districts where the racial or ethnic composition of such districts is a factor in the decision to conduct, or the actual conduct of, such activities there and where a purpose or significant effect of such activities is to deter qualified voters from voting; and the conduct of such activities disproportionately in or directed toward districts that have a substantial proportion of racial or ethnic populations shall be considered relevant evidence of the existence of such a factor and purpose;⁹⁸

While the consent decree bound all parties to comply with the agreement “whether acting directly or indirectly through other party committees,” it expressly stated that the RNC had no control over other state party committees. This statement formed the basis of the RNC defense in later actions to enforce the consent decree and oppose Republican caging operations.

Entering the consent decree enabled the RNC to avoid any court decision on whether or not the challenged caging program violated the Constitution or federal laws designed to protect the fundamental right to vote. The consent decree specifically expressed that the RNC and the state GOP did not admit to having breached the law.

1986 New Jersey Litigation

As discussed above at page nine, the Louisiana Republican Party conducted a caging operation in minority and Democratic districts in the 1986 race for the United States Senate. The DNC again filed a complaint against the RNC in the New Jersey District Court in 1986, charging that the RNC took part in the Louisiana caging operations in violation of the 1982 consent order as well as state law federal law, and the United States Constitution.⁹⁹ The RNC answered that it had run a “ballot security direct mail program” in “full compliance with all state and federal voting rights laws” and with the terms of the 1982 consent decree.

Once again there was no trial on the merits. The parties entered into a consent decree, filed on October 20, 1986, which by its terms was to be effective until March 1, 1987 or further order of the court. The key element of this short-lived decree was the following:

- ... the RNC, its agents, employees and parties acting in active concert will not conduct a direct-mail campaign in the future directed at names appearing on voter registration lists in order; (1) to use the letters returned undelivered to compile voter challenge lists; (2) to make such challenges, or (3) to deter registered persons from voting.¹⁰⁰

On July 27, 1987, in the same case, the parties entered into a final (to-date) consent decree which modified the original 1982 agreement. As modified by the 1987 order, the 1982 consent decree continues in full force and effort. The New Jersey District Court has retained jurisdiction to enforce its terms.

The critical element of the 1987 consent decree provides that the RNC must obtain court approval before operating or assisting in the operation of a “ballot security program.” Specifically the decree provides:

⁹⁸ See DNC v. RNC, Amended Complaint and Consent Order, 1982, Exhibit A.

⁹⁹ Democratic National Committee v. Republican National Committee, Civil Action No. 86-3972, (D.N.J. 1986).

¹⁰⁰ See DNC v. RNC, 1986 and 1987 consent decrees, Exhibit B.

C. ...the RNC shall not engage in, and shall not assist or participate in, any ballot security program unless the program (including the method and timing of any challenges resulting from the program) has been determined by this Court to comply with the provisions of the Consent Order and applicable law. Applications by the RNC for determination of ballot security programs by the Court shall be made following 30 days notice to the DNC which notice shall include a description of the program to be undertaken, the purpose(s) to be served, and the reasons why the program complies with the Consent Order and applicable law.

The New Jersey 1982 consent decree, as modified by the 1986 decree only applies to actions by the RNC, the New Jersey District Court does not have jurisdiction to enforce its terms against state Republican parties. The RNC has defended charges that it violated the New Jersey decrees by claiming that it has not been involved in state caging plans.

As outlined above, internal emails and documents indicate that the RNC has, in fact, “assisted or participated” in caging operations in Florida and Ohio. Top RNC officials have helped organize and taken part in press conferences to announce allegations of voter fraud as a product of caging operations in the years since the consent decrees were signed. The unveiling of caging operations at pre-election new conferences is a key element in Republican caging operations. This has been done in derogation of the 1987 consent decree which specifically prohibits the RNC from assisting or participating in such programs with prior court approval. The RNC public involvement in Republican caging operations, which the party prefers to call ballot security programs, and RNC internal communications cast grave doubt on the claim that the organization has not taken part in Republican caging operations since 1987.

2004 New Jersey Caging Case

In response to Republican caging operations in Ohio in the weeks before the 2004 presidential election, Ebony Malone, an Ohio African American voter, and Irving Agosto, an Ohio Hispanic voter, filed a motion to intervene in the New Jersey District Court case of *DNC v. RNC*. The Ohio voters charged that the RNC had violated the court’s 1987 consent decree. The factual grounds for the complaint were that the Ohio Republican Party had mailed out non-forwardable letters to all newly registered voters, then compiled a caging list from the returned letters. The state GOP proposed to use caging list to challenge the eligibility of all 35,000 voters. The intervenors charged, and provided evidence that, the RNC coordinated and assisted in the Ohio caging operation.

The Ohio voters asserted standing to intervene in the case on the grounds that, as minority voters, they were among the intended beneficiaries of the New Jersey consent decrees. Judge Dickinson R. Debevoise of the New Jersey District Court agreed, and granted their motion to intervene. Judge Debevoise also found that the RNC was involved in the Ohio Republican caging operation in violation of the consent decrees. The court issued an order enjoining the RNC from using the Ohio caging list to challenge Ohio voters. This order was entered on November 1, 2004, just one day before the presidential election.

The RNC appealed the district court order to the U.S. Court of Appeals for the Third Circuit and filed a motion seeking a stay of the injunction. On November 1, 2004, a three-judge panel of the circuit court denied the RNC’s request for a stay. In denying the stay, the three judge panel issued an opinion holding that it was likely that the proposed Ohio Republican caging operation would “take effect in precinct where minorities predominate, interfering with and discouraging voters from voting in those districts.” The opinion also found that there was ample support for the district court’s finding that the RNC collaborated and cooperated in the Ohio caging operation. The opinion cited emails that had passed between the RNC and the Ohio Republicans. Judge Fisher dissented from this opinion.

By this time it was Election Day 2004. The Republican Party filed a motion for a rehearing by the

Third Circuit Court sitting en banc, which was granted along with a reversal of the decision of the court's three-judge panel. The order granting a re-hearing en banc also granted a stay of Judge Debevoise's injunction against the RNC. With hours before the polls opened the Republican plans to challenge voters was once again permitted.

The RNC's motion for a rehearing en banc was based on an eleventh hour decision in the U.S. Court of Appeals for the Sixth Circuit. That decision reversed two Ohio district court decisions that had found that the state's challenge law, as applied in the Republican plan for mass challenges, imposed an unconstitutional burden on the fundamental right to vote. In the first couple of hours on Election Day, November 2, 2004, the Sixth Circuit granted a stay of the orders enjoining the mass challenges that were part of the Republican caging operation. This Ohio decision opened the door for the Republican Party to deploy challengers in Ohio polling places as planned.

With just hours to go before the polls opened, one intervenor in the DNC v. RNC case, Ebony Malone, sought relief in the U.S. Supreme Court. She requested a stay of the Third Circuit's en banc decision. Justice Souter denied the motion in part due to time constraints and in part on lack of standing. After she made her application, Ms Malone had filed a declaration in which she advised the court that she had voted.

2004 Ohio Litigation

There are two prongs in the litigation against the Ohio Republican Party's 2004 caging operation. The Southern prong was a decision by the U.S. District Court for the Southern District of Ohio, enjoining the GOP caging operation,¹⁰¹ and the Northern prong was a similar decision by the U.S. District Court for the Northern District of Ohio.¹⁰²

The Southern District Court Judge, Susan Dlott was appointed by President Clinton and the Northern District Court Judge, John R. Adams, was appointed by the first President Bush. Both District Courts ruled in favor of the plaintiffs, but the Sixth Circuit Court of Appeals reversed the decisions in an order issued hours before dawn on Election Day. Just as in the New Jersey DNC v. RNC case, plaintiffs appealed to the United States Supreme Court. Due to the lack of time to adequately review the issues, the Supreme Court declined to grant relief. The United States Supreme Court has not yet ruled on the ultimate issue of whether caging operations violate the constitution and federal law. A summary of the Ohio district and circuit court decisions follows.

Spencer v. Blackwell, S.D. Ohio

On October 27, 2004, two Ohio registered voters filed a complaint against Secretary of State J. Kenneth Blackwell, other state officials, and the Chairman of the Hamilton County Republican Party.¹⁰³ The complaint, based upon 42 U.S.C § 1983, alleged that defendants, "acting under color of state law," violated rights secured to the plaintiffs by the First and Fourteenth Amendments, including, inter alia, the right to vote, the right to due process, and the right to equal protection under the law. The Ohio Republican Party and the RNC had revealed the direct mail caging operation, or ballot security plan, at a press conference a few days earlier. The plaintiffs in the action were an African American couple who were registered voters living in a pre-dominantly African American Cincinnati precinct. The couple sued on their own behalf and on behalf of others similarly situated. In their prayer for relief, they sought a declaratory judgment that the mass challenges planned by the Republican Party (which were based upon the Republican caging lists) violated plaintiffs' statutory and constitutional rights. The complaint also sought an injunction prohibiting the announced mass challenges to voters.

¹⁰¹ Spencer v. Blackwell, 347 F. Supp. 2nd 528, S.D Ohio, 2004.

¹⁰² Summit County Democratic Cent. & Executive Comm. v. Blackwell (*Summit County I*), No. 5:04CV2165, 2004 U.S. Dist. LEXIS 22539.

¹⁰³ Supra. n. 37

On November 1, 2004, Judge Dlott granted the plaintiffs' request for a preliminary injunction barring enforcement of Ohio's challenge statute, O.R.C. 3505.20. The judge noted in her opinion that the placement of hundreds of challengers in the polls was a departure from the traditional application of Ohio's challenge statute. Traditionally, each major political party filed a list of executive challengers who did not physically go into the polls.

The Ohio challenge statute permits pre-election challenges, which are to be resolved at hearing before county election boards, and Election Day challenges. Judge Dlott's ruling was based on the *Anderson v. Celebrezze* balancing test, balancing the severity of the burden imposed by defendants' proposed actions and the importance of the state's interest in preventing voter fraud. The court found that the GOP mass challenges in predominately minority precincts would place a severe burden on plaintiffs' right to vote. It also found that the state had a compelling interest in preventing voter fraud. Because O.R.C. 3505.20 placed a severe burden on the right to vote, it would have to be narrowly tailored to serve the state's compelling interest if it were to pass constitutional muster. The court found that the portion of O.R.C. § 3505.20 that permitted private challengers in the polls was not narrowly tailored to address the state's interest in preventing voter fraud. Elections officials and precinct judges, the opinion noted, were in place to prevent voter fraud and there were other restrictions designed to prevent fraud.

Based on this reasoning the judge found that the plaintiffs were likely to succeed on the merits, "on the ground that the application of Ohio's statute allowing challengers at polling places is unconstitutional" and that the plaintiffs would suffer irreparable harm if the mass challenges were to take place. Finding the absence of substantial harm to defendants if the private challengers were not permitted in polls and finding that its order would be in the public interest, the court enjoined the Ohio Secretary of State from "allowing any challengers other than election judges and other electors" into Ohio polling places.

Citing an absence of state statutory guidance on challenges and the "questionable enforceability of the state and the county policies regarding good faith challenges," the court found that there was an "enormous risk of chaos, delay, intimidation, and pandemonium inside the polls and lines out the door," if appointed challengers were permitted to launch their mass challenges.

Summit County Democratic Party v. Blackwell, N.D. Ohio

The plaintiffs in this action were the county Democratic Party and individual citizens of Summit County, Ohio. This complaint also charged that the Republican caging operation, and its resulting challenge plans, imposed a severe burden on the right of the citizens and members of the Democratic Party to cast their votes in the 2004 presidential election. The plaintiffs sought declaratory relief under 42 U.S.C. § 1983, stating that the challenge provisions of O.R.C.3505.20 violated the First and Fourteenth Amendments, and that a directive issued by Secretary of State J. Kenneth Blackwell was void for the same reasons. Plaintiffs also sought a preliminary and permanent injunction prohibiting the Ohio Republican Party and other defendants from "condoning, authorizing, conducting, or ordering any of the challenge procedures set forth in § 3505.20."¹⁰⁴

On October 31, 2004, Judge John R. Adams issued a preliminary injunction stating that "persons appointed as challengers under O.R.C. § 3505.20 may not be present at Ohio's polling places for the sole purpose of challenging the qualifications of other voters." The court granted the motion of several Ohio challengers to intervene in the case, thereby making the court's decision applicable to all Ohio counties except Hamilton County in which a similar case was pending. Judge Adams did not grant all of the injunctive relief requested in the complaint. The order enjoined the enforcement of that portion of O.R.C. § 3505.20 which permitted partisan appointed challengers to make challenges, but it did not restrict precinct election officials from issuing challenges under

.....
¹⁰⁴ Supra n. 38.

the statute. Applying the *Anderson v. Celebrezze* balancing test used by Judge Dlott in the Southern District Court, Judge Adams found that the plaintiffs were likely to succeed on the merits of their claim that actions planned by partisan appointed challengers unconstitutionally burdened their fundamental right to vote. The court cited the likelihood of undue delays, disruption and voter intimidation if the planned mass challenges were to be permitted to go forward.

U.S. Court of Appeals for the Sixth Circuit, consolidated appeals, 2004.

Ohio Secretary of State J. Kenneth Blackwell did not appeal the Northern District's decision in the case of the *Summit County Democratic Central and Executive Committee v. Blackwell*. However, the intervenor-defendants and appointed Republican challengers did file an appeal and a motion to stay the district court's order. Similarly, in the Southern District case of *Spencer v. Blackwell*, the Secretary of State did not appeal, but Republican intervenors and challengers did appeal and file motion for a stay of the injunction.

In an opinion issued in the early hours of Election Day 2004, a three-judge panel of the Sixth Circuit Court of Appeals granted the Republican challengers' motion to stay both district court orders in a 2-1 split decision. The effect of the decision was to permit challengers to carry out the mass Republican challenge program.¹⁰⁵

In the Sixth Circuit Court, Judge Rogers based his opinion upon a finding that the claims that the Republican-appointed challengers would cause disruption, delay and intimidation were merely "speculative," and that the proposed challenge plans did not unduly or severely burden the rights of Ohio voters to exercise their franchise. The decision is unusual in that an appellate court must apply the "abuse of discretion" standard when reviewing a lower court's decision to issue a preliminary injunction. Deference is to be given to a trial court's factual findings because a trial court is in a better position to review the evidence and question witnesses. In this case both trial courts, after reviewing evidence presented on both sides, found that the proposed challenge plan would impose a severe burden on plaintiffs' right to vote. Despite the strict standard of appellate review, the appellate majority opinion issued by Judge Adams found to the contrary. Judge James L. Ryan concurred "solely" on the basis that plaintiffs lacked standing to bring the action. Judge R. Guy Cole dissented to the majority opinion.

U.S. Supreme Court, 2004

Within hours, as the countdown to the hour for opening the polls on the East Coast continued, plaintiffs filed an application in the U.S. Supreme Court to vacate the Sixth Circuit Court of Appeals decision. Justice Stevens issued the decision for the Court, denying the application for "prudential reasons." Justice Stevens commented that only hours were left before voters "will make their way to the polls" and it would be difficult for the full Court to review the relevant filings and cases, in addition to all of the parties' submissions. These factors weighed against granting the extraordinary relief requested by plaintiffs. Justice Stevens opined that he had faith that the elected officials and "numerous election volunteers on the ground (would) carry out their responsibility in a way that will enable qualified voters to cast their ballots."

Justice Stevens' opinion in this case also formed a basis for Justice Souter's denial of the U.S. Supreme Court appeal on the same day by the intervenors in *DNC v. RNC*, Election Day, 2004.

¹⁰⁵ *Summit County Democratic Cent. & Executive Comm. v. Blackwell (Summit County II)*, 388 F.3d 547, 549 (6th Cir. 2004).

RECENT CHANGES TO STATE VOTER CHALLENGE LAWS

In recent years, several states have made substantive changes to their voter challenge statutes. Not surprisingly, the type of changes reflect partisan interests. Florida, Ohio and Pennsylvania changed their laws to facilitate voter challenges while Minnesota and Washington acted to make vote caging and election challenges more difficult. These five states are reviewed below.¹⁰⁶

FLORIDA

Currently, Florida's current challenge law requires a challenger to sign an oath giving his or her name, address and political affiliation in addition to the reason for the challenge. The challenger need only have a "good faith belief" to issue the challenge, it does not have to be based on personal knowledge.¹⁰⁷

In 2005, Florida amended its challenge statute to eliminate provisions that gave challenged voters the opportunity to oppose the challenge at the polls, show that they were eligible, and vote a regular ballot. The challenged voter is no longer given an opportunity to contest the challenge on Election Day, as he or she was in 2004. Instead the voter is forced to cast a provisional ballot on the basis of the challenger's oath alone. At the same time, the law on provisional ballots was made more restrictive. Instead of having three days immediately after the election to give evidence of eligibility, the voter has now only 48 hours.¹⁰⁸

Filing a frivolous challenge in Florida is a first-degree misdemeanor, but there is a "good faith" exception that states: "electors or poll watchers shall not be subject to liability for any action taken in good faith and in furtherance of any activity or duty permitted of such electors or poll watchers by law."¹⁰⁹ This exception will make prosecution of frivolous or unfounded challenges extremely difficult.

MINNESOTA

Minnesota changed its voter challenge statute in 2006 to effectively prohibit the use of direct mail to compile a voter caging list. The law provides that "challengers and the political parties that appoint them must not compile lists of voters to challenge on the basis of mail sent by a political party that was returned as undeliverable or if receipt by the intended recipient was not acknowledged in the case of registered mail."¹¹⁰

Challengers in Minnesota may be appointed by political parties for partisan elections, by candidates in non-partisan elections, or by certain officials for issue-only elections. Challenges are made only on the basis of personal knowledge and the legislature further protected voters by prohibiting challengers from speaking to voters except in front of an election judge for purposes of deciding the challenge.

¹⁰⁶ ProjectVote reviewed the challenger states of 10 states in which there had been recent caging or Election Day challenger programs

¹⁰⁷ Fla. Stat. § 101.111(1).

¹⁰⁸ Fla. Sessions Laws Ch. 2005-277. HB 1567.

¹⁰⁹ Fla. Stat. § 110.111(7).

¹¹⁰ Mn. Stat. 204C.07 Subd. 5.

OHIO

Ohio substantially changed its challenge law on June 1, 2006 in legislation passed by the state's Republican-controlled legislature.¹¹¹ Under prior law, all challenged voters were entitled to notice and an opportunity to be heard before the election board decided the pre-election challenge. Under the new law, the board can grant or deny the challenge without any notice to the voter if the board decides that it can make that determination from its records alone.¹¹²

If the board decides to grant the challenge and the unsuspecting voter appears up to vote, the voter has the burden of proof to show that her disqualifying “disabilities” have been “removed” and that she “has a right to vote.”

One potentially positive change to Ohio challenge law was the elimination of partisan challengers at the polls. Effective June 1, 2006, only precinct election judges may challenge voters. Election judges head bi-partisan teams of pollworkers in Ohio and they are chosen from the party that prevailed in that precinct's last gubernatorial election.¹¹³

PENNSYLVANIA

Before the 2004 election, Pennsylvania relaxed its restrictions on partisan poll watchers. Under the old law, poll watchers were restricted to the polling place in which they were officially enrolled. Under the new law, they could move from one polling place within the county, permitting greater latitude in organizing mass challenges.¹¹⁴

WASHINGTON

In 2006, the Washington legislature amended its challenge laws to place a significant barriers to unfounded voter challenges. Under the new law, any registered voter or the county prosecutor may challenge a voter's registration by affidavit. The challenge must be made on the basis of personal knowledge, under oath, and under penalty of perjury. The voter's registration is presumptive evidence that he is eligible to vote. The burden of proving that he is not eligible to vote is on the challenger under the “clear and convincing” standard of proof. This is a higher standard than the more common “preponderance of the evidence” standard. The challenged voter is given an opportunity to give evidence at a hearing or in writing.¹¹⁵

Grounds for challenges are that the voter: is underage, is not a citizen, was convicted of felony and her civil rights have not been not restored, has been declared mentally incompetent, and does not live at residence on her registration. If the challenge is based on the latter reason, the challenger must provide the voter's current address or attest that the challenger exercised due diligence in attempting to find the voter's address. Due diligence includes: going to the voter's registration address to determining the current occupant, checking voter rolls for evidence that voter is registered elsewhere, checking phone directories, and searching county auditor records for any property owned by voter.

The county auditor must publish the entire content of the challenge on the internet within 72 hours after the challenge is received.¹¹⁶

¹¹¹ It is unclear from the recent changes in Ohio law whether a person whose right to vote was successfully challenged without a hearing before an election does or does not finally have a right to defend his right to vote on election day in Ohio.

¹¹² O.R.C. §§ 3505.19, 3503.24.

¹¹³ It is unclear from the recent changes in Ohio law whether a person whose right to vote was successfully challenged without a hearing before an election does or does not finally have a right to defend his right to vote on election day in Ohio.

¹¹⁴ Infield, Tom, “Election changes could cause snarls on Nov. 2,” Philadelphia Inquirer, Oct 27, 2004 B-1.

¹¹⁵ RCW 29A.08.810 to RCW 29A.08.850.

¹¹⁶ RCW 29A.08.835

RECOMMENDATIONS

The most effective means to avoid burdening our election system with caging operations and mass challenges at the polls is to eliminate the use of partisan challengers in the month immediately before an election and on Election Day. History demonstrates that laws allowing private citizens to challenge other citizens' right to vote at the polls are a relic of the Jim Crow era, a means to preserve private and partisan control over elections. As such they should be eliminated or tightly regulated.

States provide trained, bipartisan teams of poll workers to monitor elections at the local level. When partisan challengers receive training at all, the training is geared toward advancing a partisan agenda to control the vote in opposition areas. In contrast, publicly appointed bipartisan teams of poll workers are trained to challenge voters only when necessary and according to non-partisan standards. Moreover, publicly appointed bipartisan teams of poll workers have the tools that are necessary to check the eligibility of voters, such as access to official registration rolls and access to experienced election officials in the event of question. Private challengers are not as likely to know their state's challenge laws, and they are not automatically teamed with a person from the opposing party to avoid bias.

If one party chooses to place partisan challengers in the polling places, opposition parties have no alternative but to reciprocate to protect their members from intimidation and harassment. We have witnessed the acrimony, chaos, and last-minute litigation that results. The presence of partisan challengers does nothing to enhance election integrity but much to polarize it.

Below are several recommendations to address the problem of voter caging and challenge operations.

1. Challenges that rest solely on the basis of a returned non-forwardable letter should be prohibited by law as in Minnesota.
2. The proper training of all poll workers is critical to successful elections. Project Vote recommends that a central poll worker training manual be written by the office of the chief elections officer of each state for distribution to local elections authorities to ensure uniformity and the correct interpretation of the state's election code.
3. In lieu of challengers, it is recommended that states appoint one observer from each major political party for each polling place. States have the laws and authority to prevent and punish election fraud in various forms. They do not require partisan vigilantes to complicate the process.
4. If partisan challengers are permitted to challenge other citizens' right to vote, it is recommended that the process be completed at least 30 days before election day, just as registration applications in many states must be filed well in advance of an election. The challenge process should provide adequate notice to the challenged voters and an opportunity to be heard. It is inefficient and unrealistic to require poll-workers to make on-the-spot decision about a voter's eligibility.
5. Pre-election challengers should be required to submit evidence in support their challenges.
6. Partisan challengers should be required to undergo training by non-partisan election officials on the specific grounds for challenges, the challenge process, and the penalties for

frivolous challenges before they are appointed as challengers. It is also recommended that partisan challengers be tested on the training before they are appointed.

7. States should require challenges to be based upon personal knowledge, not merely upon a “reason to believe” or a “good faith belief,” under penalty of perjury. The fundamental right to vote should not be burdened without good cause. Permitting partisan challengers to put other voters to the test under a loose “reason to believe” or “good faith” standard (or no standard at all) places a severe burden on the fundamental right to vote.
8. Enact specific and narrow grounds for challenging a voter’s eligibility, limited to age, residence or citizenship. No challenge should be permitted merely on grounds of a returned, non-forwardable mail by a public or private entity. NVRA standards address what happens when mail to a voter’s residence is returned.
9. Enact legislation creating a presumption that a person whose name has been placed on registration rolls by an election official is an eligible voter. Place the burden for overcoming that presumption on the challenger and not on the challenged.
10. Ensure that legislation expressly provides that a successfully challenged voter is entitled to receive a provisional ballot, as required by HAVA.
11. Enact significant sanctions against challengers who violate the “personal knowledge standard” or raise challenges not based on one of the statutorily enumerated grounds. Increase penalties based on the number of such unlawful challenges at one or more elections.
12. Provide successfully challenged voters an opportunity to give evidence why their provisional votes should be counted.

CONCLUSION

The evidence of Republican caging operations and the mass challenge and purge attempts that follow such operations is overwhelming. Research done by experts, civic organizations and journalists into the demographics and geographic patterns of the targeted populations establishes that Republican caging operations have profiled minority and Democratic voters for challenges.

If the Republican operations were not almost exclusively limited to Democratic and minority areas, credence might be given to Republican claims that the parties are guarding ballot integrity. In the absence of evidence that Republican organizations launch caging operations against populations that are not perceived as potential political opponents, it is difficult to give credence to such claims. Voter fraud knows no party, now or in the past.

During the last half century, the focus of Republican organizations on voter caging operations has had less to do with voter fraud and more to do with a desire to use state voter challenge statutes to suppress minority and urban votes.

There is no evidence that litigation or the unintended negative consequences of voter caging programs has dampened the enthusiasm of today's Republican leadership for caging operations or mass challenges. During an appearance on behalf of the Virginia GOP gubernatorial candidate in 2005, RNC Chairman Kenneth Mehlman vowed to "do whatever we can to help make sure Jerry Kilgore becomes the next governor of the state" - including, "having poll workers on hand to challenge voter eligibility."¹¹⁷

The problem of caging and blanket challenges against targeted populations will not end without effort on the part of citizens. Election administrators, civic organizations, and the political parties themselves must work together to prevent wholesale disenfranchisement of voters based solely on a single piece of returned mail, an ethnic surname, or a partisan challenger's "belief" that a voter is not eligible to vote.

¹¹⁷ Gerth, Joseph, "Some in GOP Urge Party Chief To Quit" The Courier-Journal, Aug. 3, 2004. IB. Associated Press, May 26, 2005.