

VOTE CAGING AS A REPUBLICAN BALLOT SECURITY TECHNIQUE

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I. INTRODUCTION

In recent years, a growing controversy has surrounded efforts by Republicans to disqualify Democratic voters through the technique of vote caging. This technique gained national attention on May 23, 2007 during U.S. House Judiciary Committee hearings on the firing of nine U.S. attorneys in 2006. The attorneys were fired for reasons alleged to be improperly political and irrelevant to their job performance.¹

Monica Goodling, a former senior counsel and White House liaison to Attorney General Alberto Gonzales, told the committee

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1. See generally *Fired U.S. Attorneys*, WASH. POST, Mar. 6, 2007 (showing a chart of the names, pictures, offices, job review excerpts, and cases of the nine fired attorneys); Amy Goldstein & Dan Eggen, *Number of Fired Prosecutors Grows*, WASH. POST, May 10, 2007, at A10.

that Deputy Attorney General Paul McNulty, who had recently resigned as the Justice Department's number two official, was less than candid in his February testimony before the U.S. Senate Judiciary Committee.² McNulty testified about Timothy Griffin, who was appointed on an interim basis—without the normal confirmation hearing—to replace the U.S. attorney in the Eastern District of Arkansas.³ Griffin was a former opposition researcher for the Republican National Committee (RNC) and aide to White House political advisor Karl Rove.⁴ According to Goodling, McNulty did not reveal to the senators information about allegations that Griffin was involved in “caging” African-American votes in 2004.⁵ When Goodling was asked during her testimony to explain the term, her response was so vague that it was unclear why she thought McNulty should have revealed information about a caging operation, and no committee member asked her for clarification.⁶ The issue continued to gain attention, particularly on political blogs, when Griffin suddenly resigned his interim appointment as U.S. attorney a few days after Goodling's testimony

2. Dan Eggen & Paul Kane, *Goodling Says She 'Crossed the Line,'* WASH. POST, May 24, 2007, at A1.

3. Jason McClure & Emma Schwartz, *Goodling Admits to 'Crossing the Line'; Denies Major Role in Attorney Firings,* LEGAL TIMES, May 24, 2007, <http://www.law.com/jsp/article.jsp?id=1179911108382&pos=atag glance>.

4. *Id.*

5. *Id.* McNulty had reportedly angered Goodling, Gonzales, and others in his earlier congressional testimony, in part because he had said that H. E. Cummins III, the U. S. Attorney whom Griffin replaced, had been dismissed “solely to make room for J. Timothy Griffin, who had been named as the temporary successor with the backing of Karl Rove, the senior White House political adviser.” David Johnston, *Gonzales's Deputy Quits Justice Department,* N.Y. TIMES, May 15, 2007, at A15. After Goodling's testimony about the caging, McNulty strongly denied her assertions. “Ms. Goodling's characterization of my testimony is wrong and not supported by the extensive record of documents and testimony already provided to Congress,” he said in a statement. David Johnston & Eric Lipton, *Ex-Justice Aide Admits Politics Affected Hiring,* N.Y. TIMES, May 24, 2007, at A1.

6. *Goodling Testifies Before the House Judiciary Committee* (CQ Transcripts Wire), WASH. POST, May 23, 2007, http://www.washingtonpost.com/wpsrv/politics/transcripts/goodling_testimony_052307.html. In response to the question from Rep. Linda T. Sanchez, “Can you explain what caging is?” Ms. Goodling stated: You know, my understanding—and I don't actually know a lot about it—is that it's a direct-mail term that people who do direct mail, when they separate addresses that may be good versus addresses that may be bad. That's about the best information that I have, is that it's a direct mail-term that's used by vendors in that circumstance.

Id.

and shortly before his Senate confirmation hearing would have been held.⁷ In a speech recorded on C-Span, he strongly denied having participated in vote caging, although he also did not define it.⁸

As these events were unfolding, the updated paperback edition of *Armed Madhouse*⁹ by Greg Palast, a muck-raking American journalist employed by the BBC, appeared in bookstores across the nation. Following Goodling's testimony, Palast also became active in the liberal blogosphere, describing what he called Republican "vote caging" efforts in 2004 that focused on Jacksonville, Florida, a city with a large African-American population.¹⁰ Indeed, it was primarily because Palast publicized the events in Florida that the issue received as much attention as it did.¹¹

In June 2007, Democratic Senators Edward Kennedy and Sheldon Whitehouse sent a letter to Attorney General Gonzales requesting, to no avail, information about Griffin's role in the 2004 vote caging operation.¹² Invoking executive privilege, the Bush administration has refused to honor requests and subpoenas issued by both the House and Senate Judiciary Committees regarding the firing of the U.S. attorneys and related events that would have shed

7. See Posting of Max Brantley to Arkansas Blog, It's Official, <http://www.arktimes.com/blogs/arkansasblog/> (May 30, 2007, 17:58 CST).

8. Tim Griffin on Vote Caging (C-Span television broadcast June 14, 2007), <http://www.youtube.com/watch?v=TeDrHjagQck>; see also E-mail from Kelly Porter to Tim Griffin et al., Research Dir. and Deputy Commc'ns Dir. Republican Nat'l Comm. (Aug. 25, 2004, 17:47 EST), <http://2004.georgewbush.org/deadletteroffice/> (last visited Dec. 30, 2007) (stating the caging total to date was 1771 and attaching a spreadsheet of the caging list).

9. GREG PALAST, *ARMED MADHOUSE: FROM BAGHDAD TO NEW ORLEANS—SORDID SECRETS AND STRANGE TALES OF A WHITE HOUSE GONE WILD* (2007).

10. Greg Palast, *New Florida Vote Scandal Feared*, BBC NEWS, Oct. 26, 2004, <http://news.bbc.co.uk/2/hi/programmes/newsnight/3956129.stm>.

11. See PALAST, *supra* note 9, at 199–208 (detailing Palast's account of caging efforts in Florida in 2004); see also Palast, *supra* note 10; *Newsnight Report* (BBC television broadcast Oct. 26, 2004), <http://www.youtube.com/watch?v=IkvWkwv7UVo>. Palast's trademark hyperbole apparently causes the mainstream media to take him with a grain of salt and may partly account for their unwillingness to give serious attention to his caging charges. See, e.g., Greg Palast, Editorial, *Media as Lapdog*, L.A. TIMES, Apr. 27, 2007, at A33 (condemning U.S. mainstream media culture for allowing the story of voter challenges of African Americans in the 2004 election to slip through the cracks). "The truth is, I knew a story like this one would never be reported in my own country. Because investigative reporting . . . is dying." *Id.*

12. Press Release, Senator Sheldon Whitehouse, Senators Demand DOJ Investigation into Voter Suppression Allegations (June 18, 2007), available at <http://www.whitehouse.senate.gov/record.cfm?id=277168>.

additional light on the subject.¹³ Thus, it is impossible at this writing to determine the precise facts behind Griffin's "caging" memos.¹⁴ After Goodling's testimony, the mainstream press has generally ignored the story, relegating it primarily to the blogosphere and on-line venues.¹⁵

II. VOTE CAGING: A DEFINITION

At this juncture, the primary value of the controversy has been to raise troubling questions about vote caging—or "voter caging," an equivalent term—as it has been practiced and may be practiced in the future. The purpose of this article is to define it, point to phenomena that often accompany it, and shed light on its history by rehearsing a noteworthy account of it that occurred more than fifty years ago and may have served as a model for its subsequent use.

The term "vote caging" (or "caging") as referring to a process leading to voter challenges is of recent vintage. No major dictionary or political science reference work mentions them, nor does a leading legal casebook published as recently as 2007.¹⁶ The

13. Greg Gordon, *Bush Invokes Executive Privilege for Rove in Attorney Firings*, MCLATCHY NEWSPAPERS, Aug. 1, 2007, <http://www.mcclatchydc.com/homepage/story/18637.html>.

14. See generally *id.* (stating that the decision throws a roadblock in the way of the investigation).

15. See Dahlia Lithwick, *Raging Caging: What the Heck is Vote Caging, and Why Should We Care?*, SLATE, May 31, 2007, http://www.slate.com/id/2167284/page_num/all/#page_start; see also Greg Gordon, 'Vote Caging' Allegations Arise in Probe of U.S. Attorney Firings, SACRAMENTO BEE (Cal.), June 25, 2007, at A7; PBS Now: Voter Caging & Housing Works (PBS television broadcast July 27, 2007), available at <http://www.pbs.org/now/shows/330/index.html>.

16. "Vote caging" or "caging" as a reference to voter challenges does not appear in WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1993) or in MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2003). No general or political science dictionary published as late as 2004 of which we are aware contains an entry for the terms. See, e.g., ALAN ABRAMOWITZ, VOICE OF THE PEOPLE: ELECTIONS AND VOTING IN THE UNITED STATES (2004); FRANK BEASLEY, THE BLACKWELL DICTIONARY OF POLITICAL SCIENCE (1999); PHILIP JOHN DAVIES, US ELECTIONS TODAY (2d ed. 1999); JOHN L. MOORE, ELECTIONS A TO Z (1999); THE REFERENCE SHELF: THE U.S. ELECTION SYSTEM (Paul McCaffrey ed., 2004). Nor does a scholarly overview of vote suppression techniques in the United States published in 2006 mention the terms. See SPENCER OVERTON, STEALING DEMOCRACY: THE NEW POLITICS OF VOTER SUPPRESSION (2006). A brief overview of the same subject by a non-profit organization the same year also does not mention the terms. See PEOPLE FOR THE AMERICAN WAY, THE NEW FACE OF JIM CROW: VOTER SUPPRESSION IN AMERICA (2006), available at <http://www.pfaw.org/pfaw/general/default.aspx?oid=29392222>. Nor do the terms appear in the index of the 2007 edition of a leading

on-line *Double-Tongued Dictionary*, however, which describes itself as “a lexicon of fringe English, focusing on slang, jargon, and new words,” has an entry for “caging: *n.* the processing of responses to a fund-raising or marketing campaign, especially when concerning money.”¹⁷

Apparently, the etymology of the term is based on the numerous cubbyholes or “cages” where mail used to be sorted by postal workers called “cagers.”¹⁸ *The Double-Tongued Dictionary’s* examples of usage go back to 1981, but only one concerns vote caging, a quote from Greg Palast in the November 2, 2004 *Baltimore Chronicle*: “The GOP’s announced plan to block 35,000 voters in Ohio ran up against the wrath of federal judges; so, in Florida, what appear to be similar plans had been kept under wraps until the discovery of documents called ‘caging’ lists.”¹⁹

Due to the prominence of the U.S. attorney firings scandal, the term “caging,” connoting voter-suppression, can be found in *Wikipedia*.²⁰ In addition, various blogs, publications by non-profit organizations, and on-line news sources provide definitions as well as examples.²¹

For purposes of this essay, vote caging is defined as a three-stage process designed to identify persons in another party or faction whose names are on a voter registration list, but whose legal

election law casebook. SAMUEL ISSACHAROFF ET AL., *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* (3d ed. 2007).

17. Double-Tongued Dictionary, <http://www.doubletongued.org/index.php/dictionarycitations/caging/> (last visited Dec. 30, 2007).

18. Paul Kiel, *Cage Match: Did Griffin Try to Disenfranchise African-American Voters in 2004?*, TPM MUCKRAKER, June 26, 2007, <http://www.tpmuckraker.com/archives/003523.php>.

19. Double-Tongued Dictionary, *supra* note 17.

20. See Caging, Wikipedia, http://en.wikipedia.org/wiki/Caging_list (last visited Dec. 15, 2007).

21. See, e.g., Posting of J. Gerald Herbert to Campaign Legal Center, *Inside the Vote Cage: Griffin, Goodling, and McNulty (No, Not Another Law Firm)*, http://www.clcblog.org/blog_item-138.html (June 20, 2007); Posting of J. Gerald Hebert & Brian Dupre to Campaign Legal Center Blog, *Vote Caging and the Attorney General*, http://www.clcblog.org/blog_item-152.html (July 23, 2007); Teresa James, *Caging Democracy: A 50-Year History of Partisan Challenges to Minority Voters*, Project Vote (Sept. 2007), available at http://projectvote.org/fileadmin/ProjectVote/Publications/Caging_Democracy_Report.pdf; Whitehouse, *supra* note 12; Justin Levitt & Andrew Allison, *A Guide to Voter Caging*, Brennan Center for Justice (June 2007), available at http://www.brennancenter.org/dynamic/subpages/download_file_49608.pdf; Justin Levitt & Andrew Allison, *Reported Instances of Vote Caging*, Brennan Center for Justice (June 2007), available at http://www.brennancenter.org/dynamic/subpages/download_file_49609.pdf.

qualification to vote is dubious, and then to challenge their qualification either before or on Election Day. Ostensibly, caging is an attempt to prevent voter fraud. In practice, it may have the effect of disenfranchising voters who are legitimately registered.

In the first stage, political operatives typically identify a geographic area with a disproportionate number of registered voters who belong to a different party from that of the operatives.

In the second stage, the operatives send first-class, do-not-forward letters (sometimes by registered mail)²² to people in the identified areas, sometimes asking them to perform a simple task that includes responding by mail to the original letter. All letters returned to the senders unopened are assumed to indicate the addressees no longer live at the address that appears on the registration rolls, and therefore may not be legally entitled to vote. Their names are then put on a “caging list.”

In the third stage, political operatives allied with those who constructed the caging list may appear on Election Day at the polling places where those people whose letters were returned unopened may try to vote. The votes are then challenged, either by the partisan operatives or by election officials who have been supplied with their names by the operatives, depending on the state’s laws.

If the challenged voter had moved out of the precinct she tried to vote in, she would—in many cases—be unable to vote there, as well as in the precinct she actually inhabited, without having re-registered, although she might still be able to cast a provisional ballot. Moreover, the challenge process takes time. If there is a long line of voters, multiple challenges—whether successful or not—can slow the voting process and discourage legitimate voters waiting in line from voting. For the most part, the challenged voters would presumably tend to vote for the party of those whose votes were caged, given that the original do-not-forward letters were targeted at geographical areas containing a disproportionate number of registrants from the opposing party.

In addition, if some of the voters waiting in line and observing the challengers suddenly had doubts about their own voter qualifications—justified or otherwise—they too might drop out of the line. While it is not a necessary aspect of caging, operatives representing the cagers sometimes encourage this eventuality by

22. See Levitt & Allison, *A Guide to Voter Caging*, *supra* note 21, at ¶ 3.

distributing handbills, putting up signs, making phone calls, or placing radio ads that contain false information about voter qualifications and stress dire legal consequences of breaking the law. For example, the following sign was put up in a Democratic precinct on or near Election Day 2002 in Baltimore: "COME OUT TO VOTE ON NOVEMBER 6th. BEFORE YOU COME TO VOTE MAKE SURE YOU PAY YOUR: PARKING TICKETS, MOTOR VEHICLE TICKETS, OVERDUE RENT, AND MOST IMPORTANT ANY WARRANTS."²³

Of course, none of the items mentioned in the sign were required to be paid or quashed in order to vote. Moreover, election day that year was the fifth of November, not the sixth. Another tactic with the same intimidating purpose is to station at the polling place off-duty police officers or people in official-seeming uniforms, sometimes carrying side arms.²⁴ A bill introduced by Senator Barack Obama, called the Deceptive Practices and Voter Intimidation Prevention Act, is currently being considered in Congress.²⁵ The Act would make such tactics a crime.²⁶

The hope of discouraging potential voters with these techniques is premised on the assumption that a disproportionate number of people in the targeted precincts will be uneducated, unsure of their voting rights, unreasonably fearful they might break an election law, unable to take the time necessary to establish that

23. Anne-Marie Cusac, *Bullies at the Voting Booth*, THE PROGRESSIVE, Oct. 2004, available at <http://www.commondreams.org/views04/0917-09.htm>. This article also provides interesting examples of voting information, containing the wrong date, being handed out in predominantly Democratic districts. *Id.*

24. CHANDLER DAVIDSON, TANYA DUNLAP, GALE KENNY, & BENJAMIN WISE, REPUBLICAN BALLOT SECURITY PROGRAMS: VOTE PROTECTION OR MINORITY VOTE SUPPRESSION—OR BOTH? 50 (2004), available at http://www.votelaw.com/blog/blogdocs/GOP_Ballot_Security_Programs.pdf [hereinafter DAVIDSON ET AL.] (discussing the RNC-directed New Jersey Ballot Security Program in 1981). Similar events in 1988 occurred on the opposite coast in Orange County, California. *Id.* at 68.

25. Deceptive Practices and Voter Intimidation Prevention Act, S. 453, 110th Cong. (2007), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_bills&docid=f:s453rs.txt.pdf; see also Jocelyn Friedrichs Benson, *Election Fraud and the Initiative Process: A Study of the 2006 Michigan Civil Rights Initiative*, 34 FORDHAM URB. L.J. 889, 933 n.243 (2007); Matthew Hay Brown, *Senate Bill Outlaws Campaign Trickery; Cardin Backs Curb on Bogus Endorsements*, BALTIMORE SUN (Md.), Feb. 1, 2007, at 5B.

26. *Id.*

they are legally registered, or are indeed unqualified to vote.²⁷ If many do-not-forward letters have been returned, at least some of those on the registration rolls *are* probably unqualified to vote, which gives some credence to the cagers' claim that their sole concern is detecting and preventing fraud instead of discouraging legal voters from voting. For, at its core, caging can only gain favor in the court of public opinion if it is successfully portrayed as an anti-fraud measure, not a partisan vote-suppression technique.

Even if vote caging were used solely to prevent illegal voting in the populace at large, there are serious problems with the method as we have described it. For example, to the extent that party operatives target only members of another party, it is clear that fraud prevention is not the sole or even primary purpose of the caging operation. The subtext is that only fraud in the opposing party is worth exposing, to diminish its power, while the cagers' party's potential illegal voters are ignored.

In addition, there are several reasons why a "Do Not Forward" letter can be returned to the sender. First, the letter might have mistakenly been delivered to the wrong address or not delivered at all. Voting rights lawyer Dayna Cunningham has marshaled evidence to raise serious questions about the fairness of challenges or purges based on address verification.²⁸ Among the most important of these is poor mail delivery in low-income areas.²⁹ Both Internal Revenue Service and census data "suggest that a major contributor to low response rates in minority communities may be ineffective mail delivery."³⁰

Second, "partisan activists can make mistakes—unintentional or otherwise—in matching the names on the returned letters with the names on the registration lists they are using" (i.e., mistaking "Jameson" for "Jamison").³¹ In addition, two or more people with exactly the same name can be confused with each other.³²

Third, if the letter is registered, the intended recipient may actually have lived at the address, but was not home to sign for the letter when it was delivered. For example, in his book, Palast

27. See generally Cusac, *supra* note 23 (discussing attempts to confuse or frighten voters).

28. See generally Dayna L. Cunningham, *Who Are to be the Electors? A Reflection on the History of Voter Registration in the United States*, 9 YALE L. & POL'Y REV. 370 (1991).

29. *Id.* at 393–94.

30. *Id.*

31. DAVIDSON ET AL., *supra* note 24, at 18.

32. See *id.* at 18.

claimed that some of the targeted recipients of caging mail in Jacksonville in 2004 were actually serving abroad in the Armed Services.³³

Finally, the registration list the cagers worked with might have been out of date or inaccurate.³⁴

In spite of these important sources of error, once a voter's name is on the cagers' list, he is the target of a challenge, even if qualified to vote.³⁵ Then, "[e]ach [person] confronted by a challenge slows down the line."³⁶ Whether voters persevere or give up depends on how confident they are, how knowledgeable about the voting process, and how aggressive the challenger.³⁷ But even if voters persevere, they may be required to cast a provisional ballot until the status of their registration is established.³⁸ Unfortunately, not all such ballots are counted.³⁹ A survey of provisional ballots nationwide in 2004 found that only sixty-eight percent of the 1.6 million ballots cast were counted.⁴⁰

From this description of the process of vote caging, one can see that it works best as a means of suppressing votes when the population targeted is relatively uneducated, particularly about election laws. Vote caging in a wealthy, highly educated neighborhood would be unlikely to net a sizable percentage of returned unopened letters. The chances that letters returned in such a neighborhood were indicative of people who had either moved and were likely to try to vote in their old precinct, or who were disqualified from voting for some other reason, are small when compared to poor neighborhoods. The logic of the process thus recommends that it be used primarily in the latter areas. Moreover, when low-income, low-education precincts also happen to be largely populated by African-Americans, the voters will usually be Democrats.⁴¹ While not as Democratic as blacks, Latinos in poor

33. PALAST, *supra* note 9, at 204.

34. Cunningham, *supra* note 28, at 387–88, 403.

35. DAVIDSON ET AL., *supra* note 24, at 18.

36. *Id.*

37. *Id.*

38. See SOLUTION OR PROBLEM? PROVISIONAL BALLOTS IN 2004 1, 2 (2005), available at <http://www.electionline.org/Portals/1/Publications/ERIP10Apr05.pdf> (discussing provisional voting status).

39. *Id.*

40. *Id.* at 5.

41. See DAVIDSON ET AL., *supra* note 24, at 13–14; RICHARD J. ELLIS ET AL., THE ELECTIONS OF 2000, 64–65 tbl. 3-1 (2001) (showing that ninety percent of voting African Americans voted for the Democratic presidential candidate in 2000, and

neighborhoods—except for anomalies such as Cuban-Americans—also present a logical target for vote caging.⁴²

Students at predominantly black colleges are more likely to be Democrats and, therefore, another target.⁴³ While not poorly educated, they are not yet experienced voters; they are probably not as well-versed in the basics of registration requirements and procedure. Accordingly, they are vulnerable to the kinds of misinformation mentioned above. Moreover, if do-not-forward letters are sent to their campus addresses during summer vacation, the chances they will receive them are diminished.⁴⁴

Thus, while caging is a technique that could be employed by partisans of any party, its logic suggests that it is primarily employed by Republicans against Democrats, especially those in areas with heavily African-American and Latino concentrations. Moreover, there is evidence that this technique has been in use for many years, regardless of the fact that targeting race in caging may be illegal under the Voting Rights Act.⁴⁵

showing a link between a lower income and a Democratic or Independent vote); *id.* at 68 (discussing a strong correlation between voter's income and culture and their choice of candidate).

42. DAVIDSON ET AL., *supra* note 24, at 13–14. See, e.g., ELLIS ET AL., *supra* note 42, at 64–65 tbl. 3-1 (showing that sixty-two percent of Latino voters chose the Democratic presidential candidate in 2000). Compare Jeffrey Gettleman, *On Politics; A Cuban Revolution, Only It's in New Jersey*, N.Y. TIMES, Feb. 5, 2006, at 14NJ (stating that Cuban-American voters in New Jersey are primarily Democrats), with Christopher Marquis, *It's Republican vs. Republican on Cuba*, N.Y. TIMES, July 28, 2002, at 18 (stating that Cuban-American voters have been a core constituency for Republican candidates in Florida).

43. While some predominantly black colleges have long been targets of vote suppression, students at other colleges may also become victims of both Democratic and Republican efforts. See ELLEN KOLASKY & LORA WONDOLOWSKI, LEAGUE OF CONSERVATION VOTERS EDUCATION FUND, NOT HOME, NOT WELCOME: BARRIERS TO STUDENT VOTERS (2004), available at http://www.lcveducation.org/programs/polling-research/LCVEF_PD-Barriers-to-Student-Voting_2004-Rpt.pdf. For examples of historically black colleges as targets of vote suppression, see NATIONAL COMMISSION ON THE VOTING RIGHTS ACT, PROTECTING MINORITY VOTERS: THE VOTING RIGHTS ACT AT WORK 1982-2005, 65–66 (2006), available at <http://www.votingrightsact.org/report/finalreport.pdf>.

44. The director of the counseling center at historically black Edward Waters College in Jacksonville commented on the small likelihood that students at his college would have received the caging letters they were sent by Republicans during the summer vacation of 2004. *PBS Now: Voter Caging & Housing Works*, *supra* note 15.

45. See The Voting Rights Act § 10(b), 42 U.S.C. 1973i (2006).

III. ARIZONA PRECURSORS TO TWENTY-FIRST CENTURY VOTE CAGING

One widely discussed example of the caging described above occurred in Arizona in the late 1950s and early 1960s.⁴⁶ It received wide publicity when William H. Rehnquist was nominated to the U.S. Supreme Court in 1971 and to the office of Chief Justice in 1986.⁴⁷ The following is an account of the Arizona ballot security program Rehnquist participated in, a component of which involved vote caging, and the challenges and harassment of African-American and Latino voters in Phoenix.⁴⁸ The story not only sheds light on racially discriminatory caging, it also indicates the longevity of the procedure. Moreover, it demonstrates that caging is not necessarily conducted by shady individuals or organizations. Sometimes, as in Phoenix, respected members of the community, in their capacity as party leaders, are responsible for caging.⁴⁹

The account of Justice Rehnquist's confirmation hearings and the famous controversy over his participation in vote caging activities might, at first reading, seem to play an inordinate role in the present analysis of vote caging. But it is largely because of the Senate hearings on his nominations in 1971 and 1986 that the logic of vote caging and its abuses as a ballot security technique are so well documented. It is also worth noting that Rehnquist's possible participation—while a major element in the hearings' drama—is not germane to the larger issue of whether racially discriminatory vote caging efforts by the Phoenix Republican Party occurred, and if so, how they worked. The evidence is clear that some of those efforts were racially targeted and involved threats and intimidation in minority precincts.

GOP ballot security programs gained national attention in the fall of 1971, after President Richard Nixon nominated William

46. DAVIDSON ET AL., *supra* note 24, at 17–21. Other cities were also the source of much debate regarding voter fraud and voter challenging strategies. *See id.* at 33–38 (citing instances in Chicago, Los Angeles, and Houston among others).

47. *Id.* at 19–21 (describing controversy around Rehnquist's nomination to the Supreme Court); *id.* at 21–24 (describing even greater debate surrounding his nomination to Chief Justice).

48. *Id.* at 15–24.

49. For example, Rehnquist, a future Supreme Court Chief Justice and prominent Phoenix attorney, who was serving as co-chairman of the GOP ballot security program in 1960, had a role in training challengers using some of these questionable tactics. *See id.* at 21–24.

Rehnquist to the U.S. Supreme Court.⁵⁰ The nomination surprised observers. Nixon and his staff had kept their consideration of Rehnquist quiet; Nixon, in fact, had decided on him only the day before the public announcement.⁵¹ The president's hesitation and secrecy resulted from previous confirmation battles.⁵² In 1969, opposition to Nixon's Supreme Court nominees, conservative southerners Clement Haynsworth and G. Harrold Carswell, forced the president to withdraw their names.⁵³ A weary Senate later confirmed Harry Blackmun and Warren Burger.⁵⁴ In 1971, few senators opposed Nixon's nomination of Lewis Powell, but public concern about Rehnquist's stance on civil rights arose soon after the surprise announcement.⁵⁵ Opponents believed he had worked against the civil rights of minority voters, and part of the evidence they offered was information about his involvement in the Arizona Republican Party and GOP ballot security programs.⁵⁶

Rehnquist became active in the Arizona Republican Party after completing his clerkship for Supreme Court Justice Robert H. Jackson in June 1953.⁵⁷ It was an exciting time to join the Arizona

50. *See id.* at 19–21 (describing how the 1971 hearings, by challenging Rehnquist and his debatable civil rights record, became a catalyst for exploring tactics used in ballot security programs).

51. Justices Hugo Black and John Harlan fell ill and left two vacancies on the court in September 1971. JOHN DEAN, *THE REHNQUIST CHOICE: THE UNTOLD STORY OF THE NIXON APPOINTMENT THAT REDEFINED THE SUPREME COURT* 31–34 (2001). Nixon wanted a southerner, a conservative, and a relatively young candidate. *Id.* at 31–59. After considering several candidates, he finally settled on Lewis Powell and Rehnquist. *Id.* at 241–64. The latter had been responsible for vetting the candidates in the Department of Justice until his name was taken seriously into consideration. *See id.* for detailed information on the nominating process.

52. DONALD E. BOLES, *MR. JUSTICE REHNQUIST, JUDICIAL ACTIVIST* 3–5 (1987); DEAN, *supra* note 51, at 14–29.

53. DEAN, *supra* note 51, at 14–23.

54. Dean argues that Nixon intended to significantly reshape the court when he became president, even intimidating Supreme Court justices to try to secure their resignations. *Id.* at 1–9.

55. *See* DAVIDSON ET AL., *supra* note 24, at 19–21 (a number of scholars and civil rights activists weighed in during the hearings); DEREK DAVIS, *ORIGINAL INTENT: CHIEF JUSTICE REHNQUIST AND THE COURSE OF AMERICAN CHURCH/STATE RELATIONS* 6–7 (1991) (explaining that despite his reputation and qualifications, Rehnquist's record rejecting various anti-discrimination measures became a source of concern).

56. *See* DAVIDSON ET AL., *supra* note 24, at 19–21.

57. William Hubbs Rehnquist was born on October 1, 1924 in Milwaukee, Wisconsin. DAVIS, *supra* note 55, at 3–6. He graduated Phi Beta Kappa with a degree in political science from Stanford in 1948. *Id.* He later earned an M.A. in political science from Stanford and an M.A. in government from Harvard. *Id.* In 1952 he graduated from Stanford Law School and then clerked for Justice Jackson

GOP. The state became a Democratic stronghold in the 1930s, with the number of Republican registered voters declining to an all-time low of twelve percent by 1940.⁵⁸ The narrow victories of Republicans Barry Goldwater to the U.S. Senate and John Rhodes to the U.S. House of Representatives (the first Arizona Republican ever elected to the House) in 1952 revived the state's competitive two-party system.⁵⁹ Particularly noteworthy was the fact that Goldwater defeated Ernest McFarland, the Democratic majority leader of the Senate.⁶⁰ Republicans also made sharp inroads in the state legislature that year, and the GOP suddenly became a strong force in Arizona.⁶¹ Goldwater won a landslide victory in 1958, although Arizona's black precincts voted heavily against him.⁶² He won this election, in part, with the help of volunteers like Rehnquist: bright, aspiring white professionals who wanted to build a national Republican party reflecting their conservative values.⁶³

Several factors aided the Republicans. Conservative newcomers from other states, hardworking volunteers, a pro-GOP press, and popular candidates like Barry Goldwater, contributed to their success.⁶⁴ They also benefited from a split in the Democratic Party between liberal activists, many of whom had moved to Arizona after 1945, and the so-called Pinto Democrats, traditional

for eighteen months. *Id.* In 1953 Rehnquist moved to Phoenix where he practiced law with four different firms until he moved to Washington, D.C. in 1969 to work as Assistant Attorney General in the Office of Legal Counsel, Department of Justice. *Id.* Richard Kleindienst recommended Rehnquist to head the Office of Legal Counsel after he took the number two position in the Justice Department (Rehnquist had become a trusted friend and adviser to then-Arizona state party chairman Kleindienst in the 1950s). *Id.* In 1971 Rehnquist was forty-seven years old. *Id.* On Rehnquist's relationship with Kleindienst, see DAVID G. SAVAGE, TURNING RIGHT: THE MAKING OF THE REHNQUIST SUPREME COURT 39 (1993); BOLES, *supra* note 52, at 17.

58. Republican voter registration dropped from thirty-three percent of the total in 1928 to just twelve percent in 1940. DAVID R. BERMAN, ARIZONA POLITICS AND GOVERNMENT: THE QUEST FOR AUTONOMY, DEMOCRACY, AND DEVELOPMENT 48–51 (1998). Between 1933 and 1951, the GOP did not elect a single representative to the Arizona senate. *Id.* In the Arizona house during those same years, "Republican representation reached a high of eleven out of seventy-two seats." *Id.* at 48.

59. *Id.* at 51–56.

60. ROBERT ALAN GOLDBERG, BARRY GOLDWATER 131–32 (1995).

61. *Id.*

62. *Id.* at 132.

63. *Id.* at 127.

64. *See id.* at 125–32.

conservatives who were alienated by the national Democratic Party's increasing support for black civil rights.⁶⁵

Nonetheless, while Republicans made steady progress after 1952, electoral contests in the state remained highly competitive.⁶⁶ In this context, African-Americans and Latinos played an important role. Both groups were desperately poor.⁶⁷ Their situation—as measured by the degree of residential and school segregation, exclusion from public accommodations by an informal Jim Crow system, and, in most respects, exclusion as well from the local political system—was not so different from that of African Americans in the South at the time.⁶⁸ Barry Goldwater's butler, Otis Burns, told an interviewer many years later that the city “wasn't any better than a southern town.”⁶⁹

In 1960, African Americans made up 4.8 percent of Phoenix's residents, having declined from 6.5 percent in 1940.⁷⁰ Residents with Hispanic surnames, while growing in numbers along with the general population, composed only 8.2 percent in 1960.⁷¹ For various reasons, including their low socio-economic status and their younger average age, these two groups composed a much smaller

65. BERMAN, *supra* note 58, at 52–53, 63–64. According to Berman, many conservative Democrats retained their registration in the Democratic Party to influence politics in their counties but often voted for Republicans. *Id.* “Pinto” is Spanish for a horse of two colors. *See id.* at 53.

66. Republican gains increased faster in the 1966 election because that year a federal court instituted a new population-based apportionment system for the Arizona senate and house. *Id.* at 54, 56. The previous geographically based system favored farmers, ranchers, and miners. *Id.* at 54. The new plan gave significant weight to the Republican stronghold in Phoenix (Maricopa County). *Id.* During the postwar years, for the first time in Arizona history, Republicans captured the state house and senate. *Id.* at 554–56.

67. *See* GOLDBERG, *supra* note 60, at 37–38.

68. BRADFORD LUCKINGHAM, PHOENIX: THE HISTORY OF A SOUTHWESTERN METROPOLIS 171–76 (1989). *See also* Mary Melcher, *Blacks and Whites Together: Interracial Leadership in the Phoenix Civil Rights Movement*, J. ARIZ. HIST. 32, 196–211 (Summer 1991). *See generally* Interview by Mary Melcher with the Rev. George B. Brooks (Jan. 24, 1990) (on file with the Ariz. Historical Found., Hayden Library at Ariz. State Univ.) (describing a first-hand account of these kinds of challenges faced by African-Americans).

69. GOLDBERG, *supra* note 60, at 88; *see also id.* at 37–38, 88–89.

70. LUCKINGHAM, *supra* note 68, at 175.

71. Leonard E. Goodall, *Phoenix: Reformers at Work*, in URBAN POLITICS IN THE SOUTHWEST 111 (Leonard E. Goodall ed., 1967). *But see* LUCKINGHAM, *supra* note 68, at 171 (stating that Hispanics made up fourteen percent of the population in Phoenix in 1960).

percentage of the city's actual voters—probably less than ten percent combined.⁷²

Still, in spite of these groups' small proportion of the electorate, Republicans took them seriously—not as groups to be won over, but as ones that could frustrate Republican goals, particularly when elections were tight.⁷³ Historical memory also came into play. Democrats, after all, had taken over the state in the 1930s with the support of new voters and Latinos.⁷⁴ African-Americans had also demonstrated they were not Goldwater fans.⁷⁵ The ballot security measures made famous by the Rehnquist hearings can best be understood in this context.

The Republicans were especially blessed at this time with a perfect rationale for focusing on minority, low-income precincts that happened to vote Democratic: a state law requiring voters be literate in English.⁷⁶ The law was enacted shortly after achieving statehood, as one historian described it, “to limit ‘the ignorant Mexican vote’” As recently as the 1960s, registrars applied the test to reduce the ability of blacks, Indians, and Hispanics to register to vote.⁷⁷ Arizona shared this racial barrier to voting with several of the states of the Old South, a barrier there since the end of Reconstruction.⁷⁸ The use of the literacy test continued without interruption until prohibited by the Voting Rights Act of 1965.⁷⁹

72. GOLDBERG, *supra* note 60, at 37–38. While black and Hispanic residents contributed to a substantial minority of the population, “[o]f the twenty-nine precincts in Phoenix, fourteen contained no blacks and seven more contained fewer than ten black residents each.” *Id.* at 37. Both *de facto* and *de jure* segregation and discrimination resulted in limited or even “no influence on community decision-making.” *Id.* at 38; *see also* BERMAN, *supra* note 58, at 78–80 (describing Arizona’s “participation problem” related to age, non-citizen status, and racial exclusion).

73. *See* Berman, *supra* note 58, at 64–65, 74–80 (describing the relationship between minority voters and the political parties in Arizona).

74. *Id.* at 48–49.

75. GOLDBERG, *supra* note 60, at 132.

76. “[M]inority mobilization has tended to benefit Democrats.” BERMAN, *supra* note 58, at 64. Republicans could use the law to challenge voters in primarily Democratic precincts, which also happened to have minorities.

77. BERMAN, *supra* note 58, at 75.

78. Phoenix was comparable to the South with regard to discrimination. *See* GOLDBERG, *supra* note 60, at 88; BERMAN, *supra* note 58, at 76–77 (stating that Arizona and Alaska were the only non-southern states that had to comply with the pre-clearance components of the Voting Rights Act, which required federal approval of legal changes affecting voting rights, such as changing district boundaries).

79. BERMAN, *supra* note 58, at 76.

The Arizona legislature did not officially repeal the test, however, until 1972: the year Rehnquist became a member of the Supreme Court.⁸⁰ But during the Republican ascendancy in Arizona, the literacy test was a key tool with which to challenge minority voters.⁸¹ As Arizona political historian David Berman describes it: “Anglos sometimes challenged minorities at the polls and asked them to read and explain ‘literacy’ cards. Intimidators hoped to discourage minorities from standing in line to vote.”⁸²

The literacy test was not integral to vote caging.⁸³ Nonetheless, the caging incidents described in the Rehnquist nomination hearings were employed in tandem with the tests, just as caging has subsequently been used in conjunction with other forms of suppression techniques.

A. *Challenging Voters in Phoenix Minority Precincts*

Experiments with ballot security in Phoenix began at least as early as 1954, but the first large-scale ballot security drive took place in 1958, when the Arizona Republican Party sent volunteers and party leaders to ninety percent of Maricopa County’s 220 polling places to turn out the Republican vote and challenge Democratic voters’ qualifications.⁸⁴ The first basis for challenge was residency.⁸⁵ Republicans mailed campaign literature to 18,000 Democrats marked “Do not forward” and “Return postage guaranteed.”⁸⁶ The returned mail was collected to form challenge lists.⁸⁷ Equipped with lists of voters whose current address apparently did not

80. *Id.* See also *Ely v. Klahr*, 403 U.S. 108 (1971) (regarding a challenge to Arizona’s state legislative districting laws); *Apache County v. United States*, 256 F. Supp. 903 (D.D.C. 1966) (upholding reinstatement of literacy testing, distinguished from those barred by the Voting Rights Act, as a prerequisite to voter registration); Venita Hawthorne James, *Arizona’s Legacy of Prejudice*, ARIZ. REPUBLIC, Jan. 12, 1991, at A2. For more on the relationship between minority voters and the political parties, see BERMAN, *supra* note 58, at 64–65, 74–80.

81. See *supra* text accompanying notes 76–77.

82. BERMAN, *supra* note 58, at 76.

83. Other voter suppression and intimidation tactics were used in tandem with Arizona’s literacy tests, as will become clear below.

84. *Some GOP Vote Challengers Face Criminal Charges for Holding Posts*, ARIZ. REPUBLIC, Nov. 5, 1958, at 4.

85. *Id.*

86. *Id.*

87. *Id.*

correspond to their address of registration, GOP challengers tried to disqualify the Democratic voters if they showed up at the polls.⁸⁸

The second basis for challenge in 1958 was literacy: challenged voters had to be able to read from the U.S. Constitution.⁸⁹ On Election Day, Republicans sent challengers to confront potential voters with passages from the Constitution.⁹⁰ According to witnesses, the challengers (described as Anglos) flanked voters (described as blacks or Latinos, and often elderly) and asked them to read aloud a passage from the Constitution printed on a note card.⁹¹ If the voter refused or could not read satisfactorily, the challengers often asked the person to leave the voting line, although the law stipulated that the challenger could not harass or intimidate the voter.⁹² To make matters even more confusing in this particular election, contrary to the law, the Maricopa Republican county chairman assigned poll-watchers and challengers to selected precincts, when only the official precinct committee had legal jurisdiction to do so.⁹³

Opponents of these practices argued that the GOP ballot security programs attempted to disfranchise qualified minority

88. *Id.* The pro-GOP paper reported that Democrats were “obviously surprised by the Republican program.” *Id.* Some Democrats retaliated in 1960 with postcards to 349 Republican voters in District 15 warning them of “punishment” if they moved and voted in their former precinct. *See* Bill King, *Postcards Threaten GOP Voters*, ARIZ. REPUBLIC, Nov. 5, 1960, at 8. The unspecified punishment included the loss of vote and perjury penalties for making false affidavits. *Id.* The Democratic list was compiled on the basis of returned mailings to registered Republicans. *Id.*

89. For descriptions of such challenges, see *Senate Committee on the Judiciary: Hearings on the Nominations of William H. Rehnquist, of Arizona, and Lewis F. Powell, Jr., of Virginia, to be Associate Justices of the Supreme Court of the United States*, 92nd Cong. 295–96 (1971) (testimony of Clarence Mitchell, Director, Washington Bureau, National Association for the Advancement of Colored People, and Legislative Chairman, Leadership Conference On Civil Rights) [hereinafter *Nominations 1971*] available at <http://www.gpoaccess.gov/congress/senate/judiciary/sh92-69-267/browse.html> (describing challengers using the Arizona State Constitution). *See, e.g.*, Gene McLain, *Fight Erupts At South Side Precinct*, ARIZ. REPUBLIC, Nov. 7, 1962, at 11 (stating that under Arizona law, it was legal to use the U.S. Constitution to challenge voters).

90. *Nominations 1971*, *supra* note 89, at 295–96.

91. *Id.*

92. *Id.* *See* Melcher, *Blacks and Whites Together*, *supra* note 68, at 208–09. *See, e.g.*, Interview by Mary Melcher with Rev. George B. Brooks (Jan. 31, 1991) (on file with the Ariz. Historical Found., Hayden Library at Ariz. State Univ.) (documenting first-hand account of challenges at the voting precinct).

93. *Some GOP Vote Challengers Face Criminal Charges For Holding Posts*, ARIZ. REPUBLIC, Nov. 5, 1958, at 4.

voters.⁹⁴ Richard G. Kleindienst, Arizona GOP chairman in the late 1950s and attorney general under President Nixon, later denied those claims, saying that Republicans “challenge in precincts where it has been demonstrated in the past that some parts of the Democratic organization in Maricopa County try to crowd into the polls at the last minute people who are not qualified to vote.”⁹⁵ But *The Arizona Republic* only mentioned south side minority precincts as the ones in which Republican challengers were active that year.⁹⁶ County Democratic chairman Vince Maggiore claimed that some of the challengers were arrogating authority reserved for precinct election officials.⁹⁷ “There should be no place in Arizona for deliberate attempts to impede the voting of groups which have fought so hard for their rights,” he said.⁹⁸ Other Democrats claimed some Republican challengers were asking voters to read sections of the Constitution “containing a lot of big and difficult words.”⁹⁹

B. Events at a Polling Place in 1962: The 1971 Hearings

Rehnquist’s involvement in these disputed ballot security programs came to light near the end of the 1971 Judiciary Committee hearings when five witnesses sent sworn affidavits accusing him of challenging and harassing voters with literacy tests in the predominantly black Bethune precinct in 1964.¹⁰⁰ They seem

94. See Melcher, *Blacks and Whites Together*, *supra* note 68, at 208–09.

95. McLain, *supra* note 89, at 11.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* The fight here involved Republican challenger Wayne Bentson and Democratic Party representative Pat Marino. *Id.* at 1. Several witnesses in Rehnquist’s 1971 confirmation hearings apparently confused Rehnquist with Bentson. *Nominations 1971*, *supra* note 89, at 290. Poll-watchers were active in seven minority South Side precincts plus Sky Harbor, Parkview, and Okemah. McLain, *supra* note 89, at 11. The 1962 Phoenix ballot security campaign also included turning out the Republican vote. *Election Puzzles Experts*, ARIZ. REPUBLIC, Nov. 8, 1962, at 11. In this non-presidential election, more than seventy percent of registered voters made the trip to the polls. *Id.* The *Arizona Republic* credited the turnout to Republican organization. *Id.*

100. GOP ballot security programs were not the only reason for opposition to Rehnquist. After his 1971 nomination, a memo came to light which Rehnquist wrote during his clerkship for Justice Robert Jackson in support of the 1896 *Plessy v. Ferguson* decision upholding the segregationist doctrine of “separate but equal.” TINSLEY E. YARBROUGH, *THE REHNQUIST COURT AND THE CONSTITUTION* 2 (2000). Rehnquist claimed that the views were those of Jackson, not his—a contention strongly denied by Jackson’s long-time secretary, who called Rehnquist’s account

to have confused Rehnquist with Wayne Bentson, a Republican who challenged voters to read from his note card at the Bethune precinct in 1962 and was involved in a scuffle with a Democratic Party representative that year.¹⁰¹ But accurate information that Rehnquist had trained GOP challengers prevented the Senate from ignoring the charges.¹⁰² The evidence included an FBI investigation of voting interference in Arizona in the 1960s;¹⁰³ relevant testimony from Clarence Mitchell, director of the NAACP Washington Bureau and legislative chairman for the Leadership Conference on Civil Rights;¹⁰⁴ and a letter from Superior Court Judge Charles L. Hardy explaining in general terms how some of the state's voters were intimidated in 1962.¹⁰⁵ Judge Hardy's letter shed a harsh light on the GOP ballot security activities:

In each precinct [with overwhelmingly Democratic registrants] *every* black or Mexican person was being challenged [that he or she was unable to read the Constitution of the United States in the English language] and it was quite clear that this type of challenging was a deliberate effort to slow down the voting so as to cause people awaiting their turn to vote to grow tired of waiting and leave without voting. In addition, there was a well organized campaign of outright harassment and intimidation to discourage persons from attempting to

"incredible on its face" and added that Rehnquist has "smeared the reputation of a great justice." *Id.* at 5. Other issues that opponents raised included Rehnquist's opposition to a public accommodations ordinance in Phoenix in 1964, to a civil rights march in Arizona during the spring of 1964, and to desegregation in Arizona high schools in 1967. *Nominations 1971, supra* note 89, at 290. Opponents also questioned his opposition to the publication of the Pentagon papers and his support for government powers of surveillance. *Id.* at 289–361, 483–92. *See generally* RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* 765–82 (1975) (arguing the re-emergence of separate-but-equal jurisprudence after Rehnquist became Chief Justice by detailing the Court's handling of desegregation cases).

101. McLain, *supra* note 89, at 11.

102. The five witnesses were Democratic poll-watchers Robert Tate and Jordan Harris, the Rev. George B. Brooks, and the Rev. and Mrs. Snelson W. McGriff. Fred P. Graham, *2 Negroes From Phoenix, Ariz., Say Rehnquist Harassed Blacks at Polls in 1964*, N.Y. TIMES, Nov. 16, 1971, at 32; Donald Janson, *Rights Aide Calls Rehnquist Racist*, N.Y. TIMES, Nov. 28, 1971, at 46. For the information on Wayne Bentson, *see* McLain, *supra* note 89, at 1, 11. Rehnquist denied ever being in the Bethune Precinct on Election Day 1964, which sheds little light on his role in this situation since the event took place in 1962. *Nominations 1971, supra* note 89, at 492.

103. *Id.* at 297.

104. *Id.* at 295. For Mitchell's testimony, *see id.* at 289–98.

105. *Id.* at 486.

vote. In the black and brown areas, handbills were distributed warning persons that if they were not properly qualified to vote they would be prosecuted. There were squads of people taking photographs of voters standing in line waiting to vote and asking for their names[.] There is no doubt in my mind that these tactics of harassment, intimidation and indiscriminate challenging were highly improper and violative of the spirit of free elections.¹⁰⁶

These factors prompted the Senate to submit written questions to Rehnquist concerning his involvement in elections from 1958 to 1968.¹⁰⁷ Rehnquist was asked if he had ever personally challenged voters, or if he had trained or counseled poll-watchers or challengers.¹⁰⁸ He was also asked if he had ever prepared, selected, or advised on the use of printed passages from the Constitution for literacy challenges.¹⁰⁹ In addition, he was asked when such practices came to his attention and if he thought the practices lawful or took action to curb them.¹¹⁰ Rehnquist responded: "In none of these years did I personally engage in challenging the qualifications of any voters."¹¹¹ He denied recruiting challengers but admitted that he had spoken at a challengers' school to train them.¹¹² He also distanced himself from the practice of literacy challenges, which he asserted he never prepared, selected, or advised.¹¹³ "No such practice came to my attention until sometime on Election Day, 1962," Rehnquist claimed.¹¹⁴ "The manner in

106. *Id.* (quoting Letter from Hardy to Mississippi Senator James Eastland, Chairman of the Committee on the Judiciary).

107. *Id.* at 485.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* at 491.

112. Rehnquist recalled speaking at the challengers' school for the 1960, 1962, and perhaps the 1964 elections:

The purpose of my talk was to advise the various persons who were to act as challengers as to what authorization was required in order to enable them to be present in a polling place during the time the election was being conducted, and also as to the various legal grounds for challenging as provided by applicable Arizona law. My recollection is that I simply recited the grounds set forth in the Arizona Revised Statutes as to the basis for challenge, the method of making the challenge, and the manner in which the challenge was to be decided by the Election Board of the precinct in question.

Id.

113. *Id.*

114. *Id.*

which I saw this type of challenge being used, when I visited one precinct, struck me as amounting to harassment and intimidation, and I advised the Republican challenger to stop using these tactics.”¹¹⁵

Rehnquist also claimed that when he saw one Republican challenger “going down the line and requiring prospective voters to read some passage of the Constitution, rather than presenting his challenge to the Election Board in an orderly way,” he “advised him to stop this practice, and to make any challenges in the manner provided by the law.”¹¹⁶ In response to Judge Hardy’s description of GOP challengers in 1962 deliberately slowing down voting lines and intimidating and harassing voters by photographing them and recording their names, Rehnquist explained that before 1962 Republican challengers concerned themselves with preventing unregistered persons or persons who had changed their residence from voting.¹¹⁷ “I did not realize the change in emphasis of some of the Republican challengers in 1962 until sometime during Election Day of that year. I therefore feel that there was no connection between my role and the circumstances related by Judge Hardy.”¹¹⁸

Rehnquist’s sworn response forced senators to make a choice. They could believe the nominee, who stated he neither intimidated and harassed voters nor supported such measures, or they could believe his opponents, who linked him to GOP ballot security efforts, but could not prove that he had harassed and intimidated voters.¹¹⁹ John P. Frank, “a leading constitutional and Supreme Court expert in Phoenix,” wrote in the *Washington Post* that Rehnquist “has been an intellectual force for reaction. . . . He honestly doesn’t believe in civil rights and will oppose them.”¹²⁰ The American Civil Liberties Union joined the debate, breaking a fifty-two year position of never opposing a nominee for public

115. *Id.*

116. *Id.*

117. *Id.* at 491–92.

118. *Id.* at 492.

119. Graham, *supra* note 102, at 32 (documenting that affidavits from witnesses in the 1971 hearings confused Rehnquist with Bentson, and the year 1964 with 1962).

120. BOLES, *supra* note 52, at 77–78 (quoting a November 1, 1971 *Washington Post* article).

office, when it publicly called for the defeat of Rehnquist as “a dedicated opponent of individual civil liberties.”¹²¹

The national debate on Rehnquist’s resistance to civil rights brought attention and controversy to the hearings.¹²² The senators were under pressure to reach a conclusion, because the Court, with two vacant seats, had been in session since early October.¹²³ Finally, they voted: sixty-eight senators sided with Rehnquist, twenty-six with his opponents.¹²⁴ Lewis Powell’s simultaneous confirmation was much more decisive at eighty-nine to one.¹²⁵

C. Events at a Polling Place in 1962: The 1986 Hearings

Publicity about ballot security programs in Arizona resurfaced in 1986 when President Ronald Reagan nominated Rehnquist for Chief Justice.¹²⁶ Ironically, 1986 was the same year the RNC was involved in a major scandal involving efforts to disfranchise African Americans in Louisiana using a type of return-mail registration verification Arizona Republicans used in the 1950s.¹²⁷ This time, Rehnquist’s opponents were better organized and more credible.¹²⁸ During his confirmation hearings, Senator Edward Kennedy of Massachusetts charged that Rehnquist “led a Republican Party ballot security program designed to disenfranchise minority voters” in the early 1960s.¹²⁹

Kennedy’s charges were in accord with a 1971 *New York Times* article stating that Rehnquist was co-chairman of the GOP ballot security program in 1960, trained challengers in 1962 when he was chairman of the lawyer’s committee of the Maricopa County Republican Party, and was chairman of the ballot security program in 1964.¹³⁰ Kennedy asserted that Rehnquist “held a high and

121. *Id.* at 11 (quoting AMERICAN CIVIL LIBERTIES UNION, CIVIL LIBERTIES 8 (1972)).

122. *See generally id.* at 3–12 (discussing events surrounding Justice Rehnquist’s nomination).

123. *Id.* at 3.

124. DAVIS, *supra* note 55, at 7.

125. *Id.*

126. BOLES, *supra* note 52, at 86.

127. *See* DAVIDSON ET AL., *supra* note 24, at 60.

128. *See generally* BOLES, *supra* note 52, at 86–90 (discussing witness testimony and referencing documents during confirmation hearings).

129. *Nomination of William H. Rehnquist to be Chief Justice of the United States*, 132 CONG. REC. S12378-04 (1986).

130. *See* Fred P. Graham, *Rehnquist Role in Election Confirmed*, N.Y. TIMES, Nov. 13, 1971, at 37.

responsible position in the election day apparatus from at least 1960 to 1964, a period that saw very substantial harassment and intimidation of voters in minority group precincts.”¹³¹

New and credible witnesses also testified or submitted sworn affidavits about Rehnquist’s roles in ballot security programs.¹³² James Brosnahan, in 1962 an assistant U.S. attorney in Arizona, later a U.S. attorney, and in 1986 a senior partner at a San Francisco law firm with cases before the Supreme Court, provided the most credible refutation of Rehnquist’s sworn statements.¹³³ During the Judiciary Committee hearings, he explained that he had not come forward in 1971 because he had not known that events in south Phoenix in 1962 were a focus of the hearings.¹³⁴

Unlike witnesses at the earlier hearings who mistook Rehnquist for another challenger, Brosnahan knew Rehnquist personally.¹³⁵ He had attended Phoenix bar association functions with him and introduced his wife to him.¹³⁶ Brosnahan testified that he did not see Rehnquist challenge voters.¹³⁷ But in his official capacity as an assistant U.S. attorney, he was called to a polling

131. *Id.*; *Nomination of William H. Rehnquist to be Chief Justice of the United States*, 132 CONG. REC. S12.378-04 (1986). Rehnquist’s responsibilities, according to Kennedy, included the following: In 1960, Rehnquist supervised and assisted in the preparation of envelopes mailed to Democrats—largely in African-American and Mexican-American districts—which were the foundation of residency challenges; he recruited lawyers to serve on a lawyer’s committee; he advised challengers on the law; and he supervised in assembling returns of the mailings for challenging purposes. *Id.* In 1962, Rehnquist again taught challengers the procedures they were to use. *Id.* And, as in 1960, “he served as a troubleshooter, going to precincts at which disputes had arisen in order to help resolve them. In 1964, Rehnquist had overall responsibility for mailing out envelopes, recruiting challengers and members of the lawyer’s committee, and speaking, or seeing that someone spoke, at a training session of challengers.” *Id.* See also YARBROUGH, *supra* note 100, at 1–11 (discussing a wide array of issues during the 1986 hearings). For more information on other contentious issues during the 1986 hearings see *id.*

132. See generally BOLES, *supra* note 52, at 86–90 (discussing the testimony of four witnesses who had not participated in the 1971 hearings).

133. *Id.* at 86–87.

134. *Nomination of Justice William Hubbs Rehnquist: Hearings before the S. Comm. on the Judiciary*, 99th Cong. 1007–08 (1986) [hereinafter *Hearings 1986*] (statement of James Brosnahan, Attorney, Morrison & Forrester). He came forward in 1986 because he received a call ten days prior to his appearance before the committee requesting his testimony. *Id.* at 996. He claimed he would have had misgivings if he had not come forward. See *id.* at 1007.

135. *Id.* at 986.

136. *Id.* at 1012. For Brosnahan’s entire testimony, see *id.* at 984–1040.

137. *Id.* at 995–96.

place in 1962 in order to investigate claims of harassment.¹³⁸ “At that polling place, I saw William Rehnquist, who was known to me as an attorney practicing in the city of Phoenix,” Brosnahan testified.¹³⁹ Rehnquist, he said, was the only challenger present when he arrived.¹⁴⁰ The atmosphere was very tense; the voters waiting in line told him that Rehnquist was challenging, and they complained about the aggressiveness of the challenging.¹⁴¹ Brosnahan talked with Rehnquist, who “did not deny he was a challenger. At that time in 1962, he did not raise any question about credentials or any of that. He did not deny that.”¹⁴²

Brosnahan further testified that while talking to Rehnquist about the complaints against him, Rehnquist’s comments indicated that he had been challenging voters.¹⁴³ Brosnahan stated his views on events that occurred in south Phoenix in 1962: “Based on interviews with voters, polling officials, and my fellow assistant U.S. attorneys, it was my opinion in 1962 that the challenging effort was designed to reduce the number of black and Hispanic voters by confrontation and intimidation.”¹⁴⁴ “The thrust of the effort,” he continued later, “was to confront voters, to challenge them, in hope that they would be intimidated, that they would not stand in line, that they would be fearful that maybe they would be embarrassed.”¹⁴⁵

Other witnesses corroborated Brosnahan’s testimony that the nominee challenged and intimidated minority voters in Phoenix. Dr. Sydney Smith, a professor of psychology and former professor at Arizona State University, was not certain if it was election day in 1960 or 1962, but he was certain he heard Rehnquist tell two black voters in line, after asking them to read, “You have no business in this line trying to vote. I would ask you to leave.”¹⁴⁶ Melvin Mirkin, an attorney in Phoenix who supported Rehnquist’s nomination, testified that he saw Rehnquist intimidate voters by encouraging them to leave the line at a minority polling place and instructing

138. *Id.* at 989.

139. *Id.* at 985.

140. *Id.* at 989.

141. *Id.* at 985.

142. *Id.* at 994.

143. *Id.* at 1008–09, 1011–12, 1038–39. For descriptions of voters identifying Rehnquist as an aggressive challenger, *see id.* at 1024–26.

144. *Id.* at 989.

145. *Id.* at 1007.

146. *Id.* at 1007–08 (statement of Dr. Sydney Smith). For Smith’s entire testimony, *see id.* at 1054–65.

Republican challengers loudly enough for voters to hear that unregistered or illiterate people would not be allowed to vote.¹⁴⁷

These charges became a central obstacle to Rehnquist's confirmation as Chief Justice. He again denied them and claimed that his recollection was not good enough to give more detailed information.¹⁴⁸ When Kennedy asked Rehnquist whether he challenged individuals, Rehnquist replied: "I don't think you—I think it was simply watching the vote being counted."¹⁴⁹ Kennedy bore in: "Well you'd remember whether you challenged them now, Mr. Justice, wouldn't you. Did you at any time challenge any individual?"¹⁵⁰ Rehnquist tried to explain that a challenger was authorized by law to go to a polling place most often to watch the vote being counted.¹⁵¹ Kennedy then read aloud from Rehnquist's 1971 affidavit in which the nominee swore that he did not intimidate or harass voters or encourage such behavior in 1964 or at any other time from 1958 to 1968.¹⁵² "So you might have challenged them," Kennedy queried, "but you didn't intimidate or harass them, I guess is the way I should conclude."¹⁵³ Rehnquist responded: "Well, I've answered all of your questions the best I can, I think."¹⁵⁴ Kennedy did not press further for an answer.¹⁵⁵

Senators again faced the choice of believing Rehnquist or his opponents, only this time they had to decide whether a sitting Supreme Court Justice rather than a mere nominee to the Court was not truthful. In making their decision, senators had to sort through confusing aspects of Rehnquist's testimony.¹⁵⁶ In 1986, Kennedy pressed Rehnquist on his 1971 affidavit in which

147. *Id.* at 1040–48 (statement of Melvin J. Merkin, Attorney); *see also* Robert Lindsey, *Rehnquist in Arizona: A Militant Conservative in 60's Politics*, N.Y. TIMES, Aug. 4, 1986, at A7 (generally citing testimony of witnesses who said Rehnquist challenged minority voters); Stuart Taylor, Jr., *Rehnquist Says He Didn't Deter Voters in 60's*, N.Y. TIMES, July 31, 1986, at A1.

148. For an overview of the charges against Rehnquist, *see Excerpts from Questioning of Rehnquist in the Senate Judiciary Committee*, N.Y. TIMES, July 31, 1986, at A14 [hereinafter *Excerpts*]. Rehnquist had to refute testimony from several witnesses, including Arizona State Senator Manuel Peña. *Hearings 1986*, *supra* note 134, at 1065–78 (statement of Manuel Peña, Sen., State of Arizona).

149. *Excerpts*, *supra* note 148, at A14.

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *See id.*

Rehnquist wrote: "In none of these years [1958 to 1968] did I personally engage in challenging the qualifications of any voters."¹⁵⁷ This carefully crafted statement apparently did not mean that Rehnquist denied ever having been involved in the process of challenging voters at the polls.¹⁵⁸ It seemed to mean that he did not personally confront or question them only during those years.¹⁵⁹ He could have presented a challenge to the election board official "in the manner provided by the law," and the official would have personally challenged the voter.¹⁶⁰ This, of course, contradicted the testimony of Brosnahan and Smith.¹⁶¹ There was also a question of chronology. Rehnquist denied "personally challenging" voters between 1958 and 1968, but according to a *New York Times* article, he admitted that he may have personally questioned voters' literacy in 1964.¹⁶²

Senators also had to decide what defined harassment and intimidation in the context of legal literacy challenges to Arizona voters before 1964. Stuart Taylor, Jr., a journalist for *The New York Times*, opined that Rehnquist may not have equated challenging with stopping people in line at polling places and asking them to demonstrate their qualifications.¹⁶³ John Dean, former counsel to President Nixon, who claims he was the first to suggest Rehnquist as a candidate for the court in 1971, believes "that Rehnquist was not truthful about his activities in challenging voters."¹⁶⁴ But he added, contrary to the testimony of Brosnahan and others, "I don't believe Rehnquist 'harassed' black voters ever, for that is not his style or nature. Yet I have no doubt he challenged black voters at a time when it was perfectly legal in Arizona to do so."¹⁶⁵ Rehnquist's

157. *Nominations 1971*, *supra* note 89, at 491.

158. *See* Taylor, *supra* note 147, at A1.

159. *See id.*

160. *See* discussion *supra* Part III.B. "[I]n the manner provided by the law" is the advice Rehnquist reportedly gave to a Republican challenger whom Rehnquist claimed he reprimanded in 1962 for personally questioning voters as they stood in line to vote. *Nominations 1971*, *supra* note 89, at 491.

161. *See supra* notes 134–147 and accompanying text.

162. *See* Taylor, *supra* note 147, at A1.

Justice Rehnquist . . . also said he did not recall approaching any voters in those years [1958 to 1968] to question them about their qualifications or to ask them to prove their ability to read, as several people have alleged. But he said it was possible he had taken such an action in 1964.

Id.

163. *Id.*

164. DEAN, *supra* note 51, at 273.

165. *Id.*

careful language and his status as a sitting Supreme Court Justice were determinative in the end. He was confirmed as Chief Justice.

While the 1986 hearings did not prevent Rehnquist's elevation to Chief Justice, they dramatically brought attention to Republicans' purposeful targeting and intimidation of minority voters under the guise of ballot security in the 1950s and 1960s.

The Arizona story illustrates important features of vote caging as a discriminatory phenomenon. Political operatives belonging to one party caged voters who were predominantly members of ethnic minority groups likely to vote for the other party. The caging consisted of using do-not-forward letters to identify people who might not be properly registered. Then, on election day, at least some of the partisan operatives—including lawyers—went beyond simply asking election officials to challenge the voters who were on the caging list. In some cases, the operatives attempted to apply literacy tests and were abrasive and threatening. Their intervention sometimes slowed the lines of voters. Moreover, they sometimes broke the election law by arrogating to themselves the roles of challenging the voters' registration and of applying literacy tests when those roles were legally assigned to election officials.

IV. VOTE CAGING SINCE THE 1960S

America is a large nation with thousands of elections every year at every level of government. There is no systematic effort by government, political activists, or scholars to scientifically monitor—either *in toto* or using statistical sampling techniques—vote suppression efforts. Hence, it would be impossible to estimate accurately how widespread caging has been since Rehnquist's involvement in it almost fifty years ago.

The authors of this article wrote a report in 2004 that focused on some of the more widely reported instances of vote caging since the post-World War II era.¹⁶⁶ There was, for example, the Republican Party's national ballot security program in 1964, named Operation Eagle Eye.¹⁶⁷ In addition, the RNC was involved in vote caging during the 1981 New Jersey gubernatorial election. This incident led to a 1982 consent decree in the court of Judge Dickinson R. Debevoise, prohibiting either the RNC or the Democratic National Committee from engaging in some of the

166. DAVIDSON ET AL., *supra* note 24.

167. *Id.* at 25.

more egregious forms of vote suppression—in particular, racial targeting.¹⁶⁸ In 1986, a major caging effort by Republicans in a Louisiana senatorial race was enjoined by a federal judge, which led to the RNC being required to appear before Judge Debevoise once again and agree to submit all its future ballot security programs to his court for approval—an agreement still in effect.¹⁶⁹ There was ample evidence that the vote caging was racially targeted. An RNC operative in Louisiana wrote to a fellow operative in 1986, “I would guess that this program will eliminate at least 60-80,000 folks from the rolls. . . . If it’s a close race . . . which I’m assuming it is, this could keep the black vote down considerably.”¹⁷⁰

Another widely noted example of caging occurred in the 1990 North Carolina contest between Republican U.S. Senator Jesse Helms and his black Democratic challenger Harvey Gantt.¹⁷¹ In that contest, the state Republican apparatus in conjunction with the Helms campaign sent out two mailings of first-class mail postcards containing false and threatening information.¹⁷² The first (81,000 cards) was sent to precincts in which ninety-four percent of the voters were black, and the second (44,000 cards) was sent exclusively to black voters.¹⁷³ The Gantt campaign reported instances in which biracial couples received cards addressed only to the black member of the family.¹⁷⁴ One of the purposes of both mailings was to obtain a list of black registrants whose cards were returned as undeliverable, in order to challenge them at the polls on election day.¹⁷⁵

In the wake of Goodling’s May 2007 testimony, reports by non-profit organizations have shed more light on caging and its history. The Brennan Center for Justice presented a chronological account

168. *Id.* at 48–49. See Consent Order, Democratic Nat’l Comm. v. Republican Nat’l Comm., Civ. No. 81-3876 (D.N.J. Nov. 1, 1982).

169. DAVIDSON ET AL., *supra* note 24, at 60.

170. Thomas B. Edsall, “Ballot Security” Effects Calculated; GOP Aide Said Louisiana Effort “Could Keep the Black Vote Down,” WASH. POST, Oct. 24, 1986, at A1.

171. DAVIDSON ET AL., *supra* note 24, at 72.

172. Michael Isikoff, *Justice Dept. Investigates GOP Mailings to Voters*, WASH. POST, Nov. 6, 1990, at A6.

173. Levitt & Allison, *Reported Instances of Vote Caging*, *supra* note 21, at 1–5.

174. Isikoff, *supra* note 172, at A6.

175. Complaint for Declaratory and Injunctive Relief, United States v. N.C. Republican Party, No. 91-161-CIU 5 F, 5–9 (E.D.N.C. Feb. 26, 1992).

from the early years in Arizona mentioned above to five instances in 2004 in Ohio, Nevada, Pennsylvania, Florida, and Wisconsin.¹⁷⁶

Other actual or intended voter challenges by Republicans in 2002 or later, which may have involved caging lists derived from techniques other than direct mail, are mentioned by Teresa James of Project Vote. She documents instances that occurred in Wisconsin in 2002 and 2004; North Carolina, South Carolina, Georgia, and Kentucky in 2004; Washington in 2005; and New York in 2006.¹⁷⁷

Events in Wisconsin in 2004 indicate a new twist to caging techniques, which James calls “virtual caging.”¹⁷⁸ As she describes it:

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. 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. As in other states, the party then launched a major media campaign to disclose its findings and lodge charges of voter fraud.¹⁷⁹

In most or all the above accounts of caging, the authors have presumably relied on random media accounts or lawyers connected to political parties. Another approach to ascertaining the extent of this technique would involve a systematic tally of potential caging problems throughout the country, as reported to vote-protection hotlines in national elections. One such hotline project has recently reported its tally of all complaints, not necessarily involving caging, from voters in 2006.¹⁸⁰ Conducted under the auspices of

176. Levitt & Allison, *Reported Instances of Vote Caging*, *supra* note 21, at 1–5.

177. James, *supra* note 21, at 21–25.

178. *Id.* at 21.

179. *Id.*

180. CHRISTOPHER PATUSKY ET AL., MYVOTE1 NATIONAL ELECTION REPORT: VOICE OF THE ELECTORATE 2006, 7 (2007), http://www.fels.upenn.edu/Reports/myvote1_report_8_20_07.pdf.

the Fels Institute of Government at the University of Pennsylvania, Project MyVote1 found a slight rise from 2004 to 2006 (from 4.0 to 5.4) in the percentage of hotline complaints of coercion.¹⁸¹ Coercion was defined as intentional bad behavior “including harassment by campaign or polling place workers inside or just outside the polling place,” as distinct from poor administration.¹⁸² While constituting a small proportion of all problems on Election Day, these data suggest that problems sometimes associated with a caging operation still occur widely and are perhaps increasing.¹⁸³

In the current politically-charged atmosphere, when many Republicans assert that Democratic vote fraud is rampant, it appears likely that vote caging, both in its traditional direct-mail version and its more imaginative forms, will continue to be part of the Republican arsenal.¹⁸⁴ Whether it will be effective in suppressing votes depends on several factors that are beyond the scope of this essay. Among them are the willingness of Republicans to risk the bad publicity that accompanies publicly exposed illegal vote-caging efforts, as well as the aggressiveness of both the media and election-protection organizations in identifying and exposing such efforts.¹⁸⁵ These factors, in turn, may themselves be influenced by the outcome of the continuing investigation of the facts surrounding the sudden firing of U.S. attorneys by the Bush administration in 2006, including the facts concerning the caging lists sent by Timothy Griffin alluded to in the congressional testimony of Monica Goodling.¹⁸⁶

181. *Id.* at 6.

182. *Id.* at 7.

183. *Id.* at 7.

184. For more discussion of Republican claims about Democratic vote fraud, see DAVIDSON ET AL., *supra* note 24, at 25–26 (explaining that the Republican national campaign, Operation Eagle Eye, was implemented specifically to counter expected Democratic fraud); see also LORRAINE C. MINNITE, THE POLITICS OF VOTER FRAUD (2007) available at http://projectvote.org/fileadmin/ProjectVote/Publications/Politics_of_Voter_Fraud_Final.pdf (finding little evidence of voter fraud); Dan Eggen & Amy Goldstein, *Voter-Fraud Complaints by GOP Drove Dismissals*, WASH. POST, May 14, 2007, at A4 (reporting that recent U.S. Attorney firings were the result of Republican Justice Department officials targeting those seen weak on prosecuting voter fraud).

185. A useful summary of litigation regarding discriminatory vote caging and ways to prevent it is found in James, *supra* note 21, at 26–35.

186. See McClure & Schwartz, *supra* note 3.