

MONITORING OF ELECTION PROCESSES BY PRIVATE ACTORS

Peter K. Schalestock[†]

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According to the apocryphal (but believable) quote attributed to career bank robber Willie Sutton, he robbed banks because “that’s where the money is.”¹ Mindful of the temptations large

[†] Deputy Counsel, Rudy Giuliani Presidential Committee, and a veteran of four recounts of statewide elections in three states from 2004–2006. Seattle University School of Law, J.D. *cum laude*, 1996. Thanks to Julie Devine of Drexel University College of Law for her outstanding research assistance.

1. Steve Cocheo, *The Bank Robber, the Quote, and the Final Irony*, A.B.A. BANKING J., Mar. 1997, at 71, available at <http://www.banking.com/ABA/profile>

collections of money present, banks employ extensive security mechanisms to protect against Sutton's progeny: vaults, cameras, alarms, guards, and more.

For those who crave not wealth, but political power, another target beckons more forcefully than the bank: the election, which is where the votes are. Recognizing this, states have adopted an extensive array of security mechanisms to protect elections against the progeny of Chicago's first Mayor Daley, Louisiana's Huey Long, and Texas' John Connally.²

One protective measure used in a majority of states is to allow private actors, usually individual citizens or political parties, to monitor the election process in a sanctioned capacity. In most states these private actors have official standing to affect the process by challenging voter registrations, voters, or absentee ballots.³ As candidates, political parties, and interest groups search for additional ways to influence electoral results, private monitoring is likely to become more prominent in future elections, as are disputes about its use.

I. PRIVATE MONITORING'S PLACE IN THE SYSTEM

Election systems are complex operations with many points where things can go wrong. Election officials use audit procedures and technology to guard against fraud and errors.⁴ Sometimes these systems are effective, and at other times they are not. When the stakes are high for a particular election, the candidates or political parties involved may seek judicial intervention to give them the right to monitor the process above and beyond what official procedures and their statutory rights provide. Alternately, they may find on close scrutiny that their statutory rights are inadequate or ambiguous and ask a court to expand them so they are not left to rely on election officials to protect their interests.⁵ Elections are hardly the only area where private parties play a role in monitoring and enforcement; many such rights exist in statute.⁶

0397.htm.

2. See, e.g., Dirk Johnson, *Believe It or Not, Voting is Almost Free of Fraud*, N.Y. TIMES, Jan. 10, 1996, at A10; Kaye Northcott, *I Reminded Everybody of Lyndon*, N.Y. TIMES, Nov. 26, 1989, § 7, at 9.

3. See *infra* Parts II.C, III.D, and IV.C.

4. See *infra* Part I.A.

5. See *infra* Part I.D.

6. See *infra* Part I.E.

A. *Official Protections—Audit Processes and Technology*

States employ a wide array of tools to protect the integrity of elections.⁷ Tracking voters and ballots in the hundreds of thousands or even millions presents a challenge not unlike tracking the millions of packages shipped by FedEx or UPS or the billions of dollars that flow through a bank each day. There must be a system to ensure that only eligible voters are able to cast ballots, that the number of ballots tabulated matches actual voters who voted, that ballots are secure from tampering, and that the tabulated results accurately reflect the will of the voters. In almost every state, elections are administered at the county or town level, so there are thousands of different systems used around the country and a comparable number of different ways elections can succeed or fail.

To detect problems in an election, administrators use an array of audit mechanisms. Common audit tools include systems to record the number of ballots printed, used, and remaining; ballot accountability forms where precinct election workers reconcile the number of ballots with the number of voters signing in to vote; and tracking of absentee ballots received, counted, and rejected.⁸

In addition to audit tools, technology also plays a role in protecting election operations. One major role for technology is in the processing and monitoring of absentee ballots. Maricopa County, Arizona, has implemented a sophisticated system for producing and tracking absentee ballots that was recognized by the National Museum of American History in 2000.⁹ It is no accident that Maricopa County would be a leader when it comes to absentee ballots. In the 2004 election, 41.5% of the county's ballots—503,516 out of 1,211,963—were cast as absentee votes.¹⁰ By 2006 the percentage had climbed even higher, when 49.1% of 899,484

7. See MARIE GARBER, FED. ELECTION COMM'N, *INNOVATIONS IN ELECTION ADMIN. 10: BALLOT SECURITY AND ACCOUNTABILITY* (1995), available at <http://www.eac.gov/clearinghouse/docs/innovations-in-election-administration-10-ballot-security-and-accountability>.

8. See *id.*

9. *Maricopa County Elections Vote-By-Mail in Smithsonian*, <http://recorder.maricopa.gov/htm/web7.htm> (last visited Dec. 28, 2007).

10. FINAL REPORT OF THE 2004 ELECTION DAY SURVEY, U.S. ELECTION ASSISTANCE COMM'N (2005) [hereinafter "FINAL REPORT"], available at <http://www.eac.gov/clearinghouse/clearinghouse/2004-election-day-survey/> (follow "State Data Tables" hyperlink, then select "Arizona_Jurisdictions.xls" spreadsheet, then select "Ballots Counted" and "Turnout Source" Tabs). The Arizona spreadsheet lists Maricopa County's absentee ballots as "early" ballots, because in Arizona absentee and early votes are cast using the same system.

ballots were cast as absentee.¹¹ At this level, an error rate as small as one-half of one percent could affect 2500 votes in the county.

Audit techniques and technology are needed to protect against two common problems with elections. The first is simple error. With so many pieces of paper, and so many voters, and so many election workers involved, some degree of error is inevitable. With many poll workers being temporary employees who only serve a few days a year, it is expected that the incidence of human error can be even higher. Recognizing the tendency of mistakes to cloud election results, one election official noted that part of the reason machines are used to count ballots is precisely that a human being counting 500 pieces of paper might find 499 one day and 501 another.¹² When the task is keeping track of hundreds of thousands of ballots and making sure the number counted corresponds to the number validly cast, the risk of error is exponentially greater.

The second reason for using audit techniques and technology is to protect elections against the Willie Sutton problem¹³—robbing votes. For as long as there have been elections there have been efforts to manipulate them,¹⁴ so it is no surprise that complex and varied systems have developed to protect them.

Effective auditing and accurate technological tools can detect fraud and, by increasing the likelihood of detection, deter it from occurring in the first place. Sometimes official processes work to identify errors and fraud, and sometimes they do not.

B. Official Protections—Success Stories

The States of Washington and Missouri provide recent examples where official procedures worked to identify and address problems in the election system. In Washington, employees of the

11. See Maricopa County Election Results, General Election, 11/07/2006, <http://recorder.maricopa.gov/electionresults/electionresults06.aspx?election=GENERAL+ELECTION%2c+11%2f07%2f2006> (select “Registration and Turnout,” then select “All Voters”) (last visited Dec. 28, 2007).

12. Andrew Garber, *Top Vote-Getter? We May Never Truly Know*, SEATTLE TIMES, Dec. 5, 2004, at A1.

13. See Cocheo, *supra* note 1, at 71.

14. See, e.g., Spencer Overton, *Voter Identification*, 105 MICH. L. REV. 631, 638 n.26 (2007) (providing examples of fraud concerns in the 20th century); E.S. STAVELY, GREEK AND ROMAN VOTING AND ELECTIONS 113–17 (1972) (stating it is likely that opportunities for deliberate fraud were numerous in the Greeks’ voting and allotment procedures).

Association of Community Organizations for Reform Now (ACORN) submitted more than 1700 fraudulent voter registration forms, an act the secretary of state called “the worst case of voter-registration fraud in the history of the state”¹⁵ Election officials spotted the fraudulent submissions and initiated law enforcement actions that resulted in criminal charges against the organization (settled under a deferred prosecution agreement that included payment of \$25,000 for investigative costs).¹⁶

In Missouri, several ACORN workers pleaded guilty to submitting false voter registration documents.¹⁷ As in Washington, election officials identified and prosecuted the fraud, and one of the workers was sentenced to 120 days in a halfway house.¹⁸

In another example, the county elections administrator in Bexar County, Texas acted to remove 330 non-citizens from the voter rolls.¹⁹ The individuals were discovered after they returned jury summonses to the court, claiming ineligibility because they were not citizens of the United States; nonetheless, they were already registered to vote.²⁰ This is also an example of elections officials detecting and acting to correct a problem without intervention from private parties. Unfortunately, the corrective action did not come in time to prevent forty-one of the non-citizens from voting in local, state, and federal elections.²¹

C. Official Protections—Failures

Other examples inspire less confidence in official oversight of election processes. When the initial vote count showed the 2004 election for Governor of Washington separated by 261 votes out of nearly three million, investigators working for the political parties

15. Keith Ervin, *Felony Charges Filed Against 7 in State’s Biggest Case of Voter-Registration Fraud*, SEATTLE TIMES, July 26, 2007 (quoting Secretary of State Sam Reed).

16. *Id.*

17. Mark Morris, *ACORN Worker Enters Guilty Plea*, KAN. CITY STAR, Feb. 7, 2007, at B5; Mark Morris, *Former ACORN Worker Pleads Guilty to Voter Registration Fraud*, KAN. CITY STAR, May 17, 2007; Tony Rizzo, *ACORN Worker Enters Guilty Plea*, KAN. CITY STAR, June 7, 2007, at B3.

18. *Woman Sentenced in Voter Fraud*, KAN. CITY STAR, July 28, 2007, at B3.

19. *Noncitizens Likely Voted in Bexar County*, DALLAS MORNING NEWS, June 10, 2007; Guillermo X. Garcia, *Vote Fraud Probed in Bexar*, SAN ANTONIO EXPRESS-NEWS, June 9, 2007, at 1A.

20. Garcia, *supra* note 19.

21. *See id.*

learned that voters who had been issued provisional ballots²² in some counties were able to place those ballots directly into tabulators rather than returning them to elections officials for later verification as required by law.²³

While the exact number of these errors was never found, the judge who heard the ensuing election contest found evidence that 425 provisional ballots in two counties were placed in tabulators without first being verified.²⁴ One reason this problem was detected was that political party observers in polling places on election day saw voters receive provisional ballots and place them directly in tabulators.²⁵

In the 1996 election for the 46th Congressional District of California, Loretta Sanchez defeated incumbent Robert Dornan by 984 votes.²⁶ Dornan contested the election in the House of Representatives.²⁷ The investigating committee found evidence of 944 invalid votes, including 278 cast by immigrants who were registered to vote while attending classes preparing them to become American citizens.²⁸ The committee determined that “had the Task Force and Committee not acted to consider the merits of this contest, significant vote fraud and vote irregularities would have gone undetected”²⁹ In other words, the normal checks in the system did not catch them.

A humorous attempt to highlight flaws in the election system led to official monitoring systems identifying a problem, but taking an embarrassingly long time to do it. Jane Balogh of Federal Way,

22. Provisional ballots are issued to voters who arrive at a polling place and claim to be registered and eligible to vote, but whose names cannot be found on the list of registered voters at the polling place. The completed provisional ballots are placed in envelopes with information about the voter. If later review determines that the person who cast the ballot is in fact registered and eligible, the envelope is opened and the ballot is tabulated. See U.S. Election Assistance Comm’n, *Provisional Voting*, <http://www.eac.gov/election/practices/bpea/hava-checklist/provisional/> (last visited Dec. 28, 2007).

23. WASH. REV. CODE § 29A.44.207 (2006). For a more detailed description of the errors, see Keith Ervin, *Election Scrutiny Reveals Provisional-Vote Flaws*, SEATTLE TIMES, Jan. 5, 2005 [hereinafter Ervin, *Election Scrutiny*]; see also Keith Ervin, *GOP Says Hundreds of Ballots Suspect*, SEATTLE TIMES, Jan. 6, 2005.

24. *Borders v. King County*, No. 05-2-00027-3, Court’s Oral Decision at 5 (Wash. Chelan County Ct. June 6, 2005), available at <http://www.secstate.wa.gov/documentvault/CourtsOralDecision-629.pdf>.

25. See Ervin, *Election Scrutiny*, *supra* note 23.

26. H.R. REP. NO. 105-416, at 2 (1998).

27. *Id.*

28. *Id.* at 31–32, 35.

29. *Id.* at 16.

Washington, obtained telephone service in the name of her dog and used the phone bill to register the dog to vote.³⁰ She then submitted absentee ballots in the dog's name in three elections.³¹ Her intention was not to cast fraudulent votes, but to point out the weaknesses in the voter registration system.³² To make this clear, she wrote "void" on the ballots, without marking any votes, and placed a paw print on the outside of the absentee ballot envelopes in the space for the voter's signature.³³ After the third time she sent in a ballot signed with a paw print, election officials contacted her and she was charged with making a false statement to a public official.³⁴

As these examples show, relying on election officials to spot errors and fraud leads to mixed results. Private monitoring of elections can supplement the work of public officials, whether it is performed by nonpartisan groups whose sole interest is the integrity of the process or by political parties and candidates playing roles in an adversary system.

D. Seeking Judicial Rights to Private Party Monitoring

The actors in the political process clearly believe that their ability to conduct private party monitoring of elections is important. Sometimes, private parties turn to the courts to seek a right of participation where it is not guaranteed by law. When Washington state election officials were organizing for a second recount of the state's 2.8 million ballots in 2004, a dispute ensued over the right of campaign and party representatives to observe the count.³⁵ With their candidate trailing after the first recount by forty-two votes, Democratic party officials petitioned the state supreme court for an order requiring county election officials to allow observers to see each individual ballot as it was recounted a

30. Keith Ervin, *Woman Registers Her Dog to Vote; Prosecutors Growl*, SEATTLE TIMES, June 22, 2007, available at http://seattletimes.nwsourc.com/html/localnews/2003758181_votingdog22m.html.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*; Keith Ervin, *Deal Reached with Woman Who Registered Dog to Vote*, SEATTLE TIMES, Sept. 6, 2007, available at http://seattletimes.nwsourc.com/html/localnews/2003871083_votingdog06m.html.

35. Brief and Amended Motion of Petitioners at 2, 5, *McDonald v. Reed*, 153 Wash. 2d 201 (Wash. 2004) (No. 76321-6), available at http://www.secstate.wa.gov/office/news_docs/Recount/Democrat/Amd%20Mot%20Brief.pdf.

second time.³⁶ State statute created a general right to observe, but did not specify its extent.³⁷ The court found the existing statutory language sufficient and declined the petition for additional observer rights.³⁸

An interested party also asked a court to order more specific observer rights in the recount of the 2006 election for Vermont auditor of accounts.³⁹ The court's initial recount order stated, "The candidates . . . or their representatives and the general public, subject to reasonable restriction as may be imposed by the respective County Clerks, may attend but may not participate in the recount or impede it in any manner."⁴⁰ In a motion to the court, the Republican candidate (who led by 137 votes after the initial count) claimed that this order was being interpreted in some counties to mean that observers could not speak with the individuals conducting the recount.⁴¹ Those individuals were, by statute and the court's recount order, appointed by the political parties having candidates in the election for auditor of accounts.⁴² The court denied the request to clarify observers' rights, leaving the matter to the discretion of each county clerk.⁴³

The most obvious reason states would adopt laws allowing citizen monitoring functions is to increase the resources dedicated to election oversight by bringing private actors into the process. Where election administrators operate with limited staffs and budgets, private parties can increase the scrutiny of elections processes and improve the chances errors or fraud will be identified. But this is not the only reason offered for the existence of private party monitoring laws. A report from Project Vote, an affiliate of ACORN,⁴⁴ describes the origin of private monitoring

36. *Id.* at 19–21.

37. *Id.*; *see also* WASH. ADMIN. CODE 434-261-020 (West 2007).

38. *McDonald*, 153 Wash. 2d at 206.

39. Motion for Clarification of Respondent at 1, *In re* Thomas M. Salmon, No. 714-11-06 (Vt. Wash. County Ct. Nov. 7, 2006).

40. *In re* Thomas M. Salmon, No. 714-11-06, at 3 (Vt. Wash County Ct. Nov. 21, 2006) (order for statewide recount).

41. Motion for Clarification of Respondent, *supra* note 39, at 1.

42. VT. STAT. ANN. tit. 17, § 2602(a) (2002 & Supp. 2007); *In re* Thomas M. Salmon, *supra* note 40, at 2.

43. *In re* Thomas M. Salmon, No. 714-11-06 (Vt. Wash. County Ct. Dec. 5, 2006) (entry regarding motion).

44. *See* ACORN's Links to Related Organizations, <http://www.acorn.org/index.php?id=4143> (last visited Dec. 28, 2007). These organizations also work from the same address in Washington, D.C. *See* <http://www.projectvote.org> (address for Project Vote) (last visited Dec. 28, 2007); <http://www.acorn.org/>

statutes in more sinister terms: “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.”⁴⁵

It may be true that some states adopted private election monitoring statutes for reasons less noble than preserving the integrity of the process.⁴⁶ But the presence of states in New England (Connecticut, Massachusetts and Rhode Island) and on the west coast (California and Washington) among those that allow challenges at some point during the process indicates that more factors are at work than residual Jim Crow influences.

Private monitoring statutes permit some or all of three practices. The first is allowing private actors to challenge voter registrations before election day.⁴⁷ Such challenges, if successful, have the effect of removing the challenged voter from the registration rolls and preventing him or her from casting a ballot.⁴⁸ The second form of private monitoring is granting private actors standing to challenge voters in person at a polling place.⁴⁹ The means of adjudicating these challenges and the effect if they succeed vary widely from state to state, including barring the voter from casting a ballot and requiring them to vote using a provisional ballot subject to later review.⁵⁰ The third way states allow private participation is allowing private actors to challenge absentee ballots at the verification stage, before they are removed from their outer envelopes and tabulated.⁵¹

E. Other Provisions for Private Monitoring and Enforcement

The concept of employing interested private parties to expand enforcement efforts is not unique to elections. In fact, it is widely

index.php?id=4318 (address for District of Columbia office of ACORN) (last visited Dec. 28, 2007).

45. Teresa James, *Caging Democracy: A 50-Year History of Partisan Challenges to Minority Voters*, PROJECT VOTE, Sept. 2007, at 34, available at http://projectvote.org/fileadmin/ProjectVote/Publications/Caging_Democracy_Report.pdf.

46. See *id.* at 7 (stating many state voter challenge laws have roots in the post-Reconstructionist Era).

47. See *infra* Part II.

48. See *id.*

49. See *infra* Part III.

50. See *id.*

51. See *infra* Part IV.

employed in other areas of law. Private citizens can sue on behalf of the government to recoup fraudulently obtained payments under the False Claims Act.⁵² Individual workers can file suits to remedy violations of the Davis-Bacon Act's prevailing wage rules.⁵³ The federal do-not-call statute allows individuals who receive calls in violation of the rules to sue the offending party for statutory damages separate from any enforcement action the government may undertake.⁵⁴ And under CERCLA, individuals may seek payments from liable polluters.⁵⁵ This list is hardly comprehensive.

Only four states—Alabama, Kansas, Oklahoma, and Wyoming—prohibit the three private monitoring practices under discussion.⁵⁶ The others all, in various ways, give private parties official standing to enforce election policies.⁵⁷ In fact, twelve states—Delaware, Florida, Idaho, Illinois, Iowa, Massachusetts, Michigan, New Mexico, New York, Pennsylvania, South Carolina, and Wisconsin—permit private parties to act in all three ways: challenging voter registrations before an election, challenging voters at the polls, and challenging absentee ballots.⁵⁸

II. PRE-ELECTION REGISTRATION CHALLENGES

One of the most extensive and bitterly contested uses of the right to challenge voter registrations before an election took place in Washington state in 2005. As a direct result, the state legislature made substantial changes to Washington's law governing pre-election challenges the following year.⁵⁹ Twenty-nine states permit pre-election challenges, subject to a wide range of time limitations and procedures.⁶⁰

A. *Washington State Registration Challenges in 2005*

King County is the largest county in Washington, with nearly one-third of the state's population.⁶¹ It was also the epicenter of the

52. 31 U.S.C. § 3730b (2000).

53. 40 U.S.C. § 3144a(2) (effective Aug. 21, 2002).

54. 47 U.S.C. § 227b(3) (2000).

55. 42 U.S.C. § 9613(f)(1) (2000).

56. *See infra* notes 91, 122, and 188.

57. *See id.*

58. *See id.*

59. *See infra* Part II.B.

60. *See infra* note 91.

61. *See* King County Quick Facts, U.S. Census Bureau, <http://quickfacts>.

dispute over the 2004 governor's election, which led to two recounts and an election contest trial that lasted until June of 2005.⁶² Following that dispute, the King County Republican Party sought to correct some of the flaws it believed still existed in the county's election system before the election for county executive on November 8, 2005.⁶³

Washington permits any registered voter to challenge another voter's registration before an election.⁶⁴ The King County Republicans decided to use this right in an effort to correct errors on the county's voter registration rolls. They first challenged approximately two thousand registrations they believed were duplicates, representing the same voter registered more than once.⁶⁵ Duplicate registrations are a substantial concern in Washington because the state allows voters to select a permanent no-excuse absentee status.⁶⁶ Voters in that status automatically receive a ballot by mail for each election.⁶⁷ So, if a voter has more than one registration that voter will receive more than one ballot, with each appearing to be sent and returned legitimately.

The next step for the King County Republicans came on October 26, when they submitted a second list of challenges. This list included 1944 names and was based on the claim that the addresses on the registrations were not legitimate residences but instead storage facilities or private mailbox services.⁶⁸

Democrats vigorously opposed the registration challenges. The Democratic chairman of the County Council, Larry Phillips, asked County Prosecutor Norm Maleng to explore perjury charges against the person who signed the challenge forms, King County GOP Vice Chairwoman Lori Sotelo, claiming Sotelo lacked personal knowledge that the voters did not live at the addresses

census.gov/qfd/states/53/53033.html (last visited Nov. 18, 2007). The 2000 census counted 1,737,034 people living in King County and 5,894,121 in Washington state. *Id.*

62. See Timothy Egan, *Washington Candidate Wages Endless Campaign*, N.Y. TIMES, May 23, 2005, at A13.

63. Sharon Pian Chan, *GOP Questions More Registrations*, SEATTLE TIMES, Oct. 25, 2005, at B2.

64. WASH. REV. CODE § 29A.08.820 (2006).

65. Keith Ervin & Justin Mayo, *Voter Names Found Twice*, SEATTLE TIMES, Oct. 13, 2005, at B1.

66. WASH. REV. CODE § 29A.40.040 (2005).

67. *Id.*

68. Gregory Roberts, *Challenging the GOP Challenge in King County*, SEATTLE POST-INTELLIGENCER, Nov. 15, 2005, at B2.

where they were registered.⁶⁹ A Democratic lawyer argued that the challenges should be dismissed without hearings.⁷⁰ County Democratic chair Susan Sheary said the challenges infringed on voters' civil rights.⁷¹

After some of the challenges were found to have been filed in error, the Republicans withdrew 140 of them.⁷² Meanwhile, reporters investigated thirty addresses that accounted for more than one thousand of the challenged registrations, and found that twenty-nine of them were in fact private mailbox services as claimed by the Republicans; the remaining address had already been identified as an error and was included in the 140 challenges previously withdrawn.⁷³

Further investigation by the media uncovered some additional errors in the original list, most caused by challenging voters whose street number and street name were the same as a storage facility with the same street number and street name in another area or city.⁷⁴ The chairman of the state Republican party, Chris Vance, acknowledged that the party's data analyst had not compared cities or geographic designations when matching voter registration addresses to storage facility and private mail box facility addresses.⁷⁵ By the time challenge hearings began, the original list of 1944 was reduced by 176 withdrawn challenges, seventy-six duplicate entries, and over 200 voters who changed their registration addresses before the election deadline.⁷⁶ With those deductions, roughly three-quarters of the challenges remained.

The first hearings on the challenges were held November 17, 2005.⁷⁷ At the hearings, Democratic lawyers argued that state law required individuals challenging voters to attest not only that the voter did not live at the address where he or she was registered, but

69. Eric Pryne, *GOP Not Dropping Voter Challenges*, SEATTLE TIMES, Nov. 10, 2005, at B4.

70. See Roberts, *supra* note 68, at B2.

71. Eric Pryne, *Voter-Challenge Errors Mount*, SEATTLE TIMES, Nov. 16, 2005, at B1 [hereinafter Pryne, *Errors Mount*].

72. Eric Pryne, *GOP Admits it Erred in Challenging Some Voters' Registration*, SEATTLE TIMES, Nov. 5, 2005, at A1.

73. Eric Pryne, *Parties Clash Over Voter Challenges*, SEATTLE TIMES, Nov. 8, 2005, at B1.

74. See Pryne, *Errors Mount*, *supra* note 71, at B1.

75. *Id.*

76. See *More Mistakes in Voter Challenges*, SEATTLE TIMES, Nov. 19, 2005, at B3.

77. See Sam Skolnik, *GOP Registration Objections Receive More Scrutiny; Few Voters Show Up to Plead Case*, SEATTLE POST-INTELLIGENCER, Nov. 18, 2005, at B1.

also to provide the voter's true address.⁷⁸ The county canvassing board first considered 192 challenges to registrations where the voter cast a ballot in the November 8, 2005 election.⁷⁹ The board rejected three-fourths of the challenges, upholding only those where voters themselves provided information showing they did not live at the address where they were registered.⁸⁰ The county's election director said that he voted to reject the challenges because the challenger "did not prove conclusively that [the] voters [did] not live at the addresses" where they were registered,⁸¹ effectively endorsing the argument made by the lawyer for the Democratic Party. At the same time, he acknowledged that it appeared most of the challenged voters were in fact registered at private mailbox or storage facilities.⁸² After the canvassing board's action on the challenges for voters who had cast ballots, the remaining challenges were left to be resolved administratively by the elections director.⁸³

B. Legislative Response to Washington Registration Challenges

The errors in handling the challenges and the politically charged atmosphere when they were filed put the focus on the challenge process rather than on the registrations. In response, the Washington Legislature revised the challenge process in its 2006 session.⁸⁴ The revisions preserved the right to challenge registrations, but imposed substantial new burdens on the challenger.⁸⁵

Under the new Washington challenge provisions, a challenge to a registration because the voter does not live at the residential

78. Eric Pryne, *GOP May Need to Find Homes of Contested Voters*, SEATTLE TIMES, Nov. 18, 2005, at B1.

79. See Gregory Roberts, *Most Challenges on Voters Tossed: Ballots Will Now Be Counted, Unlikely to Change Results*, SEATTLE POST-INTELLIGENCER, Nov. 29, 2005, at B1.

80. *See id.*

81. *Id.*

82. Eric Pryne, *Most Challenged Ballots are Cleared to be Counted*, SEATTLE TIMES, Nov. 29, 2005, at B1.

83. See Eric Pryne, *Maleng: Voter Rolls Flawed*, SEATTLE TIMES, Nov. 30, 2005, at B1.

84. Act Relating to Modifying Processes for Challenging Voter Registration, 2006 Wash. Legis. Serv. Ch. 320 (S.S.B. 6362) (West), available at <http://www.leg.wa.gov/pub/billinfo/200506/Pdf/Bills/Session%20Law%20200/6362-S.sl.pdf>.

85. *Id.*

address provided must include one of two specific elements. The first is the challenged voter's actual address.⁸⁶ The second is evidence of due diligence, demonstrated by following all of five steps: sending a letter with return receipt requested, visiting the address and interviewing persons there, searching telephone directories, searching property records, and searching the statewide voter registration database.⁸⁷ Imposing these requirements means that cost factors will make large-scale challenges such as those filed in 2005 almost impossible in the future, even where there is evidence the registration addresses are per se invalid (for example, by reason of being private mailbox facilities that cannot serve as a residence). The bill did clarify the requirement that registrations include the actual physical residence of the voter.⁸⁸

The Washington Legislature also required that challenges be filed sooner. For existing registrations, challenges must now be filed at least 45 days before an election.⁸⁹ For new registrations submitted less than 60 days before an election, the challenge must be filed at least 10 days before the election.⁹⁰

C. State Laws on Pre-election Challenges

Twenty-nine states permit private-party challenges of voter registrations before Election Day.⁹¹ In six of these—California, Georgia, Ohio, Texas, Washington and West Virginia—pre-

86. *Id.* at § 4.

87. *Id.*

88. *Id.* at § 2.

89. *Id.* at § 5.

90. *Id.*

91. CAL. ELEC. CODE § 2213 (2003); COLO. REV. STAT. § 1-9-101(1) (2000 & Supp. 2007); DEL. CODE ANN. tit. 15 § 2012 (1999); FLA. STAT. § 101.111(3) (2002 & Supp. 2007); GA. CODE ANN. § 21-2-229 (2003); HAW. REV. STAT. § 11-25(a) (2007); IDAHO CODE ANN. § 34-431 (2001); 10 ILL. COMP. STAT. 5/4-12 (2003); IOWA CODE § 48A.14(1) (1999 & Supp. 2007); MD. CODE ANN., ELEC. LAW § 3-602(a) (2002 & Supp. 2007); MASS. GEN. LAWS ch. 51, § 48 (2007); MICH. COMP. LAWS § 168.512 (1989); MINN. STAT. § 201.195 subdiv. 1 (2006); MISS. CODE ANN. § 23-15-63 (2007); MONT. CODE ANN. § 13-13-301(1) (2007); NEV. REV. STAT. § 293.547 (2002); N.M. STAT. § 1-4-22 (2004); N.Y. ELEC. LAW § 5-218 (2007); N.C. GEN. STAT. § 163-85(a) (2006); OHIO REV. CODE ANN. § 3503.24(a) (2007); 25 PA. STAT. § 1329(a) (2007); R.I. GEN. LAWS § 17-9.1-28(a) (2003); S.C. CODE ANN. § 7-5-230 (1977 & Supp. 2006); TEX. ELEC. CODE ANN. § 16.091(2003); UTAH CODE ANN. § 20A-3-202 (2003 & Supp. 2007); VA. CODE ANN. § 24.2-431 (2006); WASH. REV. CODE § 29A.08.810 (2005 & Supp. 2007); W. VA. CODE § 3-2-28(a) (2006); WIS. STAT. § 6.48(1)(a) (2004 & Supp. 2006).

registration challenges are the only private party role allowed; polling place and absentee ballot challenges are not permitted.⁹² A few states restrict the time when pre-election challenges may be filed. Colorado allows them no later than sixty days before an election.⁹³ In Florida, any elector may challenge another voter's right to vote not sooner than thirty days before the election (but the challenged voter may still cast a provisional ballot).⁹⁴ Nevada allows registration challenges only between thirty and twenty-five days before an election.⁹⁵ New Mexico requires challenges to be made at least forty-two days before an election,⁹⁶ and North Carolina at least twenty-five days.⁹⁷ The deadline in Ohio is not later than twenty days before the election,⁹⁸ and in Utah it is two business days before the start of voting.⁹⁹ Along with Washington, whose time for challenges was changed to forty-five days before the election for existing registrations and ten days before for new registrations¹⁰⁰ after the 2005 challenges discussed above,¹⁰¹ these are the only states that impose time limits on their pre-registration challenges.

In a sign of concern about large-scale challenges, New York requires that each challenge affidavit may refer to only one voter registration.¹⁰² Some states also ban malicious or frivolous challenges, or impose a probable cause standard.¹⁰³

III. POLLING PLACE CHALLENGES

Challenges to voter registrations address questions about voter eligibility before election day. In thirty-nine states, private parties—usually the established political parties—are allowed through

92. See CAL. ELEC. CODE § 2213 (2003); GA. CODE ANN. § 21-2-229 (2003); OHIO REV. CODE ANN. § 3503.24(a) (2007); 25 PA. STAT. § 1329(a) (2007); W. VA. CODE § 3-2-28(a), (b) (2006).

93. COLO. REV. STAT. § 1-9-101(1)(a) (2000 & Supp. 2007).

94. FLA. STAT. § 101.111(3) (2002 & Supp. 2007).

95. NEV. REV. STAT. § 293.547 (2002).

96. N.M. STAT. § 1-4-22(A) (2004).

97. N.C. GEN. STAT. § 163-85(a) (2006).

98. OHIO REV. CODE ANN. § 3503.24 (A) (2007).

99. UTAH CODE ANN. § 20A-3-202(2)(a) (2003 & Supp. 2007).

100. Act of June 7, 2006, ch. 320, § 5, 2006 Wash. Sess. Laws.

101. See *supra* Part II.A.

102. N.Y. ELEC. LAW § 5-220(1) (2007).

103. See, e.g., FLA. STAT. § 101.111(4) (2002 & Supp. 2007); MICH. COMP. LAWS § 168.512 (1989); WASH. REV. CODE 29A.08.810 (2005 & Supp. 2007); W. VA. CODE § 3-9-7 (2006).

designated individuals to challenge a voter on election day when the voter appears at a polling place to cast a ballot.¹⁰⁴ Many states appear to treat pre-election registration challenges and polling place challenges as alternative, rather than complementary, tools. Twenty-two states allow one or the other, but not both.¹⁰⁵

In one documented incident from 2007, a polling place challenger blocked an attempt to impersonate a voter in Hoboken, New Jersey.¹⁰⁶ The Hoboken incident demonstrated two theoretical justifications for polling place challengers: they can bring information and resources to bear that election officials cannot, and valid voter registration may be used by someone other than the registered voter to cast a ballot.

In advance of the 2004 presidential election, the parties prepared an extensive plan to station challengers in polling places in Ohio under the provisions of the state's election code.¹⁰⁷ The Democrats filed three lawsuits trying to bar challengers from the Ohio polls despite their statutory right to be there,¹⁰⁸ and those

104. ALASKA STAT. § 15.15.210 (2006); ARIZ. REV. STAT. ANN. § 16-590 (2006); ARK. CODE ANN. § 7-5-312 (2007); COLO. REV. STAT. § 1-9-201 (West Supp. 2007); CONN. GEN. STAT. § 9-232 (West 2002); DEL. CODE ANN. tit. 15, § 4934 (1999); FLA. STAT. § 101.111 (West Supp. 2007); HAW. REV. STAT. § 11-25 (2006); IDAHO CODE ANN. § 34-304 (Supp. 2007); 10 ILL. COMP. STAT. 5/17-23 (Supp. 2007); IND. CODE § 3-10-1-9 (2006); IOWA CODE § 49.79 (Supp. 2007); KY. REV. STAT. ANN. § 117.315(3) (LexisNexis 2004); LA. REV. STAT. ANN. § 18:565 (2004); ME. REV. STAT. ANN. tit. 21-A, § 673 (Supp. 2006); MD. CODE ANN., ELEC. LAW § 10-311 (LexisNexis Supp. 2007); MASS. GEN. LAWS ch. 54, § 85A (West 2007); MICH. COMP. LAWS § 168.730 (West 2005); MINN. STAT. § 204C.12 (2006); MISS. CODE ANN. § 23-15-571 (2007); MO. STAT. § 115.429(2) (West 2003); MONT. CODE ANN. § 13-13-301 (2007); NEB. REV. STAT. § 32-926 (2005); NEV. REV. STAT. § 293.287(2) (2002); N.H. REV. STAT. ANN. §§ 659:27, 666:4-5 (2007); N.J. STAT. ANN. § 19:7 (West Supp. 2007); N.M. STAT. § 1-2-21 (2003); N.Y. ELEC. LAW § 8-502 (McKinney 2007); N.C. GEN. STAT. § 163-87 (Supp. 2006); N.D. CENT. CODE § 16.1-05-06 (Supp. 2007); 25 PA. STAT. § 2687(b) (2007); R.I. GEN. LAWS § 17-19-22 (2003); S.C. CODE ANN. § 7-13-810 (Supp. 2006); S.D. CODIFIED LAWS § 12-18-6.3 (2004); TENN. CODE ANN. § 2-7-104(c) (Supp. 2007); UTAH CODE ANN. § 20A-3-202 (Supp. 2007); VT. STAT. ANN. tit. 17 § 2564 (2002); VA. CODE ANN. § 24.2-651 (Supp. 2007); WIS. STAT. § 6.925 (2004).

105. Alaska, Arizona, Arkansas, California, Connecticut, Georgia, Indiana, Kentucky, Louisiana, Maine, Missouri, Nebraska, New Hampshire, New Jersey, North Dakota, Ohio, South Dakota, Tennessee, Texas, Vermont, Washington, and West Virginia.

106. See *infra* Part III.A.

107. *Spencer v. Blackwell*, 347 F. Supp. 2d 528, 530 (S.D. Ohio 2004), *stay granted*, 388 F.3d 547 (6th Cir. 2004).

108. OHIO REV. CODE ANN. § 3505.21, as it existed before the legislative changes described in Part III.C *infra*, stated: "At any primary, special, or general election, any political party . . . may appoint to any of the polling places in the

suits were not resolved until a few hours before the polls opened.¹⁰⁹ As happened in Washington after the 2005 pre-election registration challenges, the Ohio legislature stepped in and rewrote the state's election statute in the wake of the 2004 disputes.¹¹⁰ Among the states that allow polling place challengers, there are many differences in the procedure for making a challenge and the effect if one is upheld.¹¹¹

A. *Hoboken, NJ—Anatomy of a Fraud*

On June 12, 2007, the city of Hoboken, New Jersey held a runoff election in the primary for the city council.¹¹² That morning, John Branciforte—a former zoning board president and nineteen-year resident of the city—was on his way to volunteer as an election challenger at a polling place when he noticed two men standing in a semi-circle of seven other men and handing out 3x5 index cards.¹¹³ One of the men who had received a card later entered the polling place where Branciforte was volunteering and signed in to vote.¹¹⁴ Branciforte challenged him, and a city worker asked the man for identification, which prompted the man attempting to vote to leave abruptly.¹¹⁵ Branciforte followed him and called police.¹¹⁶

According to a police report, the man lived in a homeless shelter and had signed in to vote in another person's name (Branciforte had suspected the index cards contained names of registered voters and that the men receiving the cards were instructed to impersonate them at the polls).¹¹⁷ The man told police that someone had come to the shelter that morning and asked men outside if they wanted to make ten dollars.¹¹⁸

county or city one person, a qualified elector, who shall serve as a challenger for such party”

109. See *infra* Part III.B.

110. See *infra* Part III.C.

111. See *infra* Part III.D.

112. Madeline Friedman & Caren Lissner, *Anatomy of Voter Fraud; Will Officials Follow Up on Alleged \$10 Vote Payoff?*, HUDSON REP. (Hudson County, NJ, July 1, 2007), available at <http://www.hudsonreporter.com/site/news.cfm?newsid=18535598>.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

Apparently, Branciforte's intervention prevented the homeless man from impersonating a voter at the polls.¹¹⁹ Based on what Branciforte observed on his way to the polling place, it also seems likely that there was an effort to enlist others in the same practice.¹²⁰ The candidate Branciforte was working for on Election Day and his opponent both said they believed this incident was part of a larger attempt by local political party organizations to influence the election outcome.¹²¹

This incident illustrates the positive side of polling place voter challenges. Branciforte was able to prevent a fraudulent vote based on his own knowledge and observations. Had he not been present, there is no indication that the city election workers would have challenged the person attempting to vote in someone else's name.

B. *Ohio 2004—Deadlock Over Challengers*

Again, thirty-nine states allow private actors to challenge voters in the polling place on election day¹²² and Ohio is one of them. Leading up to the November 2, 2004 election, the two major political parties arranged for several hundred challengers in one Ohio county alone (Hamilton County, which includes the city of Cincinnati).¹²³ On October 27, two voters in Hamilton County filed a suit in federal court in Cincinnati seeking to block the Republicans' polling place challengers.¹²⁴ The next day, Democrats filed another federal suit in Cleveland, also seeking to enjoin the Republican challenger program.¹²⁵ In a period of seven days from

119. *Id.*

120. *See id.*

121. *Id.*

122. *See supra* note 104.

123. *Spencer v. Blackwell*, 347 F. Supp. 2d 528, 530 (S.D. Ohio 2004), *stay granted*, 388 F.3d 547 (6th Cir. 2004).

124. *See id.* at 529; *see also* Cindi Andrews, *Dems Want Challengers Out*, CINCINNATI ENQUIRER, Oct. 29, 2004, at 1C (reporting on testimony in the *Spencer* case, including Hamilton County Democratic co-chairman Tim Burke's concerns that Republicans were targeting black voters); Gregory Korte, *Dlott Rulings Could Impact Vote*, CINCINNATI ENQUIRER, Oct. 29, 2004, at 1A (reporting on status of court cases over Republican efforts to combat alleged voter fraud, including lawsuit by longtime Cincinnati civil rights leaders Marian and Donald Spencer).

125. *Summit County Democratic Cent. & Executive Comm. v. Blackwell*, No. 5:04CV2165, 2004 U.S. Dist. LEXIS 22539 at *3-5 (N.D. Ohio Oct. 31, 2004), *stay granted*, 388 F.3d 547 (6th Cir. 2004).

the time the first case was filed, these two cases generated seven opinions, including two from the Supreme Court.¹²⁶

In the first case to be decided, the court explicitly weighed the state's compelling interest in preventing election fraud against the potential harm to the voters being challenged.¹²⁷ The court determined that the polling place challenger provisions were not narrowly drawn to serve the state's compelling interest for two primary reasons: the availability of pre-election challenges by private actors, and the presence of election officials in the polling place.¹²⁸

The district court in the second case reached a similar conclusion, also holding that the election day challenger statute was not narrowly drawn and therefore excessively burdened the right to vote.¹²⁹ The court emphasized the ability of official election judges to protect against fraud, the role of the Board of Elections in screening registration applications to ensure only valid ones are processed, and the availability of pre-election private party challenges.¹³⁰ The court also observed that the secretary of state and attorney general were in dispute over the role of private party challengers.¹³¹ On October 29, the secretary of state announced that he would recommend banning private challengers from polling places,¹³² while the attorney general countered that his duty was to uphold the challenger statute as enacted by the legislature.¹³³

With less than eight hours remaining before the polls were scheduled to open, a panel of the Third Circuit upheld a district court order in yet a third path of litigation, enjoining Ohio Republicans from using lists prepared before election day as the basis for challenging voters in polling places.¹³⁴ The circuit court

126. See *Spencer v. Pugh*, 543 U.S. 1301 (2004); *Democratic Nat'l Comm. v. Republican Nat'l Comm.*, No. 04-4186, 2004 U.S. App. LEXIS 22687 (3d Cir. Nov. 1, 2004), *reh'g granted*, 2004 U.S. App. LEXIS 22689 (3d Cir. Nov. 2, 2004), *stay denied*, 543 U.S. 1304 (2004); *Summit County Democratic Cent. & Executive Comm.*, 2004 U.S. Dist. LEXIS 22539; *Spencer v. Blackwell*, 347 F. Supp. 2d at 528-38.

127. *Summit County Democratic Cent. & Executive Comm.*, 2004 U.S. Dist. LEXIS 22539 at *20-21.

128. *Id.* at *21.

129. *Spencer*, 347 F. Supp. 2d at 537.

130. *Id.*

131. *Id.* ("How can the average election official or inexperienced challenger be expected to understand the challenge process if the two top election officials cannot?").

132. *Id.* at 532.

133. *Id.* at 536-37.

134. *Democratic Nat'l Comm. v. Republican Nat'l Comm.*, No. 04-4186, 2004

then granted a petition for rehearing en banc, vacated the panel's order, and stayed the district court's injunction.¹³⁵

Meanwhile, a panel of the Sixth Circuit heard a consolidated appeal of the *Spencer* and *Summit County* cases.¹³⁶ The court granted an emergency stay of the district court orders pending further appeal, using an analytical approach different than that of the district courts.¹³⁷ In the Sixth Circuit's view, the plaintiffs were unlikely to prevail on the threshold question of whether the presence of challengers burdens the right to vote, because "[c]hallengers may only *initiate* an inquiry process by precinct judges" while the precinct judges made the final decision on the voter's status.¹³⁸ Recognizing that it was a close case, the court weighed the balance in favor of leaving the statutory provisions for private challengers in place:

[I]f the plaintiffs are not correct in their view of the law, the State will be irreparably injured in its ability to execute valid laws, which are presumed constitutional, for keeping ineligible voters from voting. . . . It is particularly harmful to such interests to have the rules changed at the last minute.¹³⁹

The plaintiffs in both the Third and Sixth Circuit cases asked the Supreme Court to reverse the court of appeals orders overturning the district courts. Justice Stevens denied the application in the consolidated *Spencer* and *Summit County* cases in large part because it was impossible as a practical matter for the Court to review and rule upon the case materials in the limited time available before the polls opened.¹⁴⁰ In the *Democratic National Committee v. Republican National Committee* case, Justice Souter denied the application for stay when the lone individual voter who

U.S. App. LEXIS 22687 (3d Cir. Nov. 1, 2004), *vacated*, 2004 U.S. App. LEXIS 22689 (3d Cir. Nov. 2, 2004) (en banc).

135. *Id.*

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

137. *See id.* at 550 (reasoning that the factors to be considered in determining whether an order should be stayed are the same factors used to determine whether to issue a temporary restraining order or a preliminary injunction).

138. *Id.* at 551.

139. *Id.*

140. *Spencer v. Pugh*, 543 U.S. 1301, 1302 (2004).

was party to the case filed a pleading with the Court disclosing that she had already voted without challenge.¹⁴¹

When voting proceeded on November 2 after this epic flurry of litigation, the incumbent President George W. Bush defeated John Kerry in Ohio by 118,601 votes, 2,859,768 to 2,741,167, securing Ohio's electoral votes and the presidency for a second term.¹⁴² Years later, Democrats continue to argue that Bush's Ohio victory was procured through fraud.¹⁴³

C. *Legislative Response to Dispute Over Ohio Poll Challengers*

Following the extensive litigation over polling place challengers in 2004, the Ohio Legislature enacted significant changes to the state's laws governing election day challenges.¹⁴⁴ The legislature required pre-election challenges by private parties to be brought no later than twenty days before an election.¹⁴⁵ More dramatically, the legislature abolished private challengers in polling places, replacing all references to challengers with the term "observers."¹⁴⁶ The revised law allows only election judges to challenge voters at the polls on election day.¹⁴⁷ As a counterbalance to shutting out private actors from election day challenges, the legislature required election officials to mail a nonforwardable piece of mail to each registered voter before each election.¹⁴⁸ If the

141. *Democratic Nat'l Comm. v. Republican Nat'l Comm.*, 543 U.S. 1304, 1304 (2004).

142. Official Results 2004, <http://www.sos.state.oh.us/sos/ElectionsVoter/results2004.aspx?Section=135> (last visited Nov. 20, 2007).

143. See, e.g., Robert F. Kennedy, Jr., *Was the 2004 Election Stolen?*, ROLLING STONE, June 1, 2006, available at http://www.rollingstone.com/news/story/10432334/was_the_2004_election_stolen (quoting Sen. Christopher Dodd, Democrat of Connecticut, as saying Ohio's Republican secretary of state "was determined to guarantee a Republican outcome.").

144. Act of Jan. 31, 2006, No. 65, § 1, 2006 Ohio Legis. Serv. Ann. L-2 (West), available at <http://www.legislature.state.oh.us/JournalText126/HJ-01-31-06.pdf>.

145. OHIO REV. CODE ANN. § 3503.24 (West 2007).

146. See, e.g., OHIO REV. CODE ANN. § 3505.21 (West 2007):

At any primary, special, or general election, any political party supporting candidates to be voted upon at such election and any group of five or more candidates may appoint to the board of elections or to any of the precincts in the county or city one person, a qualified elector, who shall serve as *observer* for such party or such candidates during the casting and counting of the ballots

Id. (emphasis added).

147. See OHIO REV. CODE ANN. § 3505.20 (West 2006), *invalidated by* *Boustani v. Blackwell*, 460 F. Supp. 2d 822 (N.D. Ohio 2006).

148. OHIO REV. CODE ANN. § 3501.19(A) (West 2007).

mail is returned, voters will be required to show identification the next time they attempt to vote.¹⁴⁹

Even though Ohio's legislative changes eliminate private challengers at the polls, some activists have treated the new legislation as if it were designed to make it easier to challenge voters. A former lawyer in the Justice Department's voting rights section said the changes "make one wonder whether there will be new efforts to have massive challenges in the future."¹⁵⁰

D. Procedures Governing Polling Place Challenges

In addition to challengers, who have official standing to participate in the election process by raising challenges, almost all states allow observers in polling places.¹⁵¹

The effect of a challenge varies from state to state. In Arizona, if a majority of the polling place's election board decides that a challenge is valid, the voter casts a provisional ballot instead of a regular ballot.¹⁵² That process gives the voter a second bite at the apple, creating an opportunity for a ballot to be counted if the provisional ballot is deemed valid.

When a voter is challenged at the polls in Hawaii, the challenge is immediately considered and decided by the election officials in the precinct.¹⁵³ If the officials uphold the challenge, the voter either is prevented from voting or may appeal the decision to the board of registration.¹⁵⁴ For an appeal, the voter completes a ballot that is sealed in an envelope to be reviewed by the board and counted or not depending on the board's ruling (the functional equivalent of a provisional ballot).¹⁵⁵

In Maine, a challenged voter casts a ballot that is counted with the regular ballots but marked with a number that is recorded on a "challenge certificate" and kept sealed with the voting materials.¹⁵⁶ The word "challenged" also is marked next to the voter's name on

149. § 3501.19(C).

150. Greg Gordon, *States' New Laws Help GOP Raise Voter Challenges*, SACRAMENTO BEE, Sept. 27, 2007, at A1.

151. West Virginia prohibits anyone other than election officers or voters going to or from the election room to vote to be within 300 feet of the entrance to the polling place. W. VA. CODE § 3-1-37(a) (2006).

152. ARIZ. REV. STAT. ANN. § 16-592(C) (2006).

153. HAW. REV. STAT. § 11-25(b) (2006).

154. *Id.*

155. *Id.*

156. ME. REV. STAT. ANN. tit. 21-A, § 673(3) (Supp. 2006).

the precinct roster.¹⁵⁷ After the election, if the challenged ballots could affect the outcome, the challenge certificates are unsealed and a determination of the challenges is made.¹⁵⁸ Wisconsin also marks a serial number directly on a challenged ballot.¹⁵⁹

A challenged voter in Michigan or Minnesota is asked a series of questions by a precinct election official to determine his or her qualifications.¹⁶⁰ If the official determines based on the answers that the voter is not qualified to vote in that precinct, the person is not entitled to receive a ballot and vote.¹⁶¹

When a challenge is upheld in New Mexico, the voter completes a ballot that is placed in an envelope with the word “rejected” and the voter’s name written on the outside.¹⁶² The envelope is then placed in the ballot box and not counted.¹⁶³ A similar procedure applies in Tennessee.¹⁶⁴ If a voter is challenged successfully in Vermont, the voter is denied access to the voting area and cannot vote except by obtaining a court order before the polls close.¹⁶⁵

IV. ABSENTEE BALLOT CHALLENGES

Following a series of indictments for absentee ballot fraud in 2007, an official in Hale County, Alabama, credited the presence of political party monitors in the elections office with reducing the number of absentee ballots cast, many of which were presumed fraudulent.¹⁶⁶ This is one example of private party monitoring having an effect on the voting process, even where the Alabama monitors did not have the right to challenge the absentee ballots.¹⁶⁷ Although challenging absentee ballots is conceptually similar to challenging voters at a polling place, the actual practice and process is different because of the way absentee ballots are

157. *Id.* § 673(3-A).

158. *Id.* § 696(1).

159. WIS. ADMIN. CODE EL. § 6.95 (Supp. 2006).

160. MICH. COMP. LAWS § 168.729 (2005); MINN. STAT. § 204C.12 subdiv. 3 (Supp. 2007).

161. MICH. COMP. LAWS § 168.729 (2005); § 204C.12, subdiv. 3 (Supp. 2007).

162. N.M. STAT. § 1-12-22(A) (2003).

163. *Id.*

164. TENN. CODE ANN. § 2-7-125 (2003).

165. VT. STAT. ANN. tit. 17, § 2564 (2002).

166. Stephanie Taylor, *Two Accused of Voter Fraud In Hale County*, TUSCALOOSA NEWS, Aug. 17, 2007, at 1A, available at <http://www.tuscaloosaneews.com/article/20070817/LATEST/70817026>.

167. ALA. CODE § 17-11-11(b) (LexisNexis Supp. 2006).

handled. Relatively few states—twenty-two—permit challenges of absentee ballots,¹⁶⁸ and the choice of whether to allow the practice does not seem to correlate to the proportion of a state's votes that are cast by absentee.¹⁶⁹

A. *Monitors Making a Difference in Alabama*

In Greensboro, Alabama, two people—one a former city council member—were indicted on August 16, 2007 on charges related to absentee ballot fraud.¹⁷⁰ The allegations involved the casting of apparently fraudulent absentee ballots in two Democratic primary elections in Alabama's Hale County.¹⁷¹

One of those elections was a May 2005 primary for an open seat in the state house of representatives.¹⁷² Candidate Ralph Howard surpassed opponent Albert Turner, Jr. in Hale County by a vote of 2264 to 1380.¹⁷³ But while only forty-three of Howard's 2264 votes were cast by absentee ballot, Turner received 813 of his 1380 votes by absentee.¹⁷⁴

When he announced the charges, Alabama Attorney General Troy King said that Hale County had a history of problems: "Very rarely do we have elections in Hale County that we do not receive complaints This has been a systemic problem of corruption."¹⁷⁵ Nonetheless, even before the indictments were filed there were signs that the situation might be improving. A clerk in the county probate judge's office said the number of absentee ballots cast had been declining since 2000, falling from thousands per election to only 300 in the most recent.¹⁷⁶ Most interestingly, the clerk said that one factor in the decrease was the presence of poll watchers from candidates and political parties in the absentee vote office during the five weeks it was open.¹⁷⁷

Only a few days before the Alabama indictments, a report emerged in neighboring Mississippi that more than 30% of the

168. *See infra* note 188.

169. *See infra* Part IV.B.

170. Taylor, *supra* note 167.

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

absentee ballots cast in an August 2007 election were fraudulent.¹⁷⁸ The issue was taken seriously enough that the ballots were transported to a state crime lab and analyzed for DNA and fingerprints.¹⁷⁹

A few months later, a commissioner in Refugio County, Texas, resigned after admitting to a fraud scheme involving absentee ballots in his 2006 election.¹⁸⁰ He was reported to have had county residents sign absentee ballot applications that were sent to his supporters and then signed by the applicants after being completed.¹⁸¹

B. The Different Challenge of Monitoring Absentees

The Alabama and Mississippi examples cited above illustrate problems that can arise in casting absentee ballots and how monitors or challengers could seek to identify and prevent them. Nationwide 12% of ballots were cast by absentee ballot in 2004,¹⁸² but some states—especially in the West—had absentee rates that were much higher: 68.7% in Washington, 40.8% in Arizona (including both absentee and early votes, which are cast using the same process), 33.2% in California (accounting for over four million ballots), and 100% in Oregon, the nation's only all vote-by-mail state.¹⁸³

The types of activities that challengers can monitor for absentee ballots are different than those at polling places. In absentee processing, ballots are handled by election officials at a central office, but they are handled for an extended period of time.¹⁸⁴ Ballot accountability—reconciling the number of tabulated ballots to the number of legitimate voters casting them—can be far more complex for tens or hundreds of thousands of absentee ballots in a central office than for a few hundred ballots in a

178. Andy Wise, *Tunica County Ballot Investigation Targets Circuit Clerk's Office*, WREG-TV (Memphis), Aug. 15, 2007, <http://www.freerepublic.com/focus/f-news/1887759/posts> (last visited Dec. 28, 2007).

179. *Id.*

180. Tara Bozick, *Refugio Commissioner Admits to Voter Fraud: Commissioner Resigns, Pleads Guilty to State Jail Felony*, VICTORIA ADVOCATE, Oct. 11, 2007, available at 2007 WLNR 19836561.

181. *Id.*

182. FINAL REPORT, *supra* note 10, at 4-6.

183. *Id.* at 4-7.

184. GARBER, *supra* note 7, at 23.

precinct polling place.¹⁸⁵ Absentee voting often is cited as the most likely source of election fraud.¹⁸⁶

C. Absentee Ballot Challenge Rules in the States

Compared to the twenty-nine states that allow pre-election registration challenges and the thirty-nine that allow election day challenges at polling places, a smaller number—twenty-two—permit challenges to absentee ballots.¹⁸⁷ The states that allow the practice do not seem to base the choice on the percentage of their ballots cast by absentee. The table below shows the states allowing absentee challenges and the percentage of their votes cast by absentee in 2004:¹⁸⁸

Arizona	41%
Iowa	30%
New Mexico	20%
Alaska	20%
Michigan	18%
Florida	18%

185. The failure to perform an accurate absentee ballot reconciliation figured prominently in the election contest litigation following the 2004 Washington governor's election. Keith Ervin, *Election Manager Linked to False Report*, SEATTLE TIMES, May 19, 2005, at B1; Keith Ervin, *Higher-up Linked to Flawed Report*, SEATTLE TIMES, May 21, 2005, at B1; Keith Ervin, *King County Ballot Numbers Don't Add Up*, SEATTLE TIMES, May 25, 2005, at A16.

186. See, e.g., U.S. ELECTION ASSISTANCE COMM'N, ELECTION CRIMES: AN INITIAL REVIEW AND RECOMMENDATIONS FOR FUTURE STUDY (2006), at 9, available at http://www.eac.gov/clearinghouse/docs/reports-and-surveys2006electioncrimes.pdf/attachment_download/file; CENTER FOR DEMOCRACY AND ELECTION MGMT & AM. UNIV., BLDG. CONFIDENCE IN U.S. ELECTIONS (2005), at 46, available at http://www.american.edu/ia/cfer/report/full_report.pdf.

187. ALASKA STAT. § 15.20.203 (2006); ARIZ. REV. STAT. ANN. § 16-552 (2006); ARK. CODE ANN. § 7-5-312 (2007); CONN. GEN. STAT. § 9-159p(a) (2002); DEL. CODE ANN. tit. 15, § 5513 (1999); FLA. STAT. § 101.6104 (2002); FLA. STAT. § 101.68(2)(c)(2) (2002); IDAHO CODE ANN. § 34-1009 (2001); 10 ILL. COMP. STAT. 5/19-10 (Supp. 2007); IOWA CODE § 49.79 (1999); KY. REV. STAT. ANN. § 117.087 (LexisNexis 2004); LA. REV. STAT. ANN. § 18:1315 (2004); ME. REV. STAT. ANN. tit. 21-A, § 757 (1993); MASS. GEN. LAWS ch. 54, § 96 (West 2007); MICH. COMP. LAWS § 168.769a (West 2005); MO. REV. STAT. § 115.105 (1997); N.H. REV. STAT. ANN. § 659:51 (2007); N.M. STAT. § 1-6-25 (West 2003); N.Y. ELEC. LAW § 8-506 (Mckinney 2007); 25 PA. STAT. § 3146.8(e) (2007); S.C. CODE ANN. § 7-13-810 (1976); TENN. CODE ANN. § 2-7-104(c) (2003); WIS. STAT. § 7.41 (West 2004); WIS. ADMIN. CODE El. Bd. § 9.04 (2007), WIS. ADMIN. CODE El. Bd. 9.05 (West 2007). Oregon is not included on the list because 100 percent of its votes are cast by mail; the state does allow challenges to those ballots. OR. REV. STAT. § 253.700 (2003).

188. See FINAL REPORT, *supra* note 10, at 4–6.

<i>National Average</i>	12%
New Hampshire	9%
Connecticut	9%
Wisconsin	9%
Missouri	7%
Idaho	6%
Massachusetts	5%
Kentucky	5%
Delaware	5%
Arkansas	4%
New York	4%
Illinois	4%
Tennessee	2%
Louisiana	1%
Maine	0%
South Carolina	0%

Six of the twenty-two states are above the national average in percentage of votes cast by absentee, and sixteen are below the average. They also represent a wide range of geography.

The procedures for challenging absentee ballots vary less than those for challenging voters at the polls. This may reflect in part the different nature of the events. A poll challenger is faced with a voter who is present at the time to cast a ballot, and who may or may not come with identification or clear answers to questions to resolve the challenge. The challenge must be resolved quickly to determine whether or not the voter can vote (or a provisional ballot can be accepted, which effectively puts off the challenge determination to a later date). When an absentee ballot is challenged, the ballot is a fixed document, already containing information about the voter (otherwise it could not have been sent and returned successfully), and without an impatient voter present, there is time to evaluate and investigate the information available.

Illinois allows poll watchers to observe the processing of absentee ballots and issue challenges, and the state also accounts for a unique aspect of absentee ballots: the signature match.¹⁸⁹ Poll watchers in Illinois have a specific right to observe the election judges comparing the signature on the ballot envelope with the

189. 10 ILL. COMP. STAT. § 5/19-10 (West 2003).

signature on the voter's registration card.¹⁹⁰ This allows them the opportunity to challenge not only based on the eligibility of the registered voter to cast a ballot, but also on a claim that the ballot was submitted by a person other than the registered voter (equivalent to the polling place impersonation in the Hoboken incident described earlier).

Kentucky's process for challenging absentee ballots includes an important time limitation. All absentee ballot challenges must be in writing and in the county clerk's possession by 10 a.m. on election day;¹⁹¹ however, absentee ballots will be counted if they are received by the time polls close.¹⁹² Consequently, a person wishing to challenge an absentee ballot either must make the challenge based solely on the request for the ballot, without knowing whether it was returned, or must forego the opportunity to challenge any ballots arriving on election day.

IV. CONCLUSION

A large majority of states—forty-five—allow pre-election voter registration challenges, polling place challenges, or both, by private, non-governmental parties. This represents a strong endorsement of private monitoring and enforcement processes by the states. As the use of absentee ballots expands, the number of states allowing challenges to absentee ballots may grow from its current twenty-two to reach a majority as well.

Private monitoring and enforcement can help identify errors and misconduct in elections, increasing the level of integrity beyond what government resources can provide. It also acknowledges the role of key stakeholders in what is, at its core, an adversarial system.

With high-profile, very close elections becoming frequent, the candidates and political parties whose success and—literally—fortunes depend upon winning those elections are likely to look more and more to available private enforcement mechanisms as a tool for gaining the tiny edge they need to finish on top. As the legislatures in Washington and Ohio showed, though, using private enforcement tools too aggressively can backfire by causing them to be restricted in the future.

190. *Id.*

191. KY. REV. STAT. ANN. § 117.087(1) (LexisNexis 2004).

192. *Id.*