

## **Returned Mail as a Determinant of Voter Residence Analysis of Data From Champaign County, Illinois**

### **Background**

Voter caging is a topic of considerable concern among election administration reformers and within the court system. Caging is the process whereby a political party or candidate challenges the right of a person to vote based upon the return of undeliverable first class mail sent to the voter.

There are two camps when it comes to voter caging. The first camp suggests that the return of the mail is evidence that people are being registered fraudulently. This camp then stands up and protects the integrity of the election process by challenging these people at the polling place.

The second camp suggests that returned mail is not certain proof of someone not living at an address. They are generally able to find a number of examples of people who have been challenged who actually live at the address for which they were challenged. The second camp claims that certain demographic groups, often minorities, are the targets of these caging operations.

One lawsuit filed in New Jersey resulted in a 1982 consent decree that forbade the Republican National Committee from engaging in voter caging. However, the consent decree did not include Republican candidates or other Republican Party organizations from conducting caging operations so the practice has continued in many places.

There is plenty of literature about voter caging. Project Vote released a legislative brief in February regarding it.<sup>1</sup> The Campaign Legal Center has opined upon it.<sup>2</sup> A U.S. Senate hearing<sup>3</sup> was held on the topic in 2008. Much is missing from the discussions, which center generally on anecdotal evidence of the flaws in caging efforts.

### **Beyond the Anecdotal Evidence**

What's largely missing from discussions about caging are two items. First, there has been little examination of voter caging in context of the entire election process and the laws that exist to protect the integrity of that process.

Second, there has been little in the way of hard data brought to this discussion. Chandler Davidson, Professor Emeritus at Rice University, testified in a U.S. Senate

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<sup>1</sup> Voter Intimidation And Caging, Project Vote, February 2010

<sup>2</sup> Vote Caging and the Attorney General , Campaign Legal Center Blog, July 23, 2007

<sup>3</sup>Protecting Voters at Home and at the Polls: Limiting Abusive Robocalls and Vote Caging Practices (Senate Committee on Rules and Administration, February 27, 2008)

hearing in support of anti-caging legislation and admitted that there was no evidence to support the disenfranchisement claims of caging opponents.<sup>4</sup>

## **Equal Protection Concerns**

One argument against voter caging has been a concern about equal protection. This is a valid concern where caging efforts target a protected class of voters. However, the equal protection issues generally raised are one-sided. There has been little discussion of the disparity between those who follow voter registration rules and those who ignore them.

Under Illinois law and the National Voter Registration Act (NVRA), voters who have moved within their election jurisdiction more than 4 weeks prior to the election and have not updated their registration are entitled to cast a Federal Only ballot, also known as “fail-safe” voting. The reasoning behind the fail-safe ballot is that a person might move and therefore not be accurately registered for local offices, but they remain in the same Congressional Districts and their address within the state is irrelevant regarding their votes for U.S. Senate and President. Fail-safe voting is a federal law and applies just to federal elections. Nothing in Illinois law extends it to the statewide offices, although in some states it extends down ballot. Voters in Illinois who move outside their election jurisdiction more than 4 weeks prior to the election and fail to update their registration are ineligible to vote at all.

Here is how fail safe voting played out In November 2008 in Champaign County. There were 1,670 people who cast a federal only or fail-safe ballot. These 1,670 people were registered at an address that they no longer lived at. There are a number of possibilities as to how they were identified as moving. Some would have self identified to the election judges. Some number were possibly identified by a neighborhood election judge who was aware that the voter had moved. In some rare incidents, perhaps another voter in the polling place identified them. There is no evidence of extensive voter integrity campaigns in Champaign County in 2008, but in previous elections those efforts would have resulted in some federal only ballots. Finally, these elements can work together to incline a voter to ask for a federal only ballot. If a voter walks into a polling place and does not know the election judges, he might decide to attest to an old address. However, if the voter is acquainted with an election judge, it might incline him to tell the truth and vote the federal ballot. Similarly, ongoing voter integrity efforts likely

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<sup>4</sup>Chairman Feinstein: All right. Let me ask a question of Professor Davidson. Is there any evidence that there is any electoral impact based on these challenge provisions? Has your historical research shown that caging has prevented illegitimate voters from voting or has it shown that caging practices have discouraged legitimate voters?

Mr. Davidson: Senator, there is very little good evidence on that subject, in part, because looking over the history of it, this has only become a national concern I think fairly recently, and there has been no scientific way in which people have been able to get a scientific sample of the precincts where the cagers show up or the challengers show up and I am just not aware of any hard data that would answer that question.

create a disincentive for voters to even attempt to provide false information.

Beyond the 1,670 people who voted a federal only ballot, the question is how many others cast a full ballot to which they weren't entitled. This is the flip side of the equal protection argument. The opponents of caging suggest that most efforts to find voters beyond those 1,670 are wrong. Under this less scrutinized process suggested by caging opponents, if you move prior to the registration deadline and are honest, you'll vote a federal only ballot. If you move prior to the registration deadline and happen to live next door to your election judge, you'll vote a federal only ballot. If you move prior to the registration deadline and are prepared to lie about it, you'll probably vote full ballot.

### **Do Voters Provide Inaccurate Information?**

In an effort to determine just how many voters caging might have caught, we examined mail returned by the post office from people who voted in the 2008 election in Champaign County.

In Champaign County, mailings of voter identification cards are routinely sent out. First, every registration that is received results in a new card being sent out. Second, various mailings are sent out regarding polling place changes, identification requirements, etc. When these mailings are returned, it begins the confirmation process under the NVRA. A forwardable confirmation mailing follows the returned mail, which was nonforwardable. The confirmation mailing results in the voter having their address updated, being removed, being put on inactive status, or being confirmed at the residence on their registration.

The evidence gathered indicates that both sides in this debate have some facts to support their positions. That some voters have mail returned when they in fact live at an address is undoubtable. That some voters are voting at addresses where they don't live is also undoubtable.

From August 2008 through February 2009, 653 pieces of mail were returned to the Champaign County Clerk's office that had been sent to voters who voted in the November 2008 election. In each instance, the owner of the property where the voter claimed to live was identified. Then, a letter was sent to the owner asking whether the voter in question lived there on November 4, 2008. Out of 653 letters sent, 390 responses were received. 221 of the responses indicated that person lived there. 169 responses indicated that the person did not live there.

For the purposes of this article, analysis is focused on the 169 responses that indicated the voter did not live at the address they provided. However, the 221 voters who did live at the address they provided are an important area that needs to be examined and will be in the coming months.

Of the responses where the person did not live there, the records were checked to

ascertain whether there was a data entry error. None were found. Interestingly, a number of property owners gave statements regarding when such individuals would likely have ceased residing at the residence. Some had leases that expired anywhere from August 2008 all the way back to 2005. Further research demonstrated that in some instances the new owners of a single family home had taken possession of the property from the voter who was identified as having moved.

Records from the Driver's License databases were also examined for other registration or residence data. In a number of instances, the data from the Driver's License data reinforced the information provided by the landlord or homeowner.

What is clear is that a number of individuals illegally voted in the November 5, 2008 election from an address where they no longer resided while 1,670 other voters in Champaign County were compelled to vote a federal only ballot because of their honesty or the presence of a person in the polling place with personal knowledge that the voter had moved.

### **Detailed Findings**

From August 1, 2008 until the close of registration, 22,687 people either registered for the first time in Champaign County or updated their registration, resulting in a new voter registration card being sent to them. Of those, 18,576 voted. 67 of those people who voted had mail returned prior to the election and have been subsequently confirmed as not having lived at the address where they voted. 33 others had mail returned in the three months after the election and have been subsequently confirmed as not living at the address.

Of the 169 voters who moved, 23 voted a federal only ballot and/or had an error by a judge that indicates they were attempting to provide correct information. While these voters did not live where they claimed to live, they also did not vote a full ballot. These voters may have been given inaccurate information about the law at some point.

Of the remaining voters, 10 were confirmed to have not been at the address by the new home owner who was at the address. In 21 instances, the landlord confirmed that the person had been a tenant, but that the lease had expired, as early as three years before. In 15 instances, information from the Driver's License database indicates the person had moved prior to the election. The remaining 100 voters were merely noted by the landlord as being nonresidents, without further comment.

13% of the voters who did not live at the address they provided cast an early or absentee ballot which is approximately the overall percentage of absentee and early voters in Champaign County in November 2008.

### **Polling Place Case Study**

Precincts 2 and 3 in the City of Champaign had a change of polling place to the Illini Union, necessitating a mailing to all voters. Because a mailing was sent prior to the

November 2008 election to every voter in those two precincts, this provides an interesting test case of what results a caging effort might have brought. A number of pieces of mail were returned from that mailing. However, for these purposes, we focus just on voters in the November 2008 election.

In all, 1,256 people voted from those two precincts. Of those 1,256 people, 50 had mail returned prior to election day. One presumes that in a caging operation, those 50 people would have been challenged, representing 4% of the voters in the precinct. We followed up with landlords and homeowners for each of the 50 people who had voted in November 2008 and had mail returned to us prior to the election. We received no response regarding 14 of the voters. Landlords or homeowners responded in 19 instances that the person in question did not live at the address. Four of those landlords indicated that the lease had expired. Three of those voters voted absentee through the mail with ballots going to Aurora, Rockford, and Atlanta, Georgia. Landlords and homeowners responded in 17 instances that the voter did live at the address.

This is proof that in this particular polling place, 1.5% of the voters voted illegally. If the voters registered at the residences where no response was received from the owner had a similar rate of not living at the residence, the number of illegal voters would rise to 26, or 2.1% of the voters on election day.

Interestingly, despite the absence of a caging effort in the polling place, 39 voters in the two precincts cast a federal only ballot, presumably because they self identified as no longer living at the address at which they were registered. These voters, generally because of their honesty, did not cast ballots for countywide offices, state legislature, and County Board races, the state constitutional convention question, and the school sales tax question which lost by a mere 262 votes. Those voters willing to give false information on the Application to Vote were able to cast votes on these issues when state law makes it clear that they shouldn't. In fact, if the voters had left Champaign County entirely, they would not have been entitled to vote at all.

In addition to those pieces of mail returned prior to the election, an additional 42 pieces of mail were returned after the November 2008 election for people who voted in the November 2008 election. Of those additional 42 pieces, 8 were people who landlords indicate no longer lived at the address, including one whose lease expired in 2007. By appearances, the mailing prior to the November 2008 election was delivered to these 42 voters even though a letter subsequent to the election was not delivered. These 8 voters would not have been identified in a caging effort, but in fact did not live at the address. Overall then, the number of voters identified as having moved is 27 out of the 61 responses. Extrapolated to cover the non-responses, there are an estimated total of 41 voters, or 3.3% of the overall vote in the precinct, who cast a ballot illegally.

The fact that some mail was delivered prior to the election, even though the voter did not live there, is an indication that the actual number of people who cast a ballot illegally can't be easily discerned without a comprehensive examination of the voter rolls by mailing to landlords and canvassing the precinct.

## **Where Caging Stands Today**

The literature on voter caging is long on anecdotes, but very thin on facts. It would be surprising if no one had been negatively impacted with caging and lost their right to vote. At the same time, it is noteworthy that no names of individuals disenfranchised are being brought up in newspaper articles, journals, or Congressional testimony.

For example, the Brennan Center in “A Guide to Voter Caging” provides just two names, Raven Shaffer and Catherine Herold. Both of these names are from news articles published prior to the November 2004 election and every indication is that the challenges to these two voters were not upheld.

Much of the concern on voter caging centers on the harassment aspect. A challenged voter through no fault of their own, has to go through extra steps to cast a ballot. How difficult that is depends on the state. For example, in the commonly cited State of Ohio, voters can be challenged and compelled to come to the Board of Elections office to make their case for inclusion on the voter rolls. That’s a substantial burden.

In their guide to voter caging, the Brennan Center lays out nine different examples of how mail might get returned through no fault of the voter and which might result in their being “caged”. What is missing from the Brennan Center analysis, and elsewhere in this discussion, is what actually happens at the polling place in the caging process. In Illinois the process is much less burdensome than Ohio and unlikely to result in disenfranchisement. For example, much has been made about the absence of apartment numbers on the returned mail from some caging efforts. However, in Champaign County, it would be expected that an election judge would deny the challenge to a voter if there was an apartment number on their registration but there was no apartment number on the returned mail.

This discretion by election judges in Illinois, and no doubt in many states, should be a factor in the discussion of caging, but generally is not. Of the nine cases presented by the Brennan Center, it would be expected that election judges would deny challenges in at least some instances for all nine cases. In other instances, these voters would be eligible for a provisional ballot, and if the voter was indeed eligible to vote, their ballot counted.

Further missing from these discussions are voter errors. There is little doubt that at times, errors on registrations are a result of an error by a voter. Much of the returned mail can be traced to that problem. An indictment of caging efforts due to errors by voters seems misplaced.

## **Voter Caging in the Future**

The facts presented demonstrate that a large number of people decide to illegally vote at an address where they no longer live. Further, another large number of people have mail returned despite living at their registered address. What policies might be pursued to meet the concerns of both camps in this debate?

### *Legal Clarifications*

One reason voter caging exists is because the process for election officials to challenge voters is unclear. Most officials will not change the status of a voter, even with a piece of returned mail, in the 90 days prior to the election, in accord with the provisions of the National Voter Registration Act. Empowering election officials, in a clear and fair manner, to flag registrations where the address is in question, is reasonable. It would also send a message, especially to those concerned about integrity, that election officials are taking such issues seriously.

### *Modernizing Registration*

One area to advance the resolution of this dilemma, is to proceed with some of the voter modernization proposals that have been proposed. On the state level, Arizona has led the way with a system that reduces some of the data problems that exist with paper forms. At the same time, special caution needs to be taken with some of the more expansive modernization schemes which would likely create even more problems as voters end up being shifted from one address to another without their knowledge or consent.

### *P.O. Boxes*

On a state level, there needs to be more clarity regarding P.O. Boxes and other alternative mailing addresses. One's residence is so vital to ballot entitlement that it is critical it be present on the registration, and in some way verifiable. It is easy to have sympathy for those who are burdened in some way by having to demonstrate their residence because they receive mail at a Post Office Box. At the same time, without some sort of verification, it would be easy for a person to be registered at an address that they don't live at, perhaps even unintentionally.

### *Pre-election challenges*

Laws which allow for pre-election challenges to voter eligibility, should be reconsidered, such as the little used provision in Illinois<sup>5</sup>. Forcing someone to come at a specific time to a particular location within days of an election in order to demonstrate their eligibility to vote is too great a burden. It seems that the least obtrusive and least burdensome place to address these challenges is on election day at the polling place, although statutes that would allow for additional methods of verification prior to the election could reduce that burden.

### *Third Party Challenges*

Legislation has been proposed which would essentially eliminate third party challenges to the right to vote at the polling place. A strong argument can be made that placing

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<sup>5</sup>10 ILCS 5/4-12

the ability to challenge the right to vote in the hands of an unofficial actor is not a good idea. However, a strong argument can also be made that third parties can provide a good mechanism to prevent voter fraud. In fact, third parties have been employed on both sides of this argument, both in attempts to prevent fraud and in assisting those whose registration status has been challenged.

Some of the blanket objections to third party interventions seem willfully oblivious to the large number of examples of voters fraudulently casting ballots from locations where they no longer live, as evidenced above. Once again, anecdotal evidence exists that both valid and invalid challenges can arise from a mailing.

States ought to consider a few ideas to mitigate problems with third party challenges. One would be to perhaps clear challenge lists prior to the election. Any group wanting to use a mailing to demonstrate that a person had moved would have to submit that list and documentation to the election authority. The list would then be sampled to verify that it was compiled in good faith. A caging effort that intentionally left off apartments, for example, could be summarily dismissed.

Another idea would be to clarify the role of judges in dismissing complaints at the polling place. Election judges should be granted more latitude to get to the bottom of these disputes. Along those same lines, eliminating provisional ballots and allowing the voting of a regular ballot where consensus exists between election judges and the election authority about the entitlement of the voter would also be a good idea.

Finally, policy makers need to remember that the provisional ballot exists for a reason. Ever since its advent on a national level, many have expressed consternation at the number of provisional ballots and the number that aren't counted. Of course, the goal should always be to have no provisional ballots. No voters making mistakes on their voter registrations. Every voter writing legibly. Every voter showing up at the correct polling place. Every clerk in every election office typing everything in right. Understanding that this would not happen, provisional voting was initiated. In a rather odd turn, there are people concerned about the fact that some people have to vote provisionally.

Provisional voting is the safety net for the election administration system as good common sense reforms move forward. One can hope that the need for provisional ballots can be reduced. But the voter integrity protections in the law should not be vitiated because people don't have confidence in provisional voting.

### *Empowering Voters*

Perhaps the best way to reduce these challenges is to empower voters. Every jurisdiction should have an ability for voters to check their voter registration status. And every voter ought to do it prior to the election. Those most concerned about protecting the right to vote should be encouraging this and election officials need to take advantage of new technologies, such as Twitter, Facebook, and RSS feeds to push this.

### *Post Election Audits*

Many people are calling for post election audits of ballots to assure the integrity of the ballot counting process. Such audits on registrations should also be considered. Where problems are found, they should be followed up on with the proper legal authorities.

### **Conclusion**

Problems with voter fraud, voter intimidation, and public confidence in the election process are not likely to go away soon. But a few common sense and relatively simple ideas can be implemented that, while not resolving the issue entirely, can go a long way to addressing all three of the issues. In the end, we need a system that encourages honesty, operates efficiently, increases the confidence of the public, and treats all voters equally under the law.