

voter identification laws, polling place locations, and distribution of voting machines as activities that can constitute voter intimidation.

Those interviewed also expressed opinions on the enforcement of voting fraud and voter intimidation laws. States have varying authorities to enforce these laws. In some states, enforcement is left to the county or district attorney, and in others enforcement is managed by the state's attorney general. Regardless, voting fraud and voter intimidation are difficult to prove and require resources and time that many local law enforcement and prosecutorial agencies do not have. Federal law enforcement and prosecutorial agencies have more time and resources but have limited jurisdiction and can only prosecute election crimes perpetrated in elections with a federal candidate on the ballot or perpetrated by a public official under the color of law. Those interviewed differed on the effectiveness of the current system of enforcement. Some allege that prosecutions are not sufficiently aggressive. Others feel that the current laws are sufficient for prosecuting fraud and intimidation.

A summary of the each of the interviews conducted is attached as Appendix "3".

### **Case Law and Statutes**

Consultants reviewed more than 40,000 cases that were identified using a series of search terms related to voting fraud and voter intimidation. The majority of these cases came from courts of appeal. This is not surprising, since most cases that are publicly reported come from courts of appeal. Very few cases that are decided at the district court level are reported for public review.

Very few of the identified cases were applicable to this study. Of those that were applicable, no apparent thematic pattern emerged. However, it did seem that the greatest number of cases reported on fraud and intimidation have shifted from past patterns of stealing votes to present problems with voter registration, voter identification, the proper delivery and counting of absentee and overseas ballots, provisional voting, vote buying, and challenges to felon eligibility.

A listing of the cases reviewed in this study is attached as Appendix "4".

### **Media Reports**

EAC consultants reviewed thousands of media reports concerning a wide variety of potential voting fraud or voter intimidation, including:

- absentee ballot fraud,
- voter registration fraud,
- voter intimidation and suppression,
- deceased voters on voter registration list and/or voting,
- multiple voting,
- felons voting,

- non-citizens voting,
- vote buying,
- deceptive practices, and
- fraud by election officials.

While these reports showed that there were a large number of allegations of voting fraud and voter intimidation, they provided much less information as to whether the allegations were ever formalized as complaints to law enforcement, whether charges were filed, whether prosecutions ensued, and whether any convictions were made. The media reports were enlightening as to the pervasiveness of complaints of fraud and intimidation throughout the country, the correlation between fraud allegations and the perception that the state was a “battleground” or “swing” state, and the fact that there were reports of almost all types of voting fraud and voter intimidation. However, these reports do not provide much data for analysis as to the number of complaints, charges and prosecutions of voting fraud and intimidation throughout the country.

## DEFINITION OF ELECTION CRIMES

From our study of available information on voting fraud and voter intimidation, we have learned that these terms mean many things to many different people. These terms are used casually to refer to anything from vote buying to refusing to register a voter to falsifying voter registration applications. Upon further inspection, however, it is apparent that there is no common understanding or agreement of what constitutes “voting fraud” and “voter intimidation.” Some think of voting fraud and voter intimidation only as criminal acts, while others include actions that may constitute civil wrongs, civil rights violations, and even legal activities. To arrive at a common definition and list of activities that can be studied, EAC assessed the appropriateness of the terminology that is currently in use and applied certain factors to limit the scope and reach of what can and will be studied by EAC in the future. As a result, EAC has adopted the use of the term “election crimes” for its future study.

### Current Terminology

The phrase “voting fraud” is really a misnomer for a concept that is much broader. “Fraud” is a concept that connotes an intentional act of deception, which may constitute either a criminal act or civil tort depending upon the willfulness of the act.

**Fraud**, n. 1. A knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment. • Fraud is usu[ally] a tort, but in some cases (esp. when the conduct is willful) it may be a crime.

Black’s Law Dictionary, Eighth Edition, p. 685.

“Voting” is the act of casting votes to decide an issue or contest. Black’s Law Dictionary, Eighth Edition, p. 1608. Using these terms to form a definition of “voting fraud,” it means fraudulent or deceptive acts committed to influence the act of voting.

Thus, a voter who intentionally impersonates another registered voter and attempts to vote for that person would be committing "voting fraud." Similarly, a person who knowingly provides false information to a voter about the location of the voter's polling place commits fraud on the voter.

The phrase "voting fraud" does not capture a myriad of other criminal acts that are related to elections which are not related to the act of voting and/or do not involve an act of deception. For example, "voting fraud" does not capture actions or willful inaction in the voter registration process. When an election official willfully and knowingly refuses to register to vote a legally eligible person it is a crime. This is a crime that involves neither the act of voting nor an act of deception.

To further complicate matters, the phrases "voting fraud" and "voter intimidation" are used to refer to actions or inactions that are criminal as well as those that are potentially civil wrongs and even those that are legal. Obviously, criminal acts and civil wrongs are pursued in a very different manner. Criminal acts are prosecuted by the local, state or federal government. Generally, civil wrongs are prosecuted by the individual who believes that they were harmed. In some cases, when civil rights are involved, the Civil Rights Division of the Department of Justice may become involved.

### **New Terminology**

The goal of this study was to develop a common definition of what is generically referred to as "voting fraud" and "voter intimidation" that would serve as the basis for a future comprehensive study of the existence of these problems. Because the current terminology has such a variety of applications and meanings, "voting fraud" and "voter intimidation" can be read to encompass almost any bad act associated with an election. Such broad terminology is not useful in setting the boundaries of a future study. A definition must set parameters for future study by applying limitations on what is included in the concepts to be studied. The current terminology applies no such limitations.

Thus, EAC has adopted the use of the phrase "election crimes" to limit the scope of its future study. This term captures all crimes related to the voter registration and voting processes and excludes civil wrongs and non-election related crimes. EAC adopted this definition because it better represents the spectrum of activities that we are able to and desire to study. In addition, we recognize that the resources, both financial and human capital, needed to study all "voting fraud" and "voter intimidation," including criminal acts, civil actions, as well as allegations of voter suppression through the use of legal election processes are well beyond the resources available to EAC. Finally, by limiting this definition to criminal acts, EAC can focus its study on a set of more readily measurable data. Criminal behavior is readily defined through state and federal statutes and is prosecuted by government agencies. This is not the case with civil matters. Civil actions can be prosecuted by individuals and/or government entities. Furthermore, what constitutes civil action is far less defined, subject to change, and can vary from case to

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case. A more complete discussion of the concept of “election crimes” follows along with a list of excluded actions.

### **The Definition of an Election Crime for Purposes of this Study**

Election crimes are intentional acts or willful failures to act, prohibited by state or federal law, that are designed to cause ineligible persons to participate in the election process; eligible persons to be excluded from the election process; ineligible votes to be cast in an election; eligible votes not to be cast or counted; or other interference with or invalidation of election results. Election crimes generally fall into one of four categories: acts of deception, acts of coercion, acts of damage or destruction, and failures or refusals to act.

Election crimes can be committed by voters, candidates, election officials, or any other members of the public who desire to criminally impact the result of an election. However, crimes that are based upon intentional or willful failure to act assume that a duty to act exists. Election officials have affirmative duties to act with regard to elections. By and large, other groups and individuals do not have such duties.

The victim of an election crime can be a voter, a group of voters, an election official, a candidate, or the public in general. Election crimes can occur during any stage of the election process, including but not limited to qualification of candidates; voter registration; campaigning; voting system preparation and programming; voting either early, absentee, or on election day; vote tabulation; recounts; and recalls.

The following are examples of activities that may constitute election crimes. This list is not intended to be exhaustive, but is representative of what states and the federal government consider criminal activity related to elections.

#### ***Acts of Deception***

- Knowingly causing to be mailed or distributed, or knowingly mailing or distributing, literature that includes false information about the voter’s precinct or polling place, the date and time of the election or a candidate;
- Possessing an official ballot outside the voting location, unless the person is an election official or other person authorized by law or local ordinance to possess a ballot outside of the polling location;
- Making or knowingly possessing a counterfeit of an official election ballot;
- Signing a name other than his/her own to a petition proposing an initiative, referendum, recall, or nomination of a candidate for office;
- Knowingly signing more than once for the proposition, question, or candidate in one election;
- Signing a petition proposing an initiative or referendum when the signer is not a qualified voter.
- Voting or attempting to vote in the name of another person;
- Voting or attempting to vote more than once during the same election;

- Intentionally making a false affidavit, swearing falsely, or falsely affirming under an oath required by a statute regarding their voting status, including when registering to vote, requesting an absentee ballot or presenting to vote in person;
- Registering to vote without being entitled to register;
- Knowingly making a materially false statement on an application for voter registration or re-registration; and
- Voting or attempting to vote in an election after being disqualified or when the person knows that he/she is not eligible to vote.

***Acts of Coercion***

- Using, threatening to use, or causing to be used force, coercion, violence, restraint, or inflicting, threatening to inflict, or causing to be inflicted damage harm, or loss, upon or against another person to induce or compel that person to vote or refrain from voting or to register or refrain from registering to vote;
- Knowingly paying, offering to pay, or causing to be paid money or other thing of value to a person to vote or refrain from voting for a candidate or for or against an election proposition or question;
- Knowingly soliciting or encouraging a person who is not qualified to vote in an election;
- Knowingly challenging a person's right to vote without probable cause or on fraudulent grounds, or engaging in mass, indiscriminate, and groundless challenging of voters solely for the purpose of preventing voter from voting or to delay the process of voting;
- As an employer, attempting by coercion, intimidation, threats to discharge or to lessen the remuneration of an employee, to influence his/her vote in any election, or who requires or demands an examination or inspection by himself/herself or another of an employee's ballot;
- Soliciting, accepting, or agreeing to accept money or other valuable thing in exchange for signing or refraining from signing a petition proposing an initiative;
- Inducing or attempting to induce an election official to fail in the official's duty by force, threat, intimidation, or offers of reward;
- Directly or through any other person advancing, paying, soliciting, or receiving or causing to be advanced, paid, solicited, or received, any money or other valuable consideration to or for the use of any person in order to induce a person not to become or to withdraw as a candidate for public office; and
- Soliciting, accepting, or agreeing to accept money or other thing of value in exchange for registering to vote.

***Acts of Damage or Destruction***

- Destroying completed voter registration applications;
- Removing or destroying any of the supplies or other conveniences placed in the voting booths or compartments;
- Removing, tearing down, or defacing election materials, instructions or ballots;

- Fraudulently altering or changing the vote of any elector, by which such elector is prevented from voting as the person intended;
- Knowingly removing, altering, defacing or covering any political sign of any candidate for public office for a prescribed period prior to and following the election;
- Intentionally changing, attempting to change, or causing to be changed an official election document including ballots, tallies, and returns; and
- Intentionally delaying, attempting to delay, or causing to be delayed the sending of certificate, register, ballots, or other materials whether original or duplicate, required to be sent by jurisdictional law.

***Failure or Refusal to Act***

- Intentionally failing to perform an election duty, or knowingly committing an unauthorized act with the intent to effect the election;
- Knowingly permitting, making, or attempting to make a false count of election returns;
- Intentionally concealing, withholding, or destroying election returns or attempts to do so;
- Marking a ballot by folding or physically altering the ballot so as to recognize the ballot at a later time;
- Attempting to learn or actually and unlawfully learning how a voter marked a ballot;
- Distributing or attempting to distribute election material knowing it to be fraudulent;
- Knowingly refusing to register a person who is entitled to register under the rules of that jurisdiction;
- Knowingly removing the eligibility status of a voter who is eligible to vote; and
- Knowingly refusing to allow an eligible voter to cast his/her ballot.

**What is not an Election Crime for Purposes of this Study**

There are some actions or inactions that may constitute crimes or civil wrongs that we do not include in our definition of “election crimes.” All criminal or civil violations related to campaign finance contribution limitations, prohibitions, and reporting either at the state or federal level are not “election crimes” for purposes of this study and any future study conducted by EAC. Similarly, criminal acts that are unrelated to elections, voting, or voter registration are not “election crimes,” even when those offenses occur in a polling place, voter registration office, or a candidate’s office or appearance. For example, an assault or battery that results from a fight in a polling place or at a candidate’s office is not an election crime. Last, violations of ethical provisions and the Hatch Act are not “election crimes.” Similarly, civil or other wrongs that do not rise to the level of criminal activity (i.e., a misdemeanor, relative felony or felony) are not “election crimes.”

## **RECOMMENDATIONS ON HOW TO STUDY ELECTION CRIMES**

As a part of its study, EAC sought recommendations on ways that EAC can research the existence of election crimes. EAC consultants, the working groups and some of the persons interviewed as a part of this study provided the following recommendations.

### ***Recommendation 1: Conduct More Interviews***

Future activity in this area should include conducting additional interviews. In particular, more election officials from all levels of government, parts of the country, and political parties should be interviewed. It would also be especially beneficial to talk to law enforcement officials, specifically federal District Election Officers (“DEOs”) and local district attorneys, as well as civil and criminal defense attorneys.

### ***Recommendation 2: Follow Up on Media Research***

The media search conducted for this phase of the research was based on a list of search terms agreed upon by EAC consultants. Thousands of articles were reviewed and hundreds analyzed. Many of the articles contained allegations of fraud or intimidation. Similarly, some of the articles contained information about investigations into such activities or even charges brought. Additional media research should be conducted to determine what, if any, resolutions or further activity there was in each case.

### ***Recommendation 3: Follow Up on Allegations Found in Literature Review***

Many of the allegations made in the reports and books that were analyzed and summarized by EAC consultants were not substantiated and were certainly limited by the date of publication of those pieces. Despite this, such reports and books are frequently cited by various interested parties as evidence of fraud or intimidation. Further research should include follow up on the allegations discovered in the literature review.

### ***Recommendation 4: Review Complaints Filed With “MyVote1” Voter Hotline***

During the 2004 election and the statewide elections of 2005, the University of Pennsylvania led a consortium of groups and researchers in conducting the MyVote1 Project. This project involved using a toll-free voter hotline that voters could call for poll locations, be transferred to a local hotline, or leave a recorded message with a complaint. In 2004, this resulted in more than 200,000 calls received and more than 56,000 recorded complaints.

Further research should be conducted using the MyVote1 data with the cooperation of the project leaders. While perhaps not a fully scientific survey given the self-selection of the callers, the information regarding 56,000 complaints may provide insight into the problems voters may have experienced, especially issues regarding intimidation or suppression.

***Recommendation 5: Further Review of Complaints Filed With U.S. Department of Justice***

According to a recent GAO report, the Voting Section of the Civil Rights Division of the Department of Justice has a variety of ways it tracks complaints of voter intimidation. Attempts should be made to obtain relevant data, including the telephone logs of complaints and information from the Interactive Case Management (ICM) system. Further research should also include a review and analysis of the DOJ/OPM observer and “monitor field reports” from Election Day.

***Recommendation 6: Review Reports Filed By District Election Officers***

Further research should include a review of the reports that must be filed by every District Election Officer to the Public Integrity Section of the Criminal Division of the Department of Justice. The DEOs play a central role in receiving reports of voting fraud and investigating and pursuing them. Their reports back to the Department would likely provide tremendous insight into what actually transpired during the last several elections. Where necessary, information could be redacted or made confidential.

***Recommendation 7: Attend Ballot Access and Voting Integrity Symposium***

Further activity in this area should include attending the next Ballot Access and Voting Integrity Symposium. At this conference, prosecutors serving as District Election Officers in the 94 U.S. Attorneys’ Offices obtain annual training on fighting election fraud and voting rights abuses. These conferences are sponsored by the Voting Section of the Civil Rights Division and the Public Integrity Section of the Criminal Division, and feature presentations by Civil Rights officials and senior prosecutors from the Public Integrity Section and the U.S. Attorneys’ Offices. By attending the symposium researchers could learn more about the following: how District Election Officers are trained; how information about previous election and voting issues is presented; and how the Voting Rights Act, the criminal laws governing election fraud and intimidation, the National Voter Registration Act, and the Help America Vote Act are described and explained to participants.

***Recommendation 8: Conduct Statistical Research***

EAC should measure voting fraud and intimidation using interviews, focus groups, and a survey and statistical analysis of the results of these efforts. The sample should be based on the following factors:

- Ten locations that are geographically and demographically diverse where there have been many reports of fraud and/or intimidation;
- Ten locations (geographically and demographically diverse) that have not had many reports of fraud and/or intimidation;

EAC should also conduct a survey of elections officials, district attorneys, and district election officers. The survey sample should be large in order to be able to get the necessary subsets, and it must include a random set of counties where there have and have not been a large number of allegations.

***Recommendation 9: Explore Improvements to Federal Law***

Future researchers should review federal law to explore ways to make it easier to impose either civil or criminal penalties for acts of intimidation that do not necessarily involve racial animus and/or a physical or economic threat.

***Recommendation 10: Use Observers to Collect Data on Election Day***

Use observers to collect data regarding fraud and intimidation at the polls on Election Day. There may be some limitations to the ability to conduct this type of research, including difficulty gaining access to polling places for the purposes of observation, and concerns regarding how the observers themselves may inadvertently or deliberately influence the occurrence of election crimes.

***Recommendation 11: Study Absentee Ballot Fraud***

Because absentee ballot fraud constitutes a large portion of election crimes, a stand-alone study of absentee ballot fraud should be conducted. Researchers should look at actual cases to see how absentee ballot fraud schemes are conducted in an effort to provide recommendations on more effective measures for preventing fraud when absentee ballots are used.

***Recommendation 12: Use Risk Analysis Methodology to Study Fraud***

Conduct an analysis of what types of fraud people are most likely to commit. Researchers will use that risk analysis to rank the types of fraud based on the “ease of commission” and the impact of the fraud.

***Recommendation 13: Conduct Research Using Database Comparisons***

Researchers should compare information on databases to determine whether the voter rolls contain deceased persons and felons. In addition, the voter rolls can then be compared with the list of persons who voted to determine whether a vote was recorded by someone who is deceased or if felons are noted as having voted.

***Recommendation 14: Conduct a Study of Deceptive Practices***

The working group discussed the increasing use of deceptive practices, such as flyers and phone calls with false and/or intimidating information, to suppress voter participation. A number of groups, such as the Department of Justice, the EAC, and organizations such as the Lawyers Committee for Civil Rights, keep phone logs regarding complaints of such

practices. These logs should be reviewed and analyzed to see how and where such practices are being conducted and what can be done about them.

***Recommendation 15: Study Use of HAVA Administrative Complaint Procedure as Vehicle for Measuring Fraud and Intimidation***

EAC should study the extent to which states are utilizing the administrative complaint procedure mandated by HAVA. In addition, the EAC should study whether data collected through the administrative complaint procedure can be used as another source of information for measuring fraud and intimidation.

***Recommendation 16: Examine the Use of Special Election Courts***

Given that many state and local judges are elected, it may be worth exploring whether special election courts should be established to handle fraud and intimidation complaints before, during, and after Election Day. Pennsylvania employs such a system and could investigate how well that system is working.

**Accepted Recommendations**

There has never been a comprehensive, national study that gathered data regarding all claims, charges, and prosecutions of voting crimes. EAC feels that a comprehensive study is the most important research that it can offer the election community and the public. As such, EAC has adopted all or a part of six of the 16 recommendations made by EAC consultants and the working group.

While several of the other recommendations could be used to obtain more anecdotal information regarding election crimes, EAC believes that what is needed is a comprehensive survey and study of the information available from investigatory agencies, prosecutorial bodies and courts on the number and types of complaints, charges and prosecutions of election crimes. Additional media reviews, additional interviews and the use of observers to collect information from voters on Election Day will only serve to continue the use of anecdotal data to report on election crimes. Hard data on complaints, charges and prosecutions exists and we should gather and use that data, rather than rely on the perceptions of the media or the members of the public as to what might be fraud or intimidation.

Some of the recommendations are beyond the scope of the current study. While election courts may be a reasonable conclusion to reach after we determine the volume and type of election crimes being reported, charged or prosecuted, it is premature to embark on an analysis of that solution without more information. Last, some of the recommendations do not support a comprehensive study of election crimes. While a risk analysis might be appropriate in a smaller scale study, EAC desires to conduct a broader survey to avoid the existing problem of anecdotal and limited scope of information.

In order to further its goal of developing a comprehensive data set regarding election crimes and the laws and procedures used to identify and prosecute them, EAC intends to engage in the following research activities in studying the existence and enforcement of election crimes:

***Survey Chief Election Officers Regarding Administrative Complaints***

Likely sources of complaints concerning election crimes are the administrative complaint processes that states were required to establish to comply with Section 402 of HAVA. These complaint procedures were required to be in place prior to a state receiving any funds under HAVA. Citizens are permitted to file complaints alleging violations of HAVA Title III provisions under these procedures with the state's chief election official. Those complaints must be resolved within 60 days. The procedures also allow for alternative dispute resolution of claims. Some states have expanded this process to include complaints of other violations, such as election crimes.

In order to determine how many of these complaints allege the commission of election crimes, EAC will survey the states' chief election officers regarding complaints that have been filed, investigated, and resolved since January 1, 2004. EAC will use the definition of election crimes provided above in this report in its survey so that data regarding a uniform set of offenses will be collected.

***Survey State Election Crime Investigation Units Regarding Complaints Filed and Referred***

Several chief state election officials have developed investigation units focused on receiving, investigating, and referring complaints of election crimes. These units were established to bolster the abilities of state and local law enforcement to investigate allegations of election crimes. California, New York and Florida are just three examples of states that have these types of units.

EAC will use a survey instrument to gather information on the numbers and types of complaints that have been received by, investigated, and ultimately referred to local or state law enforcement by election crime investigation units since January 1, 2004. These data will help us understand the pervasiveness of perceived fraud, as well as the number of claims that state election officials felt were meritorious of being referred to local and state law enforcement or prosecutorial agencies for further action.

***Survey Law Enforcement and Prosecutorial Agencies Regarding Complaints and Charge of Voting Crimes***

While voters, candidates and citizens may call national hotlines or the news media to report allegations of election crimes, it is those complaints that are made to law enforcement that can be investigated and ultimately prosecuted. Thus, it is critical to the study of election crimes to obtain statistics regarding the number and types of complaints that are made to law enforcement, how many of those complaints result in the perpetrator

being charged or indicted, and how many of those charges or indictments result in pleas or convictions.

Thus, EAC will survey law enforcement and prosecutorial agencies at the local, state and federal level to determine the number and types of complaints, charges or indictments, and pleas or convictions of election crimes since January 1, 2004. In addition, EAC will seek to obtain an understanding of why some complaints are not charged or indicted and why some charges or indictments are not prosecuted.

*Analyze Survey Data in Light of State Laws and Procedures*

Once a reliable data set concerning the existence and enforcement of election crimes is assembled, a real analysis of the effectiveness of fraud prevention measures can be conducted. For example, data can be analyzed to determine if criminal activities related to elections are isolated to certain areas or regions of the country. Data collected from the election official surveys can be compared to the data regarding complaints, charges and prosecutions gathered from the respective law enforcement and prosecutorial agencies in each jurisdiction. The effect and/or effectiveness of provisions such as voter identification laws and challenger provisions can be assessed based on hard data from areas where these laws exist. Last, analyses such as the effectiveness of enforcement can be conducted in light of the resources available to the effort.

**CONCLUSION**

Election crimes are nothing new to our election process. The pervasiveness of these crimes and the fervor with which they have been enforced has created a great deal of debate among academics, election officials, and voters. Past studies of these issues have been limited in scope and some have been riddled with bias. These are issues that deserve comprehensive and nonpartisan review. EAC, through its clearinghouse role, will collect and analyze data on election crimes throughout the country. These data not only will tell us what types of election crimes are committed and where fraud exists, but also inform us of what factors impact the existence, prevention, and prosecution of election crimes.

**EAC REPORT ON VOTER FRAUD AND VOTER INTIMIDATION STUDY**

**INTRODUCTION**

Voter fraud and intimidation is a phrase familiar to many voting-aged Americans. However, it means different things to different people. Voter fraud and intimidation is a phrase used to refer to crimes, civil rights violations, and at times even the correct application of state or federal laws to the voting process. Past study of this topic has been as varied as its perceived meaning. In an effort to help understand the realities of voter fraud and voter intimidation in our elections, EAC has begun this, phase one, of a comprehensive study on election crimes. In this phase of its examination, EAC has developed a definition of election crimes and adopted some research methodology on how to assess the true existence and enforcement of election crimes in this country.

**PURPOSE AND METHODOLOGY OF THE EAC STUDY**

Section 241 of the Help America Vote Act of 2002 (HAVA) calls on the U.S. Election Assistance Commission (EAC) to research and study various issues related to the administration of elections. During Fiscal Year 2006, EAC began projects to research several of the listed topics. These topics for research were chosen in consultation with the EAC Standards Board and Board of Advisors. Voter fraud and voter intimidation was a topic that EAC as well as its advisory boards felt were important to study to help improve the administration of elections for federal office.

EAC began this study with the intention of identifying a common understanding of voter fraud and intimidation and devising a plan for a comprehensive study of these issues. This study was not intended to be a comprehensive review of existing voter fraud and voter intimidation actions, laws, or prosecutions. That type of research is well beyond the basic understanding that had to be established regarding what is commonly referred to as voter fraud and voter intimidation. Once that understanding was reached, a definition had to be crafted to refine and in some cases limit the scope of what reasonably can be researched and studied as evidence of voter fraud and voter intimidation. That definition will serve as the basis for recommending a plan for a comprehensive study of the area.

To accomplish these tasks, EAC employed two consultants, who along with EAC staff and interns conducted the research that forms the basis of this report. Consultants were chosen based upon their experience with the topic. In addition, consultants were chosen to assure a bipartisan representation in this study. The consultants and EAC staff were charged (1) to research the current state of information on the topics of voter fraud and voter intimidation, (2) to develop a uniform definition of voter fraud and voter intimidation, and (3) to propose recommended strategies for researching this subject.

EAC consultants reviewed existing studies, articles, reports and case law on voter fraud and intimidation. In addition, EAC consultants conducted interviews with selected

experts in the field. Last, EAC consultants and staff presented their study to a working group that provided feed back. The working group participants were:

**The Honorable Todd Rokita**  
Indiana Secretary of State  
Member, EAC Standards Board and the  
Executive Board of the Standards Board

**Kathy Rogers**  
Georgia Director of Elections, Office of  
the Secretary of State  
Member, EAC Standards Board

**J.R. Perez**  
Guadalupe County Elections  
Administrator, Texas

**Barbara Arnwine**  
Executive Director, Lawyers Committee  
for Civil Rights under Law  
Leader of Election Protection Coalition

**Benjamin L. Ginsberg**  
Partner, Patton Boggs LLP  
Counsel to national Republican  
campaign committees and Republican  
candidates

**Robert Bauer**  
Chair of the Political Law Practice at the  
law firm of Perkins Coie, District of  
Columbia  
National Counsel for Voter Protection,  
Democratic National Committee

**Mark (Thor) Hearne II**  
Partner-Member, Lathrop & Gage, St  
Louis, Missouri  
National Counsel to the American  
Center for Voting Rights

**Barry Weinberg**  
Former Deputy Chief and Acting Chief,  
Voting Section, Civil Rights Division,  
U.S. Department of Justice

*Technical Advisor:*

**Craig Donsanto**  
Director, Election Crimes Branch, U.S.  
Department of Justice

Throughout the process, EAC staff assisted the consultants by providing statutes and cases on this subject as well as supervision on the direction, scope and product of this research.

The consultants drafted a report for EAC that included their summaries of existing laws, cases, studies and reports on voter fraud and intimidation as well as summaries of the interviews that they conducted. The draft report also provided a definition of voter fraud and intimidation and made certain recommendations developed by the consultants or by the working group on how to pursue further study of this subject. This document was vetted and edited to produce this final report.

## **EXISTING INFORMATION ABOUT FRAUD AND INTIMIDATION**

To begin our study of voter fraud and voter intimidation, EAC consultants reviewed the current body of information on voter fraud and intimidation. What the world knows about these issues comes largely from a very limited body of reports, articles and books. There are volumes of case law and statutes in the various states that also impact our understanding of what actions or inactions are legally considered fraud or intimidation.

Last, there is anecdotal information available through media reports and interviews with persons who have administered elections, prosecuted fraud, and studied these problems. All of these resources were used by EAC consultants to provide an introductory look at the available knowledge of voter fraud and voter intimidation.

### **Reports and Studies of Voter Fraud and Intimidation**

Over the years, there have been a number of studies conducted about the concepts of voter fraud and voter intimidation. EAC reviewed many of these studies and reports to develop a base-line understanding of the information that is currently available about voter fraud and voter intimidation. EAC consultants reviewed the following articles, reports and books, summaries of which are available in Appendix “\_\_”:

#### **Articles and Reports**

- People for the American Way and the NAACP, “The Long Shadow of Jim Crow,” December 6, 2004.
- Laughlin McDonald, “The New Poll Tax,” *The American Prospect* vol. 13 no. 23, December 30, 2002.
- Wisconsin Legislative Audit Bureau, “An Evaluation: Voter Registration Elections Board” Report 05-12, September, 2005.
- Milwaukee Police Department, Milwaukee County District Attorney’s Office, Federal Bureau of Investigation, United States Attorney’s Office “Preliminary Findings of Joint Task Force Investigating Possible Election Fraud,” May 10, 2005.
- National Commission on Federal Election Reform, “Building Confidence in U.S. Elections,” Center for Democracy and Election Management, American University, September 2005.
- The Brennan Center for Justice at NYU School of Law and Spencer Overton, Commissioner and Law Professor at George Washington University School of Law “Response to the Report of the 2005 Commission on Federal Election Reform,” September 19, 2005.
- Chandler Davidson, Tanya Dunlap, Gale Kenny, and Benjamin Wise, “Republican Ballot Security Programs: Vote Protection or Minority Vote Suppression – or Both?” A Report to the Center for Voting Rights & Protection, September, 2004.
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- Andrew Gumbel, *Steal this Vote: Dirty Elections and the Rotten History of Democracy in American*, Nation Books, 2005.
- Tracy Campbell, *Deliver the Vote: A History of Election Fraud, An American Political Tradition – 1742-2004*, Carroll & Graf Publishers, 2005.
- David E. Johnson and Jonny R. Johnson, *A Funny Thing Happened on the Way to the White House: Foolhardiness, Folly, and Fraud in the Presidential Elections, from Andrew Jackson to George W. Bush*, Taylor Trade Publishing, 2004.
- Mark Crispin Miller, *Fooled Again*, Basic Books, 2005.

During our review of these documents, we learned a great deal about the type of research that has been conducted in the past concerning voter fraud and voter intimidation. None of the studies or reports was based on a comprehensive study, survey or review of all allegations, prosecutions or convictions of state or federal crimes related to voter fraud or voter intimidation. Most reports focused on a limited number of case studies or instances of alleged voter fraud or intimidation. For example, "Shattering the Myth: An Initial Snapshot of Voter Disenfranchisement in the 2004 Elections," a report produced by the People for the American Way, focused exclusively on citizen reports of fraud or intimidation to the Election Protection program during the 2004 presidential election. Similarly, reports produced annually by the Department of Justice, Public Integrity Division, deal exclusively with crimes reported to and prosecuted by the United States Attorneys and/or the Department of Justice through the Public Integrity Section.

It is also apparent from a review of these articles and books that there is no consensus on the pervasiveness of voter fraud and voter intimidation. Some reports, such as "Building Confidence in U.S. Elections," suggest that there is little or no evidence of extensive fraud in U.S. elections or of multiple voting. This conflicts directly with other reports, such as the "Preliminary findings of Joint Task Force Investigating Possible Election Fraud," produced by the Milwaukee Police Department, Milwaukee County District Attorney's Office, FBI and U.S. Attorney's Office. That report cited evidence of more than 100 individual instances of suspected double-voting, voting in the name of persons who likely did not vote, and/or voting using a name believed to be fake.

Voter intimidation is also a topic of some debate. Generally, speaking there is little agreement on what constitutes actionable voter intimidation. Some studies and reports cover only intimidation that involves physical or financial threats, while others cover non-criminal intimidation even legal practices that they allege suppress the vote.

One point of agreement is that absentee voting and voter registration by third-party groups create opportunities for fraud. A number of studies cited circumstances in which voter registration drives have falsified voter registration applications or have destroyed voter registration applications of voters of a certain party. Others conclude that paying persons per voter registration application creates the opportunity and perhaps the incentive for fraud.

### **Interviews with Experts**

In addition to reviewing prior studies and reports on voter fraud and intimidation, EAC consultants interviewed a number of persons regarding their experiences and research of voter fraud and voter intimidation. Persons interviewed included

**Wade Henderson**  
Executive Director,  
Leadership Conference for Civil Rights

**Wendy Weiser**  
Deputy Director,  
Democracy Program, The Brennan  
Center

**William Groth**  
Attorney for the plaintiffs in the Indiana  
voter identification litigation

**Lori Minnite**  
Barnard College, Columbia University

**Neil Bradley**  
ACLU Voting Rights Project

**Nina Perales**  
Counsel,  
Mexican American Legal Defense and  
Education Fund

**Pat Rogers**  
Attorney, New Mexico

**Rebecca Vigil-Giron**  
Secretary of State, New Mexico

**Sarah Ball Johnson**  
Executive Director,  
State Board of Elections, Kentucky

**Stephen Ansolobhere**  
Massachusetts Institute of Technology

**Chandler Davidson**  
Rice University

**Tracey Campbell**  
Author, *Deliver the Vote*

**Douglas Webber**  
Assistant Attorney General, Indiana

**Heather Dawn Thompson**  
Director of Government Relations,  
National Congress of American Indians

**Jason Torchinsky**  
Assistant General Counsel,  
American Center for Voting Rights

**Robin DeJarnette**  
Executive Director,  
American Center for Voting Rights

**Evelyn Stratton**  
Justice  
Supreme Court of Ohio

**Harry Van Sickle**  
Commissioner of Elections,  
Pennsylvania

**Tony Sirvello**  
Executive Director  
International Association of Clerks,  
Recorders, Election Officials and  
Treasurers

**Joseph Sandler**  
Counsel  
Democratic National Committee

**Joseph Rich**  
Former Director  
Voting Section, Civil Rights Division  
U.S. Department of Justice

**John Ravitz**  
Executive Director  
New York City Board of Elections

**Craig Donsanto**  
Director, Public Integrity Section  
U.S. Department of Justice

**Sharon Priest**  
Former Secretary of State, Arkansas

**Kevin Kennedy**  
Executive Director  
State Board of Elections, Wisconsin

**John Tanner**  
Director  
Voting Section, Civil Rights Division  
U.S. Department of Justice

These interviews in large part confirmed the conclusions that were gleaned from the articles, reports and books that were analyzed. For example, the interviewees largely agreed that absentee balloting is subject to the greatest proportion of fraudulent acts, followed by vote buying and voter registration fraud. They similarly pointed to voter registration drives by third-party groups as a source of fraud, particularly when the workers are paid per registration. Many asserted that impersonation of voters is probably the least frequent type of fraud, citing as reasons that it was the most likely type of fraud to be discovered and that there are stiff penalties associated with this type of fraud.

Interviewees differed on what they believe constitutes actionable voter intimidation. Law enforcement and prosecutorial agencies tend to look to the criminal definitions of voter intimidation which generally require some threat of physical or financial harm. On the other hand, voter rights advocates tended to point to activities such as challenger laws, voter identification laws, the location of polling places, and distribution of voting machines as activities that can constitute voter intimidation.

Those interviewed also expressed opinions on the enforcement of voter fraud and voter intimidation laws. States have varying authorities to enforce these laws. In some states, enforcement is left to the county or district attorney, and in others enforcement is managed by the state's attorney general. Regardless, voter fraud and voter intimidation are difficult to prove and require resources and time that local law enforcement and prosecutorial agencies do not have. Federal law enforcement and prosecutorial agencies

have more time and resources but have limited jurisdiction. They can only prosecute crimes related to elections involving federal candidates. Those interviewed differed on the effectiveness of the current system of enforcement, including those that allege that prosecutions are not sufficiently aggressive and those that feel that the current laws are sufficient for prosecuting fraud and intimidation.

A summary of the each of the interviews conducted is attached as Appendix “ \_\_\_”.

### **Case Law and Statutes**

Consultants reviewed over 40,000 cases that were identified using a series of search terms related to voter fraud and voter intimidation. The majority of these cases came from appeal courts. This is not a surprising situation, since most cases that are publicly reported come from courts of appeal. Very few cases that are decided at the district court level are reported for public review.

Very few of the identified cases were applicable to this study. Of those that were applicable, no apparent thematic pattern emerged. However, it did seem that the greatest number of cases reported on fraud and intimidation have shifted from past patterns of stealing votes to present problems with voter registration, voter identification, the proper delivery and counting of absentee and overseas ballots, provisional voting, vote buying and challenges to felon eligibility.

A listing of the cases reviewed in this study is attached as Appendix “ \_\_\_”.

### **Media Reports**

EAC consultants reviewed thousands of media reports concerning a wide variety of potential voter fraud or voter intimidation, including:

- absentee ballot fraud,
- voter registration fraud,
- voter intimidation and suppression,
- deceased voters,
- multiple voting,
- felons voting,
- non-citizens voting,
- vote buying,
- deceptive practices, and
- fraud by election officials.

While these reports showed that there were a large number of allegations of voter fraud and voter intimidation, they provided much less information as to whether the allegations were ever formalized as complaints to law enforcement, whether charges were filed, whether prosecutions ensued, and whether any convictions were made. The media reports were enlightening as to the pervasiveness of complaints of fraud and intimidation

throughout the country, the correlation between fraud allegations and the perception that the state was a “battleground” or “swing” state, and the fact that there were reports of almost all types of voter fraud and voter intimidation. However, these reports do not provide much data for analysis as to the number of complaints, charge and prosecutions of voter fraud and intimidation throughout the country.

## **DEFINITION OF ELECTION CRIMES**

From our study of available information on voter fraud and voter intimidation, we have learned that these terms mean many things to many different people. These terms are used casually to refer to anything from vote buying to refusing to register a voter to falsifying voter registration applications. Upon further inspection, however, it is apparent that there is no common understanding of what is and what is not “voter fraud” and “voter intimidation.” Some think of voter fraud and voter intimidation only as criminal acts, while others include actions that may constitute civil wrongs, civil rights violations, and even legal and appropriate activities. In order to come up with a common definition and list of activities that can be studied, EAC assessed the appropriateness of the terminology that is currently in use and applied certain factors to limit the scope and reach of what can and will be studied by EAC in the future.

### **New Terminology**

The phrase “voter fraud” is really a misnomer for a concept that is much broader. “Fraud” is a concept that connotes an intentional act of deception, which may constitute either a criminal act or civil tort depending upon the willfulness of the act.

**Fraud**, n. 1. A knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment. • Fraud is usu. a tort, but in some cases (esp. when the conduct is willful) it may be a crime.

Black’s Law Dictionary, Eighth Edition, p. 685.

A “voter” is a person who is eligible to and engages in the act of voting. Black’s Law Dictionary, Eighth Edition, p. 1608. Using these terms to form a definition of “voter fraud,” it means fraudulent or deceptive acts committed by the voter or in which the voter is the victim. Thus, a voter who intentionally provides false information on a voter registration application or intentionally impersonates another registered voter and attempts to vote for that person would be committing “voter fraud.” Similarly, a person who knowingly provides false information to a voter about the location of the voter’s polling place commits fraud on the voter.

The phrase “voter fraud” does not capture a myriad of other criminal acts that are related to elections which are not perpetrated by the voter and/or do not involve an act of deception. For example, “voter fraud” does not capture actions or willful inaction by candidates and election workers. When an election official willfully and knowingly

refuses to register to vote an otherwise legally eligible person it is a crime. This is a crime that involves neither the voter nor an act of deception.

To further complicate matters, the phrases “voter fraud” and “voter intimidation” are used to refer to actions or inactions that are criminal as well as those that are potentially civil wrongs and even those that are legal. Obviously, criminal acts and civil wrongs are pursued in a very different manner. Criminal acts are prosecuted by the local, state or federal government. Generally, civil wrongs are prosecuted by the individual who believes that they were harmed. In some cases, when civil rights are involved, the civil division of the Department of Justice may become involved.

The goal of this study was to develop a common definition of what is generically referred to as “voter fraud” and “voter intimidation” that would serve as the basis of a future, comprehensive study of the existence of these problems. In order to meet that goal, we recognize that the current terminology does not accurately represent the spectrum of activities that we desire to study. Furthermore, we recognize that the resources, both financial and human capital, needed to study allegations and prosecutions of criminal acts, suits involving civil torts, and allegations of potential voter suppression through the use legal election processes are well beyond the resources available to EAC. As such, EAC has defined “election crimes,” a phrase that captures all crimes related to the voter registration and voting processes.

### **What is an Election Crime for Purposes of this Study**

Election crimes are intentional acts or willful failures to act, prohibited by state or federal law, that are designed to cause ineligible persons to participate in the election process, eligible persons to be excluded from the election process, ineligible votes to be cast in an election, eligible votes not to be cast or counted, or other interference with or invalidation of election results. Election crimes generally fall into one of four categories: acts of deception, acts of coercion, acts of damage or destruction, and failures or refusals to act.

Generally speaking, election crimes can be committed by voters, candidates, election officials, or any other members of the public that desire to criminally impact the result of an election. However, crimes that are based upon knowing or willful failure to act assume that a duty to act exists. Election officials have affirmative duties to act with regard to elections. By and large, other groups and individuals do not have such duties.

The victim of an election crime can be a voter, a group of voters, or the public, in general. Election crimes can occur during any stage of the election process, including but not limited to qualification of candidates; voter registration; campaigning; voting system preparation and programming; voting either early, absentee, or election day; vote tabulation; recounts; and recalls.

The following are examples of activities that may constitute election crimes. This list is not intended to be exhaustive, but is representative of what states and the federal government consider criminal activity related to elections.

*Acts of Deception*

- Knowingly causing to be mailed or distributed, or knowingly mailing or distributing, literature that includes false information about the voter's precinct or polling place, regarding the date and time of the election or regarding a candidate;
- Possessing an official ballot outside the voting location, unless the person is an election official or other person authorized by law or local ordinance possess a ballot outside of the polling location;
- Making, or knowingly possessing, a counterfeit of an official election ballot;
- Signing a name other than his/her own to a petition proposing an initiative, referendum, recall, or nomination of a candidate for office;
- Knowingly signing more than once for the proposition, question, or candidate at one election;
- Signing a petition proposing an initiative or referendum when the signer is not a qualified voter.
- Voting or attempting to vote in the name of another person;
- Voting or attempting to vote more than once at the same election;
- Intentionally making a false affidavit, swearing falsely, or falsely affirming under an oath required by a statute regarding their voting status, including when registering to vote, requesting an absentee ballot or presenting to vote in person;
- Registering to vote without being entitled to register;
- Knowingly making a material false statement on an application for voter registration or re-registration; and
- Voting or attempting to vote in an election after being disqualified or when the person knows that he/she is not eligible to vote.

*Acts of Coercion*

- Using, threatening to use, or causing to be used force, coercion, violence, restraint, or inflicting, threatening to inflict, or causing to be inflicted damage harm, or loss, upon or against another person to induce or compel that person to vote or refrain from voting or to register or refrain from registering to vote;
- Knowingly paying, offering to pay, or causing to be paid money or other valuable thing to a person to vote or refrain from voting for a candidate or for or against an election proposition or question;
- Knowingly soliciting or encouraging a person who is not qualified to vote in an election;
- Knowingly challenging a person's right to vote without probable cause or on fraudulent grounds, or engaging in mass, indiscriminate, and groundless challenging of voters solely for the purpose of preventing voter from voting or delay the process of voting;
- As an employer, attempting by coercion, intimidation, threats to discharge or to lessen the remuneration of an employee, to influence his vote in any election, or who requires or demands an examination or inspection by himself or another of an employee's ballot;

- Soliciting, accepting, or agreeing to accept money or other valuable thing in exchange for signing or refraining from signing a petition proposing an initiative;
- Inducing or attempting to induce an election official to fail in the official's duty by force, threat, intimidation, or offers of reward;
- Directly or through any other person advancing, paying, soliciting, or receiving or causing to be advanced, paid, solicited, or received, any money or other valuable consideration to or for the use of any person in order to induce a person not to become or to withdraw as a candidate for public office; and
- Soliciting, accepting, or agreeing to accept money or other valuable thing in exchange for registering to vote.

***Acts of Damage or Destruction***

- Removing or destroying any of the supplies or other conveniences placed in the voting booths or compartments for the purpose of enabling the voter to vote his or her ballot;
- Removing, tearing down, or defacing election materials, instructions or ballots;
- Fraudulently altering or changing the vote of any elector, by which such elector is prevented from voting as he intended;
- Knowingly removing, altering, defacing or covering any political sign of any candidate for public office for a prescribed period prior to and following the election;
- Intentionally changing, attempting to change, or causing to be changed an official election document including ballots, tallies, and returns; and
- Intentionally delaying, attempting to delay, or causing to be delayed the sending of certificate, register, ballots, or other materials whether original or duplicate, required to be sent by jurisdictional law.

***Failure or Refusal to Act***

- Intentionally failing to perform an election duty, or knowingly committing an unauthorized act with the intent to effect the election;
- Knowingly permitting, making, or attempting to make a false count of election returns;
- Intentionally concealing, withholding, or destroying election returns or attempts to do so;
- Marking a ballot by folding or physically altering the ballot so as to recognize the ballot at a later time;
- Attempting to learn or actually and unlawfully learning how a voter marked a ballot;
- Distributing or attempting to distribute election material knowing it to be fraudulent;
- Knowingly refusing to register a person who is entitled to register under the rules of that jurisdiction; and
- Knowingly refusing to allow an eligible voter to cast his/her ballot.

### **What is not an Election Crime for Purposes of this Study**

There are some actions or inactions that may constitute crimes or civil wrongs that we do not include in our definition of “election crimes.” All crimes or civil violations related to campaign finance reporting either at the state or federal level are not “election crimes” for purposes of this study and any future study conducted by EAC. Similarly, criminal acts that are unrelated to elections, voting, or voter registration are not “election crimes,” even when those offenses occur in a polling place, voter registration office, or a candidate’s office or appearance. For example, an assault or battery that results from a fight in a polling place or at a candidate’s office is not an election crime. Similarly, violations of ethical provisions such as the Hatch Act are not “election crimes.” Last, actions that do not rise to the level of criminal activity, that is a misdemeanor, relative felony or felony, are not “election crimes.”

### **RECOMMENDATIONS ON HOW TO STUDY ELECTION CRIMES**

As a part of its study, EAC sought recommendations on ways that EAC can study the existence of election crimes. EAC consultants developed recommendations. In addition, the working group and some of the persons interviewed as a part of this study provided recommendations.

#### ***Recommendation 1: Conduct More Interviews***

Future activity in this area should include conducting additional interviews. In particular, more election officials from all levels of government, parts of the country, and parties should be interviewed. It would also be especially beneficial to talk to people in law enforcement, specifically federal District Election Officers (“DEOs”) and local district attorneys, as well as civil and criminal defense attorneys.

#### ***Recommendation 2: Follow Up on Media Research***

The media search conducted for this phase of the research was based on a list of search terms agreed upon by EAC consultants. Thousands of articles were reviewed and hundreds analyzed. Many of the articles contain allegations of fraud or intimidation. Similarly, many of the articles contain information about investigations into such activities or even charges brought. Additional media research should be conducted to determine what, if any, resolutions or further activity there was in each case.

#### ***Recommendation 3: Follow Up on Allegations Found in Literature Review***

Many of the allegations made in the reports and books that were analyzed and summarized by EAC consultants were not substantiated and were certainly limited by the date of publication of those pieces. Despite this, such reports and books are frequently cited by various interested parties as evidence of fraud or intimidation. Further research should include follow up on the allegations discovered in the literature review.

***Recommendation 4: Review Complaints Filed With “MyVote1” Voter Hotline***

During the 2004 election and the statewide elections of 2005, the University of Pennsylvania led a consortium of groups and researchers in conducting the MyVote1 Project. This project involved using a 1-800 voter hotline where voters could call for poll location, be transferred to a local hotline, or leave a recorded message with a complaint. In 2004, this resulted in over 200,000 calls received and over 56,000 recorded complaints.

Further research should be conducted using the MyVote1 data with the cooperation of the project leaders. While perhaps not a fully scientific survey given the self-selection of the callers, the information regarding 200,000 complaints may provide a good deal of insight into the problems voters experienced, especially those in the nature of intimidation or suppression.

***Recommendation 5: Further Review of Complaints Filed With U.S. Department of Justice***

Although according to a recent GAO report the Voting Section of the Civil Rights Division of the Department of Justice has a variety in ways it tracks complaints of voter intimidation. Attempts should be made to obtain relevant data, including the telephone logs of complaints and information from the Interactive Case Management (ICM) system. Further research should also include a review and analysis of the DOJ/OPM observer and monitor field reports from Election Day.

***Recommendation 6: Review Reports Filed By District Election Officers***

Further research should include a review of the reports that must be filed by every District Election Officer to the Public Integrity Section of the Criminal Division of the Department of Justice. The DEOs play a central role in receiving reports of voter fraud and investigating and pursuing them. Their reports back to the Department would likely provide tremendous insight into what actually transpired during the last several elections. Where necessary, information could be redacted or made confidential.

***Recommendation 7: Attend Ballot Access and Voting Integrity Symposium***

Further activity in this area should include attending the next Ballot Access and Voting Integrity Symposium. At this conference, prosecutors serving as District Election Officers in the 94 U.S. Attorneys’ Offices obtain annual training on fighting election fraud and voting rights abuses. These conferences are sponsored by the Voting Section of the Civil Rights Division and the Public Integrity Section of the Criminal Division, and feature presentations by Civil Rights officials and senior prosecutors from the Public Integrity Section and the U.S. Attorneys’ Offices. By attending the symposium researchers could learn more about the following how District Election Officers are trained; how information about previous election and voting issues is presented; and how the Voting Rights Act, the criminal laws governing election fraud and intimidation, the

National Voter Registration Act, and the Help America Vote Act are described and explained to participants

***Recommendation 8: Conduct Statistical Research***

EAC should measure voter fraud and intimidation using interviews, focus groups, and a survey and statistical analysis of the results of these efforts. The sample should be based on the following factors:

- Ten locations that are geographically and demographically diverse where there have historically been many reports of fraud and/or intimidation;
- Ten locations (geographically and demographically diverse) that have not had many reports of fraud and/or intimidation;

EAC should also conduct a survey of elections officials, district attorneys, and district election officers. The survey sample should be large in order to be able to get the necessary subsets. The sample must include a random set of counties where there have and have not been a large number of allegations

***Recommendation 9: Explore Improvements to Federal Law***

Future researchers should review federal law to explore ways to make it easier to impose either civil or criminal penalties for acts of intimidation that do not necessarily involve racial animus and/or a physical or economic threat.

***Recommendation 10: Use Observers to Collect Data on Election Day***

Use observers to collect data regarding fraud and intimidation at the polls in on Election Day. There may be some limitations to the ability to conduct this type of research, including difficulty gaining access to polling places for the purposes of observation.

***Recommendation 11: Study Absentee Ballot Fraud***

Because absentee ballot fraud constitutes a large portion of election crimes, a stand-alone study of absentee ballot fraud should be conducted. Researchers should look at actual cases to see how absentee ballot fraud schemes are conducted in an effort to provide recommendations on more effective measures for preventing them.

***Recommendation 12: Use Risk Analysis Methodology to Study Fraud***

Conduct an analysis of what types of fraud people are most likely to commit. Researchers can use that risk analysis to rank the types of fraud based on the ease of commission and the impact of the fraud.

***Recommendation 13: Conduct Research Using Database Comparisons***

Researchers should compare information on databases to determine whether the voter rolls contain deceased persons and felons. In addition, the voter rolls can then be compared with the list of persons who voted to determine whether deceased voters or felons actually voted.

***Recommendation 14: Conduct a Study of Deceptive Practices***

The working group discussed the increasing use of deceptive practices, such as flyers with false and/or intimidating information, to suppress voter participation. A number of groups, such as the Department of Justice, the EAC, and organizations such as the Lawyers Committee for Civil Rights, keep phone logs regarding complaints of such practices. These logs should be reviewed and analyzed to see how such practices are being conducted and what can be done about them.

***Recommendation 15: Study Use of HAVA Administrative Complaint Procedure as Vehicle for Measuring Fraud and Intimidation***

EAC should study the extent to which states are actually utilizing the administrative complaint procedure mandated by HAVA. In addition, the EAC should study whether data collected through the administrative complaint procedure can be used as another source of information for measuring fraud and intimidation.

***Recommendation 16: Examine the Use of Special Election Courts***

Given that many state and local judges are elected, it may be worth exploring whether special election courts should be established to handle fraud and intimidation complaints before, during and after Election Day. Pennsylvania employs such a system and could investigate how well that system is working.

**Accepted Recommendations**

There has never been a comprehensive study that gathered data regarding all claims, charges and prosecutions of voting crimes. EAC feels that a comprehensive study is the most important research that it can offer the election community and the public. As such, EAC has adopted all or a part of six of the 16 recommendations made by EAC consultants and working group.

While several of the other recommendations could be used to obtain more anecdotal information regarding election crimes, EAC believes that what is needed is a comprehensive survey and study of the information available from investigatory agencies, prosecutorial bodies and courts on the number and types of complaints, charges and prosecutions of election crimes. Additional media reviews, additional interviews and the use of observers to collect information from voters on Election Day will only serve to continue the use of anecdotal data to report on election crimes. Hard data on complaints, charges and prosecutions exists and we should gather and use that data, rather than rely on the perceptions of the media or the members of the public as to what might be fraud or intimidation.

Some of the recommendations are beyond the scope of the current study. While election courts may be a reasonable conclusion to reach after we determine what volume and type of election crimes are being reported, charged or prosecuted, it is premature to embark on an analysis of that solution without more information. Last, some of the recommendations do not support a comprehensive study of election crimes. While a risk analysis might be appropriate in a smaller scale study, EAC desires to conduct a broader survey to avoid the existing problem of anecdotal and limited scope of information.

In order to further its goal of developing a comprehensive data set regarding election crimes, EAC intends to engage in the following research activities in studying the existence and enforcement of election crimes:

***Survey Chief Election Officers Regarding Administrative Complaints***

Likely sources of complaints concerning voting crimes are the administrative complaint processes that states were required to establish as a part of complying with HAVA. Those complaint procedures were required to be in place prior to a state receiving any funds under HAVA. Citizens are permitted to file complaints under those procedures with the state's chief election official and those complaints must be resolved within 60 days. The procedures also allow for alternative dispute resolution of claims.

In order to determine how many of these complaints allege the commission of election crimes, EAC will survey the states' chief election officers regarding complaints that have been filed, investigated and resolved since January 1, 2004. EAC will use the definition of election crimes provided above in this report in its survey so that data regarding a uniform set of offenses can be collected.

***Survey State Election Crime Investigation Units Regarding Complaints Filed and Referred***

Several chief state election officials have developed investigation units focused on receiving, investigating and referring complaints of election crimes. These units were established to bolster the abilities of state and local law enforcement to investigate allegations of election crimes. California, New York and Florida are just three examples of states that have these types of units.

EAC will use a survey instrument to gather information on the numbers and types of complaints that have been received by, investigated and ultimately referred to local or state law enforcement by election crime investigation units since January 1, 2004. This data will help us understand the pervasiveness of perceived fraud, as well as the number of claims that state election officials felt were meritorious of being referred to local and state law enforcement or prosecutorial agencies for further action.

***Survey Law Enforcement and Prosecutorial Agencies Regarding Complaints and Charge of Voting Crimes***

While voters, candidates and citizens may call national hotlines or the news media to report allegations of election crimes, it is those complaints that are made to law enforcement that can be investigated and ultimately prosecuted. Thus, it is critical to the study of election crimes to obtain statistics regarding the number and types of complaints that are made to law enforcement, how many of those complaints result in the perpetrator being charged or indicted, and how many of those charges or indictments result in pleas or convictions.

Thus, EAC will survey law enforcement and prosecutorial agencies at the local, state and federal level to determine the number and types of complaints, charges or indictments, and pleas or convictions of election crimes since January 1, 2004. In addition, EAC will seek to obtain an understanding of why some complaints are not charged or indicted and why some charges or indictments are not prosecuted.

#### *Analyze Survey Data in Light of State Laws and Procedures*

Once a reliable data set concerning the existence and enforcement of election crimes is assembled, a real analysis of the effectiveness of fraud prevention measures can be conducted. For example, data can be analyzed to determine if criminal activities related to elections are isolated to certain areas or regions of the country. Data collected from the election official surveys can be compared to the data regarding complaints, charges and prosecutions gathered from the respective law enforcement and prosecutorial agencies in each jurisdiction. The effect and/or effectiveness of provisions such as voter identification laws and challenger provisions can be assessed based on hard data from areas where these laws exist. Last, analyses such as the effectiveness of enforcement can be conducted in light of the resources available to the effort.

### **CONCLUSION**

Election crimes are nothing new to our election process. The pervasiveness of these crimes and the fervor with which they have been enforced has created a great deal of debate among academics, election officials, and political pundits. Past studies of these issues have been limited in scope and some have been riddled with bias. These are issues that deserve comprehensive and nonpartisan review. EAC through its clearinghouse role will collect and analyze data on election crimes throughout the country. These data not only will tell us what types of election crimes are committed and where fraud exists, but also inform us of what factors impact the existence, prevention and prosecution of election crimes.

**EXCERPT FROM DOJ VOTING SECTION FAQs POSTED AT  
<http://www.usdoj.gov/crt/voting/misc/faq.htm#faq18> (as of 8-2-06)**

**What responsibilities does the Justice Department have with regard to voter fraud or intimidation?**

The administration of elections is chiefly a function of state government. However, federal authorities sometimes become involved in election fraud matters when a state prosecutor asks for federal assistance. In addition, the Justice Department can become involved when allegations arise that criminal vote fraud has occurred in a federal election. And, in some exceptional cases, where voting fraud or intimidation involving racial bias occurs in local or state elections, federal criminal charges may also be brought and are handled by the Criminal Section of the Civil Rights Division.

If you have information about vote fraud, you should contact the nearest office of the FBI or your local U.S. Attorney's office. If you know of vote fraud that was driven by racial animus, you can either contact the Voting Section, or contact the Criminal Section of the Civil Rights Division:

Chief, Criminal Section  
Civil Rights Division  
Department of Justice  
950 Pennsylvania Ave., N.W. - PHB  
Washington, D.C. 20530

(202) 514-3204

## Existing Research Analysis

There are many reports and books that describe anecdotes and draw broad conclusions from a large array of incidents. There is little research that is truly systematic or scientific. The most systematic look at fraud is the report written by Lori Minnite. The most systematic look at voter intimidation is the report by Laughlin McDonald. Books written about this subject seem to all have a political bias and a pre-existing agenda that makes them somewhat less valuable.

Researchers agree that measuring something like the incidence of fraud and intimidation in a scientifically legitimate way is extremely difficult from a methodological perspective and would require resources beyond the means of most social and political scientists. As a result, there is much more written on this topic by advocacy groups than social scientists. It is hoped that this gap will be filled in the "second phase" of this EAC project.

Moreover, reports and books make allegations but, perhaps by their nature, have little follow up. As a result, it is difficult to know when something has remained in the stage of being an allegation and gone no further, or progressed to the point of being investigated or prosecuted or in any other way proven to be valid by an independent, neutral entity. This is true, for example, with respect to allegations of voter intimidation by civil rights organizations, and, with respect to fraud, John Fund's frequently cited book. Again, this is something that it is hoped will be addressed in the "second phase" of this EAC project by doing follow up research on allegations made in reports, books and newspaper articles.

Other items of note:

- There is as much evidence, and as much concern, about structural forms of disenfranchisement as about intentional abuse of the system. These include felon disenfranchisement, poor maintenance of databases and identification requirements.
- There is tremendous disagreement about the extent to which polling place fraud, e.g. double voting, intentional felon voting, noncitizen voting, is a serious problem. On balance, more researchers find it to be less of a problem than is commonly described in the political debate, but some reports say it is a major problem, albeit hard to identify.
- There is substantial concern across the board about absentee balloting and the opportunity it presents for fraud.
- Federal law governing election fraud and intimidation is varied and complex and yet may nonetheless be insufficient or subject to too many limitations to be as effective as it might be.

- Deceptive practices, e.g. targeted flyers and phone calls providing misinformation, were a major problem in 2004.
- Voter intimidation continues to be focused on minority communities, although the American Center for Voting Rights uniquely alleges it is focused on Republicans.

Existing Literature Reviewed

**Reports**

The Long Shadow of Jim Crow, People for the American Way and the NAACP

The New Poll Tax, Laughlin McDonald

Wisconsin Audit Report, Voter Registration Elections Board

Preliminary Findings, Milwaukee Joint Task Force Investigating Possible Election Fraud

Building Confidence in U.S. Elections, National Commission on Federal Election Reform (Carter/Baker Report)

Response to the Report of the 2005 Commission on Federal Election Reform (Carter/Baker Report), The Brennan Center and Professor Spencer Overton

Republican Ballot Security Programs: Vote Protection or Minority Vote Suppression – or Both?, Chandler Davidson

A Crazy Quilt of Tiny Pieces: State and Local Administration of American Criminal Disenfranchisement Law, Alec Ewald

Vote Fraud, Intimidation and Suppression in the 2004 Presidential Election, American Center for Voting Rights

America's Modern Poll Tax, The Advancement Project

Analysis of the September 15, 2005 Voter Fraud Report Submitted to the New Jersey Attorney General, The Brennan Center and Professor Michael McDonald

Democracy at Risk: The November 2004 Election in Ohio, Democratic National Committee

Department of Justice Public Integrity Reports 2002, 2003, 2004

Prosecution of Election Fraud under United States Federal Law, Craig Donsanto

Election Protection 2004, Election Protection Coalition

The Federal Crime of Election Fraud, Craig Donsanto

Views of Selected Local Election Officials on Managing Voter Registration and Ensuring Eligible Citizens Can Vote, General Accounting Office

Securing the Vote: An Analysis of Election Fraud, Lori Minnite

Shattering the Myth: An Initial Snapshot of Voter Disenfranchisement in the 2004 Elections, People for the American Way, NAACP, Lawyers Committee for Civil Rights

**Books**

Stealing Elections, John Fund

Steal this Vote: Dirty Elections and the Rotten History of Democracy in American, Andrew Gumbel

Deliver the Vote: A History of Election Fraud, An American Political Tradition – 1742-2004, Tracey Campbell

A Funny Thing Happened on the Way to the White House, David E. Johnson and Jonny R. Johnson

Foiled Again, Mark Crispin Miller

**Legal**

*Indiana Democratic Party vs. Rokita*

*Common Cause of Georgia vs. Billup*

U.S. Department of Justice Section 5 Recommendation Memorandum (Georgia voter identification)

## APPENDIX C

### BRENNAN CENTER TASK FORCE ON VOTING SYSTEM SECURITY, LAWRENCE NORDEN, CHAIR

Excerpted from p.p. 8-19

#### METHODOLOGY

The Task Force concluded, and the peer review team at NIST agreed, that the best approach for comprehensively evaluating voting system threats was to: (1) identify and categorize the potential threats against voting systems, (2) prioritize these threats based upon an agreed upon metric (which would tell us how difficult each threat is to accomplish from the attacker's point of view), and (3) determine, utilizing the same metric employed to prioritize threats, how much more difficult each of the catalogued attacks would become after various sets of countermeasures are implemented.

This model allows us to identify the attacks we should be most concerned about (*i.e.*, the most practical and least difficult attacks). Furthermore, it allows us to quantify the potential effectiveness of various sets of countermeasures (*i.e.*, how difficult the least difficult attack is after the countermeasure has been implemented). Other potential models considered, but ultimately rejected by the Task Force, are detailed in Appendix B.

#### IDENTIFICATION OF THREATS

The first step in creating a threat model for voting systems was to identify as many potential attacks as possible. To that end, the Task Force, together with the participating election officials, spent several months identifying voting system vulnerabilities. Following this work, NIST held a Voting Systems Threat Analysis Workshop on October 7, 2005. Members of the public were invited to write up and post additional potential attacks. Taken together, this work produced over 120 potential attacks on the three voting systems. They are detailed in the catalogs annexed.<sup>20</sup> Many of the attacks are described in more detail at <http://vote.nist.gov/threats/papers.htm>.

The types of threats detailed in the catalogs can be broken down into nine categories: (1) the insertion of corrupt software into machines prior to Election Day; (2) wireless and other remote control attacks on voting machines on Election Day; (3) attacks on tally servers; (4) miscalibration of voting machines; (5) shut off of voting machine features intended to assist voters; (6) denial of service attacks; (7) actions by corrupt poll workers or others at the polling place to affect votes cast; (8) vote buying schemes; (9) attacks on ballots or VVPT. Often, the actual attacks involve some combination of these categories. We provide a discussion of each type of attack in "Categories of Attacks," *infra* at pp. 24–27.

#### PRIORITIZING THREATS: NUMBER OF INFORMED PARTICIPANTS AS METRIC

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Without some form of prioritization, a compilation of the threats is of limited value. Only by prioritizing these various threats could we help election officials identify which attacks they should be most concerned about, and what steps could be taken to make such attacks as difficult as possible. As discussed below, we have determined the level of difficulty for each attack where the attacker is attempting to affect the outcome of a close statewide election.<sup>21</sup>

There is no perfect way to determine which attacks are the least difficult, because each attack requires a different mix of resources – well-placed insiders, money, programming skills, security expertise, *etc.* Different attackers would find certain resources easier to acquire than others. For example, election fraud committed by local election officials would always involve well-placed insiders and a thorough understanding of election procedures; at the same time, there is no reason to expect such officials to have highly skilled hackers or first-rate programmers working with them. By contrast, election fraud carried out by a foreign government would likely start with plenty of money and technically skilled attackers, but probably without many conveniently placed insiders or detailed knowledge of election procedures.

Ultimately, we decided to use the “number of informed participants” as the metric for determining attack difficulty. An attack which uses fewer participants is deemed the easier attack.

We have defined “informed participant” as someone whose participation is needed to make the attack work, and who knows enough about the attack to foil or expose it. This is to be distinguished from a participant who unknowingly assists the attack by performing a task that is integral to the attack’s successful execution without understanding that the task is part of an attack on voting systems.

The reason for using the security metric “number of informed participants” is relatively straightforward: the larger a conspiracy is, the more difficult it would be to keep it secret. Where an attacker can carry out an attack by herself, she need only trust herself. On the other hand, a conspiracy that requires thousands of people to take part (like a vote-buying scheme) also requires thousands of people to keep quiet. The larger the number of people involved, the greater the likelihood that one of them (or one who was approached, but declined to take part) would either inform the public or authorities about the attack, or commit some kind of error that causes the attack to fail or become known.

Moreover, recruiting a large number of people who are willing to undermine the integrity of a statewide election is also presumably difficult. It is not hard to imagine two or three people agreeing to work to change the outcome of an election. It seems far less likely that an attacker could identify and employ hundreds or thousands of similarly corrupt people without being discovered.

We can get an idea of how this metric works by looking at one of the threats listed in our catalogs: the vote-buying threat, where an attacker or attackers pay individuals to vote for a particular candidate. This is Attack Number 26 in the PCOS Attack Catalog<sup>22</sup> (though this attack would not be substantially different against DREs or DREs w/ VVPT).<sup>23</sup> In order to work under our current types of voting

systems, this attack requires (1) at least one person to purchase votes, (2) many people to agree to sell their votes, and (3) some way for the purchaser to confirm that the voters she pays actually voted for the candidate she supported. Ultimately, we determined that, while practical in smaller contests, a vote-buying attack would be an exceptionally difficult way to affect the outcome of a statewide election. This is because, even in a typically close statewide election, an attacker would need to involve thousands of voters to ensure that she could affect the outcome of a statewide race.<sup>24</sup>

For a discussion of other metrics we considered, but ultimately rejected, see Appendix C.

## **DETERMINING NUMBER OF INFORMED PARTICIPANTS**

### **DETERMINING THE STEPS AND VALUES FOR EACH ATTACK**

The Task Force members broke down each of the catalogued attacks into its necessary steps. For instance, Attack 12 in the PCOS Attack Catalog is “Stuffing Ballot Box with Additional Marked Ballots.”<sup>25</sup> We determined that, at a minimum, there were three component parts to this attack: (1) stealing or creating the ballots and then marking them, (2) scanning marked ballots through the PCOS scanners, probably before the polls opened, and (3) modifying the poll books in each location to ensure that the total number of votes in the ballot boxes was not greater than the number of voters who signed in at the polling place.

Task Force members then assigned a value representing the minimum number of persons they believed would be necessary to accomplish each goal. For PCOS Attack 12, the following values were assigned:<sup>26</sup>

**Minimum number required to steal or create ballots: 5 persons total.**<sup>27</sup>

**Minimum number required to scan marked ballots: 1 per polling place attacked.**

**Minimum number required to modify poll books: 1 per polling place attacked.**<sup>28</sup>

After these values were assigned, the Brennan Center interviewed several election officials to see whether they agreed with the steps and values assigned to each attack.<sup>29</sup> When necessary, the values and steps were modified. The new catalogs, including attack steps and values, were then reviewed by Task Force members. The purpose of this review was to ensure, among other things, that the steps and values were sound.

These steps and values tell us how difficult it would be to accomplish a *single attack in a single polling place*. They do not tell us how many people it would take to change the outcome of an election successfully – that depends, of course, on specific facts about the jurisdiction: how many votes are generally recorded in each polling place, how many polling places are there in the jurisdiction, and how close is the race? For this reason, we determined that it was necessary to construct a hypothetical jurisdiction, to which we now turn.

## **NUMBER OF INFORMED PARTICIPANTS NEEDED TO CHANGE STATEWIDE ELECTION**

We have decided to examine the difficulty of each attack in the context of changing the outcome of a reasonably close statewide election. While we are concerned by potential attacks on voting systems in any type of election, we are most troubled by attacks that have the potential to affect large numbers of votes. These are the attacks that could actually change the outcome of a statewide election with just a handful of attack participants.

We are less troubled by attacks on voting systems that can only affect a small number of votes (and might therefore be more useful in local elections). This is because there are many non-system attacks that can also affect a small number of votes (*i.e.*, sending out misleading information about polling places, physically intimidating voters, submitting multiple absentee ballots, *etc.*). Given the fact that these non-system attacks are likely to be less difficult in terms of number of participants, financial cost, risk of detection, and time commitment, we are uncertain that an attacker would target *voting machines* to alter a small number of votes.

In order to evaluate how difficult it would be for an attacker to change the outcome of a statewide election, we created a composite jurisdiction. The composite jurisdiction was created to be representative of a relatively close statewide election. We did not want to examine a statewide election where results were so skewed toward one candidate (for instance, the re-election of Senator Edward M. Kennedy in 2000, where he won 73% of the vote<sup>30</sup>), that reversing the election results would be impossible without causing extreme public suspicion. Nor did we want to look at races where changing only a relative handful of votes (for instance, the Governor's race in Washington State in 2004, which was decided by a mere 129 votes<sup>31</sup>) could affect the outcome of an election; under this scenario, many of the potential attacks would involve few people, and therefore look equally difficult.

We have named our composite jurisdiction "the State of Pennasota." The State of Pennasota is a composite of ten states: Colorado, Florida, Iowa, Ohio, New Mexico, Pennsylvania, Michigan, Nevada, Wisconsin and Minnesota. These states were chosen because they were the ten "battleground" states that Zogby International consistently polled in the spring, summer, and fall 2004.<sup>32</sup> These are statewide elections that an attacker would have expected, ahead of time, to be fairly close.

We have also created a composite election, which we label the "Governor's Race" in Pennasota. The results of this election are a composite of the actual results in the same ten states in the 2004 Presidential Election.

We have used these composites as the framework by which to evaluate the difficulty of the various catalogued attacks.<sup>33</sup> For instance, we know a ballot-box stuffing attack would require roughly five people to create and mark fake ballots, as well as one person per polling place to stuff the boxes, and one person per polling place to modify the poll books. But, in order to determine how many informed participants would be needed to affect a statewide race, we need to know how many polling places would need to be attacked.

The composite jurisdiction and composite election provide us with information needed to answer these questions: *i.e.*, how many extra votes our attackers would

need to add to their favored candidate's total for him to win, how many ballots our attackers can stuff into a particular polling place's ballot box without arousing suspicion (and related to this, how many votes are generally cast in the average polling place), how many polling places are there in the state, *etc.* We provide details about both the composite jurisdiction and election in the section entitled "Governor's Race, State of Pennasota, 2007," *infra* at pp 20–27.

#### LIMITS OF INFORMED PARTICIPANTS AS METRIC

Of the possible metrics we considered, we believe that measuring the number of people who know they are involved in an attack (and thus could provide evidence of the attack to the authorities and/or the media), is the best single measure of attack difficulty; as already discussed, we have concluded that the more people an attacker is forced to involve in his attack, the more likely it is that one of the participants would reveal the attack's existence and foil the attack, perhaps sending attackers to jail. However, we are aware of a number of places where the methodology could provide us with questionable results.

By deciding to concentrate on size of attack team, we mostly ignore the need for other resources when planning an attack. Thus, a software attack on DREs which makes use of steganography<sup>34</sup> to hide attack instruction files (*see* "DRE w/ VVPT Attack No. 1a", discussed in greater detail, *infra* at pp. 62–65) is considered easier than an attack program delivered over a wireless network at the polling place (*see* discussion of wireless networks, *infra* at pp. 85–91). However, the former attack probably requires a much more technologically sophisticated attacker.

Another imperfection with this metric is that we do not have an easy way to represent how much choice the attacker has in finding members of his attack team. Thus, with PCOS voting, we conclude that the cost of subverting a routine audit of ballots is roughly equal to the cost of intercepting ballot boxes in transit and substituting altered ballots (*see* discussion of PCOS attacks, *infra* at pp. 77–83). However, subverting the audit team requires getting a specific set of trusted people to cooperate with the attacker. By contrast, the attacker may be able to decide which precincts to tamper with based on which people he has already recruited for his attack.

In an attempt to address this concern, we considered looking at the number of "insiders" necessary to take part in each attack. Under this theory, getting five people to take part in a conspiracy to attack a voting system might not be particularly difficult. But getting five well-placed county election officials to take part in the attack would be (and should be labeled) the more difficult of the two attacks. Because, for the most part, the low-cost attacks we have identified do not necessarily involve well placed insiders (but could, for instance, involve one of many people with access to commercial off the shelf software ("COTS") during development or at the vendor), we do not believe that using this metric would have substantially changed our analysis.<sup>35</sup>

Finally, these attack team sizes do not always capture the logistical complexity of an attack. For example, an attack on VVPT machines involving tampering with the voting machine software and also replacing the paper records in transit requires the attacker to determine what votes were falsely produced by the voting

machine and print replacement records in time to substitute them. While this is clearly possible, it raises a lot of operational difficulties – a single failed substitution leaves the possibility that the attack would be detected during the audit of ballots.

We have tried to keep these imperfections in mind when analyzing and discussing our least difficult attacks.

We suspect that much of the disagreement between voting officials and computer security experts in the last several years stems from a difference of opinion in prioritizing the difficulty of attacks. Election officials, with extensive experience in the logistics of handling tons of paper ballots, have little faith in paper and understand the kind of breakdowns in procedures that lead to traditional attacks like ballot box stuffing; in contrast, sophisticated attacks on computer voting systems appear very difficult to many of them. Computer security experts understand sophisticated attacks on computer systems, and recognize the availability of tools and expertise that makes these attacks practical to launch, but have no clear idea how they would manage the logistics of attacking a paper-based system. Looking at attack team size is one way to bridge this difference in perspective.

## **EFFECTS OF IMPLEMENTING COUNTERMEASURE SETS**

The final step of our threat analysis is to measure the effect of certain countermeasures against the catalogued attacks. How much more difficult would the attacks become once the countermeasures are put into effect? How many more informed participants (if any) would be needed to counter or defeat these countermeasures? Our process for examining the effectiveness of a countermeasure mirrors the process for determining the difficulty of an attack: we first asked whether the countermeasure would allow us to detect an attack with near certainty. If we agreed that the countermeasure would expose the attack, we identified the steps that would be necessary to circumvent or defeat the countermeasure. For each step to defeat the countermeasure, we determined the number of additional informed participants (if any) that an attacker would need to add to his team. As with the process for determining attack difficulty, the Brennan Center interviewed numerous election officials to see whether they agreed with the steps and values assigned. When necessary, the values and steps for defeating the countermeasures were altered to reflect the input of election officials.

## **COUNTERMEASURES EXAMINED**

### **BASIC SET OF COUNTERMEASURES**

The first set of countermeasures we looked at is the “Basic Set” of countermeasures. This Basic Set was derived from security survey responses<sup>36</sup> we received from county election officials around the country, as well as additional interviews with more than a dozen current and former election officials. Within the Basic Set of countermeasures are the following procedures:

#### **Inspection**

The jurisdiction is not knowingly using any uncertified software that is subject

to inspection by the Independent Testing Authority (often referred to as the "ITA").<sup>37</sup>

### **Physical Security for Machines**

Ballot boxes (to the extent they exist) are examined (to ensure they are empty) and locked by poll workers immediately before the polls are opened.

Before and after being brought to the polls for Election Day, voting systems for each county are locked in a single room, in a county warehouse.

The warehouse has perimeter alarms, secure locks, video surveillance and regular visits by security guards.

Access to the warehouse is controlled by sign-in, possibly with card keys or similar automatic logging of entry and exit for regular staff.

Some form of "tamper evident" seals are placed on machines before and after each election.

The machines are transported to polling locations five to fifteen days before Election Day.

### **Chain of Custody/Physical Security of Election Day Records**

At close of the polls, vote tallies for each machine are totaled and compared with number of persons that have signed the poll books.

A copy of totals for each machine is posted at each polling place on Election Night and taken home by poll workers to check against what is posted publicly at election headquarters, on the web, in the papers, or elsewhere.<sup>38</sup>

All audit information (*i.e.*, Event Logs, VVPT records, paper ballots, machine printouts of totals) that is not electronically transmitted as part of the unofficial upload to the central election office, is delivered in official, sealed and hand-delivered information packets or boxes. All seals are numbered and tamper-evident.

Transportation of information packets is completed by two election officials representing opposing parties who have been instructed to remain in joint custody of the information packets or boxes from the moment it leaves the precinct to the moment it arrives at the county election center.

Each polling place sends its information packets or boxes to the county election center separately, rather than having one truck or person pick up this data from multiple polling locations.

Once the sealed information packets or boxes have reached the county election center, they are logged. Numbers on the seals are checked to ensure that they have not been replaced. Any broken or replaced seals are logged. Intact seals are left intact.

After the packets and/or boxes have been logged, they are provided with physical security precautions at least as great as those listed for voting machines, above. Specifically, for Pennasota, we have assumed the room in which the packets are stored have perimeter alarms, secure locks, video surveillance and regular visits by security guards and county police officers; and access to the room is controlled by sign-in, possibly with card keys or similar automatic logging of entry and exit for regular staff.

### **Testing<sup>39</sup>**

An Independent Testing Authority has certified the model of voting machine used in the polling place.

Acceptance Testing<sup>40</sup> is performed on machines at time, or soon after they are received by County.

Pre-election Logic and Accuracy<sup>41</sup> testing is performed by the relevant election official.

Prior to opening the polls, every voting machine and vote tabulation system is checked to see that it is still configured for the correct election, including the correct precinct, ballot style, and other applicable details.

### **REGIMEN FOR AUTOMATIC ROUTINE AUDIT PLUS BASIC SET OF COUNTERMEASURES.**

The second set of countermeasures is the Regimen for an Automatic Routine Audit Plus Basic Set of Countermeasures.

Some form of routine auditing of voter-verified paper records occurs in 12 states, to test the accuracy of electronic voting machines. They generally require between 1 and 10% of all precinct voting machines to be audited after each election. <sup>42</sup>

Jurisdictions can implement this set of countermeasures only if their voting systems produce some sort of voter-verified paper record of each vote. This could be in the form of a paper ballot, in the case of PCOS, or a voter-verified paper trail ("VVPT"), in the case of DREs.

We have assumed that jurisdictions take the following steps when conducting an Automatic Routine Audit (when referring to this set of assumptions "Regimen for an Automatic Routine Audit"):

### **The Audit**

Leaders of the major parties in each county are responsible for selecting a sufficient number of audit-team members to be used in that county.<sup>43</sup>

Using a highly transparent random selection mechanism (*see* point ii, below), the voter-verified paper records for between a small percentage of all voting machines in the State are selected for auditing.

Using a transparent random selection method, auditors are assigned to the selected machines (two or three people, with representatives of each major

political party, would comprise each audit team).

The selection of voting machines, and the assignment of auditors to machines, occurs immediately before the audits take place. The audits take place as soon after polls close as possible – for example, at 9 a.m. the morning after polls close.

Using a transparent random selection method, county police officers, security personnel and the video monitor assigned to guard the voter-verified records are chosen from a large pool of on-duty officers and employees on election night.

The auditors are provided the machine tallies and are able to see that the county tally reflects the sums of the machine tallies before the start of the inspection of the paper.

The audit would include a tally of spoiled ballots (in the case of VVPT, the number of cancellations recorded), overvotes, and undervotes.

### **Transparent Random Selection Process**

In this report, we have assumed that random auditing procedures are in place for both the Regimen for an Automatic Routine Audit and Regimen for Parallel Testing. We have further assumed procedures to prevent a single, corrupt person from being able to fix the results. This implies a kind of transparent and public random procedure.

For the Regimen for an Automatic Routine Audit there are at least two places where transparent, random selection processes are important: in the selection of precincts to audit, and in the assignment of auditors to the precincts they will be auditing.

Good election security can employ Transparent Random Selection in other places with good effect:

- the selection of parallel testers from a pool of qualified individuals.

- the assignment of police and other security professionals from on-duty lists, to monitor key materials, for example, the VVPT records between the time that they arrive at election central and the time of the completion of the ARA.

If a selection process for auditing is to be trustworthy and trusted, ideally:

- The whole process will be publicly observable or videotaped;<sup>44</sup>

- The random selection will be publicly verifiable, *i.e.*, anyone observing will be able to verify that the sample was chosen randomly (or at least that the number selected is not under the control of any small number of people); and

- The process will be simple and practical within the context of current election

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practice so as to avoid imposing unnecessary burdens on election officials. There are a number of ways that election officials can ensure some kind of transparent randomness. One way would be to use a state lottery machine to select precincts or polling places for auditing. We have included two potential examples of transparent random selection processes in Appendix F. These apply to the Regimen for Parallel Testing as well.

#### **REGIMEN FOR PARALLEL TESTING PLUS BASIC SET OF COUNTERMEASURES**

The final set of countermeasures we have examined is “Parallel Testing” plus the Basic Set of countermeasures. Parallel Testing, also known as election-day testing, involves selecting voting machines at random and testing them as realistically as possible during the period that votes are being cast.

#### **Parallel Testing**

In developing our set of assumptions for Parallel Testing, we relied heavily upon interviews with Jocelyn Whitney, Project Manager for Parallel Testing in the State of California, and conclusions drawn from this Report.<sup>45</sup> In our analysis, we assume that the following procedures would be included in the Parallel Testing regimen (when referring to this regimen “Regimen for Parallel Testing”) that we evaluate:

At least two of each DRE model (meaning both vendor and model) would be selected for Parallel Testing;

At least two DREs from each of the three largest counties would be parallel tested;

Counties to be parallel tested would be chosen by the Secretary of State in a transparent and random manner.

Counties would be notified as late as possible that machines from one of their precincts would be selected for Parallel Testing;<sup>46</sup>

Precincts would be selected through a transparent random mechanism;

A video camera would record testing;

For each test, there would be one tester and one observer;

Parallel Testing would occur at the polling place;

The script for Parallel Testing would be generated in a way that mimics voter behavior and voting patterns for the polling place;

At the end of the Parallel Testing, the tester and observer would reconcile vote totals in the script with vote totals reported on the machine.

#### **Transparent Random Selection Process**

We further assume that the same type of transparent random selection process that would be used for the Regimen for Automatic Routine Audit would also be employed for the Regimen for Parallel Testing to determine which machines would be subjected to testing on Election Day.

## **APPENDIX C**

### **ALTERNATIVE SECURITY METRICS CONSIDERED**

#### **Dollars Spent**

The decision to use the number of informed participants as the metric for attack level difficulty came after considering several other potential metrics. One of the first metrics we considered was the dollar cost of attacks. This metric makes sense when looking at attacks that seek financial gain – for instance, misappropriating corporate funds. It is not rational to spend \$100,000 on the misappropriation of corporate funds if the total value of those funds is \$90,000. Ultimately, we rejected this metric as the basis for our analysis because the dollar cost of the attacks we considered were dwarfed by both (1) current federal and state budgets, and (2) the amounts currently spent legally in state and federal political campaigns.

#### **Time of Attack**

The relative security of safes and other safety measures are often rated in terms of “time to defeat.” This was rejected as metric of difficulty because it did not seem relevant to voting systems. Attackers breaking into a house are concerned with the amount of time it might take to complete their robbery because the homeowners or police might show up. With regard to election fraud, many attackers may be willing to start months or years before an election if they believe they can control the outcome. As discussed *supra* at pp. 35–48, attackers may be confident that they can circumvent the independent testing authorities and other measures meant to identify attacks, so that the amount of time an attack takes becomes less relevant.

## RECOMMENDATIONS FOR FURTHER EAC ACTIVITY ON VOTER FRAUD AND INTIMIDATION

- Time and resource constraints prevented the consultants from interviewing the full range of participants in the process. As a result, we recommend that any future activity in this area include conducting further interviews.

In particular, we recommend that more election officials from all levels of government, parts of the country, and parties be interviewed. These individuals have the most direct inside information on how the system works -- and at times does not work. They are often the first people voters go to when something goes wrong and are often responsible for fixing it. They are the ones who must carry out the measures that are designed to both prevent fraud and voter intimidation and suppression. They will most likely know what, therefore, is and is not working.

It would also be especially beneficial to talk to people in law enforcement, specifically federal District Election Officers ("DEOs") and local district attorneys, as well as civil and criminal defense attorneys.

The Public Integrity Section of the Criminal Division of the Department of Justice has all of the 93 U.S. Attorneys appoint Assistant U.S. Attorneys to serve as DEOs for two years. DEOs are required to

- screen and conduct preliminary investigations of complaints, in conjunction with the FBI and PIN, to determine whether they constitute potential election crimes and should become matters for investigation;
- oversee the investigation and prosecution of election fraud and other election crimes in their districts;
- coordinate their district's (investigative and prosecutorial) efforts with DOJ headquarters prosecutors;
- coordinate election matters with state and local election and law enforcement officials and make them aware of their availability to assist with election-related matters;
- issue press releases to the public announcing the names and telephone numbers of DOJ and FBI officials to contact on election day with complaints about voting or election irregularities and answer telephones on election day to receive these complaints; and
- supervise a team of Assistant U.S. Attorneys and FBI special agents who are appointed to handle election-related allegations while the polls are open on election day.<sup>1</sup>

Given the great responsibilities of the DEOs, and the breadth of issues they must deal with, they undoubtedly are great resources for information and insight as to what types of fraud and intimidation/suppression are occurring in their districts.

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In many situations, however, it is the local district attorneys who will investigate election fraud and suppression tactics, especially in local elections. They will be able to provide information on what has gone on in their jurisdictions, as well as which matters get pursued and why.

Finally, those who defend people accused of election related crimes would also be useful to speak to. They may have a different perspective on how well the system is working to detect, prevent, and prosecute election fraud.

- The Nexis search conducted for this phase of the research was based on a list of search terms agreed upon by both consultants. Thousands of articles were reviewed and hundreds analyzed. Many of the articles contain allegations of fraud or intimidation. Similarly, many of the articles contain information about investigations into such activities or even charges brought. However, without being able to go beyond the agreed search terms, it could not be determined whether there was any later determination regarding the allegations, investigation or charges brought. This leaves a gaping hole: it is impossible to know if the article is just reporting on “talk” or what turns out to be a serious affront to the system.

As a result, we recommend that follow up Nexis research be conducted to determine what, if any, resolutions or further activity there was in each case. This would provide a much more accurate picture of what types of activities are actually taking place.

- Similarly, many allegations are made in the reports and books that we analyzed and summarized. Those allegations are often not substantiated in any way and are inherently time limited by the date of the writing. Despite this, such reports and books are frequently cited by various interested parties as evidence of fraud or intimidation.

Therefore, we recommend follow up to the literature review: for those reports and books that make or cite specific instances of fraud or intimidation, a research effort should be made to follow up on those references to see if and how they were resolved.

- During the 2004 election and the statewide elections of 2005, the University of Pennsylvania led a consortium of groups and researchers in conducting the MyVote1 Project. This project involved using a 1-800 voter hotline where voters could call for poll location, be transferred to a local hotline, or leave a recorded message with a complaint. In 2004, this resulted in over 200,000 calls received and over 56,000 recorded complaints.<sup>ii</sup> The researchers in charge of this project have done a great deal of work to parse and analyze the data collected through this process, including going through the audio messages and categorizing them by the nature of the complaint. These categories include registration, absentee

ballot, poll access, ballot/screen, coercion/intimidation, identification, mechanical, provisional (ballot).

We recommend that further research include making full use of this data with the cooperation of the project leaders. While perhaps not a fully scientific survey given the self-selection of the callers, the information regarding 200,000 complaints should provide a good deal of insight into the problems voters experienced, especially those in the nature of intimidation or suppression.

- Although according to a recent GAO report the Voting Section of the Civil Rights Division of the Department of Justice has a variety in ways it tracks complaints of voter intimidation,<sup>iii</sup> the Section was extremely reluctant to provide the consultants with useful information. Further attempts should be made to obtain relevant data. This includes the telephone logs of complaints the Section keeps and information from the database – the Interactive Case Management (ICM) system – the Section maintains on complaints received and the corresponding action taken. We also recommend that further research include a review and analysis of the observer and monitor field reports from Election Day that must be filed with the Section.
- Similarly, the consultants believe it would be useful for any further research to include a review of the reports that must be filed by every District Election Officer to the Public Integrity Section of the Criminal Division of the Department of Justice. As noted above, the DEOs play a central role in receiving reports of voter fraud and investigating and pursuing them. Their reports back to the Department would likely provide tremendous insight into what actually transpired during the last several elections. Where necessary, information could be redacted or made confidential.
- The consultants also believe it would be useful for any further activity in this area to include attendance at the next Ballot Access and Voting Integrity Symposium. According to the Department,<sup>iv</sup>

Prosecutors serving as District Election Officers in the 94 U.S. Attorneys' Offices are required to attend annual training conferences on fighting election fraud and voting rights abuses... These conferences are sponsored by the Voting Section of the Civil Rights Division and the Public Integrity Section of the Criminal Division, and feature presentations by Civil Rights officials and senior prosecutors from the Public Integrity Section and the U.S. Attorneys' Offices. As a result of these conferences, there is a nationwide increase in Department expertise relating to the prosecution of election crimes and the enforcement of voting rights.

By attending the symposium researchers could learn more about the following:

- How District Election Officers are trained, e.g. what they are taught to focus their resources on, how they are instructed to respond to various types of complaints
  - How information about previous election and voting issues is presented
  - How the Voting Rights Act, the criminal laws governing election fraud and intimidation, the National Voter Registration Act, and the Help America Vote Act are described and explained to participants
- Included in this report is a summary of various methodologies political scientists and others suggested to measure voter fraud and intimidation. While we note the skepticism of the Working Group in this regard, we nonetheless recommend that in order to further the mission of providing unbiased data, further activity in this area include an academic institution and/or individual that focuses on sound, statistical methods for political science research.
  - Finally, consultant Tova Wang recommends that future researchers review federal law to explore ways to make it easier to impose either civil or criminal penalties for acts of intimidation that do not necessarily involve racial animus and/or a physical or economic threat .

According to Craig Donsanto, long-time director of the Public Integrity Section of the Criminal Division of the Department of Justice,

As with other statutes addressing voter intimidation, in the absence of any jurisprudence to the contrary, it is the Criminal Division's position that section 1973gg-10(1) applies only to intimidation which is accomplished through the use of threats of physical or economic duress. Voter "intimidation" accomplished through less drastic means may present violations of the Voting Rights Act, 42 U.S.C. § 1973i(b), which are enforced by the Civil Rights Division through noncriminal remedies.<sup>v</sup>

Mr. Donsanto reiterated these points to us on several occasions, including at the working group meeting.

As a result, researchers should examine if there is some way in which current law might be revised or new laws passed that would reach voter intimidation that does not threaten the voter physically or financially, but rather threatens the voter's right to vote as a tangible value in itself. Such an amendment or law would reach all forms of voter intimidation, no matter if it is motivated by race, party, ethnicity or any other criteria. The law would then *potentially* cover, for example, letters and postcards with language meant to deter voters from voting and both pre-election and Election Day challengers that are clearly mounting challenges solely on illegitimate bases.

In the alternative to finding a way to criminalize such behavior, researchers might examine ways to invigorate measures to deter and punish voter intimidation under the civil law. For example, there might be a private right of action created for

voters or groups who have been subjected to intimidation tactics in the voting process. Such an action could be brought against individual offenders; any state or local actor where there is a pattern of repeated abuse in the jurisdiction that such officials did not take sufficient action against; and organizations that intentionally engage in intimidating practices. As a penalty upon finding liability, civil damages could be available plus perhaps attorney's fees.

Another, more modest measure would be, as has been suggested by Ana Henderson and Christopher Edley,<sup>vi</sup> to bring parity to fines for violations under the Voting Rights Act. Currently the penalty for fraud is \$10,000 while the penalty for acts to deprive the right to vote is \$5,000.

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<sup>i</sup> Department of Justice's Activities to Address Past Election-Related Voting Irregularities, General Accounting Office, October 14, 2004, GAO-04-1041R

<sup>ii</sup> The MyVote1 Project Final Report, Fels Institute of Government, University of Pennsylvania, November 1, 2005, Pg. 12

<sup>iii</sup> Department of Justice's Activities to Address Past Election-Related Voting Irregularities, General Accounting Office, October 14, 2004, GAO-04-1041R, p. 4. This same report criticizes some of the procedures the Section used for these systems and urged the Department to improve upon them in time for the 2004 presidential election. No follow-up report has been done since that time to the best of our knowledge.

<sup>iv</sup> "Department Of Justice To Hold Ballot Access and Voting Integrity Symposium," U.S. Department of Justice press release, August 2, 2005

<sup>v</sup> Craig C. Donsanto, Prosecution of Electoral Fraud Under United States Federal Law," IFES Political Finance White Paper Series, 2006, p. 29

<sup>vi</sup> Ana Henderson and Christopher Edley, Jr., Voting Rights Act Reauthorization: Research-Based Recommendations to Improve Voting Access, Chief Justice Earl Warren Institute on Race, Ethnicity and Diversity, University of California at Berkeley, School of Law, 2006, p. 29

## Interviews

### Common Themes

- There is virtually universal agreement that absentee ballot fraud is the biggest problem, with vote buying and registration fraud coming in after that. The vote buying often comes in the form of payment for absentee ballots, although not always. Some absentee ballot fraud is part of an organized effort; some is by individuals, who sometimes are not even aware that what they are doing is illegal. Voter registration fraud seems to take the form of people signing up with false names. Registration fraud seems to be most common where people doing the registration were paid by the signature.
- There is widespread but not unanimous agreement that there is little polling place fraud, or at least much less than is claimed, including voter impersonation, “dead” voters, noncitizen voting and felon voters. Those few who believe it occurs often enough to be a concern say that it is impossible to show the extent to which it happens, but do point to instances in the press of such incidents. Most people believe that false registration forms have not resulted in polling place fraud, although it may create the perception that vote fraud is possible. Those who believe there is more polling place fraud than reported/investigated/prosecuted believe that registration fraud does lead to fraudulent votes. Jason Torchinsky from the American Center for Voting Rights is the only interviewee who believes that polling place fraud is widespread and among the most significant problems in the system.
- Abuse of challenger laws and abusive challengers seem to be the biggest intimidation/suppression concerns, and many of those interviewed assert that the new identification requirements are the modern version of voter intimidation and suppression. However there is evidence of some continued outright intimidation and suppression, especially in some Native American communities. A number of people also raise the problem of poll workers engaging in harassment of minority voters. Other activities commonly raised were the issue of polling places being moved at the last moment, unequal distribution of voting machines, videotaping of voters at the polls, and targeted misinformation campaigns.
- Several people indicate – including representatives from DOJ -- that for various reasons, the Department of Justice is bringing fewer voter intimidation and suppression cases now and is focusing on matters such as noncitizen voting, double voting and felon voting. While the civil rights section continues to focus on systemic patterns of malfeasance, the public integrity section is focusing now on individuals, on isolated instances of fraud.
- The problem of badly kept voter registration lists, with both ineligible voters remaining on the rolls and eligible voters being taken off, remains a common concern. A few people are also troubled by voters being on registration lists in two states. They said that there was no evidence that this had led to double voting, but it opens the door to the possibility. There is great hope that full implementation of the new requirements of HAVA – done well, a major caveat – will reduce this problem dramatically.

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### Common Recommendations:

- Many of those interviewed recommend better poll worker training as the best way to improve the process; a few also recommended longer voting times or voting on days other than election day (such as weekends) but fewer polling places so only the best poll workers would be employed
- Many interviewed support stronger criminal laws and increased enforcement of existing laws with respect to both fraud and intimidation. Advocates from across the spectrum expressed frustration with the failure of the Department of Justice to pursue complaints.
  - With respect to the civil rights section, John Tanner indicated that fewer cases are being brought because fewer are warranted – it has become increasingly difficult to know when allegations of intimidation and suppression are credible since it depends on one’s definition of intimidation, and because both parties are doing it. Moreover prior enforcement of the laws has now changed the entire landscape – race based problems are rare now. Although challenges based on race and unequal implementation of identification rules would be actionable, Mr. Tanner was unaware of such situations actually occurring and the section has not pursued any such cases.
  - Craig Donsanto of the public integrity section says that while the number of election fraud related complaints have not gone up since 2002, nor has the proportion of legitimate to illegitimate claims of fraud, the number of cases the department is investigating and the number of indictments the section is pursuing are both up dramatically. Since 2002, the department has brought more cases against alien voters, felon voters and double voters than ever before. Mr. Donsanto would like more resources so it can do more and would like to have laws that make it easier for the federal government to assume jurisdiction over voter fraud cases.
- A couple of interviewees recommend a new law that would make it easier to criminally prosecute people for intimidation even when there is not racial animus.
- Almost everyone hopes that administrators will maximize the potential of statewide voter registration databases to prevent fraud. Of particular note, Sarah Ball Johnson, Executive Director of Elections for Kentucky, emphasized that having had an effective statewide voter registration database for more than thirty years has helped that state avoid most of the fraud problems that have been alleged elsewhere, such as double voting and felon voting.
- Several advocate expanded monitoring of the polls, including some associated with the Department of Justice.
- Challenge laws, both with respect to pre-election day challenges and challengers at the polls, need to be revised by all states to ensure they are not used for purposes of wrongful disenfranchisement and harassment
- Several people advocate passage of Senator Barak Obama’s “deceptive practices” bill

- There is a split on whether it would be helpful to have nonpartisan election officials – some indicated they thought even if elections officials are elected nonpartisanly they will carry out their duties in biased ways nonetheless. However, most agree that elections officials pursuing partisan agendas is a problem that must be addressed in some fashion. Suggestions included moving election responsibilities out of the secretary of states' office; increasing transparency in the process; and enacting conflict of interest rules.
- A few recommend returning to allowing use of absentee ballots “for cause” only if it were politically feasible.
- A few recommend enacting a national identification card, including Pat Rogers, an attorney in New Mexico, and Jason Torchinsky from ACVR, who advocates the scheme contemplated in the Carter-Baker Commission Report.
- A couple of interviewees indicated the need for clear standards for the distribution of voting machines

## **Defining Election Fraud**

*Note: The definition provided below is for the purposes of this EAC project. Most of the acts described come within the federal criminal definition of fraud, but some may not.*

Election fraud is any intentional action, or intentional failure to act when there is a duty to do so, that corrupts the election process in a manner that can impact on election outcomes. This includes interfering in the process by which persons register to vote; the way in which ballots are obtained, marked, or tabulated; and the process by which election results are canvassed and certified.

Examples include the following:

- falsifying voter registration information pertinent to eligibility to cast a vote, (e.g. residence, criminal status, etc).;
- altering completed voter registration applications by entering false information;
- knowingly destroying completed voter registration applications (other than spoiled applications) before they can be submitted to the proper election authority;
- knowingly removing eligible voters from voter registration lists, in violation of HAVA, NVRA, or state election laws;
- intentional destruction by election officials of voter registration records or balloting records, in violation of records retention laws, to remove evidence of election fraud;
- vote buying;
- voting in the name of another;
- voting more than once;
- coercing a voter's choice on an absentee ballot;
- using a false name and/or signature on an absentee ballot;
- destroying or misappropriating an absentee ballot;
- felons, or in some states ex-felons, who vote when they know they are ineligible to do so;
- misleading an ex-felon about his or her right to vote;
- voting by non-citizens who know they are ineligible to do so;
- intimidating practices aimed at vote suppression or deterrence, including the abuse of challenge laws;
- deceiving voters with false information (e.g.; deliberately directing voters to the wrong polling place or providing false information on polling hours and dates);

- knowingly failing to accept voter registration applications, to provide ballots, or to accept and count voted ballots in accordance with the Uniformed and Overseas Citizens Absentee Voting Act;
- intentional miscounting of ballots by election officials;
- intentional misrepresentation of vote tallies by election officials;
- acting in any other manner with the intention of suppressing voter registration or voting, or interfering with vote counting and the certification of the vote.

Voting fraud does not include mistakes made in the course of voter registration, balloting, or tabulating ballots and certifying results. For purposes of the EAC study, it also does not include violations of campaign finance laws.

List of Experts Interviewed

Wade Henderson, Executive Director, Leadership Conference for Civil Rights

Wendy Weiser, Deputy Director, Democracy Program, The Brennan Center

William Groth, attorney for the plaintiffs in the Indiana voter identification litigation

Lori Minnite, Barnard College, Columbia University

Neil Bradley, ACLU Voting Rights Project

Nina Perales, Counsel, Mexican American Legal Defense and Education Fund

Pat Rogers, attorney, New Mexico

Rebecca Vigil-Giron, Secretary of State, New Mexico

Sarah Ball Johnson, Executive Director of the State Board of Elections, Kentucky

Stephen Ansolobhere, Massachusetts Institute of Technology

Chandler Davidson, Rice University

Tracey Campbell, author, *Deliver the Vote*

Douglas Webber, Assistant Attorney General, Indiana, (defendant in the Indiana voter identification litigation)

Heather Dawn Thompson, Director of Government Relations, National Congress of American Indians

Jason Torchinsky, Assistant General Counsel, American Center for Voting Rights

Robin DeJarnette, Executive Director, American Center for Voting Rights

Joseph Rich, former Director of the Voting Section, Civil Rights Division, U.S. Department of Justice

Joseph Sandler, Counsel to the Democratic National Committee

John Ravitz, Executive Director, New York City Board of Elections

John Tanner, Director, Voting Section, Civil Rights Division, U.S. Department of Justice

Kevin Kennedy, Executive Director of the State Board of Elections, Wisconsin

Evelyn Stratton, Justice, Supreme Court of Ohio

Tony Sirvello, Executive Director, International Association of  
Clerks, Recorders, Election Officials and Treasurers

Harry Van Sickle, Commissioner of Elections, Pennsylvania

Craig Donsanto, Director, Public Integrity Section, U.S. Department of Justice

Sharon Priest, former Secretary of State, Arkansas

## Key Working Group Comments and Observations

1. **The main problems today are structural barriers to voting and administrative error.** Mr. Perez observed that, in accordance with the research, the biggest issues today are structural barriers to voting, not stealing votes. Election administrators share this view. Election fraud is negligible, and to the extent it occurs, it needs to be prosecuted with stronger criminal laws. The biggest problem is properly preparing people, which is the responsibility of election administrators.
2. **Most fraud and intimidation is happening outside of the polling place.** Mr. Greenbaum observed that with respect to both voter fraud and voter suppression, such as deceptive practices and tearing up voter registration forms, most of that is taking place outside of the polling place.
3. **This issue cannot be addressed through one study or one methodology alone.** Mr. Weinberg observed that since there is such a variety in types of fraud and intimidation, one solution will not fit all. It will be impossible to obtain data or resolve any of these problems through a single method.
4. **The preliminary research conducted for this project is extremely valuable.** Several of the working group members complimented the quality of the research done and although it is only preliminary, thought it would be useful and informative in the immediate future.
5. **The Department of Justice is exploring expanding its reach over voter suppression activities.** In the context of the conversation about defining voter intimidation, Mr. Donsanto pointed out that while voter intimidation was strictly defined by the criminal law, his section is beginning to explore the slightly different concept of vote suppression, and how to pursue it. He mentioned the phone-jamming case in New Hampshire as an initial success in this effort. He noted that he believes that vote suppression in the form of deceptive practices ought to be a crime and the section is exploring ways to go after it within the existing statutory construct. Mr. Bauer raised the example of a party sending people dressed in paramilitary outfits to yell at people as they go to the polls, telling them they have to show identification. Mr. Donsanto said that under the laws he has to work with today, such activity is not considered corrupt. He said that his lawyers are trying to "bend" the current laws to address aggravated cases of vote suppression, and the phone-jamming case is an example of that. Mr. Donsanto said that within the Department, the term vote "suppression" and translating it into a crime is a "work in progress."
6. **Registration fraud does not translate into vote fraud.** Ms. Rogers, Mr. Donsanto and others stated that although phony voter registration applications turned in by people being paid by the form was a problem, it has not been found

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in their experience to lead to fraudulent voters at the polls. Ms. Rogers said such people were motivated by money, not defrauding the election.

7. **Handling of voter fraud and intimidation complaints varies widely across states and localities.** Ms. Rogers and others observed that every state has its own process for intake and review of complaints of fraud and intimidation, and that procedures often vary within states. The amount of authority secretaries of state have to address such problems also is different in every state. Mr. Weinberg stated he believed that most secretaries of state did not have authority to do anything about these matters. Participants discussed whether secretaries ought to be given greater authority so as to centralize the process, as HAVA has mandated in other areas.

### **Working Group Concerns**

1. Mr. Rokita questioned whether the purpose of the present project ought to be on assessing the level of fraud and where it is, rather than on developing methods for making such measurements. He believed that methodology should be the focus, “rather than opinions of interviewees.” He was concerned that the EAC would be in a position of “adding to the universe of opinions.”
2. Mr. Rokita questioned whether the “opinions” accumulated in the research “is a fair sampling of what’s out there.” Ms. Wang responded that one of the purposes of the research was to explore whether there is a method available to actually quantify in some way how much fraud there is and where it is occurring in the electoral process. Mr. Rokita replied that “Maybe at the end of the day we stop spending taxpayer money or it’s going to be too much to spend to find that kind of data. Otherwise, we will stop it here and recognize there is a huge difference of opinion on that issue of fraud, when it occurs is obtainable, and that would possibly be a conclusion of the EAC.” Ms. Sims responded that she thought it would be possible to get better statistics on fraud and there might be a way of “identifying at this point certain parts in the election process that are more vulnerable, that we should be addressing.”
3. Mr. Rokita stated that, “We’re not sure that fraud at the polling place doesn’t exist. We can’t conclude that.”
4. Mr. Rokita expressed concern about working with a political scientist. He believes that the “EAC needs to be very careful in who they select, because all the time and effort and money that’s been spent up to date and would be spent in the future could be invalidated by a wrong selection in the eyes of some group.”

## **Determining a Methodology for Measuring Voter Fraud and Intimidation: Recommendations of Political Scientists**

The following is a summary of interviews conducted with a number of political scientists and experts in the field as to how one might undertake a comprehensive examination of voter fraud and intimidation. A list of the individuals interviewed and their ideas are available, and all of the individuals welcome any further questions or explanations of their recommended procedures.

- 1) In analyzing instances of alleged fraud and intimidation, we should look to criminology as a model. In criminology, experts use two sources: the Uniform Crime Reports, which are all reports made to the police, and the Victimization Survey, which asks the general public whether a particular incident has happened to them. After surveying what the most common allegations are, we should conduct a survey of the general public that ask whether they have committed certain acts or been subjected to any incidents of fraud or intimidation. This would require using a very large sample, and we would need to employ the services of an expert in survey data collection. (Stephen Ansolobehere, MIT)
- 2) Several political scientists with expertise in these types of studies recommended a methodology that includes interviews, focus groups, and a limited survey. In determining who to interview and where the focus groups should be drawn from, they recommend the following procedure:
  - Pick a number of places that have historically had many reports of fraud and/or intimidation; from that pool pick 10 that are geographically and demographically diverse, and have had a diversity of problems
  - Pick a number of places that have not had many reports of fraud and/or intimidation; from that pool pick 10 places that match the geographic and demographic make-up of the previous ten above (and, if possible, have comparable elections practices)
  - Assess the resulting overall reports and impressions resulting from these interviews and focus groups, and examine comparisons and differences among the states and what may give rise to them.

In conducting a survey of elections officials, district attorneys, district election officers, they recommend that:

- The survey sample be large in order to be able to get the necessary subsets
- The survey must include a random set of counties where there have and have not been a large number of allegations

(Allan Lichtman, American University; Thad Hall, University of Utah; Bernard Grofman, UC – Irvine)

- 3) Another political scientist recommended employing a methodology that relies on qualitative data drawn from in-depth interviews with key critics and experts on all sides of the debate on fraud; quantitative data collected through a survey of state and local elections and law enforcement officials; and case studies. Case studies should focus on the five or ten states, regions or cities where there has been a history of election fraud to examine past and present problems. The survey should be mailed to each state's attorney general and secretary of state, each county district attorney's office and each county board of elections in the 50 states. (Lorraine Minnite, Barnard College)
- 4) The research should be a two-step process. Using LexisNexis and other research tools, a search should be conducted of news media accounts over the past decade. Second, interviews with a systematic sample of election officials nationwide and in selected states should be conducted. (Chandler Davidson, Rice University)
- 5) One expert in the field posits that we can never come up with a number that accurately represents either the incidence of fraud or the incidence of voter intimidation. Therefore, the better approach is to do an assessment of what is most likely to happen, what election violations are most likely to be committed – in other words, a risk analysis. This would include an analysis of what it would actually take to commit various acts, e.g. the cost/benefit of each kind of violation. From there we could rank the likely prevalence of each type of activity and examine what measures are or could be effective in combating them. (Wendy Weiser, Brennan Center of New York University)
- 6) Replicate a study in the United States done abroad by Susan Hyde of the University of California- San Diego examining the impact of impartial poll site observers on the incidence of election fraud. Doing this retrospectively would require the following steps:
  - Find out where there were federal observers
  - Get precinct level voting information for those places
  - Analyze whether there was any difference in election outcomes in those places with and without observers, and whether any of these results seem anomalous.

Despite the tremendous differences in the political landscapes of the countries examined by Hyde in previous studies and the U.S., Hyde believes this study could be effectively replicated in this country by sending observers to a random sample of precincts. Rather than compare the incumbent's vote share, such factors such as voter complaints, voter turnout, number of provisional ballots used, composition of the electorate, as well as any anomalous voting results could be compared between sites with and without monitors.

For example, if intimidation is occurring, and if reputable monitors make intimidation less likely or voters more confident, then turnout should be higher on average in monitored precincts than in unmonitored precincts. If polling station officials are intentionally refusing to issue provisional ballots, and the polling station officials are

more likely to adhere to regulations while being monitored, the average number of provisional ballots should be higher in monitored precincts than in unmonitored precincts. If monitors cause polling station officials to adhere more closely to regulations, then there should be fewer complaints (in general) about monitored than unmonitored precincts (this could also be reversed if monitors made voters more likely to complain).

Again, random assignment controls for all of the other factors that otherwise influence these variables.

One of the downsides of this approach is it does not get at some forms of fraud, e.g. absentee ballot fraud; those would have to be analyzed separately

7) Another political scientist recommends conducting an analysis of vote fraud claims and purging of registration rolls by list matching. Allegations of illegal voting often are based on matching of names and birth dates. Alleged instances of double voting are based on matching the names and birth dates of persons found on voting records. Allegations of ineligible felon (depending on state law), deceased, and of non-citizen voting are based on matching lists of names, birth dates, and sometimes addresses of such people against a voting records. Anyone with basic relational database skills can perform such matching in a matter of minutes.

However, there are a number of pitfalls for the unwary that can lead to grossly over-estimating the number of fraudulent votes, such as missing or ignored middle names and suffixes or matching on missing birth dates. Furthermore, there is a surprising statistical fact that a group of about three hundred people with the same first and last name are almost assured to share the exact same birth date, including year. In a large state, it is not uncommon for hundreds of Robert Smiths (and other common names) to have voted. Thus, allegations of vote fraud or purging of voter registration rolls by list matching almost assuredly will find a large proportion of false positives: people who voted legally or are registered to vote legally.

Statistics can be rigorously applied to determine how many names would be expected to be matched by chance. A simulation approach is best applied here: randomly assign a birth date to an arbitrary number of people and observe how many match within the list or across lists. The simulation is repeated many times to average out the variation due to chance. The results can then be matched back to actual voting records and purge lists, for example, in the hotly contested states of Ohio or Florida, or in states with Election Day registration where there are concerns that easy access to voting permits double voting. This analysis will rigorously identify the magnitude alleged voter fraud, and may very well find instances of alleged fraud that exceed what might have otherwise happened by chance.

This same political scientist also recommends another way to examine the problem: look at statistics on provisional voting: the number cast might provide indications of intimidation (people being challenged at the polls) and the number of those not counted

would be indications of "vote fraud." One could look at those jurisdictions in the Election Day Survey with a disproportionate number of provisional ballots cast and cross reference it with demographics and number of provisional ballots discarded. (Michael McDonald, George Mason University)

- 8) Spencer Overton, in a forthcoming law review article entitled *Voter Identification*, suggests a methodology that employs three approaches— investigations of voter fraud, random surveys of voters who purported to vote, and an examination of death rolls provide a better understanding of the frequency of fraud. He says all three approaches have strengths and weaknesses, and thus the best studies would employ all three to assess the extent of voter fraud. An excerpt follows:

1. *Investigations and Prosecutions of Voter Fraud*

Policymakers should develop databases that record all investigations, allegations, charges, trials, convictions, acquittals, and plea bargains regarding voter fraud. Existing studies are incomplete but provide some insight. For example, a statewide survey of each of Ohio's 88 county boards of elections found only four instances of ineligible persons attempting to vote out of a total of 9,078,728 votes cast in the state's 2002 and 2004 general elections. This is a fraud rate of 0.00000045 percent. The Carter-Baker Commission's Report noted that since October 2002, federal officials had charged 89 individuals with casting multiple votes, providing false information about their felon status, buying votes, submitting false voter registration information, and voting improperly as a non-citizen. Examined in the context of the 196,139,871 ballots cast between October 2002 and August 2005, this represents a fraud rate of 0.0000005 percent (note also that not all of the activities charged would have been prevented by a photo identification requirement).

A more comprehensive study should distinguish voter fraud that could be prevented by a photo identification requirement from other types of fraud — such as absentee voting and stuffing ballot boxes — and obtain statistics on the factors that led law enforcement to prosecute fraud. The study would demand significant resources because it would require that researchers interview and pour over the records of local district attorneys and election boards.

Hard data on investigations, allegations, charges, pleas, and prosecutions is important because it quantifies the amount of fraud officials detect. Even if prosecutors vigorously pursue voter fraud, however, the number of fraud cases charged probably does not capture the total amount of voter fraud. Information on official investigations, charges, and prosecutions should be supplemented by surveys of voters and a comparison of voting rolls to death rolls.

2. *Random Surveys of Voters*

Random surveys could give insight about the percentage of votes cast fraudulently. For example, political scientists could contact a statistically representative sampling of 1,000 people who purportedly voted at the polls in the last election, ask them if they actually voted, and confirm the percentage who are valid voters. Researchers should conduct the survey soon after an election to locate as many legitimate voters as possible with fresh memories.

Because many respondents would perceive voting as a social good, some who did not vote might claim that they did, which may underestimate the extent of fraud. A surveyor might mitigate this skew through the framing of the question (“I’ve got a record that you voted. Is that true?”).

Further, some voters will not be located by researchers and others will refuse to talk to researchers. Photo identification proponents might construe these non-respondents as improper registrations that were used to commit voter fraud.

Instead of surveying all voters to determine the amount of fraud, researchers might reduce the margin of error by focusing on a random sampling of voters who signed affidavits in the three states that request photo identification but also allow voters to establish their identity through affidavit—Florida, Louisiana, and South Dakota. In South Dakota, for example, only two percent of voters signed affidavits to establish their identity. If the survey indicates that 95 percent of those who signed affidavits are legitimate voters (and the other 5 percent were shown to be either fraudulent or were non-responsive), this suggests that voter fraud accounts for, at the maximum, 0.1 percent of ballots cast.

The affidavit study, however, is limited to three states, and it is unclear whether this sample is representative of other states (the difficulty may be magnified in Louisiana in the aftermath of Hurricane Katrina’s displacement of hundreds of thousands of voters). Further, the affidavit study reveals information about the amount of fraud in a photo identification state with an affidavit exception—more voter fraud may exist in a state that does not request photo identification.

### 3. *Examining Death Rolls*

A comparison of death rolls to voting rolls might also provide an estimate of fraud.

Imagine that one million people live in state A, which has no documentary identification requirement. Death records show that 20,000 people passed away in state A in 2003. A cross-referencing of this list to the voter rolls shows that 10,000 of those who died were registered voters, and these names remained on the voter rolls during the November 2004 election. Researchers would look at what percentage of the 10,000 dead-but-registered people who “voted” in the November 2004 election. A researcher should distinguish the votes cast in the name of the dead at the polls from those cast

absentee (which a photo identification requirement would not prevent). This number would be extrapolated to the electorate as a whole.

This methodology also has its strengths and weaknesses. If fraudulent voters target the dead, the study might overestimate the fraud that exists among living voters (although a low incidence of fraud among deceased voters might suggest that fraud among all voters is low). The appearance of fraud also might be inflated by false positives produced by a computer match of different people with the same name. Photo identification advocates would likely assert that the rate of voter fraud could be higher among fictitious names registered, and that the death record survey would not capture that type of fraud because fictitious names registered would not show up in the death records. Nevertheless, this study, combined with the other two, would provide important insight into the magnitude of fraud likely to exist in the absence of a photo identification requirement.

## Introduction

### Charge

Under the Help America Vote Act, Pub. L. No. 107-252, 116 Stat. 1666 (2002) (“HAVA”), the United States Election Assistance Commission is charged with developing national statistics on voter fraud and developing methods of deterring and investigating voter fraud. Also, the Commission is charged with developing methods of identifying, deterring, and investigating methods of voter intimidation. The Commission employed a bipartisan team of legal consultants, Tova Wang and Job Serebrov to develop a preliminary overview work product to determine the quantity and quality of vote fraud and voter intimidation that is present on a national scale. The consultants’ work is neither comprehensive nor conclusive. This first phase of an envisioned two-phase project was constrained by both time and funding. The consultants’ conclusions and recommendations for phase II will be contained in this Report.

### Scope of Work

The consultants, working without the aid of a support staff, divided most of the work. However, the final work product was mutually checked and approved. They agreed upon the steps that were taken needed and the method employed. For all of the documentary sources, the consultants limited the time period under review from January 1, 2001 to January 1, 2006. The research performed by the consultants included an extensive Nexis search, interviews, a review of existing literature, and case research.

### The Project

**Nexis:** Initially, the consultants developed an enormous list of possible Nexis search terms. It soon became obvious that it would be impossible to conduct the research that way. As a result, consultant Wang performed the Nexis search by finding search term combinations that would yield virtually every article on a particular subject from the last five years. Consultant Serebrov approved the search terms. Then Wang created an excel spreadsheet in order to break down the articles in way in which they could be effectively analyzed for patterns. Each type of fraud is broken down in a separate chart according to where it took place, the date, the type of election it occurred in, what the allegation was, the publication it came from. Where there was a follow up article, any information that that suggested there had been some further action taken or some resolution to the allegation was also included. For four very complicated and long drawn out situations – Washington State, Wisconsin, South Dakota in 2004, and the vote buying cases in a couple of particular jurisdictions over the last several years –written summaries with news citations are provided.

**Interviews:** The consultants chose the interviewees by first coming up with a list of the categories of types of people they wanted to interview. Then the consultants separately, equally filled those categories with a certain number of people. Due to time and resource

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constraints, the consultants had to pare down this list substantially – for instance, they had to rule out interviewing prosecutors altogether – but still got a good range of people to talk to. The ultimate categories were academics, advocates, elections officials, lawyers and judges. Although the consultants were able to talk to most of the people they wanted to, some were unavailable and a few were not comfortable speaking to them, particularly judges. The consultants together conducted all of the interviews, either by phone or in person. Then the consultants split up drafting the summaries. All summaries were reviewed and mutually approved. Most of the interviews were extremely informative and the consultants found the interviewees to be extremely knowledgeable and insightful for the most part.

**Existing Literature:** Part of the selections made by the consultants resulted from consultant Wang's long-term familiarity with the material while part was the result of a joint web search for articles and books on vote fraud and voter intimidation and suggestions from those interviewed by the consultants. The consultants reviewed a wide range of materials from government reports and investigations, to academic literature, to reports published by advocacy groups. The consultants believe that they covered the landscape of available sources.

**Cases:** In order to properly identify all applicable cases the consultants first developed an extensive word search term list. A WestLaw search was performed and the first one hundred cases under each word search term were then gathered in individual files. This resulted in a total of approximately 44,000 cases. Most of these cases were federal as opposed to state and appellate as opposed to trial. Consultant Serebrov analyzed the cases in each file to determine if they were on point. If he found that the first twenty cases were inapplicable, Serebrov would sample forty to fifty other file cases at random to determine applicability. If the entire file did not yield any cases, the file would be discarded. All discarded word search terms were recorded in a separate file. Likewise, if the file only yielded a few applicable cases, it would also be discarded. However, if a small but significant number of cases were on point, the file was later charted. The results of the case search were stark because relatively few applicable cases were found.

## **Nexis Search Articles Analysis**

### Absentee Ballots

According to press reports, absentee ballots are abused in a variety of ways:

1. Campaign workers, candidates and others coerce the voting choices of vulnerable populations, usually elderly voters
2. Workers for groups and individuals have attempted to vote absentee in the names of the deceased
3. Workers for groups, campaign workers and individuals have attempted to forge the names of other voters on absentee ballot requests and absentee ballots and thus vote multiple times

It is unclear how often actual convictions result from these activities (a handful of articles indicate convictions and guilty pleas), but this is an area in which there have been a substantial number of official investigations and actual charges filed, according to news reports where such information is available. A few of the allegations became part of civil court proceedings contesting the outcome of the election.

While absentee fraud allegations turn up throughout the country, a few states have had several such cases. Especially of note are Indiana, New Jersey, South Dakota, and most particularly, Texas. Interestingly, there were no articles regarding Oregon, where the entire system is vote by mail.

### Voter Registration Fraud

According to press reports, the following types of allegations of voter registration fraud are most common:

1. Registering in the name of dead people
2. Fake names and other information on voter registration forms
3. Illegitimate addresses used on voter registration forms
4. Voters being tricked into registering for a particular party under false pretenses
5. Destruction of voter registration forms depending on the party the voter registered with

There was only one self evident instance of a noncitizen registering to vote. Many of the instances reported on included official investigations and charges filed, but few actual convictions, at least from the news reporting. There have been multiple reports of registration fraud in California, Colorado, Florida, Missouri, New York, North Carolina, Ohio, South Dakota and Wisconsin.

### Voter Intimidation and Suppression

This is the area which had the most articles in part because there were so many allegations of intimidation and suppression during the 2004 election. Most of these remained allegations and no criminal investigation or prosecution ensued. Some of the cases did end up in civil litigation.

This is not to say that these alleged activities were confined to 2004 – there were several allegations made during every year studied. Most notable were the high number of allegations of voter intimidation and harassment reported during the 2003 Philadelphia mayoral race.

A very high number of the articles were about the issue of challenges to voters' registration status and challengers at the polling places. There were many allegations that planned challenge activities were targeted at minority communities. Some of the challenges were concentrated in immigrant communities.

However, the tactics alleged varied greatly. The types of activities discussed also include the following:

- Photographing or videotaping voters coming out of polling places.
- Improper demands for identification
- Poll watchers harassing voters
- Poll workers being hostile to or aggressively challenging voters
- Disproportionate police presence
- Poll watchers wearing clothes with messages that seemed intended to intimidate
- Insufficient voting machines and unmanageably long lines

Although the incidents reported on occurred everywhere, not surprisingly, many came from “battleground” states. There were several such reports out of Florida, Ohio and Pennsylvania.

#### “Dead Voters and Multiple Voting”

There were a high number of articles about people voting in the names of the dead and voting more than once. Many of these articles were marked by allegations of big numbers of people committing these frauds, and relatively few of these allegations turning out to be accurate according to investigations by the newspapers themselves, elections officials and criminal investigators. Often the problem turned out to be a result of administrative error, poll workers mis-marking of voter lists, a flawed registration list and/or errors made in the attempt to match names of voters on the list with the names of the people who voted. In a good number of cases, there were allegations that charges of double voting by political leaders were an effort to scare people away from the voting process.

Nonetheless there were a few cases of people actually being charged and/or convicted for these kinds of activities. Most of the cases involved a person voting both by absentee ballot and in person. A few instances involved people voting both during early voting

and on Election Day, which calls into question the proper marking and maintenance of the voting lists. In many instances, the person charged claimed not to have voted twice on purpose. A very small handful of cases involved a voter voting in more than one county and there was one substantiated case involving a person voting in more than one state. Other instances in which such efforts were alleged were disproved by officials.

In the case of voting in the name of a dead person, the problem lay in the voter registration list not being properly maintained, i.e. the person was still on the registration list as eligible to vote, and a person taking criminal advantage of that. In total, the San Francisco Chronicle found 5 such cases in March 2004; the AP cited a newspaper analysis of five such persons in an Indiana primary in May 2004; and a senate committee found two people to have voted in the names of the dead in 2005.

As usual, there were a disproportionate number of such articles coming out of Florida. Notably, there were three articles out of Oregon, which has one hundred percent vote-by-mail.

### Vote Buying

There were a surprising number of articles about vote buying cases. A few of these instances involved long-time investigations in three particular jurisdictions as detailed in the vote buying summary. There were more official investigations, indictments and convictions/pleas in this area. All of these cases are concentrated in the Midwest and South.

### Deceptive Practices

In 2004 there were numerous reports of intentional disinformation about voting eligibility and the voting process meant to confuse voters about their rights and when and where to vote. Misinformation came in the form of flyers, phone calls, letters, and even people going door to door. Many of the efforts were reportedly targeted at minority communities. A disproportionate number of them came from key battleground states, particularly Florida, Ohio, and Pennsylvania. From the news reports found, only one of these instances was officially investigated, the case in Oregon involving the destruction of voter registration forms. There were no reports of prosecutions or any other legal proceeding.

### Non-citizen Voting

There were surprisingly few articles regarding noncitizen registration and voting – just seven all together, in seven different states across the country. They were also evenly split between allegations of noncitizens registering and noncitizens voting. In one case charges were filed against ten individuals. In one case a judge in a civil suit found there was illegal noncitizen voting. Three instances prompted official investigations. Two cases, from this nexis search, remained just allegations of noncitizen voting.

### Felon Voting

Although there were only thirteen cases of felon voting, some of them involved large numbers of voters. Most notably, of course, are the cases that came to light in the Washington gubernatorial election contest (see Washington summary) and in Wisconsin (see Wisconsin summary). In several states, the main problem has the large number of ineligible felons that remained on the voting list.

### Election Official Fraud

In most of the cases in which fraud by elections officials is suspected or alleged, it is difficult to determine whether it is incompetence or a crime. There are several cases of ballots gone missing, ballots unaccounted for and ballots ending up in a worker's possession. In two cases workers were said to have changed peoples' votes. The one instance in which widespread ballot box stuffing by elections workers was alleged was in Washington State. The judge in the civil trial of that election contest did not find that elections workers had committed fraud. Four of the cases are from Texas.

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Andrew Gumbel, *Steal this Vote: Dirty Elections and the Rotten History of Democracy in American*, Nation Books, 2005.

Tracy Campbell, *Deliver the Vote: A History of Election Fraud, An American Political Tradition – 1742-2004*, Carroll & Graf Publishers, 2005.

David E. Johnson and Jonny R. Johnson, *A Funny Thing Happened on the Way to the White House: Foolhardiness, Folly, and Fraud in the Presidential Elections, from Andrew Jackson to George W. Bush*, Taylor Trade Publishing, 2004.

Mark Crispin Miller, *Fooled Again*, Basic Books, 2005.

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*Common Cause of Georgia vs. Billups*, U.S. District Court, Northern District of Georgia (Rome) 4:05-cv-00201-HLM U.S. Court of Appeals, 11<sup>th</sup> Circuit 05-15784

U.S. Department of Justice Section 5 Recommendation Memorandum (regarding HB 244), August 25, 2005 at  
<http://www.votingrights.org/news/downloads/Section%205%20Recommendation%20Memorandum.pdf>

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Appendix 2: List of literature reviewed

Appendix 3: Excerpt from "Machinery of Democracy," a Brennan Center Report

Appendix 3: Members of the Working Group

## Working Group Recommendations

1. **Use the 2006 and/or 2008 elections as a laboratory by employing observers.**

At the working group meeting, there was much discussion about using observers to collect data regarding fraud and intimidation at the polls in the upcoming elections. Mr. Ginsberg recommended using representatives of both parties for the task. Mr. Bauer and others objected to this, believing that using partisans as observers would be unworkable and would not be credible to the public.

There was even greater concern about the difficulties in getting access to poll sites for the purposes of observation. Most states strictly limit who can be in the polling place. In addition, there are already so many groups doing observation and monitoring at the polls, administrators might object. There was further concern that observers would introduce a variable into the process that would impact the outcome. The very fact that observers were present would influence behavior and skew the results.

Moreover, it was pointed out, many of the problems we see now with respect to fraud and intimidation does not take place at the polling place, e.g. absentee ballot fraud and deceptive practices. Poll site monitoring would not capture this activity. Moreover, with increased use of early voting, poll site monitoring might have to go on for weeks to be effective, which would require tremendous resources.

Mr. Weinberg suggested using observers in the way they are utilized in international elections. Such observers come into a jurisdiction prior to the election, and use standardized forms at the polling sites to collect data.

2. **Do a study on absentee ballot fraud.** The working group agreed that since absentee ballot fraud is the main form of fraud occurring, and is a practice that is great expanding throughout the country, it would make sense to do a stand-alone study of absentee ballot fraud. Such a study would be facilitated by the fact that there already is a great deal of information on how, when, where and why such practices are carried out based on cases successfully prosecuted. Researchers could look at actual cases to see how absentee ballot fraud schemes are conducted in an effort to provide recommendations on more effective measures for preventing them.
3. **Use risk analysis methodology to study fraud.**<sup>1</sup> Working group members were supportive of one of the methodologies recommended for studying this issue, risk analysis. As Mr. Bauer put it, based on the assumption that people act rationally, do an examination of what types of fraud people are most likely to commit, given the relative costs and benefits. In that way, researchers can rank the types of fraud that are the easiest to commit at the least cost with the greatest effect, from

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<sup>1</sup> See Appendix C, and section on methodology

most to least likely to occur. This might prove a more practical way of measuring the problems than trying to actually get a number of acts of fraud and/or intimidation occurring. Mr. Greenbaum added that one would want to examine what conditions surrounding an election would be most likely to lead to an increase in fraud. Mr. Rokita objected based on his belief that the passions of partisanship lead people to not act rationally in an election.

4. **Conduct research using a methodology of database comparison.** Picking up on a suggestion made by Spencer Overton and explained in the suggested methodology section, Mr. Hearne recommended studying the issue using statistical database matching. Researchers should compare the voter roll and the list of people who actually voted to see if there are “dead” and felon voters. Because of the inconsistent quality of the databases, however, a political scientist would need to work in an appropriate margin of error when using such a methodology.
5. **Conduct a study of deceptive practices.** The working group discussed the increasing use of deceptive practices, such as flyers with false and/or intimidating information, to suppress voter participation. A number of groups, including the Department of Justice, the EAC, and organizations such as the Lawyers Committee for Civil Rights, keep phone logs regarding complaints of such practices, which may be available for review and analysis. This is also an area in which there is often tangible evidence, such as copies of the flyers and postcards themselves. All of this information should be reviewed and analyzed to see how such practices are being conducted and what can be done about them.
6. **Study use of HAVA’s administrative complaint procedure to see if it can be used to measure some forms of fraud and intimidation.** The EAC should study the extent to which states are actually utilizing the administrative complaint procedure mandated by HAVA. In addition, the EAC should study whether data collected through the administrative complaint procedure can be used as another source of information for measuring fraud and intimidation.
7. **Examine the use of special election courts.** Given that many state and local judges are elected, it may be worth exploring whether special election courts that are running before, during and after election day would be an effective means of disposing with complaints and violations in an expeditious manner. Pennsylvania employs such a system, and the EAC should consider investigating how well it is working to deal with fraud and intimidation problems.

## RECOMMENDATIONS FOR FURTHER EAC ACTIVITY ON VOTER FRAUD AND INTIMIDATION

### Consultant Recommendations

- **Greatly expand the scope of individuals interviewed.** Time and resource constraints prevented the consultants from interviewing the full range of participants in the electoral process. As a result, we recommend that in the next phase of this project, further interviews be conducted. In particular, a greater sampling of state and local election officials from different parts of the country should be interviewed. These individuals have first hand information and experience in the operation of elections.

We also recommend that in the next phase interviews be conducted with people in law enforcement, specifically Federal District Election Officers (“DEOs”)<sup>1</sup> and local district attorneys and attorneys defending those accused of election crimes or civil violations. In many instances it is the local district attorney who will investigate election fraud and suppression complaints. Attorneys who defend people accused of election crimes will have a different perspective on how the system is working to detect, prevent, and prosecute election fraud.

- **Conduct Follow-Up Nexis Research.** The Nexis search conducted for this phase of the research was based on a list of search terms agreed upon by both consultants. Thousands of articles were reviewed and hundreds analyzed. Many of the articles contain allegations of fraud or intimidation. Similarly, many of the articles contain information about investigations into such activities or even charges brought. However, without being able to go beyond the search terms, we

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<sup>1</sup> The Public Integrity Section of the Criminal Division of the Department of Justice has all of the 93 U.S. Attorneys appoint Assistant U.S. Attorneys to serve as DEOs for two years. DEOs are required to screen and conduct preliminary investigations of complaints, in conjunction with the FBI and PIN, to determine whether they constitute potential election crimes and should become matters for investigation; oversee the investigation and prosecution of election fraud and other election crimes in their districts; coordinate their district’s (investigative and prosecutorial) efforts with DOJ headquarters prosecutors; coordinate election matters with state and local election and law enforcement officials and make them aware of their availability to assist with election-related matters; issue press releases to the public announcing the names and telephone numbers of DOJ and FBI officials to contact on election day with complaints about voting or election irregularities and answer telephones on election day to receive these complaints; and supervise a team of Assistant U.S. Attorneys and FBI special agents who are appointed to handle election-related allegations while the polls are open on election day. *Department of Justice’s Activities to Address Past Election-Related Voting Irregularities*: General Accounting Office, October 14, 2004, GAO-04-1041R

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could not determine whether there was any action taken regarding the allegations, investigation or charges brought. Consequently, it is impossible to know if the article is just reporting on “talk” or what turns out to be a serious affront to the system. We recommend that follow up Nexis research be conducted to establish what, if any, resolutions or further activity there was in each case.

We also believe that in the second phase of this project, there should be a sampling of local newspapers from around the country to analyze for articles on voter fraud and voter intimidation. This will lead to a better idea of problems that occur on city and county levels that are often not reported statewide.

- **Conduct follow-up research to the literature reviews.** Similarly, many allegations are made in the reports and books that we analyzed and summarized. Those allegations are often not substantiated in any way and are inherently time limited by the date of the writing. Despite this, various interested parties frequently cite such reports and books as evidence of fraud or intimidation. Therefore, we recommend as a follow up to the literature review, an analysis of the resolution, if any, of specific instances of fraud and intimidation cited in the books and reports reviewed in the first phase.
- **Review a sampling of state district court cases.** In the first phase, we read and analyzed over 44,000 cases. Unfortunately, few of these were found to be on point. We therefore recommend that in the second phase, research should be concentrated on a national sampling of state district court level electoral cases. Often the district courts settle important issues that are not subsequently appealed. We believe that there could be a storehouse of information regarding vote fraud and intimidation in these cases.
- **Survey state election fraud and intimidation laws.** We recommend that there be a sampling of state electoral laws (including criminal penalty provisions), in order to aid in the development of model legislation that would address voter fraud and intimidation.
- **Review which states collect data on fraud and intimidation.** Evidently a few states, such as Arkansas and Georgia, collect and maintain data on complaints of fraud and intimidation and the disposition of those allegations at the state level. Phase two should examine what other states have such information and seek to obtain it for review and analysis. Policies and protocols on gathering such information in these states should also be looked at as possible models for the states that do not employ this practice.
- **Analyze data collected by various organizations in the 2006 election.** Several organizations, such as Election Protection, 1-800-MYVOTE1, and the parties will be setting up hotlines and sending people into the field during the upcoming mid-term elections both to assist voters and compile complete records of complaints and incidents from the period of voter registration through Election Day. Some of

these organizations have already agreed to share their data with the phase two EAC project consultants. We recommend that such data be used to the greatest extent possible to assess the incidence and the nature of the fraud and intimidation that occurred.

- **Obtain and analyze data retained by the Department of Justice.** Although according to a recent GAO report the Voting Section of the Civil Rights Division of the Department of Justice tracks complaints of voter intimidation in a variety of ways,<sup>1</sup> the Section was extremely reluctant to provide the consultants with useful information. Further attempts should be made to obtain relevant data. This includes the telephone logs of complaints the Section keeps and information from the database – the Interactive Case Management (ICM) system – the Section maintains on complaints received and the corresponding action taken. We also recommend that further research include a review and analysis of the observer and monitor field reports from Election Day that must be filed with the Section.
- **Obtain and analyze a sampling of DEO Reports.** Similarly, the consultants believe it would be useful for any further research to include a review of the reports that must be filed by every DEO to the Public Integrity Section of the Criminal Division of the Department of Justice. As noted above, the DEOs play a central role in receiving reports of voter fraud and investigating and pursuing them. Their reports would likely provide tremendous insight into what actually transpired during the last several elections. Where necessary, information could be redacted or kept confidential.
- **Attend the Department of Justice’s Ballot Access and Voting Integrity Symposium.** The consultants also believe it would be useful for any further activity in this area to include attendance at the next Ballot Access and Voting Integrity Symposium.<sup>2</sup> According to the Department, DEOs are required to attend annual training conferences centered on combating election fraud and voting rights abuses. These conferences sponsored by the Voting Section of the Civil Rights Division and the Public Integrity Section of the Criminal Division, feature presentations by civil rights officials and senior prosecutors from the Public Integrity Section and the U.S. Attorneys’ Offices.<sup>ii</sup>
- **Consult with an academic/academic institution with unimpeachable political science statistical research credentials.** Included in this report is a summary of

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<sup>2</sup> By attending the symposium researchers could learn more about the following:

How *DEOs* are trained, e.g. what they are taught to focus their resources on; How they are instructed to respond to various types of complaints; How information about previous elections and voting issues is presented; and, How the Voting Rights Act, the criminal laws governing election fraud and intimidation, the National Voter Registration Act, and the Help America Vote Act are described and explained to participants.

various methodologies political scientists and others suggested to measure voter fraud and intimidation. While we note the skepticism of the Working Group in this regard, we nonetheless recommend that in order to further the mission of providing unbiased data, further activity in this area include an academic institution and/or individual that focuses on sound, statistical methods for political science research.

- **Review and Assess Whether Current Federal Laws on Fraud and Intimidation are Adequate.** Finally, we recommend that phase two project researchers review federal laws to explore ways to make it easier to impose either civil or criminal penalties for acts of intimidation that do not necessarily involve racial animus and/or a physical or economic threats.

According to Craig Donsanto, long-time director of the Public Integrity Section of the Criminal Division of the Department of Justice,

As with other statutes addressing voter intimidation, in the absence of any jurisprudence to the contrary, it is the Criminal Division's position that section 1973gg-10(1) applies only to intimidation which is accomplished through the use of threats of physical or economic duress. Voter "intimidation" accomplished through less drastic means may present violations of the Voting Rights Act, 42 U.S.C. § 1973i(b), which are enforced by the Civil Rights Division through noncriminal remedies.<sup>iii</sup>

Mr. Donsanto reiterated these points to us on several occasions, including at the working group meeting.

The second phase of this project should examine if current laws can be revised or new laws drafted that would address voter intimidation that does not threaten the voter physically or financially, but rather threatens the voter's right to vote as *something of tangible value in itself*. Such legislation would penalize all forms of voter intimidation, regardless of the motivation. The law would, *for example*, potentially cover letters and postcards with contain language meant to deter voters from voting and pre-Election and Election Day challenges that are clearly illegitimate.

In the alternative to finding a way to penalize such behavior, researchers might examine ways to deter and punish voter intimidation under civil law. For example, there might be a private right of action created for voters or groups who have been subjected to intimidation tactics in the voting process. Such an action could be brought against individual offenders; any state or local actor where there is an unchecked pattern of repeated abuse; and organizations that intentionally engage in intimidating practices. Civil damage penalties and attorney fees should be included. Another, more modest measure, as has been suggested by Ana Henderson

and Christopher Edley,<sup>iv</sup> would be to bring fines for violations under the Voting Rights Act up to parity. Currently, the penalty for fraud is \$10,000 while the penalty for acts to deprive the right to vote is \$5,000.

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<sup>i</sup> *Department of Justice's Activities to Address Past Election-Related Voting Irregularities*: General Accounting Office, October 14, 2004, GAO-04-1041R, p. 4. This same report criticizes some of the procedures the Section used for these systems and urged the Department to improve upon them in time for the 2004 presidential election. No follow-up report has been done since that time to the best of our knowledge.

<sup>ii</sup> *Department Of Justice To Hold Ballot Access and Voting Integrity Symposium*: U.S. Department of Justice press release, August 2, 2005.

<sup>iii</sup> Craig C. Donsanto, *Prosecution of Electoral Fraud Under United States Federal Law*, IFES Political Finance White Paper Series, 2006, p. 29.

<sup>iv</sup> Ana Henderson and Christopher Edley, Jr., *Voting Rights Act Reauthorization: Research-Based Recommendations to Improve Voting Access*, Chief Justice Earl Warren Institute on Race, Ethnicity and Diversity, University of California at Berkeley, School of Law, 2006, p. 29

Vote Fraud, Intimidation & Suppression In The 2004 Presidential Election

American Center for Voting Rights Report

According to its website," the American Center For Voting Rights Legislative Fund was founded in February 2005 on the belief that public confidence in our electoral system is the cornerstone of our democracy... ACVR Legislative Fund supports election reform that protects the right of all citizens to participate in the election process free of intimidation, discrimination or harassment and which will make it easy to vote but tough to cheat.

Using court records, police reports and news articles, ACVR Legislative Fund presented this Report documenting hundreds of reported incidents and allegations from around the country. ACVR Legislative Fund found that thousands of Americans were disenfranchised by illegal votes cast on Election Day 2004. For every illegal vote cast and counted on Election Day, a legitimate voter is disenfranchised. This report alleges a coordinated effort by members of some organizations to rig the election system through voter registration fraud, the first step in any vote fraud scheme that corrupts the election process by burying local officials in fraudulent and suspicious registration forms. ACVR Legislative Fund further found that, despite their heated rhetoric, paid Democrat operatives were far more involved in voter intimidation and suppression activities than were their Republican counterparts during the 2004 presidential election.

In addition to recommended changes and a zero-tolerance commitment by the political parties, ACVR Legislative Fund has identified five cities as "hot spots" which require additional immediate attention. These cities were identified based on the findings of this report and the cities' documented history of fraud and intimidation. These cities are: Philadelphia, PA, Milwaukee, WI, Seattle, WA, St. Louis/East St. Louis, MO/IL, and Cleveland, OH.

Without going into great detail in this review, this Report: refutes charges of voter intimidation and suppression made against Republican supporters, discusses similar charges against Democrats, details incidents vote fraud and illegal voting and finally discusses problems with vote fraud, voter registration fraud and election irregularities around the country. The majority of this Report is an attempt to redeem Republicans and vilify Democrats.

In terms of sheer numbers, the report most often alleges voter intimidation and voter registration fraud, and to a lesser degree absentee ballot fraud and vote buying.

The Report presented the following recommendations for future action:

\* Both national political parties should formally adopt a zero-tolerance fraud and intimidation policy that commits the party to pursuing and fully prosecuting individuals and allied organizations who commit vote fraud or who seek to deter any eligible voter from participating in the election through fraud or intimidation. No amount of legislative

reform can effectively deter those who commit acts of fraud if there is no punishment for the crime and these acts continue to be tolerated.

\* States should adopt legislation requiring government-issued photo ID at the polls and for any voter seeking to vote by mail or by absentee ballot. Government-issued photo identification should be readily available to all citizens without cost and provisions made to assure availability of government-issued identification to disabled and low-income citizens.

\* States should adopt legislation requiring that all polling places be fully accessible and accommodating to all voters regardless of race, disability or political persuasion and that polling locations are free of intimidation or harassment.

\* States should create and maintain current and accurate statewide voter registration databases as mandated by the federal Help America Vote Act ("HAVA") and establish procedures to assure that the statewide voter roll is current and accurate and that the names of eligible voters on the roll are consistent with the voter roll used by local election authorities in conducting the election.

\* States should adopt legislation establishing a 30-day voter registration cutoff to assure that all voter rolls are accurate and that all registrants can cast a regular ballot on Election Day and the election officials have opportunity to establish a current and accurate voter roll without duplicate or fictional names and assure that all eligible voters (including all recently registered voters) are included on the voter roll at their proper precinct.

\* States should adopt legislation requiring voter registration applications to be delivered to the elections office within one week of being completed so that they are processed in a timely manner and to assure the individuals registered by third party organizations are properly included on the voter roll.

\* States should adopt legislation and penalties for groups violating voter registration laws, and provide the list of violations and penalties to all registration solicitors. Legislation should require those organizations obtaining a voter's registration to deliver that registration to election officials in a timely manner and should impose appropriate penalties upon any individual or organization that obtains an eligible voter's registration and fails to deliver it to election authorities.

\* States should adopt legislation prohibiting "bounty" payment to voter registration solicitors based on the number of registration cards they collect.

America's Modern Poll Tax: How Structural Disenfranchisement Erodes Democracy

Advancement Project

The thesis of the Report, America's Modern Poll Tax, written after the 2000 election, is that structural disenfranchisement—the effect of breakdowns in the electoral system, is the new poll tax. Structural disenfranchisement includes “bureaucratic blunders, governmental indifference, and flagrant disregard for voting rights.” The blame for structural disenfranchisement is laid squarely at the feet of states and localities that “shirk their responsibilities or otherwise manipulate election systems,” resulting in voters “either turned away from the polls or their votes are thrown out.”

The interlocking practices and mechanics that comprise structural disenfranchisement are referred to a “ballot blockers” in the report. Most ballot blockers involve the structural elements of electoral administration: “ill-trained poll workers, failures to process registration cards on time or at all, inaccurate registration rolls, overbroad purges of voter rolls, unreasonably long lines, inaccurate ballot translations and a shortage of translators to assist voters who have limited English language skills.” The Report argues that a culture of indifference overlays these issues that both tolerates and excuses widespread disenfranchisement. This culture of indifference is exemplified by legislatures that do not properly fund election systems, officials that send antiquated equipment into poor and minority areas, poorly translated ballots and polling places that are not wheelchair accessible.

The data and conclusions in the Report are taken from eight sample case studies of states and cities across the country and a survey of state election directors that reinforces the findings of the case studies. Examples of state and city problems were: New York City—in six polling places Chinese translations inverted the Democrats with the Republicans; Georgia—the state computer crashed two weeks before the election, dropping thousands of voters from the rolls; Virginia—registration problems kept an untold number from voting; Chicago—in inner-city precincts with predominately minority populations, almost four out of every ten votes cast for President (in 2000) were discarded; St. Louis—thousands of qualified voters were placed on inactive lists due to an overbroad purge; Florida—a voting list purge of voters whose name and birth date closely resembled those of people convicted of felonies; and, Texas—significant Jim Crow like barriers to minority voting.

The survey of state election directors found: election directors lack the resources to effectively do their jobs and some lack the “ability or will to force local election officials to fix serious problems”; election officials are highly under funded and legislatures refuse to grant their requests for more money; due to a lack of funds, election officials must use old and inferior equipment and can't improve training or meet structural needs; election officials are generally unaware of racial disparities in voting; only three of the 50 state election administrators are non-white.

The Report “concludes that affected communities and democracy advocates should mobilize to force change.” A number of recommendations are made to protect the

electoral franchise including: Federal policies that set nationwide and uniform election policies; federal guarantee of access to provisional ballots; enforcement of voter disability laws; automatic restoration of voting rights to those convicted of a crime after they have completed their sentence; a centralized data base of voters administered by non-partisan individuals; federal standards limiting precinct discarded vote rates to .25 %; federal requirements that jurisdiction provide voter education, including how to protect their right to vote; and laws that strengthen the ability of individuals to bring actions to enforce voting rights and anti-discrimination laws.

A Funny Thing Happened on the Way to the White House by David E. Johnson & Jonny R. Johnson

A Funny Thing Happened adds almost nothing to the present study. It contains no footnotes and no references to primary source material, save what may be able to be gleaned from the bibliography. The Johnsons take a historical look at United States Presidential elections from Andrew Jackson to George Bush by providing interesting stories and other historical information. Unfortunately, there are only three pages out of the entire book that touches on vote fraud in the first Bush election.

The authors assert that the exit polls in Florida were probably correct. The problem was the pollsters had no way of knowing that thousands of votes would be invalidated. But the authors do not believe that fraud was the cause of the tabulation inaccuracy. The major cause was undervotes and overvotes which, if all counted, would have altered the result, compounded by the use of the butterfly ballot in some strategic counties. Additionally, Ralph Nader's votes were primarily a bleed off of needed Gore votes. The authors accused Katherine Harris, then Florida Secretary of State and co-chair of the Bush campaign in Florida for prematurely certifying the state vote. The authors also ridiculed United States Secretary of State James A. Baker III, for using the courts to block attempts to hand count votes. Finally, the authors indicated that a mob of Republican partisans descended on the vote counters in Dade County and effectively stopped the count.

Analysis of the September 15, 2005 Voter Fraud Report Submitted to the New Jersey Attorney General

By The Brennan Center for Justice at NYU School of Law and Dr. Michael McDonald of George Mason University

General

A September 15, 2005 Report submitted to the New Jersey Attorney General included lists of purportedly illegitimate votes in New Jersey in the 2004 general election, including lists of 10,969 individuals who purportedly voted twice and lists of 4,756 voters who were purportedly dead or incarcerated in November 2004. For the present Analysis of the Report, the lists of voters submitted to the New Jersey Attorney General, as well as a copy of the New Jersey county voter registration files were obtained, and an initial investigation of the report's claims was conducted. The analysis shows that the lists submitted are substantially flawed.

The Analysis is based on methodology only: its authors did not gain access to original documents related to registration or original pollbook records; only recently were copies of the counties' original registration data files acquired and compiled, which contain some notable gaps; and the lists submitted to the Attorney General contain significant errors and little documentation, which complicated the analysis. Nonetheless, the analysts say that information collected is sufficient for generally assessing the quality of evidence presented to support the September 15 report. Analysis of the suspect lists reveals that the evidence submitted does not show what it purports to show: cause for concern that there is serious risk of widespread fraud given the state of the New Jersey voter registration rolls.

These suspect lists were compiled by attempting to match the first name, last name, and birth date of persons on county voter registration files. Entries that supposedly "matched" other entries were apparently deemed to represent the same individual, voting twice. This methodology was similar to the method used in compiling the notoriously inaccurate Florida "purge lists" of suspected ineligible felons in 2000 and 2004. As Florida's experience shows, matching names and birth dates in the voter registration context can easily lead to false conclusions – as was almost certainly the case here.

This Analysis reveals several serious problems with the methodology used to compile the suspect lists that compromise the lists' practical value. For example, the data used in the Report from one county appears to be particularly suspect and anomalous, and may have substantially skewed the overall results. In addition, middle initials were ignored throughout all counties, so that "J \_\_\_\_\_ A. Smith" was presumed to be the same person as "J \_\_\_\_\_ G. Smith." Suffixes were also ignored, so that fathers and sons – like "B \_\_\_\_\_ Johnson" and "B \_\_\_\_\_ Johnson, Jr." – were said to be the same person.

Underlying many of the entries on these lists, and similar lists compiled in Florida and elsewhere, is a presumption that two records with the same name and date of birth must

represent the same person. As *explained* in this analysis, this presumption is not consistent with basic statistical principles. Even when votes appear to have been cast in two different cities under the same name and birth date, statistics show that voter fraud is not necessarily to blame. With 3.6 million persons who voted in the 2004 election in New Jersey, the chance that some have the same name and birth date is not far-fetched.

#### Analysis of the Claim of Double Voting by 4,497 Individuals

Attempts to match data on one list to data on another list will often yield “false positives:” two records that at first appear to be a match but do not actually represent the same person. The natural incidence of “false positives” for a matching exercise of this scale – especially when, as here, conducted with relatively little attention to detail – readily explains the ostensible number of double votes.

1,803 of these 4,397 records of ostensibly illegal votes seem to be the product of a glitch in the compilation of the registration files. These records reflect two registration entries by the same person from the same address, with a notation next to each that the individual has voted. For example, 55-year-old W \_\_\_\_\_ A. Connors, living at 253 B \_\_\_\_\_ Ave. in a New York commuter suburb, is listed on the data files with an (erroneous) first registration date in 1901 and a second registration date in 1993; Mr. Connors is thus represented twice on the data files submitted. Each of these entries also indicates that W \_\_\_\_\_ A. Connors at 253 B \_\_\_\_\_ Ave voted in 2004. There is no credible indication, however, that Mr. Connors actually voted twice; indeed, given the clearly erroneous registration date on the files, it is far more likely that data error is to blame for the doubly logged vote as well.

More plausibly, the bulk of these 1,803 records may be traced to irregularities in the data processing and compilation process for one single county: the Middlesex County registration file accounts for only 10% of registered voters in the state but 78% of these alleged double votes. The suspect lists themselves contain an acknowledgment that the problem in Middlesex is probably not fraud: 99% of these Middlesex voters are labeled on the lists submitted to the Attorney General with a notation that the record is “less likely” to indicate an illegal double vote.

Another 1,257 entries of the 4,397 records probably represent similar data errors – also largely driven by a likely glitch in the Middlesex County file, which is also vastly over represented in this category. These records show ever-so-slight variations in records listed with the same date of birth at the same address: for example, the same first and last names, but different middle initials or suffixes (e.g., J \_\_\_\_\_ T. Kearns, Sr., and J \_\_\_\_\_ T. Kearns, Jr., both born the same day and living at the same address; or J \_\_\_\_\_ E. Allen and J \_\_\_\_\_ P. Allen, born the same day and living at the same address).

Approximately 800 of the entries on the list likely represent different people, with different addresses and different middle initials or suffixes. For example, W \_\_\_\_\_ S. Smith, living in a northern New Jersey town, and W \_\_\_\_\_ C. Smith, living in another town two hours away, share the same date of birth but are not the same person. Nor are

T \_\_\_\_ Brown, living in a New York commuter suburb, and T \_\_\_\_ H. Brown, Jr., living in a small town over an hour west, despite the fact that they also share the same birth date. About three-quarters of the entries in this category reveal data that affirmatively conflict – for example, a middle initial (“W \_\_\_\_ S.”) in one case, and a different middle initial (“W \_\_\_\_ C.”) in another, listed at different addresses. There is absolutely no good reason to conclude that these individuals are in fact the same, when the available evidence indicates the contrary.

For approximately 200 of the entries in this category, however, less information is available. These entries show a middle initial (“J \_\_\_\_ W. Davis”) in one case, and no middle initial (“J \_\_\_\_ Davis”) in another – again, at different addresses. The lack of the middle initial is ambiguous: it could mean that one of the J \_\_\_\_ Davis in question has no middle name, or it could mean that the middle initial was simply omitted in a particular registration entry. Although these entries involve less conclusive affirmative evidence of a false match than the entries noted above, there is still no good reason to believe that “J \_\_\_\_ W. Davis” and “J \_\_\_\_ Davis,” at different addresses, represent the same person.

Of the individuals remaining, there are serious concerns with the accuracy of the dates of birth. Seven voters were apparently born in January 1, 1880 – which is most likely a system default for registrations lacking date-of-birth information. For 227 voters, only the month and year of birth are listed: this means only that two voters with the same name were born in the same month and year, an unsurprising coincidence in a state of several million people.

That leaves approximately 289 votes cast under the same name and birth date – like votes cast by “P \_\_\_\_ S. Rosen,” born in the middle of the baby boom – but from two different addresses. It may appear strange, but there may be two P \_\_\_\_ S. Rosens, born on the same date in 1948 – and such coincidences are surprisingly common. For any one person, the odds of someone else having the same name and birth date is small. But because there are so many voters in New Jersey, a sizable number will have the same name and birth date simply by chance. In a group of just 23 people, it is more likely than not that two will share the same birthday. For 40 people, the probability is 90%. Many, if not most, of the 289 alleged double votes of persons registered at different addresses most likely reflect two separate individuals sharing a first name, last name, middle initial, and birth date.

The September 15 Report makes much of the raw potential for foul play based on the unsurprising fact that there are voters who appear on the New Jersey registration rolls more than once. As noted above, many of the names identified reflect two different individuals and not simply duplicate entries. But there is no doubt that there are duplicate entries on New Jersey’s registration rolls. It is well known that voter registration rolls contain “deadwood” – registration entries for individuals no longer living at a given address or deceased. There is no evidence, however, that these extra registrations are used for widespread illegal voting. Moreover, the problem of deadwood will soon be largely resolved: both the National Voter Registration Act of 1993 and the Help America

Vote Act of 2002 require states to implement several systems and procedures as of January 1, 2006, that will clean the voter rolls of duplicate or invalid entries while protecting eligible voters from unintended disfranchisement.

Response to the Report of the 2005 Commission on Federal Election Reform

**By The Brennan Center for Justice at NYU School of Law and Spencer Overton,  
Commissioner and Law Professor at George Washington University School of Law**

Introduction

On September 19, 2005, the Commission on Federal Election Reform, co-chaired by former President Jimmy Carter and former Secretary of State James Baker III, issued a report with recommendations for reforming the administration of U.S. elections. This Response addresses the main substantive flaws in the Report, refuting in detail its recommendations that “Real ID” cards be used for voter identification, that Social Security numbers be spread through interstate databases and on ID cards, and that states restore voting rights to people convicted of felony convictions only in certain cases and only after they have completed all the terms of their sentence.

Voter Identification Recommendation

According to the Response, the Report’s most troubling recommendation is that states require voters to present a Real ID card or a similar “template” ID as a condition of voting. This recommendation is more onerous than the photo ID proposal rejected by the Commission’s predecessor in 2001 and is more restrictive than any ID requirement adopted in any state to date. It would impose substantial – and for some, insurmountable – burdens on the right to vote. This ID requirement is purportedly intended to prevent “voter fraud,” and yet the Report itself concedes that “[t]here is no evidence of extensive fraud in U.S. elections or of multiple voting” before asserting, without any meaningful support, that “both occur.” Not only does the Report fail to justify the creation of stringent identification requirements, but it also does not explain why the goals of improved election integrity will not be met through the existing provisions in the Help America Vote Act of 2002 (HAVA). Additionally, the Report fails to consider alternative measures to advance its goals that are less restrictive to voters.

The Commission’s recommendation that eligible citizens be barred from voting unless they are able to present a souped-up “Real ID” card is a proposal guaranteed to disenfranchise a substantial number of eligible voters. Millions of Americans currently do not have driver’s licenses or government-issued photo ID cards. As the 2001 National Commission on Federal Election Reform recognized, research shows that between six and ten percent of voting-age Americans do not have driver’s licenses or state-issued non-driver’s photo ID. That translates into as many as 20 million eligible voters. Millions more may never get the new Real ID card, which requires substantially more cost and effort. The percentage of Americans without the documentary proof of citizenship necessary to obtain Real IDs is likely to remain high because, as discussed below, the requisite documents are both expensive and burdensome to obtain. The Report’s proposal to use Real ID as a condition of voting is so excessive that it would prevent eligible voters from proving their identity with even a valid U.S. passport or a U.S. military photo ID card. While Americans of all backgrounds would be excluded by the Report’s ID proposal, the burden would fall disproportionately on the elderly, the disabled, students, the poor, and people of color.

According to the Georgia chapter of the AARP, 36 percent of Georgians over age 75 do not have a driver's license. In Wisconsin, approximately 23 percent of persons aged 65 and older do not have driver's licenses or photo ID, and fewer than 3 percent of students have driver's licenses listing their current address. Across the country, more than 3 million Americans with disabilities do not have a driver's license or other form of state-issued photo ID. Moreover, given the frequency with which Americans move residences, it is likely that a far greater percentage of citizens lack driver's licenses or photo IDs bearing their current addresses. Since voting generally depends on the voter's address, and since many states will not accept IDs that do not bear an individual's current voting address, an additional 41.5 million Americans each year will have ID that they may not be able to use to vote.

As the Report recognizes, government-issued photo identification costs money. Thus, if required as a precondition for voting, photo identification would operate as a de facto poll tax that could disenfranchise low-income voters. To alleviate this burden, the Report appropriately recommends that the "Real ID" card itself be issued free of charge. This safeguard, however, does not address some of the most significant predicate costs in obtaining photo identification – costs incurred whether or not the card itself is free. First, each of the documents an individual is required to show in order to obtain a "Real ID" card or other government-issued photo ID card costs money or presumes a minimal level of economic resources. A certified copy of a birth certificate costs from \$10.00 to \$45.00, depending on the state; a passport costs \$85.00; and certified naturalization papers cost \$19.95. Unless the federal and all state governments waive the cost of each of these other forms of identification, the indirect costs of photo IDs will be even greater than their direct costs. In addition, since government-issued IDs may only be obtained at specified government offices, which may be far from voters' residences and workplaces, individuals seeking such IDs will have to incur transportation costs and the costs of taking time off from work to visit those offices during often-abbreviated business hours. These are not insignificant burdens.

Strong empirical evidence also shows that photo ID requirements disproportionately burden people of color. The ID recommendations reduce the benefits of voter registration at disability and other social service agencies provided by the National Voter Registration Act of 1993. Individuals who seek to register at those offices—which generally do not issue IDs – will also have to make an additional visit to the motor vehicle department in order to obtain the documentation necessary to vote. Census data demonstrate that African Americans and Latinos are more than three times more likely than whites to register to vote at a public assistance agency, and that whites are more likely than African Americans and Latinos to register when seeking a driver's license. Accordingly, the voter registration procedure far more likely to be used by minorities than by whites will no longer provide Americans with full eligibility to vote. Not only are minority voters less likely to possess the requisite ID, but they are also more likely than white voters to be asked to furnish ID at the polls. As the Task Force Report of the prior Commission found, identification requirements create the opportunity for selective enforcement – either innocuous or invidious – when poll workers request photo ID only from voters

unknown to them. This discretion has often led to special scrutiny of minority voters at the polls.

Faced with overwhelming evidence that Real IDs are both costly and difficult to obtain, the Report suggests that Real ID cards be made “easily available and issued free of charge.” While this is a laudable goal, the evidence suggests that it will not be attained. First, no State currently issues photo IDs free of charge to all voters. And even if the card itself were free, the Real ID would not be “free of charge” unless all documents required to obtain the Real ID were also “free of charge.” In addition, no State makes photo IDs “easily available” to all its citizens.

The Report premises its burdensome identification proposals on the need to ensure ballot integrity and on the existence of or potential for widespread fraud. However, the Report admits that there is simply “no evidence” that the type of fraud that could be solved by stricter voter identification – individual voters who misrepresent their identity at the polls – is a widespread problem. Indeed, the evidence that does exist shows that this sort of fraud occurs only at an extremely low rate. The Report’s photo ID proposal guards against only one type of fraud: individuals arriving at the polls to vote using false information, such as the name of another registered voter, or a recent but not current address. Since the costs of this form of fraud are extremely high (federal law provides for up to five years’ imprisonment), and the benefits to any individual voter are extremely low, it is highly unlikely that this will ever occur with any frequency. The limited types of fraud that could be prevented by a Real ID requirement are extremely rare and difficult. As the Report concedes, there is “no evidence of extensive fraud in U.S. elections” of the sort that can be cured by photo identification requirements. This admission – and not the hypothetical specter of fraud represented in the remainder of the Report – is amply borne out by independent research.

In the most comprehensive survey of alleged election fraud to date, Professor Loraine Minnite and David Callahan have shown that the incidence of individual voter fraud at the polls is negligible. A few prominent examples support their findings. In Ohio, a statewide survey found four instances of ineligible persons voting or attempting to vote in 2002 and 2004, out of 9,078,728 votes cast – a rate of 0.00004%. Earlier this year, Georgia Secretary of State Cathy Cox stated that she could not recall one documented case of voter fraud relating to the impersonation of a registered voter at the polls during her ten-year tenure as Secretary of State or Assistant Secretary of State. The Report attempts to support its burdensome identification requirements on four specific examples of purported fraud or potential fraud. **None of the Report’s cited examples of fraud stand up under closer scrutiny.** This response report goes through each instance of fraud raised by the Commission report and demonstrates that in each case the allegation in fact turned out later not to be true or the fraud cited was not of the type that would be addressed by a photo identification requirement. \_

The Report fails to provide a good reason to create greater hurdles for voters who vote at the polls than for those who vote absentee. Despite the fact that absentee ballots are more

susceptible to fraud than regular ballots, the Report exempts absentee voters from its proposed Real ID and proof of citizenship requirements.

To the extent that any limited fraud by individuals at the polls does trickle into the system, it can be addressed by far less restrictive alternatives. The first step is to recognize that only voters who appear on the registration list may vote a regular ballot. Proper cleaning of registration lists – and proper use of the lists at the poll–will therefore go a long way toward ensuring that every single ballot is cast by an eligible voter. Existing law has already accounted for this need – with proper safeguards for individual voters – and needs only adequate implementation. If inflated rolls create the specter of potential fraud, for example, the problem will be addressed by proper execution of the registration list related provisions of NVRA and HAVA, which are designed in part to remove ineligible voters from the rolls. In addition to the better registration lists that full implementation will provide, better record keeping and administration at the polls will reduce the limited potential for voting by ineligible persons. In the unlikely event that implementation of current law is not able to wipe out whatever potential for individual fraud remains, there are several effective and less burdensome alternatives to the Report’s Real ID recommendation that received wholly insufficient consideration.

#### Recommendation on Database Information Sharing Across States

It is unquestionably beneficial to account for voters who move across state lines. Nonetheless, the Report fails to consider the serious efficacy, privacy, and security concerns raised by a nationally distributed database of the magnitude it contemplates. These problems are exacerbated by the Report’s recommendation that an individual’s Social Security number be used as the broadly disseminated unique voting identifier. The Report’s recommendation creates substantial privacy and security hazards. The Report recommends –without any discussion–that the information used as an individual’s unique fingerprint to track a voter across state lines include not merely the date of birth, but also the person’s “place of birth.” As with the Social Security number, this information is often used as a key to private information wholly unrelated to voting, and as such, disclosure presents a substantial security hazard. Moreover, this information seems particularly susceptible to use in harassing legitimate voters, particularly naturalized citizens.

#### Recommendation on Voting Rights of Ex-Felons

The Report recommends that states restore voting rights only to certain people with criminal convictions, and only after they have “fully served their sentence.” This overly restrictive standard places the Commission out of step with the states, the American public, and the laws of other nations. This recommendation would set a standard more generous than the policies of the most regressive thirteen states in the nation but more restrictive than the remaining thirty-seven. The trend in the states is toward extension of the franchise. Since 1997, twelve states have reformed their laws or policies to allow more people with convictions to vote. These reforms are driven by some startling numbers. Approximately 4.7 million Americans have lost the right to vote because of a criminal conviction. This number includes 1.4 million African-American men, whose 13% rate of disenfranchisement is seven times the national average. More than 670,000

of the disenfranchised are women; more than 580,000 are veterans; and 1.7 million have completed their sentences.

The American people also support more generous re-enfranchisement than the Commission Report recommends. In a 2002 telephone survey of 1,000 Americans nationwide, researchers found that substantial majorities (64% and 62% respectively) supported allowing probationers and parolees to vote. Fully 80% favored restoring the franchise to people who had completed felony sentences. Even when questions were asked about certain unpopular offenses, majorities supported voting rights. Two-thirds of respondents supported allowing violent ex-felons to vote; 63% supported allowing ex-felons convicted of illegal stock-trading to vote; and 52% supported restoring the franchise to ex-felons who had been convicted of a sex crime. International norms are even more favorable to voting rights. Moreover, the Report's recommendation is unworkable. The general rule – that reenfranchisement should follow the completion of a criminal sentence – is itself difficult to administer.

Republican Ballot Security Programs: Vote Protection or Minority Vote Suppression – Or Both?

By Chandler Davidson

As the author describes it, this Report focuses on vote suppression through “ballot security programs”:

These are programs that, in the name of protecting against vote fraud, almost exclusively target heavily black, Latino, or Indian voting precincts and have the intent or effect of discouraging or preventing voters in those precincts from casting a ballot. In some cases, these programs have been found by courts to be illegal. Still, they continue to exist in spite of strong criticism by leaders of minority communities, their allies, and voting rights lawyers.

There are several noteworthy characteristics of these programs. They focus on minority precincts almost exclusively. There is often only the flimsiest evidence that vote fraud is likely to be perpetrated in such precincts. In addition to encouraging the presence of sometimes intimidating Republican poll watchers or challengers who may slow down voting lines and embarrass potential voters by asking them humiliating questions, these programs have sometimes posted people in official-looking uniforms with badges and side arms who question voters about their citizenship or their registration. In addition, warning signs may be posted near the polls, or radio ads may be targeted to minority listeners containing dire threats of prison terms for people who are not properly registered—messages that seem designed to put minority voters on the defensive. Sometimes false information about voting qualifications is sent to minority voters through the mail.”

He further states that a most common theme of the programs over the last 50 years is that of sending white challengers to minority precincts. He says that the tactic of doing mailings, collecting returned materials, and using that as a basis for creating challenger lists and challenging voters at the polls, started in the 1950s and continues to today. The problem with this practice is that reasons for a mailing to be returned include a wrong address, out of date or inaccurate addresses, poor mail delivery in minority areas, and matching mistakes. Davidson also sets out to demonstrate through documentary evidence that the practices have been and are approved of or winked at by high ups in the party.

Davidson goes on to provide numerous examples from the last 50 years to demonstrate his thesis, going through the historical development of Republican ballot security programs from the 1950s through to the present. The author cites and quotes internal Republican letters and memoranda, primary sources and original documents, media

reports, scholarly works, as well as the words of judges' rulings in some of the cases that ended up in litigation to prove his argument.

In addition to describing how the schemes really were brought to the fore in the 1964 election, he describes more recent incidents such as 1981 in New Jersey, 1982 Dallas, Louisiana 1986, Houston 1986, Hidalgo 1988 Orange County 1988, North Carolina 1990, South Carolina 1980-1990, and South Dakota 2002. (Summaries of these examples are available)

Davidson concludes with an outline of some of the features of vote suppression efforts put forth by Republicans under the guise of ballot security programs, as described in the Report, from the 1950s to the present day:

1. An organized, often widely publicized effort to field poll watchers in what Republicans call "heavily Democratic," but what are usually minority, precincts;
2. Stated concerns about vote fraud in these precincts, which are occasionally justified but often are not;
3. Misinformation and fear campaigns directed at these same precincts, spread by radio, posted signs in the neighborhoods, newspapers, fliers, and phone calls, which are often anonymously perpetrated;
4. Posting "official-looking" personnel at polling places, including but not limited to off-duty police—sometimes in uniform, sometimes armed;
5. Aggressive face-to-face challenging techniques at the polls that can confuse, humiliate, and intimidate—as well as slow the voting process—in these same minority precincts;
6. Challenging voters using inaccurate, unofficial lists of registrants derived from "do-not-forward" letters sent to low-income and minority neighborhoods;
7. Photographing, tape recording, or videotaping voters; and
8. Employing language and metaphors that trade on stereotypes of minority voters as venal and credulous.

The report ends with some observations on the state of research on the incidence of fraud, which the author finds lacking. He suggests that vote suppression of qualified minority voters by officials and partisan poll-watchers, challengers, and uniformed guards should also be considered as included in any definition of election fraud. Davidson also offers a few recommendations for reform, noting that Democrats should not protest all programs aimed at ballot integrity, but rather work with Republicans to find solutions to problems that confront both parties and the system as a whole.

A 'Crazy-Quilt' of Tiny Pieces: State and Local Administration of American Criminal Disenfranchisement Law

By Alec Ewald

“A Crazy-Quilt of Tiny Pieces” presents results from the first nationwide study to document the implementation of American felony disenfranchisement law. Data came from two main sources: a 33-state survey of state elections officials and telephone interviews with almost one hundred city, county, town, and parish officials drawn from 10 selected states. In the spring of 2004, a two-page survey consisting of questions regarding disqualification and restoration procedures was sent to the offices of the statewide elections director in each of the fifty states. Responses were collected through the summer and early fall of 2004. Thirty-three states responded. No state currently administers and enforces its criminal disqualification and restoration laws in an efficient, universally-understood and equitable way. Some do not appear to notify local elections officials of convictions, or do not do so in a clear and timely way; others risk “false positives” in disqualification, particularly with suspended sentences or offenses not subject to disenfranchisement; many ask local officials to handle disqualification and restoration with little or no guidance or supervision from the state; none have clear policies regarding new arrivals from other states with old convictions.

The report reaches seven major conclusions:

1. Broad variation and misunderstanding in interpretation and enforcement of voting laws:
  - More than one-third (37%) of local officials interviewed in ten states either described their state’s fundamental eligibility law incorrectly, or stated that they did not know a central aspect of that law.
  - Local registrars differ in their knowledge of basic eligibility law, often within the same state. Differences also emerge in how they are notified of criminal convictions, what process they use to suspend, cancel, or “purge” voters from the rolls, whether particular documents are required to restore a voter to eligibility, and whether they have information about the criminal background of new arrivals to the state.
2. Misdemeanants disenfranchised in at least five states:
  - The commonly-used term “felon disenfranchisement” is not entirely accurate, since at least five states – Colorado, Illinois, Michigan, South Carolina, and Maryland -- also formally bar some or all people convicted of misdemeanors from voting.
  - It is likely that misdemeanants in other states who do retain the formal right to vote could have difficulty exercising that right, given ignorance of their eligibility and the lack of clear rules and procedures for absentee voting by people in jail who have not been convicted of a felony.
  - Maryland excludes persons convicted of many misdemeanors, such as “Unlawful operation of vending machines,” “Misrepresentation of tobacco leaf weight,” and “Racing horse under false name.”
3. Significant ambiguities in voting laws:
  - Disenfranchisement in Tennessee is dependent on which of five different time periods a felony conviction occurred between 1973 and the present.
  - In Oregon, disenfranchisement is determined not by conviction or imprisonment for a felony, but for being placed under Department of Corrections supervision. Since 1997, some persons