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CORRUPTION OF THE ELECTION PROCESS UNDER U.S. FEDERAL LAW

- Craig C. Donsanto¹

A. HISTORICAL BACKGROUND

Federal concern over the integrity of the franchise has historically had two distinct areas of focus. The first, to ensure elections that are free from corruption for the general public, is the subject of this chapter. The second, to ensure there is no discrimination against minorities at the ballot box involves entirely different constitutional and federal interests, and is supervised by the Justice Department's Civil Rights Division.

Federal interest in the integrity of the franchise was first manifested immediately after the Civil War. Between 1868 and 1870, Congress passed the Enforcement Acts, which served as the basis for federal activism in prosecuting corruption of the franchise until most of them were repealed in the 1890s. See *Ex parte Coy*, 127 U.S. 731 (1888); *Ex parte Yarborough*, 110 U.S. 651 (1884); *Ex parte Siebold*, 100 U.S. 371 (1880).

Many of the Enforcement Acts had broad jurisdictional predicates that allowed them to be applied to a wide variety of corrupt election practices as long as a federal candidate was on the ballot. In *Coy*, the Supreme Court held that Congress had authority under the Constitution's Necessary and Proper Clause to regulate any activity during a mixed federal/state election that

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The views expressed in this paper represent solely those of Mr. Donsanto and do not necessarily reflect those of the Department of Justice. The discussion herein confers no substantive or procedural rights on those whose conduct may be regulated or affected by the issues discussed. This paper was prepared on September 9, 2006 and is current as of that time.

exposed the federal election to potential harm, whether that harm materialized or not. *Coy* is still applicable law. *United States v. Carmichael*, 685 F.2d 903, 908 (4th Cir. 1982), *cert. denied*, 459 U.S. 1202 (1983); *United States v. Mason*, 673 F.2d 737, 739 (4th Cir. 1982); *United States v. Malmay*, 671 F.2d 869, 874-75 (5th Cir. 1982); *United States v. Bowman*, 636 F.2d 1003, 1001 (5th Cir. 1981); *United States v. Cole*, 41 F.3d 303 (7th Cir. 1994); *United States v. McCrainie*, 169 F.3d 723 (11th Cir. 1999).

After Reconstruction, federal activism in election matters retrenched. The repeal of most of the Enforcement Acts eliminated the statutory tools that had encouraged federal activism in election fraud matters. Two surviving provisions of these Acts, now embodied in 18 U.S.C. §§ 241 and 242, covered only intentional deprivations of rights guaranteed directly by the Constitution or federal law. The courts during this period held that the Constitution directly conferred a right to vote only for federal officers, and that conduct aimed at corrupting nonfederal contests was not prosecutable in federal courts. See *United States v. Gradwell*, 243 U.S. 476 (1917); *Guinn v. United States*, 238 U.S. 347 (1915). Federal attention to election fraud was further limited by case law holding that primary elections were not part of the official election process, *Newberry v. United States*, 256 U.S. 232 (1918), and by cases like *United States v. Bathgate*, 246 U.S. 220 (1918), that read the entire subject of vote buying out of federal criminal law, even when it was directed at federal contests.

In 1941, the Supreme Court reversed direction, overturning *Newberry*. The Court recognized that primary elections are an integral part of the process by which candidates are elected to office. *United States v. Classic*, 313 U.S. 299 (1941). *Classic* changed the judicial attitude toward federal intervention in election matters and ushered in a new period of federal activism. Federal courts now regard the right to vote in a fairly conducted election as a constitutionally protected feature of United States citizenship. *Reynolds v. Sims*, 377 U.S. 533 (1964).

In 1973, the use of Section 241 to address election fraud began to expand. *United States v. Anderson*, 481 F.2d 685 (4th Cir. 1973), *aff'd on other grounds*, 417 U.S. 211 (1974). Since then, this statute has been successfully applied to prosecute certain types of local election fraud. *United States v. Howard*, 774 F.2d 838 (7th Cir. 1985); *United States v. Olinger*, 759 F.2d 1293 (7th Cir.), *cert. denied*, 474 U.S. 839 (1985); *United States v. Stollings*, 501 F.2d 954 (4th Cir. 1974); *United States v. Wadena*, 152 F.3d 831 (8th Cir. 1998).²

² As indicated in the cited cases, Section 241 has been used to prosecute election fraud that affects the vote for federal officials, as well as vote fraud directed at nonfederal candidates that involves the corruption of public officials – most often election officers – acting under color of law, *i.e.*, ballot-box stuffing schemes. This latter type of scheme will be referred to in this paper as a “public scheme.” A scheme that does not involve the necessary participation of corrupt officials acting under color of law but that affects the tabulation of votes for federal

The mail fraud statute, 18 U.S.C. § 1341, was used successfully for decades to reach local election fraud, under the theory that such schemes defrauded citizens of their right to fair and honest elections. *United States v. Clapps*, 732 F.2d 1148 (3d Cir.), *cert. denied*, 469 U.S. 1085 (1984); *United States v. States*, 488 F.2d 761 (8th Cir. 1973), *cert. denied*, 417 U.S. 909 (1974). However, this mail fraud theory has been barred since 1987 when the Supreme Court held that Section 1341 did not apply to schemes to defraud someone of intangible rights (such as the right to honest elections). *McNally v. United States*, 483 U.S. 350 (1987). Congress responded to *McNally* the following year by enacting a provision which specifically defined Section 1341 to include schemes to defraud someone of “honest services.” 18 U.S.C. § 1346. Accordingly, Section 1346 may not have restored use of Section 1341 for most election crimes, unless they involved the element of “honest services.”

Finally, over the past forty years Congress has enacted new criminal laws with broad jurisdictional bases to combat false registrations, vote buying, multiple voting, and fraudulent voting in elections in which a federal candidate is on the ballot. 42 U.S.C. §§ 1973i(c), 1973i(e), 1973gg-10. These statutes rest on Congress’s power to regulate federal elections (U.S. Const. art. I, § 4) and on its power under the Necessary and Proper Clause (U.S. Const. art. I, § 8, cl. 18) to enact laws to protect the federal election process from the potential of corruption. The federal jurisdictional predicate underlying these statutes is satisfied as long as either the name of a federal candidate is on the ballot or the fraud involves corruption of the voter registration process in a state where one registers to vote simultaneously for federal as well as other offices. *Bowman, Malmay, Mason, supra*; *United States v. Garcia*, 719 F.2d 99 (5th Cir. 1983); *United States v. Slone*, 411 F.3d 643 (6th Cir. 2005); *United States v. Olinger*, 759 F.2d 1293 (7th Cir.), *cert. denied*, 474 U.S. 839 (1985); *United States v. Howard*, 774 F.2d 838 (7th Cir. 1985); *United States v. McCrainie*, 169 F.3d 723 (11th Cir. 1999); *United States v. Barker*, 514 F.2d 1077 (7th Cir. 1975); *United States v. Cianciulli*, 482 F. Supp. 585 (E.D. Pa. 1979).

B. WHAT IS ELECTION FRAUD?

1. In General

Election fraud involves a substantive irregularity relating to the voting act – such as bribery, intimidation, or forgery – which has the potential to taint the election itself. During the past century and a half, Congress and the federal courts have articulated the following constitutional principles concerning the right to vote in the United States. Any activity intended to interfere corruptly with any of these principles may be actionable as a federal crime:

- All qualified citizens are eligible to vote.

candidates will be referred to as a “private scheme.”

- All qualified voters have the right to have their votes counted fairly and honestly.
- Invalid ballots dilute the worth of valid ballots and therefore will not be counted.
- Every qualified voter has the right to make a personal and independent election decision.
- Qualified voters may opt not to participate in an election.
- Voting shall not be influenced by bribery or intimidation.

Simply put, then, election fraud³ is conduct intended to corrupt:

- the process by which ballots are obtained, marked, or tabulated,
- the process by which election results are canvassed and certified, or
- the process by which voters are registered.

On the other hand, schemes that involve corruption of other political processes (*i.e.*, political campaigning, circulation of nominating petitions, etc.) do not normally serve as the basis for a federal election crime.

2. Conduct that Constitutes Federal Election Fraud⁴

The following activities provide a basis for federal prosecution under the statutes referenced in each category:

- Paying voters to register to vote, or to participate in elections, in which a federal candidate is on the ballot (42 U.S.C. § 1973i(c), 18 U.S.C. § 597), or through the use of the mails in those states in which vote buying is a “bribery” offense (18 U.S.C. § 1952), as well as in federal elections⁵ in those states in which purchased registrations or votes are voidable under applicable state election law (42 U.S.C. § 1973gg-10).

³ Whether any of these types of election fraud schemes are actionable under federal criminal law is discussed below.

⁴ As used throughout this paper, the terms “federal election fraud” and “election fraud” mean fraud relating to an election in which a federal criminal statute applies. As will be discussed below, this term is not limited to frauds aimed at federal elections.

⁵ For purposes of this paper, the term “federal election” means an election in which the name of a federal candidate is on the ballot, regardless of whether there is proof that the fraud caused a vote to be cast for the federal candidate. A “nonfederal election” is one in which no federal candidate was on the ballot.

- Preventing voters from participating in elections in which a federal candidate is on the ballot, or when done “under color of law” in *any* election, federal or nonfederal (18 U.S.C. §§ 241, 242).
- Voting for individuals in federal elections who do not personally participate in, and assent to, the voting act attributed to them, or impersonating voters or casting ballots in the names of voters who do not vote in federal elections (42 U.S.C. §§ 1973i(c), 1973i(e), 1973gg-10).
- Intimidating voters through physical duress in any type of election (18 U.S.C. § 245(b)(1)(A)), or through physical or economic threats in connection with their registering to vote or their voting in federal elections (42 U.S.C. § 1973gg-10), or their vote for a federal candidate (18 U.S.C. § 594). If the victim is a federal employee, intimidation in connection with *any* election, federal or nonfederal, is covered (18 U.S.C. § 610).
- Malfeasance by election officials acting “under color of law” by performing such acts as diluting valid ballots with invalid ones (ballot-box stuffing), rendering false tabulations of votes, or preventing valid voter registrations or votes from being given effect in *any* election, federal or nonfederal (18 U.S.C. §§ 241, 242), as well as in elections in which federal candidates are on the ballot (42 U.S.C. §§ 1973i(c), 1973i(e), 1973gg-10).
- Submitting fictitious names on voter registration rolls and thereby qualifying the ostensible voters to vote in federal elections (42 U.S.C. §§ 1973i(c), 1973gg-10).⁶
- Knowingly procuring eligibility to vote for federal office by persons who are not entitled to vote under applicable state law, notably persons who have committed serious crimes (approximately 40 states) (42 U.S.C. §§ 1973i(c), 1973gg-10), and persons who are not United States citizens (currently all states) (42 U.S.C. §§ 1973i(c), 1973gg-10; 18 U.S.C. §§ 1015(f), 611).
- Knowingly making a false claim of United States citizenship in order to register to vote or to vote in any election (18 U.S.C. § 1015(f)), or falsely and willfully claiming U.S. citizenship for, *inter alia*, registering or voting in any election (18 U.S.C. § 911).

⁶ With respect to fraudulent voter registrations, election registration is “unitary” in all 50 states in the sense that a person registers only once to become eligible to cast ballots for both federal and nonfederal candidates. Therefore false information given to establish eligibility to register to vote is actionable federally regardless of the type of election that motivated the subjects to act. *See, e.g., United States v. Cianciulli*, 482 F. Supp. 585 (E.D. Pa. 1979).

- Providing false information concerning a person's name, address, or period of residence in a voting district in order to establish that person's eligibility to register or to vote in a federal election (42 U.S.C. §§ 1973i(c), 1973gg-10).
- Causing the production of voter registrations that qualify alleged voters to vote for federal candidates, or the production of ballots in federal elections, that the actor knows are materially defective under applicable state law (42 U.S.C. § 1973gg-10).
- Using the United States mails, or interstate wire facilities, to obtain the salary and emoluments of an elected official through any of the activities mentioned above (18 U.S.C. §§ 1341, 1343). At the time this paper was written this so-called "salary theory" of mail and wire fraud had not yet received wide judicial support. Indeed, in *United States v. Turner*, ___ F.3d ___ (6th Cir. 2006) the Sixth Circuit expressly rejected its application to schemes aimed at corrupting elections.⁷
- Ordering, keeping, or having under one's authority or control any troops or armed men at any polling place in *any* election, federal or nonfederal. The actor must be an active civilian or military officer or employee of the United States government (18 U.S.C. § 592).

3. Conduct that Does Not Constitute Federal Election Fraud

Various types of conduct that might adversely affect the election of a federal candidate may not constitute federal election crimes, despite what in many instances may be their reprehensible character. For example, a federal election crime does not normally involve irregularities relating to: 1) issuing inaccurate campaign literature, 2) campaigning too close to the polls, 3) manipulating the process by which a candidate obtains the withdrawal of an opponent, and, 4) failing to comply with state-mandated voting procedures (by election officers). Also, "facilitation payments," that is things of value given to voters to make it easier for the voter to cast a ballot but that are not intended to stimulate or reward the voting act itself (*e.g.*, a ride to the polls, a stamp to mail in an absentee ballot) do not ordinarily involve a federal crime.

4. Conditions Conducive to Election Fraud

Most election fraud is aimed at corrupting elections for local offices, which control or influence patronage positions. Election fraud schemes are thus often linked to such other crimes

⁷ Title 18, 18 U.S.C. § 1346, likely did not restore the mail and wire statutes to all election fraud schemes because its "intangible rights" concept is confined to schemes that involve a "deprivation of honest services," a motive not usually found in election fraud schemes. In *United States v. Turner*, ___ F.3d ___ (6th cir. 2006) the Sixth Circuit expressly held that Section 1346 does not apply to schemes to corrupt elections. Thus, absent a public scheme or other deprivation of honest services by a public officer such as an election official or someone else acting under color of law, the utility of the mail and wire fraud statutes to address election fraud is currently questionable at best.

as protection of illegal activities, corruption of local governmental processes, and patronage abuses.

Election fraud does not normally occur in jurisdictions where one political faction enjoys widespread support among the electorate, because in such a situation it is usually unnecessary or impractical to resort to election fraud in order to control local public offices.⁸ Instead, election fraud occurs most frequently when there are fairly equal political factions, and when the stakes involved in who controls public offices are weighty – as is often the case where patronage jobs are a major source of employment, or where illicit activities are being protected from law enforcement scrutiny. In sum, election fraud is most likely to occur in electoral jurisdictions where there is close factional competition for an elected position that matters.

5. Voter Participation Versus Nonvoter Participation Cases

As a practical matter, election frauds fall into two basic categories: those in which individual voters do not participate in the fraud, and those in which they do. The investigative approach and prosecutive potential are different for each type of case.

a) Election frauds not involving the participation of voters

The first category involves cases when voters do not participate, in any way, in the voting act attributed to them. These cases include ballot-box stuffing cases, ghost voting cases, and “nursing home” frauds.⁹ All such matters are potential federal crimes. Proof of these crimes depends largely on evidence generated by the voting process, or on handwriting exemplars taken from persons who had access to voting equipment and thus the opportunity to misuse it. Some of the more common ways these crimes are committed include:

- Placing fictitious names on the voter rolls. This “deadwood” allows for fraudulent ballots, which can be used to stuff the ballot box.
- Casting bogus votes in the names of persons who did not vote.
- Obtaining and marking absentee ballots without the active input of the voters involved. Absentee ballots are particularly susceptible to fraudulent abuse because, by definition, they are marked and cast outside the presence of election officials.

⁸ Election fraud may occur at the local level in districts controlled by one political faction in order to affect a contested election in a larger jurisdiction. For example, a corrupt mayor assured of his own reelection may nevertheless engage in election fraud for the purpose of affecting a state-wide election that is perceived to be close.

⁹ An example of a nursing home fraud is *United States v. Odom*, 736 F.2d 104 (4th Cir. 1984), that involved a scheme by local law enforcement officials and others to vote the absentee ballots of mentally incompetent residents of a nursing home.

- Falsifying vote tallies.

b) Election frauds involving the participation of voters

The second category of election frauds includes cases in which the voters do participate, at least to some extent, in the voting acts attributed to them. Common examples include:

- Vote buying schemes,
- Absentee ballot frauds,
- Voter intimidation schemes,
- Migratory-voting (or floating-voter) schemes, and
- Voter “assistance” frauds, in which the wishes of the voters are ignored or not sought.

Successful prosecution of these cases usually requires the cooperation and testimony of the voters whose ballots were corrupted. This requirement presents several difficulties. An initial problem is that the voters themselves may be technically guilty of participating in the scheme. However, because these voters can often be considered victims, federal prosecutors may consider declining to prosecute them in exchange for truthful cooperation against organizers of such schemes.

The second difficulty encountered in cases where voters participate is that the voter’s presence alone may suggest that he or she “consented” to the defendant’s conduct (marking the ballot, taking the ballot, choosing the candidates, etc.). Compare *United States v. Salisbury*, 983 F.2d 1369 (6th Cir. 1993) (leaving unanswered the question whether a voter who signs a ballot envelope at the defendant’s instruction but is not allowed to choose the candidates has consented to having the defendant mark his or her ballot), with *United States v. Cole*, 41 F.3d 303 (7th Cir. 1994) (finding that voters who merely signed ballots subsequently marked by the defendant were not expressing their own electoral preferences).

While the presence of the ostensible voter when another marks his or her ballot does not negate whatever crime might be occurring, it thus may increase the difficulty of proving the crime. This difficulty is compounded because those who commit this type of crime generally target vulnerable members of society, such as persons who are uneducated, socially disadvantaged, or with little means of livelihood – precisely the types of people who are likely targets for manipulation or intimidation. Therefore, in cases where the voter is present when another person marks his or her ballot, the evidence should show that the defendant either procured the voter’s ballot through means that were themselves corrupt (such as bribery or threats), or that the defendant marked the voter’s ballot without the voter’s consent or input. See *United States v. Boards*, 10 F.3d 587 (8th Cir. 1993); *Salisbury*; *Cole*.

C. JURISDICTIONAL SUMMARY

Under the Constitution, the states retain broad jurisdiction over the elective process. When the federal government enters the field of elections, it does so to address specific federal interests, such as: 1) the protection of the voting rights of racial, ethnic, or language-minorities, a specific Constitutional protection, 2) the registration of voters to vote in federal elections; 3) the standardization and procurement of voting equipment purchased with federal funds; 4) the protection of the federal election process against corruption; 5) the protection of the voting process from corruption accomplished under color of law; and 6) the oversight of noncitizen and other voting by ineligible.

Most federal election crime statutes do not apply to all elections. Several apply only to elections in which federal candidates are on the ballot, and a few require proof that the fraud was either intended to influence a federal contest or that a federal contest was affected by the fraud.

For federal jurisdictional purposes, there are two fundamental types of elections in which federal election crimes may occur: federal elections, in which the ballot includes the name of one or more candidates running for federal office; and nonfederal elections, in which only the names of local or state candidates are on the ballot. Elections in which the ballot includes the names of both federal and nonfederal candidates, often referred to as “mixed” elections, are “federal elections” for the purpose of the federal election crime statutes.

1. Statutes Applicable to Nonfederal Elections

Several federal criminal statutes apply to purely nonfederal elections. Principal among these are:

- 42 U.S.C. § 1973i(c), § 1973gg-10, and 18 U.S.C. § 1015(f) - any fraud that is aimed at the process by which voters are registered, notably those to furnish materially false information to election registrars;
- 18 U.S.C. §§ 241 and 242 - any scheme that involves the necessary participation of public officials, usually election officers or notaries, “acting under color of law,” which is actionable under as a derogation of the “one person, one vote” principle of the 14th Amendment, *i.e.*, “public schemes;”¹⁰
- 18 U.S.C. § 245(b)(1)(A) - physical threats or reprisals against candidates, voters, poll watchers, or election officials;
- 18 U.S.C. § 592 - “armed men” stationed at the polls;

¹⁰ Federal prosecutors should also evaluate whether a public scheme involves a deprivation of honest services. 18 U.S.C. §§ 1341, 1343, 1346.

- 18 U.S.C. § 609 - coercion of voting among the military;
- 18 U.S.C. § 610 - coerced political activity by federal employees;
- 18 U.S.C. § 911 - fraudulent assertion of United States citizenship;
- 18 U.S.C. § 1341 - schemes involving the United States mails to corrupt elections that are predicted on the post-*McNally* “salary” or “pecuniary loss” theories (discussed *infra*), note however that this theory of mail fraud was recently rejected as applied to election fraud cases in *United States v. Turner* ___ F.3d ___ (6th Cir. 2006); and
- 18 U.S.C. § 1952 - schemes to use the mails in furtherance of vote buying activities in states that treat vote buying as bribery.

The statutes listed above also apply to elections in which a federal candidate is on the ballot.

2. Statutes Applicable to Federal Elections

The following additional statutes apply to federal (including “mixed”) elections, but not to purely nonfederal elections:¹¹

- 18 U.S.C. § 594 - intimidation of voters;
- 18 U.S.C. § 597 - payments to persons to vote, or to refrain from voting, for a federal candidate;
- 18 U.S.C. § 608(b) - vote buying and false registration under the Uniformed and Overseas Citizens Absentee Voting Act;
- 18 U.S.C. § 611 - voting by aliens;
- 42 U.S.C. § 1973i(c) - payments for registering to vote or voting, fraudulent registrations, and conspiracies to encourage illegal voting;
- 42 U.S.C. § 1973i(e) - multiple voting;
- 42 U.S.C. § 1973gg-10(1) - voter intimidation; and

¹¹ The presence of the name of a federal candidate on a ballot is sufficient to obtain federal jurisdiction.

- 42 U.S.C. § 1973gg-10(2) - fraudulent voting or registering.

D. STATUTES¹²

1. Conspiracy Against Rights: 18 U.S.C. § 241

Section 241 makes it unlawful for two or more persons to “conspire to injure, oppress, threaten, or intimidate any person in any state, territory or district in the free exercise or enjoyment of any right or privilege secured by the Constitution or laws of the United States.” Violations are punishable by imprisonment for up to ten years or, if death results, for any term of years or for life.

The Supreme Court long ago recognized that the right to vote for federal offices is among the rights secured by Article I, Sections 2 and 4, of the Constitution, and hence is protected by Section 241. *United States v. Classic*, 313 U.S. 299 (1941); *Ex parte Yarborough*, 110 U.S. 651 (1884). Although the statute was enacted just after the Civil War to address efforts to deprive the newly emancipated slaves of the basic rights of citizenship, such as the right to vote, it has been interpreted to include any effort to derogate any right that flows from the Constitution or from federal law.

Section 241 has been an important statutory tool in election crime prosecutions. Originally held to apply only to schemes to corrupt elections for federal office, it has recently been successfully applied to nonfederal elections as well, provided that state action was a necessary feature of the fraud. This state action requirement can be met not only by the participation of poll officials, but by activities of persons who clothe themselves with the appearance of state authority, *e.g.*, with uniforms, credentials, and badges. *Williams v. United States*, 341 U.S. 97 (1951).

Section 241 embraces conspiracies to stuff a ballot box with forged ballots, *United States v. Saylor*, 322 U.S. 385 (1944); *United States v. Mosley*, 238 U.S. 383 (1915); to impersonate qualified voters, *Crolich v. United States*, 196 F.2d 879 (5th Cir.), *cert. denied*, 344 U.S. 830 (1952); to alter legal ballots, *United States v. Powell*, 81 F. Supp. 288 (E.D. Mo. 1948); to fail to count votes and to alter votes counted, *Ryan v. United States*, 99 F.2d 864 (8th Cir. 1938), *cert. denied*, 306 U.S. 635 (1939); *Walker v. United States*, 93 F.2d 383 (8th Cir. 1937), *cert. denied*, 303 U.S. 644 (1938); to prevent the official count of ballots in primary elections, *Classic*; to destroy ballots, *United States v. Townsley*, 843 F.2d 1070 (8th Cir. 1988); to destroy voter registration applications, *United States v. Haynes*, 977 F.2d 583 (6th Cir. 1992) (table) (available at 1992 WL 296782); to illegally register voters and cast absentee ballots in their names, *United States v. Weston*, 417 F.2d 181 (4th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970); *United States*

¹² The text of the statutes discussed below is printed in Appendix A. Each statute carries, in addition to the prison term noted, fines applicable under 18 U.S.C. § 3571.

v. Morado, 454 F.2d 167 (5th Cir.), *cert. denied*, 406 U.S. 917 (1972); *Fields v. United States*, 228 F.2d 544 (4th Cir. 1955), *cert. denied*, 350 U.S. 982 (1956); and to injure, threaten, or intimidate a voter in the exercise of his right to vote, *Wilkins v. United States*, 376 F.2d 552 (5th Cir.), *cert. denied*, 389 U.S. 964 (1967).

Recently, Section 241 was used, along with telephone harassment charges under Section 223 of Title 47, to prosecute a scheme to jam telephone lines for a get-out-the-vote service that was done for the purpose of preventing voters from accessing that service in order to obtain rides to the polls in the 2002 general elections. *United States v. Tobin*, No. 04-216-01 (SM), 2005 WL 3199672 (D.N.N. Nov. 30, 2005) (convictions on conspiracy and aiding and abetting telephone harassment). While the defendant was acquitted on the 241 count, the Criminal Division continues to believe that the statute should be considered when addressing schemes to thwart voting in federal elections.

Section 241 does not require that the conspiracy be successful, *United States v. Bradberry*, 517 F.2d 498 (7th Cir. 1975), nor need there be proof of an overt act. *Williams v. United States*, 179 F.2d 644 (5th Cir. 1950), *aff'd on other grounds*, 341 U.S. 70 (1951); *Morado*. Section 241 reaches conduct affecting the integrity of the federal election process as a whole, and does not require fraudulent action with respect to any particular voter. *United States v. Nathan*, 238 F.2d 401 (7th Cir. 1956), *cert. denied*, 353 U.S. 910 (1957).

On the other hand, Section 241 does not reach schemes to corrupt the balloting process through voter bribery, *United States v. Bathgate*, 246 U.S. 220 (1918), even schemes that involve poll officers to ensure that the bribed voters mark their ballots as they were paid to do, *United States v. McLean*, 808 F.2d 1044 (4th Cir. 1987) (noting, however, that Section 241 may apply where vote buying occurs in conjunction with other corrupt practices, such as ballot-box stuffing).

Section 241 prohibits only conspiracies to interfere with rights flowing directly from the Constitution or federal statutes. This element has led to considerable judicial speculation over the extent to which the Constitution protects the right to vote for candidates running for nonfederal offices. *Oregon v. Mitchell*, 400 U.S. 112 (1970); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Blitz v. United States*, 153 U.S. 308 (1894); *In re Coy*, 127 U.S. 731 (1888); *Ex parte Siebold*, 100 U.S. 371 (1880). *See also Duncan v. Poythress*, 657 F.2d 691 (5th Cir. 1981), *cert. dismissed*, 459 U.S. 1012 (1982). While *dicta* in *Reynolds* casts the parameters of the federally protected right to vote in extremely broad terms, in a ballot fraud case ten years later the Supreme Court specifically refused to decide whether the federally secured franchise extended to nonfederal contests. *Anderson v. United States*, 417 U.S. 211 (1974).

The use of Section 241 in election fraud cases has generally been confined to two types of situations: "public schemes" and "private schemes."

A public scheme is one that involves the necessary participation of a public official acting under the color of law. In election fraud cases, this public official is usually an election

officer using his office to dilute valid ballots with invalid ballots or to otherwise corrupt an honest vote tally in derogation of the equal protection and due process clauses of the 14th Amendment. See, e.g. *United States v. Anderson*, 482 F.2d 685 (4th Cir. 1973, *aff'd on other grounds*, 417 U.S. 211 (1974)); *United States v. Stollings*, 501 F.2d 954 (4th Cir. 1974); *United States v. Olinger*, 759 F.2d 1293 (7th Cir.), *cert. denied*, 474 U.S. 839 (1985); *United States v. Howard*, 774 F.2d 838 (7th Cir. 1985); *United States v. Townsley*, 843 F.2d 1070 (8th Cir. 1988); *United States v. Haynes*, 977 F.2d 583 (6th Cir. 1992) (table) (available at 1992 WL 296782). Another case involving a public scheme turned on the necessary participation of a notary public who falsely notarized forged voter signatures on absentee ballot materials in an Indian tribal election. *United States v. Wadena*, 152 F.3d 831 (8th Cir. 1998), *cert. denied*, 526 U.S. 1050 (1999).

A private scheme is a pattern of conduct that does not involve the necessary participation of a public official acting under color of law, but one that can be shown factually to have adversely affected the ability of qualified voters to vote in elections in which federal candidates were on the ballot. Examples of private schemes include: 1) voting fraudulent ballots in mixed elections, and 2) thwarting get-out-the-vote or ride-to-the-polls activities of political factions or parties through such methods as jamming telephone lines or vandalizing motor vehicles.

Public schemes may be prosecuted under Section 241 regardless of the nature of the election with respect to which the conspiracy occurs, *i.e.*, elections with or without a federal candidate. On the other hand, private schemes can be prosecuted under Section 241 only when the objective of the conspiracy was to corrupt a federal election or when the scheme can be shown to have affected, directly or indirectly, the vote count for a federal candidate, *e.g.*, when fraudulent ballots were cast for an entire party ticket that included a federal office.

2. Deprivation of Rights under Color of Law: 18 U.S.C. § 242

Section 242, also enacted as a post-Civil War statute, makes it unlawful for anyone acting under color of law, statute, ordinance, regulation, or custom to willfully deprive a person of any right, privilege, or immunity secured or protected by the Constitution or laws of the United States. Violations are misdemeanors unless bodily injury occurs, in which case the penalty is ten years, or unless death results, in which case imprisonment may be for any term of years or for life.

Prosecutions under Section 242 need not show the existence of a conspiracy. However, the defendants must have acted illegally “under color of law”, *i.e.*, the case must involve a public scheme, as discussed above. This element does not require that the defendant be a *de jure* officer or a government official; it is sufficient if he or she jointly acted with state agents in committing the offense, *United States v. Price*, 383 U.S. 787 (1966), or if his or her actions were made possible by the fact that they were clothed with the authority of state law, *United States v. Williams*, 341 U.S. 97 (1951); *United States v. Classic*, 313 U.S. 299 (1941).

Because a Section 242 violation can be a substantive offense for election fraud conspiracies prosecutable under Section 241, the cases cited in the discussion of Section 241 apply to Section 242.

**3. False Information in, and Payments for, Registering and Voting:
42 U.S.C. § 1973i(c)**

Section 1973i(c) makes it unlawful, in an election in which a federal candidate is on the ballot, to knowingly and willfully 1) give false information as to name, address, or period of residence to an election official for the purpose of establishing one's eligibility to register or to vote; 2) pay, offer to pay, or accept payment for registering to vote or for voting; or 3) conspire with another person to vote illegally. Violations are punishable by imprisonment for up to five years.

a) The basis for federal jurisdiction¹³

Congress added Section 1973i(c) to the 1965 Voting Rights Act to ensure the integrity of the balloting process in the context of an expanded franchise. In so doing, Congress intended that Section 1973i(c) have a broad reach. In fact, the original version of Section 1973i(c) would have applied to all elections. However, constitutional concerns were raised during Congressional debate on the bill and the provision's scope was narrowed to elections including a federal contest. Section 1973i(c) rests on Congress's power to regulate federal elections and on the Necessary and Proper Clause. U.S. Const. art. I, § 4, art. I § 8, cl. 18. *United States v. Slone*, 411 F.3d 643 (6th Cir. 2005); *United States v. Bowman*, 636 F.2d 1003 (5th Cir. 1981); *United States v. Malmy*, 671 F.2d 869 (5th Cir. 1982); *United States v. Carmichael*, 685 F.2d 903 (4th Cir. 1982), cert. denied, 459 U.S. 1202 (1983); *United States v. Cole*, 41 F.3d 303 (7th Cir. 1994); *United States v. McCranie*, 169 F.3d 723 (11th Cir. 1999); and *United States v. Cianciulli*, 482 F. Supp. 585 (E.D. Pa. 1979).

Section 1973i(c) has been held to protect two distinct aspects of a federal election: the actual results of the election, and the integrity of the process of electing federal officials. *United States v. Cole*, 41 F.3d 303 (7th Cir. 1994). In *Cole*, the Court held that federal jurisdiction is satisfied so long as a single federal candidate is on the ballot – even if the federal candidate is unopposed – because fraud in a mixed election automatically has an impact on the integrity of the election. See also *United States v. McCrainie*, 169 F.3d 723 (11th Cir. 1999), and *United*

¹³ The discussion presented here concerning the basis for federal jurisdiction under Section 1973i(c) applies equally to its companion statute, 42 U.S.C. § 1973i(e), which addresses multiple voting. This is because the federal jurisdictional predicate is phrased precisely the same way in both statutes.

States v. Slone, 411 F.3d 643 (6th Cir. 2005), both of which followed *Cole* and achieved the same result.

Section 1973i(c) is particularly useful for two reasons: 1) it eliminates the unresolved issue of the scope of the constitutional right to vote in matters not involving racial discrimination, and 2) it eliminates the need to prove that a given pattern of corrupt conduct had an actual impact on a federal election. It is sufficient under Section 1973i(c) that a pattern of corrupt conduct took place during a mixed election; in that situation it is presumed that the fraud will expose the federal race to potential harm. *Slone*, *Cole*, *supra*; *United States v. Olinger*, 759 F.2d 1293 (7th Cir.), *cert. denied*, 474 U.S. 839 (1985); *United States v. Saenz*, 747 F.2d 930 (5th Cir. 1984), *cert. denied*, 473 U.S. 906 (1985); *United States v. Garcia*, 719 F.2d 99 (5th Cir. 1983); *United States v. Carmichael*, 685 F.2d 903 (4th Cir. 1982), *cert. denied*, 459 U.S. 1202 (1983); *United States v. Mason*, 673 F.2d 737 (4th Cir. 1982); *United States v. Malmay*, 671 F.2d 869 (5th Cir. 1982); *United States v. Bowman*, 636 F.2d 1003 (5th Cir. 1981); *United States v. Sayre*, 522 F. Supp. 973 (W.D. Mo. 1981); *United States v. Simms*, 508 F. Supp. 1179 (W.D. La. 1979).

Cases arising under this statute that involve corruption of the process by which individuals register, as distinguished from the circumstances under which they vote, present a different federal jurisdictional issue that is easily satisfied. This is because voter registration in every state is “unitary” in the sense that one registers to vote only once in order to become eligible to vote for all candidates on the ballot - local, state, and federal. Although a state could choose to maintain separate registration lists for federal and nonfederal elections, at the time this paper was written no state had chosen to do so. Consequently, any corrupt act that impacts on the voter registration process and that can be reached under 42 U.S.C. § 1973i(c) satisfies this federal jurisdictional requirement. An excellent discussion of this issue is contained in *United States v. Cianciulli*, 462 F. Supp. 585 (E.D. Pa. 1979).

b) False information to an election official

The “false information” provision of Section 1973i(c) prohibits any person from furnishing certain false data to an election official to establish eligibility to register or vote. The statute applies to three types of information: name, address, and period of residence in the voting district. False information concerning other factors (such as citizenship, felon status, and mental competence) are not covered by this provision.¹⁴

As just discussed, registration to vote is “unitary,” *i.e.*, a single registration qualifies the applicant to cast ballots for all elections. Thus, the jurisdictional requirement that the false information was used to establish eligibility to vote in a federal election is satisfied automatically

¹⁴ Such matters might, however, be charged as conspiracies to encourage illegal voting under the conspiracy clause of Section 1973i(c), as citizenship offenses under, *inter alia*, 18 U.S.C. §§ 911 and 1015(f), or under the broad “false information” provision of 42 U.S.C. § 1973gg-10. These statutes will be discussed below.

wherever a false statement is made to get one's name on the registration rolls. *United States v. Barker*, 514 F.2d 1077 (7th Cir. 1975); *Cianciulli, supra*.

On the other hand, when the false data is furnished to poll officials for the purpose of enabling a voter to cast a ballot in a particular election (as when one voter attempts to impersonate another), it must be shown that a federal candidate was being voted upon at the time. In such situations, the evidence should show that the course of fraudulent conduct could have jeopardized the integrity of the federal race, or, at a minimum, that the name of a federal candidate was on the ballot. *Carmichael, Bowman, Malmay, McCrainie, supra*. See, e.g., *In re Coy*, 127 U.S. 731 (1888).

In *United States v. Boards*, 10 F.3d 587 (8th Cir. 1993), the Eighth Circuit confirmed the broad reach of the "false information" provision of Section 1973i(c). The defendants in this case, and their unidentified coconspirators, had obtained and marked the absentee ballots of other registered voters by forging the voters' names on ballot applications and directing that the ballots be sent to a post office box without the voters' knowledge. The District Court granted post-verdict judgments of acquittal as to those counts in which the defendant's role was limited to fraudulently completing an application for an absentee ballot, based on its conclusions that: 1) the statute did not extend to ballot applications, 2) the statute did not cover giving false information as to the names of real voters (as opposed to fictitious names), and 3) the defendants could not be convicted for completing the applications when others actually voted using ballots.

The Court of Appeals rejected each of these narrow interpretations of Section 1973i(c). It held that an application for a ballot falls within the broad definition of "vote" in the Voting Rights Act, "because an absentee voter must first apply for an absentee ballot as a 'prerequisite to voting.'" *United States v. Boards*, 10 F.3d at 589 (quoting 42 U.S.C. § 1973 (c)(1)). The Court also held that by using the names of real registered voters on the applications, the defendants "[gave] false information as to [their] name[s]" within the meaning of Section 1973i(c).¹⁵ *Id.* Finally, the Court held that one of the defendants, whose role was limited to completing absentee ballot applications for ballots that others used to fraudulently vote, was liable under 18 U.S.C. § 2 as an aider and abettor.

In *United States v. Smith*, 231 F.3d 800 (11th Cir. 2000), the Court of Appeals for the 11th Circuit held that each forgery of a voter's name on a ballot document or on an application for a ballot constituted a separate offense under the "false information as to name" clause of Section 1973i(c).

Section 1973i(c)'s false information clause is particularly useful when the evidence shows that a voters's signature (name) was forged on an election-related document, e.g.: 1) when

¹⁵ The Eighth Circuit observed, "[b]ecause only registered voters are eligible to apply for and vote absentee ballots, the use of real registered voters' names was essential to the scheme to obtain and vote absentee ballots" *Boards* at 589.

signatures on poll lists are forged by election officials who are stuffing a ballot box, 2) when a voter's signature on an application for an absent ballot is forged, or 3) when bogus voter registration documents are fabricated in order to get names on voter registries.

c) Commercialization of the vote

The clause of Section 1973i(c) that prohibits "vote buying" does so in broad terms, covering any payment made or offered to a would-be voter "to vote or for voting" in an election where the name of a federal candidate appears on the ballot, as well as payments made to induce unregistered persons to register.¹⁶ Section 1973i(c) applies as long as a pattern of vote buying exposes a federal election to potential corruption, even though it cannot be shown that the threat materialized.

This aspect of Section 1973i(c) is directed at eliminating pecuniary considerations from the voting process. *Garcia; Mason; Malmay; Bowman, supra*. The statute rests on the premises that potential voters can choose not to vote; that those who choose to vote have a right not to have the voting process diluted with ballots that have been procured through bribery; and that the selection of the nation's leaders should not degenerate into a spending contest, with the victor being the candidate who can pay the most voters. *See also United States v. Blanton*, 77 F. Supp. 812, 816 (E.D. Mo. 1948).

The bribe may be anything having monetary value, including cash, liquor, lottery chances, and welfare benefits such as food stamps. *Garcia*, 719 F.2d at 102. However, offering free rides to the polls or providing employees paid leave while they vote are not prohibited. *United States v. Lewin*, 467 F.2d 1132 (7th Cir. 1972). Such things are given to make it easier for people to vote, not to induce them to do so. This distinction is important. For an offer or a payment to violate Section 1973i(c) it must have been intended to induce or reward the voter for engaging in one or more acts necessary to cast a ballot. Section 1973i(c) does *not* prohibit offering or giving things having theoretical pecuniary value, such as a ride to the polls or time off from work, to individuals who have already made up their minds to vote solely to facilitate their doing so.

Moreover, payments made for some purpose other than to induce or reward voting activity, such as remuneration for campaign work, do not violate this statute. *See Canales v. United States*, 744 F.2d 413 (5th Cir. 1984), *cert. denied*, 473 U.S. 906 (1985). Similarly, Section 1973i(c) does not apply to payments made to signature-gatherers for voter registrations

¹⁶ The federal criminal code contains another vote-buying statute, 18 U.S.C. § 597, which has a narrower scope and provides for lesser penalties than Section 1973i(c). Section 597 prohibits making or offering to make an expenditure to any person to vote or withhold his or her vote for a federal candidate. Nonwillful violations of Section 597 are one-year misdemeanors; willful violations are two-year felonies. Sections 597 and 1973i(c) are distinct offenses, since each requires proof of an element that the other does not. *Whalen v. United States*, 445 U.S. 684 (1980); *Blockburger v. United States*, 284 U.S. 299 (1932). Section 597 requires that the payment be made to influence a federal election; Section 1973i(c) requires that the defendant acted "knowingly and willfully."

such individuals may obtain, a practice sometimes referred to as “bounty hunting.” However, such payments become actionable under Section 1973i(c) if they are shared with the person being registered.¹⁷

Finally, Section 1973i(c) does not require that the offer or payment be made with a specific intent to influence a federal contest. It is sufficient that the name of a federal candidate appeared on the ballot in the election where the payment or offer of payment occurred. *Slone* (payments to influence the vote for a county judge executive); *Garcia* (providing food stamps to influence the vote for candidates running for county judge and county commissioner); *United States v. Thompson*, 615 F.2d 329 (5th Cir. 1980), *Carmichael, Mason, Sayre* (payments to influence votes for candidates running for sheriff or other local offices); *Simms* (payments to vote for a state judicial post); *Malmay* (payments to vote for school board member); *United States v. Odom*, 858 F.2d 664 (11th Cir. 1988) (payments for votes for a state representative); *United States v. Campbell*, 845 F.2d 782 (8th Cir. 1988), *cert. denied*, 488 U.S. 965 (1989) (payments to benefit a candidate for county judge); *United States v. Daugherty*, 952 F.2d 969 (8th Cir. 1991) (payments to vote for a number of local candidates); *McCrainie* (payments to influence election for sheriff where the name of an unopposed federal candidate appeared on the ballot).

d) Conspiracy to cause illegal voting

The second clause of Section 1973i(c) criminalizes conspiracies to encourage “illegal voting.” The phrase “illegal voting” is not defined in the statute. On its face it encompasses unlawful conduct in connection with voting. Violations of this provision are felonies.

¹⁷ Federal prosecutors who encounter bounty hunting activity may see evidence that organizations that pay bounty hunters per piece victimize by the submission of voter registrations with forged signatures and fictitious information. Federal prosecutors should consider prosecuting bounty hunters who knowingly gather false registrations and also prosecute organizations that pay bounty hunters and forward registrations to election officials knowing they are false.

The “illegal voting” clause of Section 1973i(c) has potential application to those who undertake to cause others to register or vote in conscious derogation of state or federal laws. *Cianciulli*, 482 F. Supp. at 616 (noting that this clause would prohibit “vot[ing] illegally in an improper election district”). For example, all states require voters to be United States citizens, and most states disenfranchise people who have been convicted of certain crimes, who are mentally incompetent, or who possess other disabilities that may warrant restriction of the right to vote. This provision requires that the voters participate in the conspiracy.¹⁸

The conspiracy provision of Section 1973i(c) applies only to the statute’s “illegal voting” clause. *Olinger*, 759 F.2d at 1298-1300. Conspiracies arising under the other clauses of Section 1973i(c) (that is, those involving vote buying or fraudulent registration) should be charged under the general federal conspiracy statute, 18 U.S.C. § 371.

4. Voting More than Once: 42 U.S.C. § 1973i(e)

Section 1973i(e), enacted as part of the 1975 amendments to the Voting Rights Act of 1965, makes it a crime to vote “more than once” in any election in which a federal candidate is on the ballot. Violations are punishable by imprisonment for up to five years.

The federal jurisdictional basis for this statute is identical to that for 42 U.S.C. § 1973i(c), which is discussed in detail in the previous item.

Section 1973i(e) is most useful as a statutory weapon against frauds which do not involve the participation of voters in the balloting acts attributed to them. Examples of such frauds are schemes to cast ballots in the names of voters who were deceased or absent, *United States v. Olinger*, 759 F.2d 1293 (7th Cir.), *cert. denied*, 474 U.S. 839 (1985); schemes to exploit the infirmities of the mentally handicapped by casting ballots in their names. *United States v. Odom*, 736 F.2d 104 (4th Cir. 1984); and schemes to cast absentee ballots in the names of voters who did not participate in and consent to the marking of their ballots by the offender. *United States v. Smith*, 231 F.3d 800 (11th Cir. 2000).

Most cases prosecuted under the multiple voting statute have involved defendants who physically marked ballots outside the presence of the voters in whose names they were cast – in other words, without the voters’ participation or knowledge. The statute may also be applied successfully to schemes when the voters are present but do not participate in any way, or otherwise consent to the defendant’s assistance, in the voting process.

¹⁸ False statements involving any fact which is material to registering or voting under state law may also be prosecuted under 42 U.S.C. § 1973gg-10, as will be discussed below.

However, when the scheme involves “assisting” voters who are present and who also marginally participate in the process, such as by signing a ballot document, prosecuting the case under Section 1973i(e) may present difficulties. For instance, in *United States v. Salisbury*, 983 F.2d 1369 (6th Cir. 1993), the defendant got voters to sign their absentee ballot forms and then instructed them how to mark their ballots, generally without allowing them to choose the candidates – and in some cases even to know the identity of the candidates on the ballot. In a few cases the defendant also personally marked others’ ballots. The Sixth Circuit held that the concept “votes more than once” in Section 1973i(e) was unconstitutionally vague as applied to these facts. Because the phrase “votes more than once” was not defined in the statute, the Court found the phrase did not clearly apply when the defendant did not physically mark another’s ballot. The Court further held that, even if the defendant did mark another’s ballot, it wasn’t clear this was an act of “voting” by the defendant if the defendant got the ostensible voters to demonstrate “consent” by signing their names to the accompanying ballot forms. *Salisbury* at 1379.¹⁹

¹⁹ The *Salisbury* Court noted that in *United States v. Hogue*, 812 F.2d 1568 (11th Cir. 1987), the jury was instructed that illegal voting under Section 1973i(e) included marking another person’s ballot without his or her “express or implied consent,” but found that, based on the facts of *Salisbury*, the jury should also have been given definitions of “vote” and “consent.” *Salisbury* at 1377.

A year after *Salisbury*, the Seventh Circuit took a different approach, with the benefit of more detailed jury instructions. *United States v. Cole*, 41 F.3d 303 (7th Cir. 1994). In both cases, the defendants had marked absentee ballots of other persons after getting the voters to sign their ballot documents. The Seventh Circuit rejected the Sixth Circuit's contention that the term "vote" was unconstitutionally vague, finding that the term was broadly and adequately defined in the Voting Rights Act itself, 42 U.S.C. § 1973 (c)(1), and this statutory definition was supported by both the dictionary and commonly understood meaning of the word. The Court held that the facts established a clear violation by the defendant of the multiple voting prohibition in Section 1973i(c).²⁰

In addition to their conflicting holdings, the *Salisbury* and *Cole* opinions differ in their approach to so-called voter "assistance" cases. *Salisbury* focused on the issue of voter consent – that is, whether the voters had, by their conduct, in some way "consented" to having the defendant mark, or help them mark, their own ballots. *Cole*, on the other hand, focused on whether it was the voter or the defendant who actually expressed candidate preferences.

In a more recent case, the Eleventh Circuit followed the rationale in *Cole* with respect to a scheme to obtain and cast ballots for indigent voters without their knowledge or consent. *Smith, supra*. The Court even went so far as to note that, in its view, a Section 1973i(e) offense could lie regardless of whether the voter had consented to another's marking his ballot. *Smith* at 816, fn. 20.

While the approach taken in *Cole* and *Smith* is, from a prosecutor's perspective, preferable to *Salisbury*'s, the latter's discussion of the issue of possible voter "consent" remains important, since facts suggesting the possibility of consent may weaken the evidence of fraud. Taken together, these three cases suggest the following approach to voter "assistance" frauds:

- The use of Section 1973i(e) most clearly applies to cases of "ballot theft." Examples of such situations are when the defendant marked the ballots of others without their input; when voters did not knowingly consent to the defendant's participation in their voting transactions; when the voters' electoral preferences were disregarded; or when the defendant marked the ballots of voters who lacked the mental capacity to vote or to consent to the defendant's activities.
- Jury instructions for a Section 1973i(e) indictment should amplify the key term "votes more than once" in the context of the particular case, and specifically define the terms "vote," and, where appropriate, "consent" and "implied consent." See 42 U.S.C. § 1973 (c)(1) (containing an extremely broad definition of "vote") and *United*

²⁰ "Ordinary people can conclude that the absentee voters were not expressing their wills or preferences, i.e., that *Cole* was using the absentee voters' ballots to vote his will and preferences." *Cole* at 308.

States v. Boards, 10 F.3d 587, 589 (8th Cir. 1993) (holding that this definition encompasses applying for an absentee ballot).

Thus, while the clearest use of Section 1973i(e) is to prosecute pure ballot forgery schemes, the statute can also apply to other types of schemes when voters are manipulated, misled, or otherwise deprived of their votes. *See Cole* at 310-311 (witness believed the defendant was merely registering her to vote, not helping her vote). Schemes to steal the votes of the elderly, infirm, or economically disadvantaged may constitute multiple voting, especially if there is a clear absence of meaningful voter participation. Because of their vulnerability, these persons are frequent targets of ballot schemes, and often do not even know that their ballots have been stolen or their voting choices ignored. Furthermore, if they have been intimidated, they are generally reluctant to say so.

There is a significant evidentiary difference between voter intimidation and multiple voting that suggests that the multiple voting statute may often become the preferred charging statute for voter “assistance” frauds. Voter intimidation requires proof of a difficult element: the existence of physical or economic intimidation that is intended by the defendant and felt by the victim. In contrast, the key element in a multiple voting offense is whether the defendant voted the ballot of another person without consulting with that person or taking into account his or her electoral preferences.

In conclusion, if the facts show manipulation of “vulnerable victims” as referenced in the United States Sentencing Guidelines for the purpose of obtaining control over the victims’ ballot choices, the use of Section 1973i(e) as a prosecutive theory should always be considered.

5. Voter Intimidation

Voter intimidation schemes are the functional opposite of voter bribery schemes. In the case of voter bribery, voting activity is stimulated by offering or giving something of value to individuals to induce them to vote or reward them for having voted. The goal of voter intimidation, on the other hand, is to deter or influence voting activity through threats to deprive voters of something they already have, such as jobs, government benefits, or, in extreme cases, their personal safety. Another distinction between voter bribery and intimidation is that bribery generates concrete evidence: the bribe itself (generally money). Intimidation, on the other hand, is amorphous and largely subjective in nature, and lacks such concrete evidence.

Voter intimidation is an assault against both the individual and society, warranting prompt and effective redress by the criminal justice system. Yet a number of factors make it difficult to prosecute. The intimidation is likely to be both subtle and without witnesses. Furthermore, voters who have been intimidated are not merely victims; it is their testimony that proves the crime. These voters must testify, publicly and in an adversarial proceeding, against

the very person who intimidated them. Obtaining this crucial testimony must be done carefully and respectfully.²¹

The crime of voter “intimidation” normally requires evidence of threats, duress, economic coercion, or some other aggravating factor that tends to improperly induce conduct on the part of the victim. If such evidence is lacking, an alternative prosecutive theory may apply to the facts, such as multiple voting in violation of 42 U.S.C. § 1973i(e). Indeed, in certain cases the concepts of “intimidation” and voting “more than once” may overlap and even merge. For example, a scheme that targets the votes of persons who are mentally handicapped, economically depressed, or socially vulnerable may involve elements of both crimes. Because of their vulnerability, these persons are often easily manipulated – without the need for inducements, threats, or duress. In such cases, the use of Section 1973i(e) as a prosecutive theory should be considered. *See United States v. Odom*, 736 F.2d 104 (4th Cir. 1984).

The main federal criminal statutes that can apply to voter intimidation are: 18 U.S.C. §§ 241, 242, 245(b)(1)(A), 594, and two statutes enacted in 1993, 18 U.S.C. § 610 and 42 U.S.C. § 1973gg-10(1). Each of these statutes is discussed below.

a) Intimidation in voting and registering to vote: 42 U.S.C. § 1973gg-10(1)

²¹ Federal prosecutors should take advantage and be mindful of Department resources and policies regarding the rights of victims and the sensitivities regarding their use as witnesses by consulting with their victim-witness coordinator in their office or division.

Congress enacted the National Voter Registration Act (NVRA), 42 U.S.C. §§ 1973gg-1973gg-10, in 1993. The principal purpose of this legislation was to require that the states provide prospective voters with uniform and convenient means by which to register for the federal franchise. In response to concerns that relaxing registration requirements might lead to an increase in election fraud, the NVRA also included a new series of election crimes, one of which prohibited knowingly and willfully intimidating or coercing²² prospective voters for registering to vote, or for voting, in any election for federal office.²³ 42 U.S.C. § 1973gg-10(1). Violators are subject to imprisonment for up to five years.

b) Intimidation of voters: 18 U.S.C. § 594

Section 594 prohibits intimidating, threatening, or coercing anyone, or attempting to do so, for the purpose of interfering with an individual's right to vote or not vote in any election held solely or in part to elect a federal candidate. The statute does not apply to primaries. Violations are one-year misdemeanors.

The operative words in Section 594 are "intimidates," "threatens," and "coerces." The *scienter* element requires proof that the actor intended to force voters to act against their will by placing them in fear of losing something of value. The feared loss may be something tangible, such as money or economic benefits, or intangible, such as liberty or safety.

²² For guidance in determining what constitutes "intimidation" or "coercion" under this statute, *see* the discussion of 18 U.S.C. § 594 below. Voter "intimidation" accomplished through conduct not covered by this statute or Section 594 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.

²³ The jurisdictional element for Section 1973gg-10(1) is "in any election for Federal office." This is slightly different phraseology than used in Sections 1973i(c) and i(e), as discussed above. In matters involving intimidation in connection with voter *registration*, this jurisdictional element is satisfied in every case because voter registration is unitary in all 50 states: *i.e.*, one registers to vote only once to become eligible to vote for federal as well as nonfederal candidates. However, when the intimidation occurs in connection with *voting*, the jurisdictional situation may not be as clear. Absent case law to the contrary, federal prosecutors should consider the position that "an election for Federal office" means any election in which a federal candidate is on the ballot.

Section 594 was enacted as part of the original 1939 Hatch Act, which aimed at prohibiting the blatant economic coercion used during the 1930s to force federal employees and recipients of federal relief benefits to perform political work and to vote for and contribute to the candidates supported by their supervisors. The congressional debates on the Hatch Act show that Congress intended Section 594 to apply when persons were placed in fear of losing something of value for the purpose of extracting involuntary political activities. 84 Cong. Rec. 9596-611 (1939). Although the impetus for the passage of Section 594 was Congress's concern over the use of threats of economic loss to induce political activity, the statute also applies to conduct which interferes, or attempts to interfere, with an individual's right to vote by placing him or her in fear of suffering other kinds of tangible and intangible losses. It thus criminalizes conduct intended to force prospective voters to vote against their preferences, or refrain from voting, through activity reasonably calculated to instill some form of fear in them.²⁴

c) Coercion of political activity: 18 U.S.C. § 610

Section 610 was enacted as part of the 1993 Hatch Act Reform Amendments to provide increased protection against political manipulation of federal employees in the Executive Branch.²⁵ It prohibits intimidating or coercing a federal employee to induce or discourage "any political activity" by the employee. Violators are subject to imprisonment for up to three years. This statute is discussed in detail in Chapter Three, which addresses patronage crimes.

Although the class of persons covered by Section 610 is limited to federal employees, the conduct covered by this new statute is broad: it reaches political activity that relates to any public office or election, whether federal, state, or local. The phrase "political activity" in Section 610 expressly includes, but is not limited to, "voting or refusing to vote for any

²⁴ The civil counterparts to Section 594, 42 U.S.C. §§ 1971(b) and 1973i(b), may also be used to combat nonviolent voter intimidation. See, e.g., *United States v. North Carolina Republican*, No. 91-161-Civ-5F (E.D.N.C., consent decree entered Feb. 27, 1992) (consent order entered against political organizations for mailing to thousands of minority voters postcards that contained false voting information and a threat of prosecution).

²⁵ A similar statute addresses political intimidation within the military. 18 U.S.C. § 609. It prohibits officers of the United States Armed Forces from misusing military authority to coerce members of the military to vote for a federal, state, or local candidate. Violations are five-year felonies. In addition, 18 U.S.C. § 593 makes it a five-year felony for a member of the military to interfere with a voter in any general or special election, and 18 U.S.C. § 596 makes it a misdemeanor to poll members of the armed forces regarding candidate preferences.

candidate or measure,” “making or refusing to make any political contribution,” and “working or refusing to work on behalf of any candidate.”

**d) Conspiracy against rights and deprivation of constitutional rights:
18 U.S.C. § 241 and § 242**

Section 241 makes it a ten-year felony to “conspire to injure, oppress, threaten, or intimidate any person in any state, territory or district in the free exercise or enjoyment of any right or privilege secured by the Constitution or laws of the United States” – including the right to vote. The statute, which is discussed in detail above, has potential application in two forms of voter intimidation: a conspiracy to prevent persons whom the subjects knew were qualified voters from entering the polls to vote in an election when a federal candidate is on the ballot, and a conspiracy to misuse state authority to prevent qualified voters from voting for any candidate in any election.

Section 241 has been successfully used to prosecute intimidation in connection with political activities. *Wilkins v. United States*, 376 F.2d 552 (5th Cir.) (*en banc*), *cert. denied*, 389 U.S. 964 (1967). *Wilkins* involved both violence and clear racial animus. It arose out of the shooting of a participant in the 1965 Selma-to-Montgomery voting rights march. The marchers had intended to present to the Governor of Alabama a petition for redress of grievances, including denial of their right to vote. The Fifth Circuit held that those marching to protest denial of their voting rights were exercising “an attribute of national citizenship, guaranteed by the United States,” and that shooting one of the marchers therefore violated Section 241. *Wilkins*, 376 F.2d at 561.

Section 242, as also discussed above, makes it a misdemeanor for any person to act “under color of any law, statute, ordinance, regulation, or custom,” knowingly and willfully to deprive any person in a state, territory, or district of a right guaranteed by the Constitution or federal law. For all practical purposes, this statute embodies the substantive offense for a Section 241 conspiracy and it therefore can apply to voter intimidation.

It is the Criminal Division’s position that Sections 241 and 242 may be used to prosecute schemes the object of which was to intimidate voters in federal elections through threats of physical or economic duress, or to prevent otherwise lawfully qualified voters from getting to the polls in elections where federal candidates are on the ballot. Examples of the latter include intentionally jamming telephone lines to disrupt a political party’s get-out-the-vote or “ride-to-the-polls” efforts, and schemes to vandalize motor vehicles a political faction or party intended to use to get voters to the polls.

e) Federally protected activities: 18 U.S.C. § 245(b)(1)(A)

The Civil Rights Act of 1968 contains a broad provision that addresses violence intended to intimidate voting in any election in this country. 18 U.S.C. § 245(b)(1)(A). This provision applies without regard to the presence of racial or ethnic factors.

Section 245(b)(1)(A) makes it illegal to use or threaten to use physical force to intimidate individuals from, among other things, “voting or qualifying to vote.” It reaches threats to use physical force against a victim because the victim has exercised his or her franchise, or to prevent the victim from doing so. Violations are misdemeanors if no bodily injury results, and ten-year felonies if it does; if death results, the penalty is life imprisonment.

Prosecutions under Section 245 require written authorization by the Attorney General, the Deputy Attorney General, the Associate Attorney General, or a specifically designated Assistant Attorney General, who must certify that federal prosecution of the matter is “in the public interest and necessary to secure substantial justice.” § 245(a)(1). This approval requirement was imposed in response to federalism issues that many Members of Congress believed were inherent in a statute giving the federal government prosecutive jurisdiction over what otherwise would be mere assault and battery cases. *See* 1968 U.S.C.C.A.N. 1837-67 (Judiciary Committee Report on H.R. 2516). In making the required certification under Section 245(b)(1)(A), the standard to be applied by the Attorney General is whether the facts of the particular matter are such that the appropriate state law enforcement authorities should, but either cannot or will not, effectively enforce the applicable state law, thereby creating an overriding need for federal intervention. 1968 U.S.C.C.A.N. 1845-48 (Judiciary Committee Report on H.R. 2516).

6. Fraudulent Registering and Voting: 42 U.S.C. § 1973gg-10(2)

This provision was enacted as part of the National Voter Registration Act of 1993 (NVRA). As discussed above, Congress enacted the NVRA to ease voter registration requirements throughout the country. The major goal of this legislation was to promote the exercise of the franchise by replacing diverse state voter registration requirements with uniform and more convenient registration options, such as registration by mail, when applying for a driver’s license, and at various government agencies.

In addition, the NVRA sought to protect the integrity of the electoral process and the accuracy of the country’s voter registration rolls. To further this goal, a new criminal statute was enacted that specifically addressed two common forms of electoral corruption: intimidation of voters (42 U.S.C. § 1973gg-10(1), discussed above), and fraudulent registration and voting (42 U.S.C. § 1973gg-10(2)). Violations of this statute are punishable by imprisonment for up to five years.

The NVRA’s criminal statute resulted from law enforcement concerns expressed during congressional debates on the proposed law. Opponents and supporters of the NVRA alike recognized that relaxing requirements for registering to vote had the unavoidable potential to increase the occurrence of election crime by making it easier for the unscrupulous to pack registration rolls with fraudulent applications and ballots.

The constitutional basis of the NVRA is Congress's broad power to regulate the election of federal officials. NVRA's criminal provision reflects this federal focus, and is limited to conduct that occurs "in any election to Federal office." The phrasing of this jurisdictional element differs somewhat from the jurisdictional language used by Congress in earlier election fraud statutes, which required only that the name of a federal candidate be on the ballot.²⁶ While the Department believes that the jurisdictional language used in Section 1973gg-10 was included to achieve the same result as the jurisdictional element for Sections 1973i(c) and i(e), prosecutors and investigators wishing to proceed under Section 1973gg-10 should be sensitive to the differences in its jurisdictional phraseology.

a) Fraudulent registration: § 1973gg-10(2)(A)

Subsection 1973gg-10(2)(A) prohibits any person, in an election for federal office, from defrauding or attempting to defraud state residents of a fair and an impartially conducted election by procuring or submitting voter registration applications that the offender knows are materially false or defective under state law. The scope of the statute is broader than that of the "false information" provision of Section 1973i(c), discussed above, which is limited to false information involving only name, address, or period of residence. The statute applies to any false information that is material to a registration decision by an election official. For this reason, the provision is likely to be the statute of preference for most false registration matters.

For schemes to submit fraudulent registration applications, the statute's "Federal office" jurisdictional element is automatically satisfied and hence does not present a problem. This is because registration to vote is unitary in all states, in the sense that in registering to vote an individual becomes eligible to vote in all elections, nonfederal as well as federal.

b) Fraudulent voting: § 1973gg-10(2)(B)

Subsection 1973gg-10(2)(B) prohibits any person, in an election for federal office, from defrauding or attempting to defraud the residents of a state of a fair election through casting or tabulating ballots that the offender knows are materially false or fraudulent under state law. Unlike other ballot fraud laws discussed in this chapter, the focus of this provision is not on any single type of fraud, but rather on the result of the false information: that is, whether the ballot generated through the false information was defective and void under state law. Because of the

²⁶ Those earlier statutes, Sections 1973i(c) and (e), contain express references to each federal office (Member of the House, Member of the Senate, President, Vice President, presidential elector) and type of election (primary, general, special) providing potential federal jurisdiction. The revised language seems to have been intended as a less cumbersome rephrasing of the required federal nexus. However, at the time this paper was written there was no jurisprudence on this point.

conceptual breadth of the new provision, it may become a useful alternative to general fraud statutes in reaching certain forms of election corruption.

The statute's jurisdictional element, "in any election for Federal office," restricts its usefulness for fraudulent voting (as opposed to fraudulent registration) schemes. This Subsection of the statute applies only to elections that include a federal candidate. Thus its scope is similar to that of 42 U.S.C. §§ 1973i(c) and (e), and arises from the fact that fraudulent activity aimed at any race in a mixed election has the potential to taint the integrity of the federal race.

7. Voting by Noncitizens

Federal law does not expressly require that persons be United States citizens in order to vote. Moreover, eligibility to vote is a matter that the Constitution leaves primarily to the states.²⁷ At the time this paper was written, all states required that prospective voters be United States citizens.

Historically, the states have regulated both the administrative and substantive facets of the election process, including how one registers to vote and who is eligible to do so. Federal requirements, on the other hand, generally have focused on specific federal interests, such as protecting the integrity of the federal elective process and the exercise of fundamental rights.²⁸

Federal laws do, however, have quite a bit to say about citizenship and voting. Specifically, in 1993 the federal role in the election process expanded significantly with the enactment of the National Voter Registration Act (NVRA). This legislation required, among other things, that forms used to register persons to vote in federal elections clearly state "each eligibility requirement (including citizenship)" and that persons registering to vote in federal elections affirm that they meet "each eligibility requirement (including citizenship)." [that citizenship is a voting prerequisite, and that persons registering to vote in federal elections affirm that they are United States citizens]. 42 U.S.C. §§ 1973gg-3(c)(2)(c), 1973gg-5(a)(6)(A)(i), 1973gg-7(b)(2). Nine years later, Congress passed the Help America Vote Act of 2002 (HAVA). HAVA reemphasized these requirements in the case of voters who register to vote by mail by requiring the states to place a citizenship question on forms used by individuals under the "registration by mail" feature of NVRA (42 U.S.C. § 1973gg-4). 42 U.S.C. § 15483(b)(4)(A)(i).

²⁷ See U.S. CONST. art. II, § 1, cl. 2 (presidential electors chosen as directed by state legislatures); art. I, § 2 and amend. XVII (electors for Members of the United States House of Representatives and the United States Senate have the qualifications for electors of the most numerous branch of the state legislatures).

²⁸ For example, the states are prohibited from depriving "citizens of the United States" of the franchise on account of any of the following factors: race (amend. XV), gender (amend. XIX), nonpayment of poll tax (amend. XXIV), age 18 or older (amend. XXVI and 42 U.S.C. § 1973bb), residency longer than 30 days (42 U.S.C. § 1973aa-1), or overseas residence (42 U.S.C. § 1973ff-1).

In addition to these federal requirements relating to voter registration, registering to vote and voting by noncitizens are covered by four separate federal criminal laws:

a) Fraudulent registration and voting under the NVRA: 42 U.S.C. § 1973gg-10(2)

The NVRA enacted a new criminal statute that reaches the knowing and willful submission to election authorities of false information which is material under state law. 42 U.S.C. § 1973gg-10(2). Because all states make citizenship a prerequisite for voting, statements by prospective voters concerning citizenship status are automatically “material” within the meaning of this statute.

Therefore, any false statement concerning an applicant’s citizenship status that is made on a registration form submitted to election authorities can involve a violation of the NVRA’s registration fraud statute. Such violations are felonies subject to imprisonment for up to five years.

For jurisdictional purposes, the statute requires that the fraud be in connection with a federal election. As discussed above, voter registration in every state is unitary in the sense that an individual registers to vote only once for all elective offices - local, state, and federal. Thus the jurisdictional element of Section 1973gg-10(2) is satisfied whenever a false statement concerning citizenship status is made on a voter registration form.

The use of the word “willful” suggests Section 1973gg-10(2) may be a specific intent offense. This means federal prosecutors may have to prove that the offender was aware that citizenship is a requirement for voting and that the registrant did not possess United States citizenship. In most instances, proof of the first element is relatively easy because the citizenship requirement is stated on the voter registration form, and the form requires that the voter check a box indicating that he or she is a citizen. Proof of the second element may be overcome by the fact that all voter registration forms now require a registrant to certify that he or she is a citizen.

b) Naturalization, citizenship, or alien registry: 18 U.S.C. § 1015(f)

Section 1015(f) was enacted in 1996 to provide an additional criminal prohibition addressing the participation of noncitizens in the voting process. This statute makes it an offense for an individual to make any false statement or claim that he or she is a citizen of the United States in order to register or to vote. Unlike all other statutes addressing alien voting, Section 1015(f) expressly applies to all elections – federal, state, and local – as well as to initiatives, recalls, and referenda.

Jurisdictionally, Section 1015(f) rests on Congress’s power over nationality (U.S. Const. art. I, § 8, cl. 3) rather than on the Election Clause (U.S. Const. art. I, § 4, cl. 1), which provides the basis for its broad reach.

Violations of Section 1015(f) are felonies, punishable by imprisonment for up to five years.

c) Citizen of the United States: 18 U.S.C. § 911

Section 911 prohibits the knowing and willful false assertion of United States citizenship by a noncitizen. *See, e.g., United States v. Franklin*, 188 F.2d 182 (7th Cir. 1951); *Fotie v. United States*, 137 F.2d 831 (8th Cir. 1943). Violations of Section 911 are punishable by imprisonment for up to three years of imprisonment.

As noted, all states require United States citizenship as a prerequisite for voting. However, historically, some states have not implemented the prerequisite through voter registration forms that clearly alerted prospective registrants that only citizens may vote. Under the NVRA, all states must now make this citizenship requirement clear, and prospective registrants must sign applications under penalty of perjury attesting that they meet this requirement. Therefore, falsely attesting to citizenship in any state is now more likely to be demonstrably willful, and therefore cognizable under Section 911.

Section 911 requires proof that the offender was aware he was not a United States citizen, and that he was falsely claiming to be a citizen. Violations of Section 911 are felonies, punishable by up to three years of imprisonment.

d) Voting by aliens: 18 U.S.C. § 611

Section 611 is a relatively new statute that creates an additional crime for voting by persons who are not United States citizens. It applies to voting by noncitizens in an election where a federal candidate is on the ballot, except when: 1) noncitizens are authorized to vote by state or local law for nonfederal candidates or issues, and 2) the ballot is formatted in a way that the noncitizen has the opportunity to vote solely for the nonfederal candidate or issues on which he is entitled to vote under state law. Unlike Section 1015(f), Section 611 is directed at the act of voting, rather than the act of lying. But unlike Section 1015(f), Section 611 is a strict liability offense in the sense that the prosecution must only prove that the defendant was not a citizen when he registered or voted. Section 611 does not require proof that the offender be aware that citizenship is a prerequisite to voting.

Violations of Section 611 are misdemeanors, punishable by up to one year of imprisonment.

8. Travel Act: 18 U.S.C. § 1952

The Travel Act, 18 U.S.C. § 1952, prohibits interstate travel, the interstate use of any other facility (such as a telephone), and any use of the mails to further specified “unlawful activity,” including bribery in violation of state or federal law. Violations are punishable by

imprisonment for up to five years. This statute is useful in election crime matters because it applies to vote buying offenses that occur in states where vote buying is a “bribery” offense, and it does so regardless of the type of election involved.

The predicate bribery under state law need not be common law bribery. The Travel Act applies as long as the conduct is classified as a “bribery” offense under applicable state law. *Perrin v. United States*, 444 U.S. 37 (1979). In addition, the Travel Act has been held to incorporate state crimes regardless of whether they are classified as felonies or misdemeanors. *United States v. Polizzi*, 500 F.2d 856, 873 (9th Cir. 1974), *cert. denied*, 419 U.S. 1120 (1975), *United States v. Karigiannis*, 430 F.2d 148, 150 (7th Cir.), *cert. denied*, 400 U.S. 904 (1970).

The first task in determining whether the Travel Act has potential application to a vote buying scheme is to examine the law of the state where the vote buying occurred to determine if it either: 1) is classified as a bribery offense, or 2) describes the offense of paying voters for voting in a way that requires proof of a *quid pro quo*, *i.e.*, that a voter be paid in consideration for his or her vote for one or more candidates. If the state offense meets either of these criteria, the Travel Act potentially applies.

In the past, Travel Act prosecutions have customarily rested on predicate acts of interstate travel or the use of interstate facilities. Since election fraud is a local crime, interstate predicate acts are rarely present, and the Travel Act has not been used to prosecute election crime. However, in *United States v. Riccardelli*, 794 F.2d 829 (2d Cir. 1986), the Act’s mail predicate was held to be satisfied by proof of an intrastate mailing. In reaching this conclusion, the Court conducted an exhaustive analysis of the Travel Act’s legislative history and Congress’s authority to regulate the mails. The Sixth Circuit subsequently reached a contrary result, holding that the Travel Act’s mail predicate required an interstate mailing. *United States v. Barry*, 888 F.2d 1092 (6th Cir. 1989). In 1990 Congress resolved this conflict by adopting the *Riccardelli* holding in an amendment to the Travel Act, expressly extending federal jurisdiction to any use of the mails in furtherance of a state predicate offense.

Thus, the Travel Act should be considered as a vehicle to prosecute vote buying schemes in which the mails were used in those states where vote buying is statutorily defined as bribery. This theory is one of the few available that do not require a federal candidate on the ballot.

As with the mail fraud statute, each use of the mails in the furtherance of the bribery scheme is a separate offense. *United States v. Jabara*, 644 F.2d 574 (6th Cir. 1981). The defendant need not actually have done the mailing, so long as it was a reasonably foreseeable consequence of his or her activities. *United States v. Kelly*, 395 F.2d 727 (2d Cir.), *cert. denied*, 393 U.S. 963 (1968). Nor need the mailing have in itself constituted the illegal activity, as long as it promoted it in some way. *United States v. Bagnariol*, 665 F.2d 877 (9th Cir. 1981), *cert. denied*, 456 U.S. 962 (1982); *United States v. Barbieri*, 614 F.2d 715 (10th Cir. 1980); *United States v. Peskin*, 527 F.2d 71 (7th Cir. 1975), *cert. denied*, 429 U.S. 818 (1976); *United States v. Wechsler*, 392 F.2d 344 (4th Cir.), *cert. denied*, 392 U.S. 932 (1968).

An unusual feature of the Travel Act is that it requires an overt act subsequent to the jurisdictional event charged in the indictment. Thus, if a Travel Act charge is predicated on a use of the mails, the government must allege and prove that the defendant or his or her agent subsequently acted to further the underlying unlawful activity. The subsequent overt act need not be unlawful in itself; this element has been generally held to be satisfied by the commission of a legal act as long as the act facilitated the unlawful activity. *See, e.g., United States v. Davis*, 780 F.2d 838 (10th Cir. 1985).

The Travel Act is particularly useful in voter bribery cases in nonfederal elections that involve the mailing of absentee ballot materials. Such matters usually involve a defendant who offers voters compensation for voting, followed by the voter applying for, obtaining, and ultimately casting an absentee ballot. Each voting transaction can involve as many as four separate mailings: 1) when the absentee ballot application is sent to the voter, 2) when the completed application is sent to the local election board, 3) when the absentee ballot is sent to the voter, and 4) when the voter sends the completed ballot back to the election authority for tabulation.

The mailing must be in furtherance of the scheme. Therefore, care should be taken to ensure that the voting transaction in question was corrupted by a bribe before the mailing charged. If, for example, the voter was not led to believe that he or she would be paid for voting until after applying for, and receiving, an absentee ballot package, then the only mailing affected by bribery would be the transmission of the ballot package to the election authority; the Travel Act charge is best predicated on this final mailing, with some other subsequent overt act charged.

9. Mail and Wire Fraud: 18 U.S.C. § 1341 and § 1343

The federal mail fraud statute prohibits use of the United States mails, or a private or commercial interstate carrier, to further a “scheme or artifice to defraud.” 18 U.S.C. § 1341.²⁹ Violations are punishable by imprisonment for up to five years.

At present, the most viable means of addressing election crime under the mail fraud statute is the “salary theory.” Under this approach, the pecuniary benefits of elective office are charged as the object of the scheme.

a) Background

Until *McNally v. United States*, 483 U.S. 350 (1987), the mail fraud statute was frequently and successfully used to attain federal jurisdiction over schemes to corrupt local elections. Because its jurisdictional basis is the broad power of Congress to regulate the mails,

²⁹ The federal wire fraud statute, 18 U.S.C. § 1343, is essentially identical to the mail fraud statute, except for its jurisdictional element. Accordingly, it also has potential application to election fraud schemes that are furthered by interstate wires.

Section 1341 was used to address corruption of the voting process in purely local or state elections. See *Badders v. United States*, 240 U.S. 391, 392 (1916) (the overt act of putting a letter in a United States post office is a matter Congress may regulate).

Courts had broadly interpreted the "scheme to defraud" element of Section 1341 to include nearly any effort to procure, cast, or tabulate ballots illegally under state law. The theory was that citizens were entitled to fair and honest elections, and a scheme to corrupt an election defrauded them of this right. *United States v. Girdner*, 754 F.2d 877, 880 (10th Cir. 1985) (scheme to cast votes for ineligible voters); *United States v. Clapps*, 732 F.2d 1148, 1152- 53 (3d Cir.) (scheme to usurp absentee ballots of elderly voters), *cert. denied*, 469 U.S. 1085 (1984); *United States v. States*, 488 F.2d 761, 766 (8th Cir. 1973) (scheme to submit fraudulent absentee ballots), *cert. denied*, 417 U.S. 909 (1974). The mail fraud statute was even held to reach schemes to deprive the public of information required under state campaign finance disclosure statutes. *United States v. Buckley*, 689 F.2d 893, 897-98 (9th Cir. 1982), *cert. denied*, 460 U.S. 1086 (1983); *United States v. Curry*, 681 F.2d 406, 411 (5th Cir. 1982).

The jurisdictional mailing requirement of Section 1341, moreover, usually posed no substantial obstacle in election fraud cases. The Second Circuit may have adopted the most expansive position, holding in an unpublished opinion that the mail fraud statute applied to any fraudulent election practice resulting in postal delivery of a certificate of election to the winning candidate. See *Ingber v. Enzor*, 664 F. Supp. 814, 815-16 (S.D.N.Y. 1987) (*habeas* opinion quoting Second Circuit's opinion on direct appeal), *aff'd on other grounds*, 841 F.2d 450 (2d Cir. 1988). See also *United States v. Gordon*, 817 F.2d 1538 (11th Cir. 1987) (mailing the certificate of election to the winning candidate held to be in the furtherance of an election fraud scheme to elect that candidate). As most states mail such notices to victorious candidates, this theory would have allowed federal jurisdiction over election fraud by victorious politicians, both federal and nonfederal.

However, in *McNally*, the Supreme Court substantially restricted the utility of the mail fraud statute to combat election crimes. *McNally* held that "scheme to defraud" does not encompass schemes to deprive the public of intangible rights, such as the rights to good government and fair elections, but is limited to schemes to deprive others of property rights.

In 1988, Congress enacted 18 U.S.C. § 1346 in response to the *McNally* decision. Unfortunately, by its express terms, Section 1346 only applies to schemes to deprive another of the "intangible right of honest services," a concept that may not embrace all schemes to defraud the public of a fair election or information required to be disclosed under federal or state campaign financing laws. Federal prosecutors should consult the Public Integrity Section for current information on the scope of honest services fraud.

Even a narrow definition of honest services fraud does not entirely foreclose use of the mail fraud statute to address election fraud. If a pecuniary interest – such as money or salary – is sought through the scheme, the mail fraud statute still applies. See *McNally*, 483 U.S. at 360 (noting that the jury was not charged on a money or property theory).

b) Salary theory of mail and wire fraud

Schemes to obtain salaried positions by falsely representing one's credentials to a hiring authority remain prosecutable under the mail fraud statute after *McNally*. The objective of such "salary schemes" is to obtain pecuniary items by fraud; such schemes are therefore clearly within the scope of the common law concepts of fraud to which *McNally* sought to restrict the mail fraud statute. See *United States v. Granberry*, 908 F.2d 278, 280 (8th Cir. 1990) (scheme to obtain employment by falsifying application cognizable under salary theory), *cert. denied*, 500 U.S. 921 (1991); *United States v. Doherty*, 867 F.2d 47, 54-57 (1st Cir. 1989) (scheme to rig police promotion exam cognizable on salary theory); *United States v. Walters*, 711 F. Supp. 1435, 1442-46 (N.D. Ill. 1989) (scheme to obtain scholarships through false information), *rev'd on other grounds*, 913 F.2d 388 (7th Cir. 1990); *United States v. Ferrara*, 701 F. Supp. 39 (E.D.N.Y.) (scheme to obtain hospital salaries by falsifying medical training), *aff'd*, 868 F.2d 1268 (2d Cir. 1988); *United States v. Thomas*, 686 F. Supp. 1078, 1083-85 (M.D. Pa.) (scheme to rig police entrance exam), *aff'd*, 866 F.2d 1414 (3d Cir. 1988) (table), *cert. denied*, 490 U.S. 1048 (1989); *United States v. Cooper*, 677 F. Supp. 778, 781-82 (D. Del. 1988) (wire fraud scheme to obtain pay for person not performing work).³⁰

This theory of post-*McNally* mail fraud has potential application to some election fraud schemes, since most elected offices in the United States carry with them a salary and various emoluments that have monetary value. The criterion by which candidates for elected positions are selected by the public is who obtained the most valid votes, *i.e.*, popular or electoral, depending on the type of election. Thus, schemes to obtain salaried elected positions through procuring and tabulating invalid ballots are capable of being charged as traditional common law frauds: that is, schemes to obtain the salary of the office in question by concealing material facts about the critical issue of which candidate received the most valid votes. In addition, election fraud schemes can present related issues concerning the quality and value of the public officer hired thereby. The Supreme Court observed in *McNally* that deceit concerning the quality and value of a commodity or service remains within the scope of the mail fraud statute:

³⁰ Another district court has upheld application of Section 1341 to a commercial bribery scheme to pay salary to a dishonest procurement officer. *United States v. Johns*, 742 F. Supp. 196, 204-06, 212-13 (E.D. Pa. 1990) (collecting cases in an extended discussion of the salary theory). The Third Circuit, however, reversed *Johns's* mail fraud convictions with a cursory, unpublished order that held, enigmatically, that the "convictions for mail fraud must be reversed inasmuch as the evidence was insufficient, as a matter of law, to establish that appellant had defrauded his employer of money paid to him as salary." *United States v. Johns*, 972 F.2d 1333 (3d Cir. 1991) (table) (available at 1991 U.S. App. LEXIS 18586).

We note that as the action comes to us, there was no charge and that the jury was not required to find that the Commonwealth itself was defrauded of any money or property. It was not charged that in the absence of the alleged scheme the Commonwealth would have paid a lower premium or secured better insurance.

483 U.S. at 360 (emphasis added). Election fraud schemes involve an aspect of material concealment insofar as the “value” of the services the public is paying for are concerned: the public “hired” the candidate it was falsely led to believe received the most valid votes, and consequently received services of lower value.

The “salary theory” of post-*McNally* mail fraud has been applied to election frauds in only a few cases to date, most notably *United States v. Walker*, 97 F.3d 253 (8th Cir. 1996) (mail fraud convictions under both salary theory and intangible right to honest services theory arising from scheme to secretly finance local candidate to split vote of opposition party but validity of the theory was neither raised nor litigated in case where validity of the theory was neither raised nor litigated); and *United States v. Webb*, 689 F. Supp. 703 (W.D. Ky. 1988) (tax dollars paid to a public official elected by fraud are a loss to the citizens, who did not receive the benefit of the bargain). However, in *United States v. Turner*, ___ F.3d ___ (6th cir. 2006) the theory was solidly rejected as applied to election fraud cases.

c) “Honest services” frauds: 18 U.S.C. § 1346

As summarized above, prior to *McNally* nearly all of the Circuits had held that a scheme to defraud the public of a fair and impartial election was one of the “intangible rights” schemes to defraud that was reached by the mail and wire fraud statutes. *McNally* repudiated this theory in an opinion that not only rejected the intangible rights theory of mail and wire fraud, but did so by citing several election fraud cases as examples of the kinds of fraud the Court found outside these criminal laws.

The following year, Congress enacted 18 U.S.C. § 1346. However, the language Congress used to achieve this objective did not clearly restore the use of these statutes to election frauds. This is because Section 1346 is limited to schemes to deprive a victim of the “intangible right to honest services,” and election frauds may not involve such an objective. Moreover, jurisprudence in the arena of public corruption has generally confined Section 1346 to schemes involving traditional forms of corruption that involve a clear breach of a fiduciary duty of “honest services” owed by a public official to the body politic: *e.g.*, bribery, extortion, embezzlement, theft, conflicts of interest, and, in some instances, gratuities. *See, e.g., United States v. Panarella*, 277 F.3d 678 (3d Cir. 2002); *United States v. Sawyer*, 329 F.3d 31 (1st Cir. 2001); *United States v. Bloom*, 149 F.3d 649 (7th Cir. 1998); *United States v. Brumley*, 116 F.3d 728 (5th Cir. 1997) (*en banc*). *See also United States v. Grubb*, 11 F.3d 426 (4th Cir. 1993) (upholding multi-count convictions of a state judge, including honest services mail fraud, arising from a scheme to extort \$10,000 donation from the candidate); *United States v. D’Alessio*, 822 F.Supp. 1134 (D.N.J. 1993) (dismissing indictment due to ambiguity regarding applicability of

local gift rule but recognizing candidate's duty of honesty to contributors and the public). Federal prosecutors should consult with the Public Integrity Section before using Section 1346 in the context of election fraud.

In *United States v. Turner*, ___ F.3d ___ (6th Cir. 2006) the application of the "honest services" theory of mail fraud to election frauds was roundly rejected by the Sixth Circuit, which in the process ruled that candidates do not owe a fiduciary duty of "honest services" to the public they seek to serve.

d) "Cost-of-election" theory: 18 U.S.C. § 1341 and § 1343

One case, *United States v. DeFries*, 43 F.3d 707 (D.C. Cir. 1995), held that a scheme to cast invalid ballots in a labor union election which had the effect of tainting the election to a point that exposed it to being declared invalid involved, among other things, a scheme to defraud the election authority charged with running the election of the costs involved.

DeFries was not a traditional election fraud prosecution. Rather, it involved corruption of a union election where supporters for one candidate for union office cast fraudulent ballots for the candidate they supported. When the scheme was uncovered, the United States Department of Labor ordered that a new election be held, thereby causing the union to incur an actual pecuniary loss. The D.C. Circuit held that the relationship between that pecuniary loss and the voter fraud scheme was sufficient to satisfy the requirements of *McNally*.

This theory of prosecution has potential validity primarily where the mail and wire fraud statutes are needed to federalize voter frauds involving the counting of illegal ballots in nonfederal elections, particularly where the fraud has led to a successful election contest and the election authority has been ordered to hold a new election and thereby incur additional costs.

10. Troops at Polls: 18 U.S.C. § 592

This statute makes it unlawful to station troops or "armed men" at the polls in a general or special election (but not a primary), except when necessary "to repel armed enemies of the United States." Violations are punishable by imprisonment for up to five years and disqualification from any federal office.

Section 592 prohibits the use of official authority to order armed personnel to the polls; it does not reach the troops who actually go in response to those orders. The effect of this statute is to raise doubt as to whether the FBI may conduct investigations within the polls on election day, and whether United States Marshals may be stationed at open polls, as both are required to carry their weapons while on duty.

This statute applies only to agents of the United States government. It does not prohibit state or local law enforcement agencies from sending police officers to quell disturbances at

polling places, nor does it preempt state laws that require police officers to be stationed in polling places.

11. Campaign Dirty Tricks

Two federal statutes, both of which are part of the Federal Election Campaign Act (FECA), specifically address campaign tactics and practices: 2 U.S.C. § 441d and § 441h. As is the case with all other features of FECA, violations of these two statutes are subject to both civil and criminal penalties, 2 U.S.C. § 437g(a) and § 437g(d) respectively.

a) Communications and solicitations: 2 U.S.C. § 441d

Section 441d provides that whenever a person or political committee makes certain types of election-related disbursements, an expenditure for the purpose of financing a public communication advocating the election or defeat of a clearly identified federal candidate, or a solicitation for the purpose of influencing the election of a federal candidate, the communication must contain an attribution clause identifying the candidate, committee, or person who authorized and/or paid for the communication. The content of the attribution, as well as its size and location in the advertisement are described in the statute.

b) Fraudulent misrepresentation: 2 U.S.C. § 441h

Section 441h prohibits fraudulently representing one's authority to speak for a federal candidate or political party. As a result of the 2002 Bipartisan Campaign Reform Act, the provision contains two specific prohibitions:

i. Section 441h(a) forbids a federal candidate or an agent of a federal candidate from misrepresenting his or her authority to speak, write, or otherwise act for any other federal candidate or political party in a matter which is damaging to that other candidate or political party. For example, Section 441h(a) would prohibit an agent of federal candidate A from issuing a statement that was purportedly written by federal candidate B and which concerned a matter which was damaging to candidate B.

ii. Section 441h(b) forbids any person from fraudulently representing his or her authority to solicit contributions on behalf of a federal candidate or political party. This provision was added by BCRA and became effective on November 6, 2002. For example, this provision would prohibit any person from raising money by claiming that he or she represented federal candidate A when in fact the person had no such authority.

12. Retention of Federal Election Records: 42 U.S.C. § 1974

The detection, investigation, and proof of election crimes – and in many instances Voting Rights Act violations – often depends on documentation generated during the voter registration, voting, tabulation, and election certification processes. In recognition of this fact, and the length of time it can take for credible election fraud predication to develop, Congress enacted Section 1974 to require that documentation generated in connection with the voting and registration process be retained for twenty-two months if it pertained to an election that included a federal candidate. Absent this statute, the disposition of election documentation would be subject solely to state law, which in virtually all states permits its destruction within a few months after the election is certified.

Section 1974 provides for criminal misdemeanor penalties for any election administrator who knowingly and willfully fails to retain, or willfully steals, destroys, or conceals, records covered by the statute. 42 U.S.C. § 1974a.³¹ More importantly, the reach of this statute qualitatively to specific categories of election documentation is critical to prosecutors as well as election administrators, who must often resolve election disputes and answer challenges to the fairness of elections.³²

For this reason, a detailed discussion of Section 1974 and its application to particular types of election documentation generated in the current age of electronic voting will be presented here.

a) Legislative purpose and background

The voting process generates voluminous documents and records, ranging from voter registration forms and absentee ballot applications to ballots and tally reports. If election fraud occurs, these records often play an important role in the detection and prosecution of the crime. Documentation generated by the election process also plays an equally important role in the detection, investigation, and prosecution of federal civil rights violations.

State laws generally require that voting documents be retained for sixty to ninety days. Those relatively brief periods are usually insufficient to make certain that voting records will be preserved until more subtle forms of federal civil rights abuses and election crimes have been detected.

In 1960, Congress enacted a federal requirement that extended the document retention period for elections where federal candidates were on the ballot to *twenty-two months* after the election. Pub. L. 86-449, Title III, § 301, 74 Stat. 88; 42 U.S.C. §§ 1974-1974e. This election

³¹ Specifically, Section 1974a provides that any election administrator or document custodian who willfully fails to comply with the statute is subject to imprisonment for up to one year.

³² Indeed, the federal courts have recognized that the purpose of this federal document retention requirement is to protect the right to vote by facilitating the investigation of illegal election practices. *Kennedy v. Lynd*, 306 F.2d 222 (5th Cir. 1962), *cert. denied*, 371 U.S. 952 (1963).

documentation retention requirement is backed-up with criminal misdemeanor penalties that apply to election officers and document custodians who willfully destroy covered election records before the expiration of the twenty-two month federal retention period.

The retention requirements of Section 1974 are aimed specifically at election administrators. In a parochial sense, these laws place criminally sanctionable duties on election officials. However, in a broader sense, this federal retention law assists election administrators in performing the tasks of managing elections and determining winners of elective contests. It does this by requiring election managers to focus appropriate attention on the types of election records under their supervision and control that may be needed to resolve challenges to the election process, and by requiring that they take appropriate steps to insure that those records will be preserved intact until such time as they may become needed to resolve legitimate questions that frequently arise involving the election process. In this way, Section 1974 serves the election administrators by better equipping them to respond to legitimate questions concerning the voting process when they arise.

b) The basic requirements of Section 1974

Section 1974 requires that election administrators preserve for twenty-two months “all records and papers that come into their possession relating to any application, registration, payment of poll tax, or other act requisite to voting.” This retention requirement applies to all elections in which a candidate for federal office was on the ballot, that is, a candidate for the United States Senate, the United States House of Representatives, President or Vice President of the United States, or presidential elector. Section 1974 does not apply to records generated in connection with purely local or state elections.

Retention and disposition of records in purely nonfederal elections (those where no federal candidates were on the ballot) are governed by state document retention laws.

However, Section 1974 does apply to all records generated in connection with the process of registering voters and maintaining current electoral rolls. This is because voter registration in virtually all United States jurisdictions is “unitary” in the sense that a potential voter registers only once to become eligible to vote for both local and federal candidates. *See United States v. Cianciulli*, 482 F.Supp. 585 (E.D.Pa. 1979). Thus, registration records must be preserved as long as the voter registration to which they pertain is considered an “active” one under local law and practice, and those records cannot be disposed of until the expiration of twenty-two months following the date on which the registration ceased to be “active.”

This statute must be interpreted in keeping with its congressional objective: Under Section 1974, all documents and records that may be relevant to the detection or prosecution of federal civil rights or election crimes must be maintained if the documents or records were generated in connection with an election that included one or more federal candidates.

c) Section 1974 requires document preservation, not document generation

Section 1974 does *not* require that states or localities produce records in the course of their election processes. However, if a state or locality chooses to create a record that pertains to voting, this statute requires that documentation be retained if it relates to voting in an election covered by the statute.

d) Originals must be retained

Section 1974 further requires that the original documents be maintained, even in those jurisdictions that have the capability to reduce original records to digitized replicas. This is because handwriting analysis may be difficult to perform on digitized reproductions of signatures, and because the legislative purpose advanced by this statute is to preserve election records for their evidentiary value in criminal and civil rights lawsuits. Therefore, in states and localities that employ new digitization technology to archive election forms that were originally manually subscribed by voters, Section 1974 requires that the originals be maintained for the requisite twenty-two month period.

e) Election officials must supervise storage

Section 1974 requires that covered election documentation be retained either physically by election officials themselves, or under the direct administrative supervision of election officers. This is because the document retention requirements of this federal law place the retention and safekeeping duties squarely on the shoulders of election officers, and Section 1974 does not contemplate that this responsibility be shifted to other government agencies or officers.

An electoral jurisdiction may validly determine that election records subject to Section 1974 would most efficiently be kept under the physical supervision of government officers other than election officers (*e.g.*, motor vehicle departments, social service administrators). This is particularly likely to occur following the enactment of the NVRA, which for the first time in many states gives government agencies other than election administrators a substantive role in the voter registration process.

If an electoral jurisdiction makes such a determination, Section 1974 requires that administrative procedures be in place giving election officers ultimate management authority over the retention and security of those election records. Those administrative procedures should ensure that election officers retain ultimate responsibility for the retention and security of covered election documents and records, and that election officers retain the right to physically access and dispose of them.

f) Retention not required for certain records

Documentation generated in the course of elections held *solely* for local or state candidates, or bond issues, initiatives, referenda and the like, is not covered by Section 1974 and may be disposed of within the usually shorter time periods provided under state election laws.

However, if there is a federal candidate on the ballot in the election, the federal retention requirement of twenty-two months applies.

g) Retention under Section 1974 versus retention under the National Voter Registration Act

The retention requirements of Section 1974 interface significantly with somewhat similar retention requirements of the National Voter Registration Act, 42 U.S.C. § 1973gg-6(i).

The differences between these two provisions are threefold:

First, Section 1974 applies to all records generated by the election process, while Section 1973gg-6(i) applies only to registration records generated under the NVRA.

Second, Section 1974 requires only that records subject to its terms be retained intact for the requisite twenty-two month period, while Section 1973gg-6(i) requires that registration records be both retained and, with certain specifically noted exceptions, be made available to the public for inspection for 24 months.

Third, violations of Section 1974 by election administrators are subject to criminal sanctions, while violations of Section 1973gg-6(i) are subject only to noncriminal remedies.

E. CONCLUSION

I conclude this paper with an editorial printed in the March 19, 2004 edition of Big Sandy News, Eastern Kentucky, concerning a series of election fraud prosecutions in a rural jurisdiction in the Appalachian Mountains of Eastern Kentucky. The editorial comments on the sentencing of the County Judge-Executive of Knott County and a campaign worker for vote buying. It appears here with the permission of The Big Sandy News, whose late Publisher and Editor, Scott Perry, led a strong charge against public corruption and took a proactive role in this difficult and ongoing fight.³³

In Kentucky, county judge-executives are the chief operating officers of county government, and, as such, occupy a position of substantial power. The jury's conviction of Knott County Judge-Executive Donnie Newsome was the culmination of a series of vote-buying cases that were jointly prosecuted by the United States Attorney's Office for the Eastern District of Kentucky and the Public Integrity Section during 2003 and early 2004. The charges arose from a scheme to pay individuals for voting in the 1998 Kentucky federal primary in violation of 42 U.S.C. § 1973i(c). The investigation ultimately resulted in the indictment of 17 defendants. Thirteen of the defendants were

³³ The Big Sandy News, Eastern Kentucky's oldest newspaper and the most widely circulated non-daily in Kentucky, was established in 1885 in Louisa, Ky.

convicted, three were acquitted, and one defendant's case was dismissed on a motion to dismiss made by the government.

Subsequent to his conviction, Judge-Executive Newsome cooperated with the government and received a sentence reduction recommendation under U.S.S.G. §5K1.1. On March 16, 2004, he was sentenced to serve 26 months in prison.³⁴

The following editorial, reprinted here in its entirety, presents a concise and eloquent statement of why the investigation and prosecution of electoral corruption are important law enforcement priorities of the Justice Department.

Vote fraud sentencing sad, encouraging
-- by Susan Allen

Tuesday's sentencing in federal court of Knott County Judge-Executive Donnie Newsome and campaign worker Willard Smith on vote buying charges was both a sad and encouraging day for Eastern Kentucky.

Sad the people of Knott County were effectively robbed of their voting rights by Newsome and others doling out cash to buy a public office.

Sad that, as Federal Judge Danny C. Reeves pointed out, some people in Knott and other counties think that elections are supposed to be bought and the only reason to go to the polls is to get their pay off.

Sad those seeking public office in Knott County, and most assuredly in other counties, target poor, handicapped, addicted and uneducated voters to carry out their scheme to secure public office and a hefty paycheck.

Sad that voters in Knott and other counties have been reduced by years and years of political corruption to truly believing that selling their vote is not wrong, it's the norm.

Sad that Eastern Kentuckians have pretty much been left to the mercy of the political machines which serve as dictators of their lives, from their home towns all the way to Frankfort.

Sad that generations sacrificed their lives and their children's lives to the political bosses for mere bones from their local leaders while now their kids are dying from drug overdoses which, we strongly suspect, are directly tied to the years of iniquity and demoralization.

³⁴ The sentencing judge stated that had it not been for the prosecution's recommendation for a downward departure, he was prepared to sentence Newsome to five years of imprisonment.

Sad that even today some elected officials continue the abuse and either refuse or can't comprehend the impact of their past and current atrocities against their own people.

Sad that Judge Reeves could see and completely understand during just a one week trial the utter hopelessness and apathy in the area people feel regarding the so-called democratic process.

Sad that our state lawmakers have piddled away their time during this legislative session on petty political issues without even proposing laws that would bar convicted felons, especially vote buyers from retaining their offices while appealing their verdicts.

Sad that Donnie Newsome continues to rule Knott County from a jail cell.

Tuesday's events were encouraging in that prosecutors [AUSA E.D. Ky.] Tom Self and [Public Integrity Section Trial Attorney] Richard Pilger were willing to fight the hard battle for the people of Knott County, which hopefully will lead to at least a grassroots effort for people to take back their towns.

Encouraging that some light has been shed on the workings of the dark political underworld which might shock the good people of Eastern Kentucky into action, at least for their children's future.

Encouraging that what might be perceived as a baby step with Newsome's conviction could finally lead to that giant step Eastern Kentuckians must surely be ready to take to recapture control of their own destinies.

Encouraging that federal authorities have pledged to continue the fight they have started to restore to the people the right to govern themselves without dealing with a stacked deck.

Encouraging that Judge Reeves and prosecutors did see that the Knott Countians who sold their votes, in some cases for food, were victims of Newsome's plot and didn't need to be punished further.

Encouraging that there's some branch of government, in this case on the federal level, not shy about taking on political power houses, knowing the obstacles in their way will be many.

Encouraging that Newsome's lips have loosened regarding others involved in similar schemes to buy public office, even though we suspect it has nothing to do with righting the wrongs, only a self-serving move to spend less days behind bars.

Encouraging that maybe, for once, we are not in this fight alone and have a place to turn to for help when we are willing to stand up to the machine.

The feds have helped us take that first step toward getting back what is rightfully ours which has been traded away by others in the past in back room deals. Not only do they need our help, WE need our help.

This time, let's not let ourselves down.

How International Election Observers Detect and Deter Fraud*

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By 2004, international election observers were invited to more than 80% of all elections in the developing world.¹ This trend has brought increased international focus to the practice of detecting election manipulation, as well as the ability of international observers to improve the quality of elections. The comparative experience of international election observers makes clear that there are dozens, if not hundreds, of ways to steal an election. This point has been widely documented (Lehoucq 2003, Schedler 2002) but exactly how international observers influence election fraud remains a subject of inquiry. Few of the many recent pieces on election monitoring have addressed this question for either academic or policy audiences.² How do international observers accurately detect election fraud, particularly when election manipulators have the incentive to conceal their activities from observers? Do international observers have the ability to reduce election fraud?

Within the democracy promotion community, international monitoring of elections is believed to promote democracy by providing an independent evaluation of whether a given election was democratic, detecting fraud when it exists, deterring fraud, and increasing voter confidence in the electoral process. The track record of election observation over the past four decades shows that many groups improved their ability to detect electoral fraud, and these organizations have also become more willing to denounce fraudulent elections. By improving the ability of international and domestic actors to identify whether an election was clean or fraudulent, the practice of international election observation has helped democracy-promoting countries, as well as domestic

¹ Hyde (2006).

² See, for example, Abbink and Hessling (2000); Beigbeder (1994); Bjornlund (2004); Bjornlund, Bratton and Gibson (1992); Carothers (1997); Chand (1997); Elklit and Svensson (1997); Geisler (1993); Kumar (1998); Laakso (2002); Lean (2004); Matlosa (2002); Middlebrook (1998); Pastor (1998); Rich (2001); Santa-Cruz (2005).

democracy advocates, identify and punish those governments that fail to hold clean elections. Some policy-makers have also defended the practice of election observation on the grounds that it improves the quality of elections. Can international observers also deter fraud or increase voter confidence in the process?

This piece first reviews the challenges international observers face in judging the quality of elections and then outlines current best-practice for fraud detection, including advancements in observer methodology such as the parallel vote tabulation, the voter registration audit, media monitoring, and coordination with domestic election observers. It then turns to the potential for fraud reduction or deterrence, and presents the randomization of international observers as a methodological innovation that will aid in the detection and measurement of fraud. Evidence from the 2003 presidential elections in Armenia is presented in order to show one way in which fraud may be detected (and how international observers may reduce fraud directly). In the Armenian election, the incumbent candidate, who was widely assumed to be cheating, performed significantly better in polling stations which were not internationally monitored, thus demonstrating that observers can deter election fraud.

The Challenges of Comparative Evaluation of Election Quality

Although international election observers report on many aspects of an electoral process, sometimes providing technical assistance to domestic observer groups or aiding civic education programs, they are best known for their post-election judgments. In the period immediately following an election, international observers issue a preliminary statement, and implicit in this evaluation is a judgment about whether the election was “clean,” “genuine,” “free and fair,” “democratic,” or “compliant with international

standards.” The process by which observers reach this judgment involves the ability to detect fraud when it exists and the ability to aggregate the various irregularities in a summary judgment on the quality of the election. Even when electoral imperfections are detected by observers, judging the degree to which the observed problems influenced the election is challenging (Elklit and Svensson 1997). It is precisely because most elections experience some imperfections that deciding when an electoral process warrants a negative evaluation is controversial. Overall, it is a process fraught with subjective judgments and sometimes conflicting evaluations by competent groups.

Given that some election fraud is observed during the course of an election, it does not necessarily follow that the election as a whole was fraudulent. Not all election irregularities are equally harmful to an electoral process. It is often difficult for international observers to distinguish between unintentional administrative mistakes and blatant attempts to manipulate the outcome of the election. Most observer organizations would agree that they do not wish to delegitimize an entire process because of a few isolated incidents, nor do they believe that administrative incompetence is as malignant to a democratic election as is intentional manipulation.

Observers have dealt with the challenges of aggregation in a variety of ways. One method employed in the public evaluations of elections is to use more diplomatic terms such as “irregularities” rather than more loaded terms like “fraud” and “manipulation” unless observers are absolutely certain that they have directly witnessed a stolen election. A second strategy used by some groups has been to consider the margin of victory. Fraud is more likely to change the outcome of an election when the candidates or parties are closely matched in popularity. It is in these cases that international observers have the

most confidence that observed irregularities changed the outcome of the election. If an election is not close, and one candidate or party is believed to be popular enough to win by a wide margin, even significant election fraud may not change the outcome of the election. Not all organizations agree with this strategy because even in uncompetitive elections, election fraud can have other negative effects such as decreasing public trust in the electoral process. This phenomenon can have long-term negative consequences by making citizens less likely to participate in the future. However, generally speaking, international observers are less severe in their criticism when it does not appear that observed irregularities would have influenced the winner of the election, even in cases in which irregularities are widespread (Abbink and Hessling 2000).³

Within this context, in which international monitors must offer a summary judgment on the quality of an election based on their observations, they must first be able to detect election fraud accurately.

International Observers and Fraud Detection

Detecting election fraud is a difficult business. Political actors who commit electoral manipulation have strong incentives to hide it from international observers. Other political actors may be motivated to accuse their opponents falsely of cheating. Methods of electoral manipulation vary widely between and within countries. Even as international observers improve their methods of detecting fraud, cheating parties and candidates are motivated to use methods of electoral manipulation that are less likely to be caught by international observers. Because each observer organization employs its

³ One potential exception to this generalization is the work of the OSCE/ODHIR. Because the organization only observes elections in OSCE member states, the organization can hold countries to a more specific set of standards for democratic elections which are clearly outlined and agreed to by all OSCE member states. This allows them to be less affected by the outcome of the election.

own methodology, any general statement about how international observers detect fraud will only be partially accurate for a given organization. Even within the same organization, practices are adapted between countries in order to meet unique logistical and technical challenges. With these caveats, the following section outlines best practice for fraud detection by international election observers.

One might suppose that all individuals or parties planning on engaging in electoral fraud would do their best to conceal their activities from international and domestic election observers. It is likely that this is often the case, and that some forms of election manipulation go undetected. However, the record of past election observation missions clearly demonstrates that blatant election manipulation is often carried out in front of international observers, and that observers have developed a variety of means to detect electoral manipulation throughout the electoral process.

One of the most understated successes of international election observation is that they have been able to detect and document widespread election fraud simply by deploying neutral and well-trained foreign observers throughout an electoral process. Because election manipulation can take place at any point before, during, or after an election, since the mid-1990s it has been best practice for missions to observe the entire electoral process whenever possible, including the registration of voters, the campaign period, election day, and the post-election announcement of results and resolution of disputes. To highlight the many forms of election manipulation detected by observers, Table 1 details signs of irregularities that are often discussed in post-election reports as evidence of election fraud. Table 2 lists signs of irregularities where the intention to manipulate the election is less clear. These more ambiguous irregularities may be

intentional attempts to bias the election toward a particular outcome, but could also be the result of lack of experience with voting, administrative incompetence, or other randomly occurring mistakes that are likely to occur with some frequency even in the most well-respected and legitimate elections.

Detecting Fraud Prior to the Campaign Period

Signs of election manipulation in the pre-campaign period include failures in voter registration, particularly when problems disproportionately target politically identifiable groups; banning of candidates or parties; an inadequate legal structure for election-related disputes; problems with the filing or appeals process; failure to prosecute previous violations of election law; and a politically biased election commission.

How do observers detect manipulation prior to the campaign period? Today, standard practice for organizations like the OSCE/ODIHR, the EU, the OAS, NDI, or the Carter Center is to deploy a pre-election assessment mission well in advance of the election. Although these missions vary widely in scope and timing, the most common purpose is to assess the possibilities for deploying a full-scale mission, determine the major issues surrounding the election and the broader political context, and negotiate with the host country on logistical issues like access to polling stations and the provision of visas for international observers. Without officially granted access to polling stations and other areas deemed relevant by election monitors, observers cannot successfully observe an election. Although prohibiting access by international observers to polling stations and vote tabulation centers on election day is rarely illegal, these actions by the government are often interpreted as signals that the government has something to hide.

Long Term Observers (LTOs) became a part of many election observation missions in the late 1990s. Generally speaking, their job is to observe the entire electoral process leading up to election day. They are deployed throughout the country. For some missions, components of the pre-election period are also observed by larger delegations of short-term observers, such as the joint OAS/Carter Center mission to observe the 2004 Venezuelan recall referendum signature verification process. LTOs watch voter and candidate registration, evaluate the legal framework for the election, monitor the actions of the election administration body, evaluate any perceived or actual bias of election administrators, and assess the preparations for the election throughout the country.⁴ These qualitative judgments are rarely aggregated or scored, but provide important context when observers evaluate the electoral process as a whole. When significant problems are noted in the pre-election period, observers issue statements suggesting that the problems be addressed. Often, simply calling attention to problems brings about resolution. In a handful of cases, controversy over the inadequacy of pre-election preparations has resulted in the postponement of elections, such as in Guyana 1992, Liberia 1997, and Venezuela 2000.

One of the most widespread problems in the pre-election period involves the registration of voters. Because the population of eligible voters is constantly shifting due to newly eligible voters, deaths, and migration; keeping voter registration accurate is a task that involves significant administrative investment even when there are no overt attempts to manipulate the election. Regulations for voter eligibility and requirements for registration vary widely. However, inaccurate voter registration lists can serve to disenfranchise large numbers of voters, can be used by the government to boost their own

⁴ See, for example, the *Handbook for European Union Election Observation Missions*.

vote share through the use “ghost voters,” or to decrease their opponents’ abilities to register their own voters.⁵

Measuring the accuracy of a voter registration list is difficult, particularly when registration is voluntary. International and domestic non-partisan election observers have used a voter registration audit in order to more precisely measure whether existing lists are up to date. The most comprehensive method used to date involves a “two-way” audit which is conducted by comparing the accuracy of information in two different random samples of the voting population (NDI 2004). This form of voter registration audit is intended to catch problems with ghost voters, problems with eligible voters who had difficulty registering, and individuals who are registered but are not aware that they are registered.

In order to determine how many voters are included in the voter list but are no longer eligible voters, a statistical sample of names and addresses is taken from the voter register and is then checked via face-to-face interviews for accuracy (called a “list-to-voters” comparison). In order to determine the rate of registered voters relative to the population of eligible voters and to determine whether voters who believed they are registered are actually registered (and vice versa), a statistical sample is also taken of all eligible voters. This “voter-to-list” comparison interviews eligible voters to determine whether they believe they are registered and compares this information to the actual voter register. This procedure is expensive and time consuming, but in relevant cases can provide an important check on the accuracy of a voter register (NDI 2004, fn 7).

⁵ The term “ghost voters” is most commonly used to refer to names on the voter register who do not correspond to living eligible voters. The most commonly used ghost voters are previously registered voter who are deceased.

Detecting Fraud During the Campaign Period

The campaign period can reveal other blatant attempts at manipulation including intimidation at political rallies, vote buying, distribution of patronage, jailing of political candidates and activists, and attempts by employers to require employees to vote for their favored candidate. Observers have been able to document these electoral abuses simply by deploying well-trained and neutral representatives throughout the country. Observers have often directly witnessed fraud during the campaign period, and in some cases observers have investigated and attempted to verify reports of attempts to manipulate the election prior to election day.

During the campaign period the playing field can be leveled or tilted further to benefit a particular party. Given that all political parties and potential candidates were given the opportunity to run (within the confines of the country's electoral rules), voter access to information about candidates is essential to a democratic election. Open competition is limited by a censored press (either officially censored or self-censoring), the use of state resources to campaign for the incumbent candidate or party, intimidation of political activists, patronage or money politics, or politically targeted violence or threats of violence. Depending on voter interest and normal channels of political communication, these issues vary in the degree to which they limit open political competition. However, because they can have a substantial effect on elections, the campaign period is closely watched by international observers. Individual missions rely primarily on the reports of LTOs deployed throughout the country. They may also utilize reports from domestic civil society groups or representatives from each political party.

Some observer organizations monitor the media, or coordinate with a domestic non-partisan organization engaging in media monitoring (Norris and Merloe 2002). Methods of media monitoring vary, but can include precise records of time given to each candidate, the relationship between state-controlled and private media, and the accuracy of paid advertising and political reporting. Very basic media monitoring consists of general impressions of coverage and fairness. In countries that lack a free and independent media, media monitoring can reveal the extent to which the communication of information to voters has been compromised. In extreme cases, opposition parties are all but prohibited from access to the news media and face significant hurdles in communicating with voters. Documenting media access and time can sometimes reveal significant barriers to democratic elections.

Election Day

Detailing all of the forms of election day fraud that have been detected by international observers would be a major undertaking and idiosyncratic to individual elections. The record clearly demonstrates that international observers are often able to witness blatant attempts to manipulate elections simply by traveling from polling site to polling site on election day. Somewhat surprisingly to political scientists, individuals engaging in election manipulation often make little attempt to hide their efforts from international observers.

On election day, short-term observers (STOs) collect qualitative and sometimes quantitative information on practices inside and around voting stations. They are prohibited from interfering in the process in anyway. STOs record their observations on standardized forms, which are then compiled by the observation mission's central office.

Observers usually travel between polling stations on election day in order to increase the number of polling stations that they may visit. Many observations that are collected are impressionistic, and are therefore difficult to aggregate. Direct observations of vote buying or voter intimidation do not always form part of a larger pattern. STOs typically collect information on the environment inside of the voting station, including the availability of materials and whether the physical arrangement of the polling station protects the secrecy of the ballot; the provision of materials and the security of unmarked ballots and ballot boxes; the presence of individuals inside polling stations (and whether they are authorized to be there); the conduct of election officials; the flow of voters (and the rejection of eligible voters); reports from domestic non-partisan observers and political party witnesses; the conduct of the voters and their compliance with electoral regulations; and the environment surrounding polling stations, including potentially intimidating individuals or interactions between voters and vote-buyers.

International observers also gain valuable information about election day by coordinating with domestic observers. Now viewed as complements rather than substitutes, international and domestic observers have developed slightly different approaches to monitoring elections. Domestic election observers are considered by some to be better able to evaluate elections because they are familiar with local practices and culture, and are typically able to deploy significantly more observers on election day (NDI 1995). However, they are not able to generate the same international media coverage of their evaluation of the election. It is also possible that individuals are more or less likely to attempt to manipulate the election in front of international observers than in front of domestic observers, but this is an empirical question that has not yet been

tested. Neutral, non-partisan domestic election observers most commonly deploy stationary election observers who remain in the same polling station for the entire election day. Although domestic election observers vary in their efficacy and commitment to non-partisan election monitoring, well respected domestic observers are an important check on election fraud, and can be a source of information for international observers. When visiting a polling station, international observers note the presence of domestic observers and may record domestic observers' observations of the process prior to the arrival of the international observers. Within problematic polling stations, they can help document the extent of problems that occurred throughout election day.

Although observers often catch many forms of election day irregularities, there is still room for international observers to improve election day observation. Observers may be able to be successful in detecting election day manipulation even when they are unable to observe it directly. In the final section of this paper I detail a proposed methodological improvement to election day observation. First, the next section discusses the tabulation of election results, one of the components of the electoral process in which international observers have been most successful in catching election fraud.

Tabulation of Results

STOs are typically deployed at the conclusion of election day to observe the first stage(s) of the vote tabulation process. To the extent that it is possible, observers report on the transparency of the ballot counting process, the presence of political party agents, the impartiality of the election officials, the ability of voters to access the results, the secrecy of the vote, the adherence to voting regulations, and the general atmosphere surrounding election day. Observers have witnessed signs of fraud such as pre-bundled

and uniformly marked ballots being removed from ballot boxes and counted. They have also found evidence of ballot box tampering such as broken seals, and uncovered “missing” ballot boxes. In several cases they have witnessed the theft of ballot boxes, as well as the intentional destruction of valid ballots.

Most notably, the parallel vote tabulation (PVT) has become one of the central means by which international and domestic observers detect fraud during the counting process (Estok, Nevitte, and Cowan 2002). In a PVT (also called a “quick count” when it is used to provide an early prediction of the election results) the tallies from a random sample of individual polling stations or vote counting centers are observed directly and the results are immediately communicated to a central location. Because the sample is random, and observers are usually able to see the actual counting of the ballots and conduct their own tally, a PVT provides an estimate of the outcome of the election. A PVT differs from an exit poll because it relies on direct observation of the vote count rather than on interviews with voters.

A PVT is preferable to exit polling in countries in which voters have the incentive to misrepresent their vote to pollsters or are unwilling to answer questions outside of the polling stations (especially if individuals that refuse to answer are disproportionately from one demographic or political group). In many cases in which both have been conducted, the results are largely similar. During the 2004 recall referendum in Venezuela there were huge differences between the PVT and the exit polls, resulting in a widely publicized controversy (Economist 2004). However, international and domestic observers are more likely to promote a PVT over an exit poll whenever possible because there are fewer means by which the results may be compromised.

In the majority of cases, parallel vote tabulations match the official results and further legitimate the electoral process. In a number of notable cases, PVTs have exposed election fraud, or are believed to have eliminated the possibility that the losing incumbent could engineer a last-minute theft of the election. To name a few examples, PVTs conducted for elections in the Philippines 1986, Chile 1988, Panama 1989, Nicaragua 1990, Zambia 1991, and Georgia 2003 are believed to have played a large role in creating the conditions for transfers of power (Garber and Cowan 1993).

Recently, the trend has been for domestic non-partisan observers to conduct most of the PVTs, often with the technical assistance of international organizations. The biggest drawback of PVT's is that they can only catch and deter manipulation that takes place during the counting and aggregation of votes. Other forms of election manipulation that may have been used on or before election day would go undetected by a parallel vote tabulation. For example, widespread vote-buying schemes would inflate the vote for the cheating candidate(s) during election day without raising any cautionary flags during the PVT process. Similarly, intimidation of voters and targeted voter suppression efforts would also directly influence the vote totals, but would not show up as fraud in a PVT.

In order for a PVT to be conducted, observers must have access to the site of vote counting, and to an accurate list of vote counting centers (most often polling stations). A PVT cannot be conducted without observer access to the vote counting process. The move toward electronic voting, particularly those forms of electronic voting without paper trails, creates a serious challenge to PVTs and any independent verification of the election results. If a paper trail is provided, parallel vote tabulation should still be possible.

Observers must also have access to a complete list of vote counting centers. If observers do not have access to a list of vote counting centers, there is more doubt cast over the accuracy of the PVT, although an accurate PVT may still be possible by sampling across other units such as neighborhoods, as in the 2004 presidential elections in Indonesia.

In addition to the PVT, some international observer mission have employed statisticians to monitor vote returns and turnout for suspicious patterns. Turnout that exceeds 100% of eligible voters in polling stations, impossibly large jumps in turnout over the course of election day, or politically competitive areas in which one candidate receives close to 100% of the vote draw attention. This form of fraud detection during the vote tabulation process remains less systematic, but is likely to become a more sophisticated and more common part of election observation missions in the future.

Acceptance of Results and Post-Election Dispute Resolution

The conclusion of an election observation mission depends on the official announcement and certification of results. Whereas in the early period of election observation, delegations left the country soon after election day was complete, current best practice is for delegations to remain in the country until the official results are announced and certified. Some missions have deployed long-term observers to closely monitor the dispute resolution process, such as in Ethiopia 2005. The mechanics of this process vary widely, but most missions focus on the acceptance of results by all parties, the use of official channels for dispute resolution, and the impartiality of the dispute resolution process.

International Observers and Fraud Deterrence

Thus far this paper has focused on how international observers may detect election fraud. International observers can also play another important role in elections by deterring attempts to manipulate the election. I now turn to a discussion of how fraud detection and fraud deterrence are related, and advocate the randomization of STOs to polling stations during election day. Randomization is a small methodological change from existing practice that will result in two improvements in fraud detection and fraud deterrence. First, randomization allows measurement of whether (and when) observers deter election day fraud. Second, and related to the first point, randomization will result in improved detection of voting fraud, particularly when election day fraud is concealed from international observers while they are present in polling stations.

It is well established in a number of experimental studies that humans often behave differently when they know they are being watched.⁶ Individuals within the election monitoring and democracy promotion community have extended this concept to suggest that one of the positive effects of international election monitors is that they reduce the rate of election fraud. Advocates of the PVT argue that the well-publicized existence of a PVT can deter attempted manipulation in the vote count (Garber and Cowan 1993). Many remain skeptical that observers actually influence the behavior of domestic political actors. Part of the reason that the question of whether international observers reduce election fraud remains unanswered is due to an endogeneity problem. Knowledge that international observers will be present at an election may prevent fraud from being attempted by political parties and candidates, but in hindsight, it is extremely

⁶ Commonly called the “observer effect” in which people behave differently when they know they are being observed. It has also been referred to as the “Hawthorne effect”, but this reference is ambiguous.

difficult to distinguish between an election that was clean because international observers were invited and an election that would have been clean regardless of their presence.

However, pre-election prevention of fraud is only one of several means by which international observers can deter fraud. It is also possible that international observers fail to prevent fraud ahead of the election, but that they nevertheless reduce fraud on election day by visiting hundreds of polling stations. Because individuals committing fraud, intimidation, or other electoral improprieties may not wish to carry out their intended actions in the physical presence of international observers, the fact that observers are present in a number of polling stations on election day may reduce the level of vote manipulation in those polling stations.

If observers visit a randomly selected sample of polling stations during the course of election day, the average election outcomes can be compared between the group of internationally monitored polling stations and the group of unmonitored polling stations. If observers reduce fraud directly on election day, there should be a statistically significant difference between observed and unobserved polling stations.

Unlike pre-election fraud prevention, this form of fraud reduction would not eliminate election day fraud. If there are enough observers relative to the size of the country, election day deterrence may translate into a sizable reduction in the planned fraud that is actually carried out, but perhaps more importantly, if fraud is occurring in an election but being concealed in those locations visited by international observers, this deterrent effect may compromise the ability of international observers to observe fraud directly.

The second positive effect of randomization is that observers can detect election day manipulation even if it is concealed from international observers. If a candidate or party does perform significantly better, on average, in unmonitored polling stations, this is a relatively unambiguous sign election manipulation was concealed from observers while they visited the polling stations.

From the perspective of observer missions, another substantial benefit of randomization is that if observers are randomly assigned and there is no observable difference in vote share or turnout between observed polling stations and unobserved polling stations, observers can be more confident in generalizing their observations to the entire electoral process. In other words, if observers are not deterring fraud on election day (and thereby recording upwardly biased election day observations of the electoral process), randomization of observers generates a representative sample of polling stations. The qualitative observations from a representative sample of polling stations can then be generalized to the entire process within a given confidence level and margin of error. Without randomization, international observers can not determine how well the observations they gather from (non-randomly selected polling stations) are representative of the entire electoral process.

The effect that observers may have is unlikely to be uniform across all elections. To illustrate this point, in an election in which election fraud is planned and international observers are invited, there are at least four types of election scenarios that could take place. In the first type of election, international observers witness a clean election and have no deterrent effect on election day fraud, but fraud occurs anyway, either in a manner that they do not notice, or before and after they visit a polling station. In the

second type of election, fraud is planned for election day, observers evaluate a fraudulent election, and have no deterrent effect on fraud (i.e. they do not reduce fraud at the polling stations they visit). In the third type of election, observers reduce fraud in the polling stations they visit but do not observe it directly. In this case, they have a localized deterrent effect on fraud. In the fourth type of election, election day fraud is planned, observers see some fraud, but also have some deterrent effect. In this case, local officials and party agents conduct a partially successful attempt to conceal fraud. Four potential outcomes are represented in Figure 1.

Figure 1: Potential Outcomes Given Fraud Detection or Fraud Deterrence

		Fraud Detection	
		Fraud Not Observed	Fraud Observed
Fraud Deterrence	Fraud Not Deterred	Type 1 Well Concealed Election Day Fraud While Observers are Present	Type 2 Blatant Manipulation
	Fraud Deterred	Type 3 Clean Election in Observed Polling Stations	Type 4 Partially Deterred Fraud

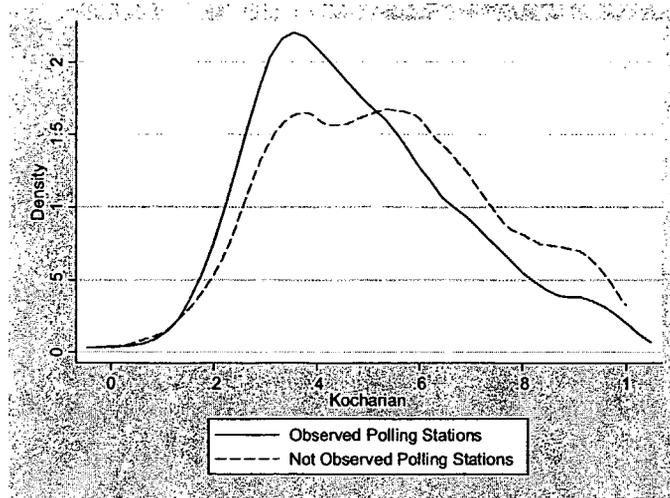
There is one additional type of election in which no fraud is planned and observers witness a clean election. They have no deterrent effect on fraud because there is none to deter. Given that fraud occurs on election day, the four scenarios in Figure 1 highlight the difficulty that observer missions face in their joint mandate to accurately evaluate elections and deter fraud. Particularly in the first, third, and fourth types of elections, if observers deter fraud, their ability to gauge the level of fraud and the degree to which it influenced the outcome is compromised. To further complicate matters, an election in which no fraud is intended or carried out may look to international observers

like Type 1 or 3, and observers could misjudge the election, even when election day fraud is not occurring. In practice, the coordination between international observers, domestic election observers, and political party witnesses make this type of confusion less likely. However, improved methodology by observers, specifically the random assignment of observers to polling stations on election day, can help election observer missions determine whether fraud occurs, particularly when election fraud is not blatant.

For example, Figure 2 shows the distribution of votes for the incumbent candidate in an actual election. The solid line shows the vote share in polling stations which were visited by international observers. The dashed line represents the vote share in polling stations that were not visited. Observers were assigned in this election using a method that is not common, but that is very close to random assignment of observers to polling stations. Randomization⁷ is equivalent to holding all other variables constant that may influence the incumbent's vote share. In this first round of the 2003 presidential elections in Armenia, the incumbent presidential candidate earned an average of 54.2% of the vote, but earned only 48.3% of the vote in polling stations that were visited by international observers. There were widely documented instances by international observers of violations by the incumbent candidate and his supporters, including ballot box stuffing, intimidation, and vote buying. However, even though international observers in this case directly observed election day fraud, Figure 1 suggests that they were also able to reduce the amount of election fraud which occurred on election day. This would be consistent with a "Type 4" election described above.

⁷ Or in this case, approximating randomization. This empirical test is described in detail in Hyde (2006), Chapter 7.

Figure 2: Kernel Density Plot of Incumbent Vote Share



This example suggests that observers can reduce election day fraud, but how this evidence can be generalized to other countries is not clear. It is possible that it was an atypical example. International observers should be randomly assigned to polling stations in the future so that observers will be able to measure whether their presence reduced fraud, whether their findings are generalizable to the entire election process, and whether election day fraud was successfully concealed in their presence. Thus far, randomization has only been attempted with these objectives in the 2004 Indonesian presidential elections, which turned out to have only minimal election day problems.⁸

Observers may also be able to better coordinate their work with domestic observers and other observer organizations. If all domestic and international observers were randomly assigned to polling stations, then coordination between their efforts could be significantly improved.

⁸ Observers have been randomly assigned for other purposes in several other cases, including in the 2006 Palestinian elections.

Conclusion

International election observers have dramatically improved their ability to judge the quality of elections, both in their methods to detect fraud and in their ability to aggregate the information they collect into an overall evaluation of elections within a wide variety of circumstances.

Extensive long-term qualitative monitoring of the election process, voter registration audits, media monitoring, the widespread presence of short term observers on election day, the parallel vote tabulation, and the potential randomization of observers during the voting process on election day are all methods used by international observers to detect fraud and to increase their ability to make summary judgments of elections. Because those engaging in election fraud will always have the incentive to find methods of manipulating the election that are less likely to be caught, observers will face continuing challenges to their mandate to evaluate election quality. Their presence may also deter attempts to manipulate elections, or reduce the rate of planned election day manipulation, as in the 2003 Armenian presidential elections. International observers and domestic non-partisan observers practice similar methodologies, and are believed to have similar effects on election quality. Rigorous, unbiased, and well-trained observers have become an integral part of elections throughout the developing world. Developed democracies are also beginning to recognize the advantages that officially accredited impartial observers may lend to an electoral process, but it remains to be seen whether these practices will become standard in all elections, including those that take place in long-term developed democracies.

Table 1: Examples of Unambiguous Signs of Election Manipulation

Pre-Election Period

- 1) No registered opposition candidates
- 2) Bans on candidates or political parties
- 3) Refusal to update inaccurate and biased voter registration lists
- 4) Gross misuse of state resources to support incumbent
- 5) Restrictions on universal adult suffrage for politically targeted populations
- 6) Campaign related violence and intimidation
- 7) Obviously biased campaign finance
- 8) State controlled media
- 9) Intimidation or harassment of media
- 10) Other unreasonable barriers to candidates wishing to communicate with voters
- 11) Blatantly partisan election commission
- 12) Selective use of legal sanctions against likely candidates
- 13) Jailing of candidates or political party officials

Election Day

- 1) Insecure ballots
- 2) Broken seals on ballot boxes
- 3) Multiple individuals inside voting booths
- 4) When ballot boxes are transparent: multiple ballots folded together, pre-marked ballots not in ballot box, too many ballots relative to number of voters checked on registration list, too few ballots relative to number of voters on list
- 5) During count: lack of transparency to international observers
- 6) Ballot boxes present outside of polling stations
- 7) Large collections of voter identification, either on election day or prior to election day
- 8) Carousel voting (also called the Tasmanian Dodge)
- 9) Exchange of money or goods following voting
- 10) Buses of voters from neighboring areas (multiple voting)
- 11) Multiple ballots given to one individual
- 12) Voters with proper identification turned away
- 13) Voters with proper identification listed as deceased
- 14) Deceased voters listed as having voted (usually reported through relatives and documented)
- 15) Systematically late or missing materials in opposition strongholds
- 16) Violence or intimidation against voters
- 17) Intimidating crowds in or outside of the polling station, particularly when their presence violates the election law
- 18) Attempts to influence voter choice inside the polling station
- 19) Interference by the military, police, or other unauthorized individuals
- 20) During the count, falsifying results
- 21) Arbitrary or inconsistent invalidation of votes cast
- 22) Stolen ballot boxes
- 23) Extra ballot boxes
- 24) Destruction of ballots

Announcement of Results

- 1) Parallel Vote Tabulation which differs significantly from official results (determines winner within margin of error)
 - 2) Changes in official results between those recorded by observers on election day and those published
 - 3) Suppression of official results
 - 4) Refusal by losing candidate to accept the results
 - 5) Large discrepancies between number of ballots distributed and official tallies of votes cast
 - 6) Government violence against protestors or bans or protest
-

Table 2: Examples of Election Irregularities when Intention to Manipulate is Unclear

Pre-Election Period

- 1) After international observers are invited, attempt to place restrictions on them
- 2) Barriers in the accreditation process to domestic election observers
- 3) Unbalanced media time for candidates
- 4) Election laws that favor one candidate or party
- 5) Controversial interpretation of election laws
- 6) Lack of an independent judiciary
- 7) Lack of transparency in election planning process
- 8) Lack of a procedure for filing election-related complaints
- 9) Lack of funding for election
- 10) Lack of training for polling station officials
- 11) Excessive requirements for candidate registration
- 12) Selective implementation of the law for particular candidates or parties
- 13) Lack of transparency of voter registration list
- 14) Voting practices or ballot design that present a barrier to voting for certain groups (illiterate, linguistic minorities, etc.)
- 15) Campaign materials near the polling station
- 16) Poorly designed voting booths that fail to ensure secrecy of the ballot
- 17) Election commission with unbalanced partisan representation

Election Day

- 1) Underage voting
- 2) Problems in identification verification
- 3) Problems with indelible ink
- 4) Family voting
- 5) Partisan polling station officials
- 6) Unbalance in political party witnesses or lack of political party witnesses
- 7) Handing out of ballots to individuals who are not checked off the voter list or otherwise recorded
- 8) Missing election materials
- 9) Disorganized polling stations
- 10) During the count, lack of political party observers and/or domestic observers
- 11) During the count, filling out official tallies in pencil
- 12) At any period, unsecured ballot boxes
- 13) Inconsistencies in interpretation of proper election day procedures

Post-Election Period

- 1) Slow legal system to deal with post-election disputes
 - 2) Post-election protest
-

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ballot box and theft

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vote and criminal

November 2, 2003 Sunday FINAL EDITION

SECTION: PERSPECTIVE; Pg. E-01

LENGTH: 953 words

HEADLINE: Mailbox or ballot box? NO: Opportunities for fraud numerous

BYLINE: Ralph Shnelvar and Alison 'Sunny' Maynard

BODY:

We - the former Libertarian and Green candidates for governor and attorney general - may disagree earnestly on many issues, but on this we both agree: If votes are not counted fairly, then all political rights are threatened.

We are terrified because we know that the voting process is being corrupted.

Despite valid citizen distrust, 30 of Colorado's county clerks are once again forcing voters to vote only by mail ballot. Election officials won't count a ballot if it gets lost in the mail; it arrives too late; the signature is missing; your signature looks different from the way you signed it at some earlier time (assuming that signatures are examined at all); and the like. In some cases, election officials will create a new ballot to replace yours.

Fraud is easy. Mail and absentee ballots get stolen as they make their way from the county clerks to your hands and back again. As National Public Radio reported in a story called 'Vote Fraud in Dallas' (www.npr.org), a Texas judge blamed mail-in voting for vote fraud.

Because your name is on the envelope and your party affiliation is public record, unscrupulous people can easily conclude how you probably voted - and intercept your ballot. With absentee ballots, it is legal for 'any person of the voter's choice' to pick up voted ballots for delivery to the clerk.

In 2000, a Castle Rock citizens' group challenged the results of a 1999 town council recall election. Among other things, the group alleged that election officials abused the process by differentiating between absentee ballots provided to recall supporters and ballots provided for supporters of the council.

A judge later ruled that problems were 'good-faith mistakes,' not fraud. But, the situation highlighted the security and privacy problems with absentee and all mail ballots.

Even if your ballot makes it to the ballot box without incident, it might not matter. Tens of thousands of insecure ballots are going to be floating around for people to pick up and vote. Nobody really knows who voted these ballots, as there are no witnesses. An absentee voter is not even required to have the ballot sent to his registered address.

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Someone can apply for an absentee ballot on your 'behalf,' have it sent to a post office box, vote on it and send it back, with you being entirely unaware.

Activities qualifying as criminal offenses at the polling place are, ironically, entirely legal with absentee and mail-in ballots. For example, it is a crime to even mention a candidate's name within 100 feet of a polling place. Also, you have only a few minutes to mark your ballot, and you do so in utter privacy. By law, no one but the voter can handle a voted paper ballot in the polling place prior to the vote being cast. With absentee and mail-in ballots, however, privacy and security are completely compromised. Groups can call members to 'vote together.' People can ask spouses, 'How shall I vote?' and mark their ballots accordingly. And someone can come to your door while the ballot is in your possession and lobby for your vote. The opportunities for intimidation and vote-selling are obvious and troubling.

It is impossible to guard against these abuses. Consider, for instance, Jeep Campbell, a candidate running for Boulder City Council. In a normal election, he could recruit friends to spend a day being poll-watchers. The election would be over and done with in a day. With mail-in balloting, the candidate and his friends will have to spend three or four weeks watching the election process as well as every single mailbox in the city of Boulder. Friends can't afford to do that. Only the rich and/or politically connected can.

Since the election fiasco in Florida in 2000, there has been an enormous push to install electronic voting machines. Voters, though, should understand that whatever the shortcomings of paper ballots, they are a physical thing that can be held and looked at. There is no such guarantee with electronic voting.

In Robert Heinlein's science-fiction novel, 'The Moon is a Harsh Mistress,' the self-aware computer announces, 'Eighty-six percent of our candidates were successful - approximately what I had expected.' Obviously, the computer rigged the election.

One author of this piece has been a computer programmer for nearly 35 years, and knows that it takes superhuman perseverance and skill to read computer programs to see that they are correct. Government has difficulty being competent - much less superhuman.

The other author is a lawyer. Experience has shown her that it is extremely difficult to prove vote fraud even when it is obvious that it has occurred.

The system is set up to count as many ballots as possible and look the other way when it comes to preventing fraud and abuse. Our representatives are looking for political legitimacy, no matter the cost in freedom and honesty.

We all know about computer viruses. Many hackers develop these viruses for fun. Imagine the effort that will be expended to influence elections. Someday soon, some hacker could gloat to his friends, 'Hey, I just got the Green Party candidate for attorney general and the Libertarian candidate for governor elected in Colorado!'

Terrifying.

Contact Ralph Shnelvar at ralph@shnelvar.com, and Alison Maynard at alismynrd@aol.com. Ralph Shnelvar was a Libertarian candidate for governor in 2002. Alison 'Sunny' Maynard was Green Party candidate for attorney general the same year.

Mailbox or ballot box? NO: Opportunities for fraud numerous The Denver P

GRAPHIC: PHOTOS: Ralph Shnelvar was a Libertarian candidate for governor in 2002. Alison 'Sunny' Maynard was Green Party candidate for attorney general the same year. The Denver Post/Thomas McKay

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Officials await election investigation

CA

Thursday, March 18, 2004

By Kollin Kosmicki/Staff Writer (kkosmick@freelancenews.com)

San Benito Co

As elections officials continue a routine canvass of the historically tight District 5 results, outside investigators haven't stepped foot in the Elections Office for a pending scrutiny into allegations of improper voting.

And even though county officials hope for a conclusion to the controversy soon, head elections official John Hodges doesn't expect anyone examining his office's documents until he's certified the votes, he said.

According to state law, that certification must happen by March 30, after which any resident or group has five days to request a recount.

Jaime De La Cruz has unofficially defeated incumbent Bob Cruz by 10 votes. But speculation has arisen regarding absentee ballots and suspicions over voting rights violations toward Spanish-speaking residents.

The local branch of the League of United Latin American Citizens (LULAC) has hired two private investigators. And the county Board of Supervisors has requested an investigation by the District Attorney's Office and the state.

Hodges said investigators rummaging through his office would "disrupt the canvass." That process includes hand-counting all ballots in one precinct of each district - and it is required after every election.

"And boy I'm looking, looking for anything," Hodges said. "Because I don't want any surprises."

He knows, however, there will be some type of recount or challenge to the contentious race, he said. It's just a matter of when, and he's advocating that potential outside involvement wait until after a certification.

The Board's hired lawyer Nancy Miller doesn't know a precise timeline, she said, but she expects some level of action soon.

"I don't think we're going to wait," Miller said. "And we shouldn't wait."

LULAC's local investigators, Dennis Stafford and Richard Boomer, have already requested access to Elections Office documents, Hodges said. They wanted to start a recount immediately.

But, Hodges said, the Elections Code "is pretty specific" about the process for a recount.

"They wanted to go through the process that you normally would go through after the canvass has been certified," Hodges said.

Despite Cruz's relationship with other supervisors and his wife's active involvement in LULAC, the two-term incumbent said he's "just staying in the background." He declined further comment.

Questions first arose regarding improper voting procedure for returning absentee ballots.

Voters are allowed to designate a family or household member to hand in their ballots at the Elections Office. Eight ballots in District 5 were returned by friends or other non-relatives, according to a log book signed by designees in the office.

Those ballots can't be canceled, though, because names are separated from ballots during the counting process.

Aside from a recount, the focus of any investigation would likely include a thorough examination of signatures on absentee ballots - to make sure voter fraud wasn't committed, Hodges said.

District Attorney John Sarsfield, who is on vacation this week, did not return phone calls placed to his cell phone Wednesday. So it is unclear if or when his office plans to start inspecting the issue.

Meanwhile, in District 1, Don Marcus unofficially defeated his two challengers and narrowly avoided a November runoff by gaining 50.1 percent of the vote - eight more votes than he needed.

The No. 2 candidate in the race, Marci Huston, was in Israel this past week so she only recently learned of the speculation over the March 2 election.

She said she hasn't considered whether she might request a recount in District 1.

"I hear all kinds of rumors, and I'm just waiting to see what happens," she said.

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Woman charged with violating election law

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04/30/03

TOM GORDON
News staff writer

A Bullock County woman has been charged with violating Alabama election law by removing a voter's absentee ballot from her mailbox during last year's primary runoff.

A county grand jury last week issued an indictment charging Mary Sue Martin of Union Springs with hindering Lisa Calloway's right to vote. If convicted, Martin could be fined no less than \$50 nor more than \$500.

District Attorney Boyd Whigham said Martin has denied any wrongdoing and will be arraigned next week before Circuit Judge Burt Smithart.

"Taking somebody's ballot out of a mailbox is a no-no," Whigham said.

Martin was a supporter of Bullock County Commissioner Alfonsa Ellis, who faced challenger Terry Jackson in the June Democratic primary and runoff, and defeated him with the help of absentee votes.

Whigham said that during the runoff campaign, Martin removed Calloway's ballot from Calloway's mailbox, then returned it to her when Calloway confronted her. Before the grand jury, one of Calloway's neighbors testified that she saw the ballot being removed from the mailbox. A friend of Calloway's testified that she went with her to get the ballot back from Martin.

Calloway later cast the ballot in the runoff election.

Bullock County is in the eastern Black Belt, and nearly 28 percent of the votes cast in its June 4, 2002, primary elections were absentee. That percentage was the highest in the state.

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ELECTION 2002

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State attorney probes ballots

By David Damron
Sentinel Staff Writer

October 31, 2002

A suspected ballot-stuffing scheme aimed at Hispanics prompted Orange-Osceola State Attorney Lawson Lamar to launch an absentee-ballot fraud investigation Wednesday.

Nearly 100 "questionable ballot request" complaints have been received recently within the two counties, leading investigators to suggest that hundreds or thousands of absentee ballots might be cast under false pretenses.

The fear is that any number of possibly illegal ballots could be dumped in Orange and Osceola election offices on Nov. 5, potentially swaying election results, state attorney spokesman Randy Means said.

"We know something is going on. And, we know someone is trying to corrupt the vote process with absentee ballots," Means said. "There's no doubt in our mind that there's some campaign . . . trying to cast an illegal ballot."

Officials want area residents to contact county elections offices before 9 a.m. Friday if they have any concerns that their identity or voter registration data or address was used to illegally obtain an absentee ballot.

That's when Orange County election officials begin tabulating absentee ballots. After that, it's too late to object to any suspicious absentee ballot -- it's already been processed.

So far, the potential ballot-rigging scheme appears to involve only Hispanic victims, investigators say.

Possible ballot-scam scenarios involve mailing in falsified registration forms or altering re-registration forms that legitimate voters filled out, officials said. Also, creating new fake voters or steering absentee-ballot requests to the wrong address could allow illegal ballots to be cast, officials said.

Means would not say which campaigns or individuals were thought to be involved, but he said it was just one state race generating complaints.

But Wednesday, state attorney investigator Roger D. Floyd sent letters to state Senate District 19 candidates Tony Suarez, a Republican, and Gary Siplin, a Democrat, related to similar complaints about illegal changes to party affiliations on voter registration cards.

Copies of the state attorney correspondence were obtained Wednesday by the Orlando Sentinel through a public-record request into the Orange County elections office.

According to the letters, investigators began receiving complaints that supporters for each campaign may

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have intentionally changed party affiliations on voter registration cards.

Both allegations were related to pre-Sept. 5 primary registrations, when a wrong party affiliation could bar a voter from voting in a closed primary race.

In Siplin's letter, Floyd said that a woman complained she had put an "X" in the "no party affiliation" spot on her registration form when she filled it out. But when she received her voter card in the mail, it said she was Democrat. She suspects someone later put a check mark in the Democratic box, the letter said.

Siplin said, "I don't know anything about it," and directed calls to his attorney, Allen "A. Daniel" Holland, who said more information and proof of the actual card was needed to respond to the complaint. He had not seen the card.

The State Attorney's Office requested Siplin turn over a list of "front desk staff" who worked at his 725 S. Goldwyn Ave. office from July 1 to Aug. 4.

"Mr. Siplin is going to cooperate 100 percent to supply the names of volunteers who worked on his staff" during that period, Holland said, adding that someone could easily lie about a change to cause Siplin embarrassment.

The timing of the complaint, right before the election, further raises concerns, Holland said.

The Suarez complaint letter outlines similar party-changing allegations that could have occurred at two "functions attended by your staff."

Investigators want to know which Suarez staffers worked registration events at the Wal-Mart at 3838 S. Semoran Blvd. on Aug 25, and another event put on by the Latino Leadership Fair at Stonewall Jackson Middle School on Aug. 3.

Suarez said he would cooperate, and that "I don't think that could happen in my campaign." But someone outside his campaign could have done such a thing, he said, adding "It's very difficult to control."

Means would not confirm if the registration complaints from the primary are linked to the absentee ballot probe.

Orange County Democratic Party Chairman Doug Head said internal analysis of voter-roll information showed an unusual number of Hispanic Republicans requesting absentee ballots before the Nov. 5 election -- even though some had failed to cast a ballot or contact election officials in more than four years.

"Something strange is going on out there," Head said.

Orange Republican Party Chairman Lew Oliver said the absentee-ballot process was largely fraud proof, and he'd heard no allegations of anything illegal going on anywhere in the county.

"This is the first anyone has suggested anything of the kind," Oliver said. "It's really, really, really hard to obtain a fraudulent ballot."

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Dodgy ballot requests under scrutiny

By Ludmilla Lelis
Sentinel Staff Writer

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October 3, 2003

DAYTONA BEACH -- Officials looking into possible election fraud involving requests for absentee ballots for Tuesday's city elections have found 43 forms that give the voter's wrong date of birth and three with forged signatures, Volusia County Elections Supervisor Deanie Lowe said Thursday.

The three forged requests are being forwarded to the State Attorney's Office for further investigation.

Lowe said several of the problem ballots, including those with the forged signatures, were printed on behalf of the "Better Way Campaign," which lists the same address as Terrance Whelan, candidate for the Zone 2 City Commission seat.

Whelan said that he and his campaign staff have been distributing the ballot request forms in several neighborhoods and sending them to the elections office.

However, he says he wasn't aware that there were problems with some of the postcards.

"Everything we did is open and aboveboard," Whelan said. "In a campaign with hundreds of ballot requests, I'm sure that some things may go wrong.

"If somebody wanted to trip us up, someone could have gotten a form and filled it out wrong. We don't have signatures to verify if it was truly the voter that signed it."

Meanwhile, Lowe said there may not be enough time to correct some of the errors and send out the absentee ballots, if voters can't be contacted by phone. All absentee ballots must be completed and received at the elections office by 7 p.m. Tuesday.

"What is frustrating is that you may have some people who legitimately ordered an absentee ballot," Lowe said. "However, I cannot issue one in some of these cases."

The problem forms aren't ballots themselves but printed postcards that request a ballot. Lowe said her office can receive requests by phone or in writing. Written requests, which can be as simple as a letter, have to list the voter's name, date of birth, address and signature.

On the forms suspected of being forgeries, elections workers found that the signatures did not match those on file and that the listed voters, when contacted, said they didn't sign those forms, Lowe said.

For the other problem forms, voters told elections officials that they did want a ballot but that someone else had filled out the form for them, Lowe said. The date of birth on the forms doesn't match the original voter registration records, although some voters said the ballot request lists the correct date of birth, Lowe said. She said she needs written verification from those voters to change the date of birth.

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Posted on Tue, Oct. 21, 2003

Extra Broward mail-in ballots cause fear of fraud

Ballots have been sent to people who moved, raising questions about fraudulent votes in elections in four Broward communities.

BY ERIKA BOLSTAD
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People who have moved but who remain on Broward County's voter rolls have been sent ballots in an ongoing mail-in election, underscoring the county's problems in purging its list of voters who have died, moved or who just don't vote.

Florida Secretary of State Glenda Hood is investigating the matter and has sent it to her legal department for review, said Broward County Mayor Diana Wasserman-Rubin, who received three extra ballots at her Southwest Ranches home over the weekend.

Ballots for the special mail-in election came for Wasserman-Rubin, her husband and three of the previous occupants of the house. The last owners moved out in July 1999, Wasserman-Rubin said.

The extra ballots raise concerns about a fraudulent election, the mayor said.

"I don't know how many people this has happened to," Wasserman-Rubin said. "How do we make sure the right vote from the right voters gets counted? It's a matter of concern for the integrity of the election."

Four special mail-in elections are currently in progress: one in Southwest Ranches, another in neighborhoods near Cooper City and one each in Deerfield Beach and Pompano Beach.

Ballots in the two North Broward cities aren't scheduled to go out until today or later on this week. Voters must return the ballots by Nov. 4.

ISSUES ONLY

None of the elections involves candidates. Instead, voters are asked to decide on commission district lines, whether to issue bonds, change their charters or join a city.

But unscrupulous people who get ballots for long-gone former residents could fill them out, forge a signature and send them in to be counted, said Roy Fink, husband of Southwest Ranches Mayor Mecca Fink.

"How do you check it? That's the problem," said Fink, whose daughter received a ballot even though she moved out of state four years ago.

Southwest Ranches Town Administrator John Canada said the town received about a dozen phone calls from people who didn't know what to do with the extra ballots. He plans to draft a letter today to Broward Elections Supervisor Miriam Oliphant asking that the signature on each mail-in ballot be compared to the voter's signature her office has on file.

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"We want to make sure that only people who are legitimately here have their ballots counted," Canada said.

The extra ballots echo the findings of an August investigation by The Herald, which found that voter rolls in Broward and Miami-Dade counties are bloated with nearly half a million people who have never cast a ballot.

NO-SHOW VOTERS

In Broward, the elections office does not aggressively pursue voters who leave town but keep their county voting cards. The Herald found 475,069 South Florida voters who have ignored every Election Day since they registered. Tens of thousands of them have moved. Some have died or gone to prison.

In a random sample of 100 of these no-show voters, The Herald found people eligible to vote in Broward who had moved to Ocala, New York and as far away as Spain. One so-called active voter is a Coconut Creek man who died last year. Another was in jail for violating probation on an armed robbery conviction -- a felony that should have knocked him off the rolls.

The problem with the ballots comes the week after a team of observers from Hood's office visited Oliphant to see whether she was on track to run a special election early next year. Hood's office raised concerns after Oliphant fired four people earlier this month, including two veteran supervisors who oversaw absentee ballots and poll worker training. A report from the visit is expected to be released later this week.

Oliphant's office has been embroiled in a year of controversy, including a now-closed investigation by the Broward State Attorney's Office and culminating in a budget battle with the Broward County Commission.

Oliphant did not return a phone message from The Herald left at her home Monday night.



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Posted on Sun, Mar. 21, 2004

POLITICS

Ballot fraud charges investigated

Miami-Dade police question Hialeah housing authority employees and campaign workers about allegations of absentee ballot fraud.

BY REBECCA DELLAGLORIA AND KARL ROSS
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A decade after a Hialeah City Council election was overturned for voter fraud, police are investigating whether another election in the city was tainted by absentee ballot abuse.

Miami-Dade public corruption detectives fanned across Hialeah on Friday, questioning employees of the city's public housing agency, as well as friends and relatives of politicians aligned with Mayor Raúl Martínez.

Sources close to the investigation say those interviewed were asked about their alleged handling of absentee ballots gathered from voters -- many of them elderly -- in the city's public housing units.

A decisive edge among absentee voters swung the result of at least one City Council race last November, prompting a federal lawsuit by losing candidate Adriana Narváez. She won at the polls but lost to the incumbent Eduardo "Eddy" González after he collected nearly three times as many absentee votes.

'POLITICAL MACHINE'

Narváez alleges the mayor's "political machine," including Hialeah Housing Authority employees, improperly solicited ballots from elderly residents living in subsidized apartments, even instructing them who to vote for in some cases.

City and housing authority officials have denied any wrongdoing, saying the inquiry is a desperate ploy by a losing candidate unwilling to accept her fate at the polls.

Hialeah Housing Director Alex Morales has acknowledged working long hours on the three council races, but says he did so only during free hours accrued through "comp time." He said Saturday he has not been contacted by police and did not want to comment.

On Friday, a team of Miami-Dade officers interviewed about a dozen people, including several with close ties to politicians on the Martínez-backed slate of candidates.

POLITICAL TIES

These included González's sister, Zoey Prieto; the wife of losing council member Julio Ponce, Yadelkis "Yadi" Ponce; and an aide to Councilman Esteban Bovo, Alfredo Llamado.

Investigative sources also told The Herald federal agents from the U.S. Department of Housing and Urban Development, as well as the FBI, have been assigned to the case and are cooperating with police.

NO INVOLVEMENT

Martínez on Saturday acknowledged the police investigation, but said it didn't involve him.

"I didn't vote absentee," Martínez said. "I didn't pick up any absentee ballots. I didn't tell anybody to pick up absentee ballots. So should I worry?"

Martínez accused Narvaez's lawyer, Michael Pizzi, of using the media to publicize the allegations and scare those cited in

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the lawsuit. Pizzi, a Miami Lakes city councilman, has clashed with Martínez in the past over land use issues.

Pizzi applauded the involvement of investigators, saying he was encouraged by the preliminary results.

"It's a long time coming," Pizzi said. "And it's great news for the people of Hialeah, who've had to put up with this stuff for well over a decade."

Sworn statements given to private investigators working for Pizzi say several voters who live in the city's subsidized housing projects were given ballots and told whom to vote for.

Dinorah Quiros, a resident at 60 E. Third St., said councilman Ponce's wife visited her home in late October.

"She indicated I should vote for her husband, Julio Ponce, Guillermo Zuñiga and Eduardo González," Quiros said in the sworn statement, dated Nov. 28, 2003.

She added: "I voted for the candidates that Yadi Ponce indicated, because I was scared that if I didn't vote for them, I could suffer consequences."

BUILDING ACCESS

The statement noted Ponce is a former housing manager of the building, the Palm Centre, and still had access to its residents.

Ponce could not be reached for comment Saturday.

Another sworn statement, this one from Gloria Reyes of 70 E. Seventh St., tells of another encounter with a man she could not identify, but who had visited during past elections.

"This man filled out my form and I signed it," Reyes told investigators. "He showed me who I had to vote for, indicating where I should mark the ballot. I don't know who I voted for."

Bovo told The Herald that his aide Llamedo was among those questioned by police. He defended his employee's conduct and that of his council colleagues.

"I don't think anybody needs to be afraid of anything," said Bovo, who was not on the ballot in November. "I stand by what the people in the campaign did, and I don't think they did anything illegal."

venture capital subsidiary has committed to invest \$5 million in a venture capital fund that holds a 12 percent interest in Hart Intercivic, a vendor that has qualified to market electronic voting devices in Ohio.

Blackwell's office stated that while SAIC's subsidiary is a passive investor in the venture capital fund and has no role in its management, operation, or investments, the fully-diluted interest of less than 2 percent of Hart Intercivic disqualifies SAIC from assisting in the security inquiries.

Compuware Corporation, based in Detroit, will conduct a technical analysis of each of the four vendor's electronic voting devices. The review will include an examination of the computer source code, and scrutiny of the potential for penetration and points of failure specific to each voting machine.

InfoSentry, based in North Carolina, will conduct in-depth analysis, including on-site inspections and additional verification of claims made by the four vendors concerning security questions previously posed. Further, InfoSentry will assess the functionality and durability of qualified electronic voting systems in environmental conditions common to the use, storage and transport of this equipment. InfoSentry had assisted the secretary of state's office with initial security inquiries of potential vendors during the qualification process.

The four vendors qualified by the state to market electronic voting equipment in Ohio are: Diebold Election Systems; Election Systems and Software (ES&S); Maximus-Hart Intercivic/DFM Associates; and Sequoia Voting Systems.

CONNECTICUT PILOT PROGRAM SEEKS TO COMBAT ABSENTEE VOTE FRAUD

A new Connecticut pilot program, prescribed by law and designed to reform the absentee ballot process, focuses on the absentee ballot application process as a way of preventing fraud and abuse. Connecticut State Elections Enforcement Executive Director Jeffrey Garfield said the Commission believes absentee voting abuses are the number one problem in Connecticut's voting process.

In passing the law the legislature observed that absentee voting abuses persist despite attempts to impose sanctions. Further, it noted that many of these problems arose from a lack of control over the absentee ballot application process. Anyone may distribute absentee ballot applications. Garfield suggested the problem begins with a process that allows candidates and party and campaign workers to go door-to-door distributing applications, or distributing them en masse, coupled with the fact that the applications are open to public inspection. This has produced ballots cast by persons not qualified to do so, and intimidation to vote for or against a candidate.

In recent Connecticut history one elected official lost his job as a result of absentee ballot application abuses. During the past year the Commission has referred evidence of criminal violations to the Chief State's Attorney involving officials in Hartford and New Haven. Former state legislator Barnaby Horton was arrested in August and charged with seven felony counts of absentee ballot fraud in connection with a 2002 primary election. The Commission has also imposed thousands of dollars in civil fines and imposed other sanctions without eradicating the problem.

The new law required the Enforcement Commission to notify all municipalities of the law, and to select three, based on population size, for the pilot project -- one large municipality, one middle-

sized and one small municipality. The legislative body in each municipality must consent to participate, thereby accepting limitations on the absentee ballot application process in their municipalities for elections this year.

The following provisions apply to absentee ballot applications in the three cities.

Applications. Only municipal clerks, registrars of voters, and absentee ballot coordinators appointed by the registrar of voters may issue absentee ballot applications. Applications may be given only to persons who apply for themselves; have been identified by candidates or political parties as potential absentee voters; or are designees of the voter. Designees must be medical caregivers or member of the applicant's family who agrees to do so.

Assistance. Persons ill or disabled may designate someone to assist them in completing an absentee ballot application. For all others, only absentee ballot coordinators may be present and provide assistance in filling out an application outside the office of the registrar. Two absentee ballot coordinators of different parties must provide assistance to applicants who request it. For primary elections, two absentee ballot coordinators representing competing slates or candidates in the primary election must provide this assistance.

Privacy. The list of absentee ballot applicants who have executed applications remains confidential until the third business day before an election or a primary.

Pilot project results. The State Elections Enforcement Commission will survey the election officials and participants in the three municipalities and will report its findings to the General Assembly in January.

SUMMIT COUNTY, OHIO CHANGES PROCEDURES FOR PRE-CHECK SERVICE FOR CANDIDATE PETITIONS

The Summit County, Ohio Board of Elections is changing its procedures for "pre-checking" candidate nomination petitions after original petitions for a candidate for the Akron City Council disappeared too late for that candidate to replace them, triggering a major investigation.

As a service to candidates in the days prior a filing deadline, Summit County offered to pre-check candidates' original petitions to determine whether they were sufficient. If a candidate's valid signatures fell short of the number needed, that candidate still had time to obtain the additional signatures. Whether their pre-checked petitions were sufficient or not, candidates must formally file all the original pages together prior to the deadline.

This year, Joe Finley, a Democratic candidate seeking to represent Ward 2 in the Akron City Council, pre-filed his petitions. Election workers verified that the petition had sufficient valid signatures and recorded details in the computer. When Finley arrived to file his petitions before the deadline, election workers could not locate his petition papers.

Ohio law requires that only original signatures may be used for filing, therefore the board could not place Finley's name on the ballot. Finley obtained a court order placing his name on the September primary election ballot and won the election. His name will now appear on the November general election ballot.