Interview with Commissioner Harry Van Sickle and Deputy Chief Counsel to the Secretary of State Larry Boyle, State of Pennsylvania

March 1, 2006

As Commissioner Van Sickle has only been in office for about a year, Mr. Boyle answered most of our questions.

Fraud and Intimidation

Neither Van Sickle nor Boyle was aware of any fraud of any kind in the state of Pennsylvania over the last five years. They are not aware of the commission of any deceptive practices, such as flyers that intentionally misinform as to voting procedures. They also have never heard of any incidents of voter intimidation. With respect to the mayoral election of 2003, the local commission would know about that.

Since the Berks County case of 2003, where the Department of Justice found poll workers who treated Latino voters with hostility among other voting rights violations, the Secretary's office has brought together Eastern Pennsylvania election administrators and voting advocates to discuss the problems. As a result, other counties have voluntarily chosen to follow the guidance of the Berks County federal court order.

Regarding the allegations of fraud that surrounded the voter identification debate, Mr. Boyle said was not aware of any instances of fraud involving identity. He believes this is because Pennsylvania has laws in place to prevent this. For example, in 2002 the state legislature passed an ID law that is stricter than HAVA's – it requires all first time voters to present identification. In addition, the SURE System – the state's statewide voter registration database – is a great anti-fraud mechanism. The system will be in place statewide in the May 2006 election.

In addition, the state took many steps before the 2004 election to make sure it would be smooth. They had attorneys in the counties to consult on problems as well as staff at the central office to take calls regarding problems. In addition, in 2004 the state used provisional ballots for the first time. This resolved many of the problems that used to occur on Election Day.

Mr. Boyle is not aware of any voter registration fraud. This is because when someone registers to vote, the administrator does a duplicate check. In addition, under new laws a person registering to vote must provide their drivers license or Social Security number which are verified through the Department of Motor Vehicles and the Social Security Administration. Therefore, it would be unlikely that someone would be able to register to vote falsely.

Process

Most problems are dealt with at the local level and do not come within the review of the Secretary of State's office. For instance, if there is a complaint of intimidation, this is generally dealt with by the county courts which are specially designated solely to election cases on

Deliberative Process Privilege

Election Day. The Secretary does not keep track of these cases. Since the passage of NVRA and HAVA counties will increasingly call the office when problems arise.

Recommendations
Mr. Boyle suggested we review the recommendations of the Pennsylvania Election Reform Task Force which is on the Secretary's website. Many of those recommendations have been introduced in the legislature.

Interview with Craig Donsanto, Director, Public Integrity Section, U.S. Department of Justice
January 13, 2006

Questions

How are Prosecution Decisions Made?

Craig Donsanto must approve all investigations that go beyond a preliminary stage, all charges, search warrant applications and subpoenas and all prosecutions. The decision to investigate is very sensitive because of the public officials involved. If a charge seems political, Donsanto will reject it. Donsanto gives possible theories for investigation. Donsanto and Noel Hillman will decide whether to farm out the case to an AUSA. Donsanto uses a concept called predication. In-other-words, there must be enough evidence to suggest a crime has been committed. The method of evaluation of this evidence depends on the type of evidence and its source. There are two types of evidence---factual (antisocial behavior) and legal (antisocial behavior leading to statutory violations). Whether an indictment will be brought depends on the likelihood of success before a jury. Much depends on the type of evidence and the source. Donsanto said he "knows it when he sees it." Donsanto will only indict if he is confident of a conviction assuming the worst case scenario – a jury trial.

A person under investigation will first receive a target letter. Often, a defendant who gets a target letter will ask for a departmental hearing. The defendant's case will be heard by Donsanto and Hillman. On occasion, the assistant attorney general will review the case. The department grants such hearings easily because such defendants are likely to provide information about others involved.

The Civil Rights Division, Voting Rights Section makes its own decisions on prosecution. The head of that division is John Tanner. There is a lot of cooperation between

Does the Decision to Prosecute Incorporate Particular Political Considerations within a State Such as a One Party System or a System in which the Party in Power Controls the Means of Prosecution and Suppresses Opposition Complaints?

Yes. Before, the department would leave it to the states. Now, if there is racial animus involved in the case, there is political bias involved, or the prosecutor is not impartial, the department will take it over.

Does it Matter if the Complaint Comes from a Member of a Racial Minority?

No. But if the question involves racial animus, that has also always been an aggravating factor, making it more likely the Department will take it over

What Kinds of Complaints Would Routinely Override Principles of Federalism?

Federalism is no longer big issue. DOJ is permitted to prosecute whenever there is a candidate for federal office.

Are There Too Few Prosecutions?

DOJ can't prosecute everything.

What Should Be Done to Improve the System?

The problem is asserting federal jurisdiction in non-federal elections. It is preferable for the federal government to pursue these cases for the following reasons: federal districts draw from a bigger and more diverse jury pool; the DOJ is politically detached; local district attorneys are hamstrung by the need to be re-elected; DOJ has more resources – local prosecutors need to focus on personal and property crimes---fraud cases are too big and too complex for them; DOJ can use the grand jury process as a discovery technique and to test the strength of the case.

In *U.S. v. McNally*, the court ruled that the mail fraud statute does not apply to election fraud. It was through the mail fraud statute that the department had routinely gotten federal jurisdiction over election fraud cases. 18 USC 1346, the congressional effort to "fix" *McNally*, did not include voter fraud.

As a result, the department needs a new federal law that allows federal prosecution whenever a federal instrumentality is used, e.g. the mail, federal funding, interstate commerce. The department has drafted such legislation, which was introduced but not passed in the early 1990s. A federal law is needed that permits prosecution in any election where any federal instrumentality is used.

Other Information

The Department has held four symposia for DEOs and FBI agents since the initiation of the Ballot Access and Voting Integrity Initiative. In 2003, civil rights leaders were invited to make speeches, but were not permitted to take part in the rest of the symposium. All other symposia have been closed to the public. (Peg will be sending us the complete training materials used at those sessions. These are confidential and are the subject of FOIA litigation).

There are two types of attorneys in the division: prosecutors, who take on cases when the jurisdiction of the section requires it; the US Attorney has recused him or herself; or when the

US Attorney is unable to handle the case (most frequent reason) and braintrust attorneys who analyze the facts, formulate theories, and draft legal documents.

Cases:

Donsanto provided us with three case lists: Open cases (still being investigated) as of January 13, 2006 – confidential; election fraud prosecutions and convictions as a result of the Ballot Access and Voting Integrity Initiative October 2002-January 13, 2006 and cases closed for lack of evidence as of January 13, 2006

If we want more documents related to any case, we must get those documents from the states. The department will not release them to us.

Although the number of election fraud related complaints have not gone up since 2002, nor has the proportion of legitimate to illegitimate complaints of fraud, *the number of cases that the department is investigating and the number of indictments the department is pursuing are both up dramatically.*

Since 2002, the department has brought more cases against alien voters, felon voters, and double voters than ever before. Previously, cases were only brought when there was a pattern or scheme to corrupt the process. Charges were not brought against individuals – those cases went un-prosecuted. This change in direction, focus, and level of aggression was by the decision of the Attorney General. The reason for the change was for deterrence purposes.

The department is currently undertaking three pilot projects to determine what works in developing the cases and obtaining convictions and what works with juries in such matters to gain convictions:

Felon voters in Milwaukee.
Alien voters in the Southern District of Florida. FYI – under 18 USC 611, to prosecute for "alien voting" there is no intent requirement. Conviction can lead to deportation. Nonetheless, the department feels compelled to look at mitigating factors such as was the alien told it was OK to vote, does the alien have a spouse that is a citizen.
Double voters in a variety of jurisdictions.

The department does not maintain records of the complaints that come in from DEOs, U.S attorneys and others during the election that are not pursued by the department. Donsanto asserted that U.S. attorneys never initiate frivolous investigations.

According to the new handbook, the department can take on a case whenever there is a federal candidate on the ballot

Interview with Douglas Webber, Assistant Attorney General, Indiana

February 15, 2006

Background
Mr. Webber was an attorney for the Marion County Election Board and was also part of the Indianapolis Ballot Security Team (sometimes called the Goon Squad). This Team was a group of attorneys well trained in election law whose mission was to enforce ballot security.

Litigation
Status of litigation in Indiana: On January 12 the briefing was completed. The parties are waiting for a decision from the U.S. district judge. The judge understood that one of the parties would seek a stay from the 7th Circuit Court of Appeals. The parties anticipate a decision in late March or early April. Mr. Webber did the discovery and depositions for the litigation. Mr. Webber feared the plaintiffs were going to state in their reply brief that HAVA's statewide database requirement would resolve the problems alleged by the state. However, the plaintiffs failed to do so, relying on a Motor Voter Act argument instead. Mr. Webber believes that the voter ID at issue will make the system much more user-friendly for the poll workers. The Legislature passed the ID legislation, and the state is defending it, on the basis of the problem of the *perception* of fraud.

Incidents of fraud and intimidation
Mr. Webber thinks that no one can put his or her thumb on whether there has been voter fraud in Indiana. For instance, if someone votes in place of another, no one knows about it. There have been no prosecuted cases of polling place fraud in Indiana. There is no recorded history of documented cases, but it does happen. In the litigation, he used articles from around the country about instances of voter fraud, but even in those examples there were ultimately no prosecutions, for example the case of Milwaukee. He also stated in the litigation that there are all kinds of examples of dead people voting---totaling in the hundreds of thousands of votes across the country.

One interesting example of actual fraud in Indiana occurred when a poll worker, in a poll using punch cards, glued the chads back and then punched out other chads for his candidate. But this would not be something that would be addressed by an ID requirement.

He also believes that the perception that the polls are loose can be addressed by the legislature. The legislature does not need to wait to see if the statewide database solve the problems and therefore affect the determination of whether an ID requirement is necessary. When he took the deposition of the Republican Co-Director, he said he thought Indiana was getting ahead of the curve. That is, there have been problems around the country, and confidence in elections is low. Therefore Indiana is now in front of getting that confidence back.

Mr. Webber stated that the largest vote problem in Indiana is absentee ballots. Absentee ballot fraud and vote buying are the most documented cases. It used to be the law that applications for absentee ballots could be sent anywhere. In one case absentee votes were exchanged for "a job on election day"---meaning one vote for a certain price. The election was contested and the trial

judge found that although there was vote fraud, the incidents of such were less than the margin of victory and so he refused to overturn the election. Mr. Webber appealed the case for the state and argued the judge used the wrong statute. The Indiana Supreme Court agreed and reversed. Several people were prosecuted as a result – those cases are still pending.

Process

In Indiana, voter complaints first come to the attorney for the county election board who can recommend that a hearing be held. If criminal activity was found, the case could be referred to the county prosecutor or in certain instances to the Indiana Attorney General's Office. In practice, the Attorney General almost never handles such cases.

Mr. Webber has had experience training county of election boards in preserving the integrity and security of the polling place from political or party officials. Mr. Webber stated that the Indiana voter rolls need to be culled. He also stated that in Southern Indiana a large problem was vote buying while in Northern Indiana a large problem was based on government workers feeling compelled to vote for the party that gave them their jobs.

Recommendations

- Mr. Webber believes that all election fraud and intimidation complaints should be referred to the Attorney General's Office to circumvent the problem of local political prosecutions. The Attorney General should take more responsibility for complaints of fraud because at the local level, politics interferes. At the local level, everyone knows each other, making it harder prosecute.
- Indiana currently votes 6 am to 6 pm on a weekday. Government workers and retirees are the only people who are available to work the polls. Mr. Webber suggested that the biggest change should be to move elections to weekends. This would involve more people acting as poll workers who would be much more careful about what was going on.
- Early voting at the clerk's office is good because the people there know what they are doing. People would be unlikely to commit fraud at the clerk's office. This should be expanded to other polling places in addition to that of the county clerk.
- Finally, Mr. Webber believes polling places should be open longer, run more professionally but that there needs to be fewer of them so that they are staffed by only the best, most professional people.

Interview Sharon Priest, former Secretary of State, Arkansas
January 24, 2006

Process:

When there is an allegation of election fraud or intimidation, the county clerk refers it to the local district attorney. Most often, the DA does not pursue the claim. There is little that state administrators can do about this because in Arkansas, county clerks are partisanly elected and completely autonomous. Indeed, county clerks have total authority to determine who is an eligible voter.

Data:

There is very little data collected in Arkansas on fraud and intimidation cases. Any information there might be stays at the county level. This again is largely because the clerks have so much control and authority, and will not release information. Any statewide data that does exist might be gotten from Susie Storms from the State Board of Elections.

Most Common Problems

The perception of fraud is much greater than the actual incidence of fraud.

- The DMV does not implement NVRA in that it does not take the necessary steps when providing the voter registration forms and does not process them properly. This leads to both ineligible voters potentially getting on the voting rolls (e.g. noncitizens, who have come to get a drivers license, fill out a voter registration form having no intention of actually voting) and voter thinking they are registered to vote to find they are not on the list on Election Day. Also, some people think they are automatically registered if they have applied for a drivers license.
- Absentee ballot fraud is the most frequent form of election fraud.
- In Arkansas, it is suspected that politicians pay ministers to tell their congregations to vote for them
- In 2003, the State Board documented 400 complaints against the Pulaski County Clerk for engaging in what was at least borderline fraud, e.g. certain people not receiving their absentee ballots. The case went to a grand jury but no indictment was brought.
- Transportation of ballot boxes is often insecure making it very easy for insiders to tamper with the ballots or stuff the ballot boxes. Priest has not actually witnessed this happen, but believes it may have.
- Intimidation at the poll sites in court houses. Many voters are afraid of the county judges or county employees and therefore will not vote. They justifiably believe their ballots will be opened by these employees to see who they voted for, and if they voted against the county people, retribution might ensue.
- Undue challenges to minority language voters at the poll sites
- Paid registration collectors fill out phony names, but these individuals are caught before anyone is able to cast an ineligible ballot.

Suggested Reforms for Improvement:

- Nonpartisan election administration
- Increased prosecution of election crimes through greater resources to district attorneys. In addition, during election time, there should be an attorney in the DA's office who is designated to handle election prosecution.
- There should be greater centralization of the process, especially with respect to the statewide database. Arkansas has a "bottom up" system. This means the counties still control the list and there is insufficient information sharing. For example, if someone

lives in one county but dies in another, the county in which the voter lived – and was registered to vote – will not be notified of the death.

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

March 22, 2006

Background

Thompson is a member of the Cheyenne River Sioux tribe in South Dakota. For many years she worked locally on elections doing poll monitoring and legal work, from a nonpartisan perspective. In 2004, she headed the Native Vote Election Protection, a project run by the National Congress of American Indians, and was in charge of monitoring all Native American voting sites around the country, focusing on 10 or 15 states with the biggest Native populations. She is now permanently on staff of the National Congress of American Indians as the Director of Government relations. NCAI works jointly with NARF as well as the Election Protection Coalition.

Recent trends

Native election protection operations have intensified recently for several reasons. While election protection efforts in Native areas have been ongoing, leaders realized that they were failing to develop internal infrastructure or cultivate locally any of the knowledge and expertise which would arrive and leave with external protection groups.

Moreover, in recent years partisan groups have become more aware of the power of the native vote, and have become more active in native communities. This has partly resulted in an extreme increase in voter intimidation tactics. As native communities are easy to identify, easy to target, and generally dominated by a single party, they are especially vulnerable to such tactics.

Initially, reports of intimidation were only passed along by word of mouth. But it became such a problem in the past 5 to 6 years that tribal leaders decided to raise the issue to the national level. Thompson points to the Cantwell election in 2000 and the Johnson election in South Dakota in 2002 as tipping points where many began to realize the Indian vote could matter in Senate and national elections.

Thompson stressed that Native Vote places a great deal of importance on being nonpartisan. While a majority of native communities vote Democratic, there are notable exceptions, including communities in Oklahoma and Alaska, and they have both parties engaging in aggressive tactics. However, she believes the most recent increase in suppression and intimidation tactics have come from Republican Party organizations.

Nature of Suppression/Intimidation of Native Voters

Thompson categorizes suppression into judge related and poll-watcher related incidents, both of which may be purposeful or inadvertent, as well as longstanding legal-structural constraints.

Structural problems

One example of inadvertent suppression built into the system stems from the fact that many Indian communities also include significant numbers of non-Indians due to allotment. Non-Indians tend to be most active in the state and local government while Indians tend to be more involved in the tribal government. Thus, the individuals running elections end up being non-Indian. Having Indians vote at polling places staffed by non-Indians often results in incidents of disrespect towards Native voters (Thompson emphasized the considerable racism which persists against Indians in these areas). Also, judges aren't familiar with Indian last names and are more dismissive of solving discrepancies with native voters.

Structural problems also arise from laws which mandate that the tribal government cannot run state or local elections. In places like South Dakota, political leaders used to make it intentionally difficult for Native Americans to participate in elections. For example, state, local and federal elections could not be held in the same location as tribal elections, leading to confusion when tribal and other elections are held in different locations. Also, it is common to have native communities with few suitable sites, meaning that a state election held in a secondary location can suddenly impose transportation obstacles.

Photo ID Issues

Thompson believes both state level and HAVA photo ID requirements have a considerable negative impact. For a number of reasons, many Indian voters don't have photo ID. Poor health care and poverty on reservations means that many children are born at home, leading to a lack of birth certificates necessary to obtain ID. Also, election workers and others may assume they are Hispanic, causing additional skepticism due to citizenship questions. There is a cultural issue as well—historically, whenever Indians register with the federal government it has been associated with a taking of land or removal of children. Thus many Indians avoid registering for anything with the government, even for tribal ID.

Thompson also offered examples of how the impact of ID requirements had been worsened by certain rules and the discriminatory way they have been carried out. In the South Dakota special election of 2003, poll workers told Native American voters that if they did not have ID with them and they lived within sixty miles of the precinct, the voter had to come back with ID. The poll workers did not tell the voters that they could vote by affidavit ballot and not need to return, as required by law. This was exacerbated by the fact that the poll workers didn't know the voters —as would be the case with non-Indian poll workers and Indian voters. Many left the poll site without voting and did not return.

In Minnesota, the state tried to prohibit the use of tribal ID's for voting outside of a reservation, even though Minnesota has a large urban Native population. Thompson believes this move was

very purposeful, and despite any reasonable arguments from the Secretary of State, they had to file a lawsuit to stop the rule. They were very surprised to find national party representatives in the courtroom when they went to deal with lawsuit, representatives who could only have been alerted through a discussion with the Secretary of State.

Partisan Poll-Monitoring

Thompson believes the most purposeful suppression has been perpetrated by the party structures on an individual basis, of which South Dakota is a great example.

Some negative instances of poll monitoring are not purposeful. Both parties send in non-Indian, non-Western lawyers, largely from the East Coast, which can lead to uncomfortable cultural clashes. These efforts display a keen lack of understanding of these communities and the best way to negotiate within in them. But while it may be intimidating, it is not purposeful.

Yet there are also many instances of purposeful abuse of poll monitoring. While there were indeed problems during the 2002 Johnson election, it was small compared to the Janklow special election. Thompson says Republican workers shunned cultural understanding outreach, and had an extensive pamphlet of what to say at polls and were very aggressive about it. In one tactic, every time a voter would come up with no ID, poll monitors would repeat "You can't vote" over and over again, causing many voters to leave. This same tactic appeared across reservations, and eventually they looked to the Secretary of State to intervene.

In another example, the head of poll watchers drove from poll to poll and told voters without IDs to go home, to the point where the chief of police was going to evict him from the reservation. In Minnesota, on the Red Lake reservation, police actually did evict an aggressive poll watcher—the fact that the same strategies are employed several hundred miles apart points to standardized instructions.

None of these incidents ever went to court. Thompson argues this is due to few avenues for legal recourse. In addition, it is inherently difficult to settle these things, as they are he said-she said incidents and take place amidst the confusion of Election Day. Furthermore, poll watchers know what the outline of the law is, and they are careful to work within those parameters, leaving little room for legal action.

Other seeming instances of intimidation may be purely inadvertent, such as when, in 2002, the U.S. Attorney chose Election Day to give out subpoenas, and native voters stayed in their homes. In all fairness, she believes this was a misunderstanding.

The effect of intimidation on small communities is especially strong and is impossible to ultimately measure, as the ripple effect of rumors in insular communities can't be traced. In some communities, they try to combat this by using the Native radio to encourage people to vote and dispel myths.

She has suggestions for people who can describe incidents at a greater level of detail if interested.

Vote Buying and Fraud

They haven't found a great deal of evidence on vote-buying and fraud. When cash is offered to register voters, individuals may abuse this, although Thompson believes this is not necessarily unique to the Native community, but a reflection of high rates of poverty. This doesn't amount to a concerted effort at conspiracy, but instead represents isolated incidents of people not observing the rules. While Thompson believes looking into such incidents is a completely fair inquiry, she also believes it has been exploited for political purposes and to intimidate. For example, large law enforcement contingents were sent to investigate these incidents. As Native voters tend not to draw distinctions between law enforcement and other officials, this made them unlikely to help with elections.

Remedies

As far as voter suppression is concerned, Native Vote has been asking the Department of Justice to look into what might be done, and to place more emphasis on law enforcement and combating intimidation. They have been urging the Department to focus on this at least much as it is focusing on enforcement of Section 203. Native groups have complained to DOJ repeatedly and DOJ has the entire log of handwritten incident reports they have collected. Therefore, Thompson recommends more DOJ enforcement of voting rights laws with respect to intimidation. People who would seek to abuse the process need to believe a penalty will be paid for doing so. Right now, there is no recourse and DOJ does not care, so both parties do it because they can.

Certain states should rescind bars on nonpartisan poll watchers on Election Day; Thompson believes this is contrary to the nonpartisan, pro-Indian presence which would best facilitate voting in Native communities.

As discussed above, Thompson believes ID requirements are a huge impediment to native voters. At a minimum, Thompson believes all states should be explicit about accepting tribal ID on Election Day.

Liberalized absentee ballot rules would also be helpful to Native communities. As many Indian voters are disabled and elderly, live far away from their precinct, and don't have transportation, tribes encourage members to vote by absentee ballot. Yet obstacles remain. Some voters are denied a chance to vote if they have requested a ballot and then show up at the polls. Thompson believes South Dakota's practice of tossing absentee ballots if a voter shows up at the ED would serve as an effective built-in protection. In addition, she believes there should be greater scrutiny of GOTV groups requesting absentee ballots without permission. Precinct location is a longstanding issue, but Thompson recognizes that states have limited resources. In the absence of those resources, better absentee ballot procedures are needed.

Basic voter registration issues and access are also important in native communities and need to be addressed.

Thompson is mixed on what restrictions should be placed on poll watcher behavior, as she believes open elections and third party helpers are both important. However, she would be willing to explore some sort of stronger recourse and set of rules concerning poll watchers' behavior. Currently, the parties are aware that no recourse exists, and try to get away with what they will. This is not unique to a single party—both try to stay within law while shaking people up. The existing VRA provision is 'fluffy'—unless you have a consent decree, you have very little power. Thompson thinks a general voter intimidation law that is left a bit broad but that nonetheless makes people aware of some sort of kickback could be helpful.

Interview with Jason Torchinsky, former attorney with the Civil Rights Section of the Department of Justice, assistant general counsel for the American Center for Voting Rights (ACVR) and Robin DeJarnette, political consultant for C4 and C5 organizations and executive director for the ACVR.

February 16, 2006

ACVR Generally

Other officers of the ACVR-Thor Hearne II-general counsel and Brian Lunde, former executive director of the Democratic National Committee.

Board of Directors of ACVR-Brian Lunde, Thor Hearne II, and Cameron Quinn

ACVR works with a network of attorneys around the country and has been recently involved with lobbying in PA and MO.

Regarding the August 2005 Report

ACVR has not followed up on any of the cases it cited in the 2005 report to see if the allegations had been resolved in some manner. Mr. Torchinsky stated that there are problems with allegations of fraud in the report and prosecution---just because there was no prosecution, does not mean there was no vote fraud. He believes that it is very hard to come up with a measure of voter fraud short of prosecution. Mr. Torchinsky does not have a good answer to resolve this problem.

P. 35 of the Report indicates that there were coordinated efforts by groups to coordinate fraudulent voter registrations. P. 12 of the Ohio Report references a RICO suit filed against organizations regarding fraudulent voter registrations. Mr. Torchinsky does not know what happened in that case. He stated that there was a drive to increase voter registration numbers regardless of whether there was an actual person to register. He stated that when you have an organization like ACORN involved all over the place, there is reason to believe it is national in scope. When it is the same groups in multiple states, this leads to the belief that it is a concerted effort.

Voting Problems

Mr. Torchinsky stated there were incidents of double voting---ex. a double voter in Kansas City, MO. If the statewide voter registration database requirement of HAVA is properly implemented, he believes it will stop multiple voting in the same state. He supports the HAVA requirement, if implemented correctly. Since Washington State implemented its statewide database, the Secretary of State has initiated investigations into felons who voted. In Philadelphia the major problem is permitting polling places in private homes and bars – even the homes of party chairs.

Mr. Torchinsky believes that voter ID would help, especially in cities in places like Ohio and Philadelphia, PA. The ACVR legislative fund supports the Real ID requirements suggested by the Carter-Baker Commission. Since federal real ID requirements will be in place in 2010, any objection to a voter ID requirement should be moot.

Mr. Torchinsky stated that there are two major poll and absentee voting problems---(1) fraudulent votes-ex. dead people voting in St. Louis and (2) people voting who are not legally eligible-ex. felons in most places. He also believes that problems could arise in places that still transport paper ballots from the voting location to a counting room. However, he does not believe this is as widespread a problem now as it once was.

Suggestions

Implement the Carter-Baker Commission recommendations because they represent a reasonable compromise between the political parties.

Interview with Joe Rich, former Chief of the Voting Section,
US Department of Justice
February 7, 2006

Background

Mr. Rich went to Yale undergraduate and received his law degree from the University of Michigan. He served as Chief of the Voting Section from 1999-2005. Prior to that he served in other leadership roles in the Civil Rights Division and litigated several civil rights cases.

Data Collection and Monitoring

The section developed a new database before the 2004 election to log complaint calls and what was done to follow up on them. They opened many investigations as a result of these complaints, including one on the long lines in Ohio (see DOJ letter on website, as well as critical commentary on the DOJ letter's analysis). DOJ found no Section 2 violation in Ohio. John Tanner should be able to give us this data. However, the database does not include complaints that were received by monitors and observers in the field.

All attorney observers in the field are required to submit reports after Election Day to the Department. These reports would give us a very good sense of the scope and type of problems that arose on that day and whether they were resolved on the spot or required further action.

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The monitoring in 2004 was the biggest operation ever. Prior to 2000, only certain jurisdictions could be observed – a VRA covered jurisdiction that was certified or a jurisdiction that had been certified by a court, e.g. through a consent decree. Since that time, and especially in 2004, the Department has engaged in more informal "monitoring." In those cases, monitors assigned to certain jurisdictions, as opposed to observers, can only watch in the polling place with permission from the jurisdiction. The Department picked locations based on whether they had been monitored in the past, there had been problems before, or there had been allegations in the past. Many problems that arose were resolved by monitors on the spot.

Processes for Cases not Resolved at the Polling Site

If the monitor or observer believes that a criminal act has taken place, he refers it to the Public Integrity Section (PIN). If it is an instance of racial intimidation, it is referred to the Civil Rights Criminal Division. However, very few such cases are prosecuted because they are very hard to prove. The statutes covering such crimes require actual violence or the threat of violence in order to make a case. As a result, most matters are referred to PIN because they operate under statutes that make these cases easier to prove. In general, there are not a high number of prosecutions for intimidation and suppression.

If the act is not criminal, it may be brought as a civil matter, but only if it violated the Voting Rights Act – in other words, only if there is a racial aspect to the case. Otherwise the only recourse is to refer it to PIN.

However, PIN tends not to focus on intimidation and suppression cases, but rather cases such as alleged noncitizen voting, etc. Public Integrity used to only go after systematic efforts to corrupt the system. Now they focus on scattered individuals, which is a questionable resource choice. Criminal prosecutors over the past 5 years have been given more resources and more leeway because of a shift in focus and policy toward noncitizens and double voting, etc.

There have been very few cases brought involving African American voters. There have been 7 Section 2 cases brought since 2001 – only one was brought on behalf of African American voters. That case was initiated under the Clinton administration. The others have included Latinos and discrimination against whites.

Types of Fraud and Intimidation Occurring

There is no evidence that polling place fraud is a problem. There is also no evidence that the NVRA has increased the opportunity for fraud. Moreover, regardless of NVRA's provisions, an election official can always look into a voter's registration if he or she believes that person should no longer be on the list. The Department is now suing Missouri because of its poor registration list.

The biggest problem is with absentee ballots. The photo ID movement is a vote suppression strategy. This type of suppression is a bigger problem than intimidation. There has been an increase in vote suppression over the last five years, but it has been indirect, often in the way that

laws are interpreted and implemented. Unequal implementation of ID requirements at the polls based on race would be a VRA violation.

The most common type of intimidation occurring is open hostility by poll workers toward minorities. It is a judgment call whether this is a crime or not – Craig Donsanto of PIN decides if it rises to a criminal matter.

Election Day challenges at the polls could be a VRA violation but such a case has never been formally pursued. Such cases are often resolved on the spot. Development of a pre-election challenge list targeted at minorities would be a VRA violation but this also has never been pursued. These are choices of current enforcement policy.

Long lines due to unequal distribution of voting machines based on race, list purges based on race and refusal to offer a provisional ballot on the basis of race would also be VRA violations.

Recommendations

Congress should pass a new law that allows the Department to bring civil actions for suppression that is NOT race based, for example, deceptive practices or wholesale challenges to voters in jurisdictions that tend to vote heavily for one party.

Given the additional resources and latitude given to the enforcement of acts such as double voting and noncitizen voting, there should be an equal commitment to enforcement of acts of intimidation and suppression cases.

There should also be increased resources dedicated to expanded monitoring efforts. This might be the best use of resources since monitors and observers act as a deterrent to fraud and intimidation.

Interview with Joe Sandler, Counsel to the DNC

February 24, 2006

Background

Sandler is an election attorney. He worked for the DNC in 1986, was in-house counsel from 1993-1998, and currently is outside counsel to the DNC and most state Democratic Parties. Sandler was part of the recount team in Florida in both 2002 and 2004. He recruited and trained attorneys in voting issues---starting in 2002 Sandler recruited in excess of 15, 000 attorneys in twenty-two states. He is now putting together a national lawyers council in each state.

2004-Administrative Incompetence v. Fraud

Sandler believes the 2004 election was a combination of administrative incompetence and fraud. Sandler stated there was a deliberate effort by the Republicans to disenfranchise voters across the

country. This was accomplished by mailing out cards to registered voters and then moving to purge from the voters list those whose cards were returned. Sandler indicated that in New Mexico there was a deliberate attempt by Republicans to purge people registered by third parties. He stated that there were intentional efforts to disenfranchise voters by election officials like Ken Blackwell in Ohio.

The problems with machine distribution in 2004 were not deliberate. However, Sandler believes that a large problem exists in the states because there are no laws that spell out a formula to allocate so many voting machines per voter.

Sandler was asked how often names were intentionally purged from the voter lists. He responded that there will be a lot of names purged as a result of the creation of the voter lists under HAVA. However, Sandler stated most wrongful purging results from incompetence. Sandler also said there was not much intimidation at the polls because most such efforts are deterred and that the last systematic effort was in Philadelphia in 2003 where Republicans had official looking cars and people with badges and uniforms, etc.

Sandler stated that deliberate dissemination of misinformation was more incidental, with individuals misinforming and not a political party. Disinformation did occur in small Spanish speaking communities.

Republicans point to instances of voter registration fraud but Sandler believes it did not occur, except for once in a blue moon. Sandler did not believe non-citizen voting was a problem. He also does not believe that there is voter impersonation at the polls and that Republicans allege this as a way of disenfranchising voters through restrictive voter identification rules.

Fraud and Intimidation Trends

Sandler stated that over the years there has been a shift from organized efforts to intimidate minority voters through voter identification requirements, improper purging, failure to properly register voters, not allocating enough voting machines, failure to properly use the provisional ballot, etc., by voter officials as well as systematic efforts by Republicans to deregister voters.

At the federal level, Sandler said, the voting division has become so politicized that it is basically useless now on intimidation claims. At the local level, Sandler does not believe politics prevents or hinders prosecution for vote fraud.

Sandler's Recommendations

Moving the voter lists to the state level is a good idea where carefully done
Provisional ballots rules should follow the law and not be over-used
No voter ID
Partisanship should be taken out of election administration, perhaps by giving that responsibility by someone other than the Secretary of State. There should at least be conflict of interest rules
Enact laws that allow private citizens to bring suit under state law

All suggestions from the DNC Ohio Report:

1. The Democratic Party must continue its efforts to monitor election law reform in all fifty states, the District of Columbia and territories.
2. States should be encouraged to codify into law all required election practices, including requirements for the adequate training of official poll workers.
3. States should adopt uniform and clear published standards for the distribution of voting equipment and the assignment of official pollworkers among precincts, to ensure adequate and nondiscriminatory access. These standards should be based on set ratios of numbers of machines and pollworkers per number of voters expected to turn out, and should be made available for public comment before being adopting.
4. States should adopt legislation to make clear and uniform the rules on voter registration.
5. The Democratic Party should monitor the processing of voter registrations by local election authorities on an ongoing basis to ensure the timely processing of registrations and changes, including both newly registered voters and voters who move within a jurisdiction or the state, and the Party should ask state Attorneys General to take action where necessary to force the timely updating of voter lists.
6. States should be urged to implement statewide voter lists in accordance with the Help America Vote Act ("HAVA"), the election reform law enacted by Congress in 2002 following the Florida debacle.
7. State and local jurisdictions should adopt clear and uniform rules on the use of, and the counting of, provisional ballots, and distribute them for public comment well in advance of each election day.
8. The Democratic Party should monitor the purging and updating of registered voter lists by local officials, and the Party should challenge, and ask state Attorneys General to challenge, unlawful purges and other improper list maintenance practices.
9. States should not adopt requirements that voters show identification at the polls, beyond those already required by federal law (requiring that identification be shown only by first time voters who did not show identification when registering.)
10. State Attorneys General and local authorities should vigorously enforce, to the full extent permitted by state law, a voter's right to vote without showing identification.
11. Jurisdictions should be encouraged to use precinct-tabulated optical scan systems with a computer assisted device at each precinct, in preference to touchscreen ("direct recording equipment" or "DRE") machines.
12. Touchscreen (DRE) machines should not be used until a reliable voter verifiable audit feature can be uniformly incorporated into these systems. In the event of a recount, the paper or other auditable record should be considered the official record.
13. Remaining punchcard systems should be discontinued.
14. States should ask state Attorneys General to challenge unfair or discriminatory distribution of equipment and resources where necessary, and the Democratic Party should bring litigation as necessary.
15. Voting equipment vendors should be required to disclose their source code so that it can be examined by third parties. No voting machine should have wireless connections or be able to connect to the Internet.
16. Any equipment used by voters to vote or by officials to tabulate the votes should be used

exclusively for that purpose. That is particularly important for tabulating/aggregating computers.

17. States should adopt "no excuse required" standards for absentee voting.
18. States should make it easier for college students to vote in the jurisdiction in which their school is located.
19. States should develop procedures to ensure that voting is facilitated, without compromising security or privacy, for all eligible voters living overseas.
20. States should make voter suppression a criminal offense at the state level, in all states.
21. States should improve the training of pollworkers.
22. States should expend significantly more resources in educating voters on where, when and how to vote.
23. Partisan officials who volunteer to work for a candidate should not oversee or administer any elections.

Interview with John Ravitz, Executive Director, New York City Board of Elections
February 16, 2006

Process

If there is an allegation of fraud or intimidation, the commissioners can rule to act on it. For example, in 2004 there were allegations in Queens that people had registered to vote using the addresses of warehouses and stores. The Board sent out teams of investigators to look into this. The Board then developed a challenge list that was to be used at the polls if any of the suspect voters showed up to vote.

If the allegation rises to a criminal level, the Board will refer it to the county district attorney. If a poll worker or election official is involved, the Board may conduct an internal investigation. That individual would be interviewed, and if there is validity to the claim, the Board would take action.

Incidences of Fraud and Intimidation

Mr. Ravitz says there have been no complaints about voter intimidation since he has been at the Board. There have been instances of over-aggressive poll workers, but nothing threatening. Voter fraud has also generally not been a problem.

In 2004, the problem was monitors from the Department of Justice intimidating voters. They were not properly trained, and were doing things like going into the booth with voters. The Board had to contact their Department supervisors to put a stop to it.

Charges regarding "ballot security teams" have generally just been political posturing.

The problem of people entering false information on voter registration forms is a problem. However, sometimes a name people allege is false actually turns out to be the voter's real name. Moreover, these types of acts do not involve anyone actually casting a fraudulent ballot.

With respect to the issue of voters being registered in both New York and Florida, the Board now compares its list with that of Florida and other places to address the problem. This will be less of an issue with the use of statewide voter registration databases, as information becomes easier to share. Despite the number of people who were on the voter registration lists of both jurisdictions, there was no one from those lists who voted twice.

Most of the problems at the polls have to do with poll workers not doing what they are supposed to do, not any sort of malfeasance. This indicates that improved training is the most important measure we can take.

There have been instances in which poll workers ask voters for identification when they shouldn't. However, the poll workers seem to do it when they cannot understand the name when the voter tells it to them. The Board has tried to train them that no matter what, the poll worker cannot ask for identification in order to get the person's name.
Absentee ballot fraud has also not been a problem in New York City. This is likely because absentee ballots are counted last – eight days after election day. This is so that they can be checked thoroughly and verified. This is a practice other jurisdictions might consider.

New York City has not had a problem with ex-felons voting or with ex-felons not knowing their voting rights. The City has not had any problems in recent years with deceptive practices, such as flyers providing misinformation about voting procedures.

Recommendations

- Better poll worker training
- Thorough inspection of absentee ballots subsequent to the election

Interview with John Tanner, Director, Civil Rights Division, U.S. Department of Justice

February 24, 2006

Note: Mr. Tanner's reluctance to share data, information and his perspective on solving the problems presented an obstacle to conducting the type of interview that would help inform this project as much as we would have hoped. Mr. Tanner would not give us any information about or data from the section's election complaint in-take phone logs; data or even general information from the Interactive Case Management (ICM) system-its formal process for tracking and managing work activities in pursuing complaints and potential violations of the voting laws; and would give us only a selected few samples of attorney-observer reports, reports that every Voting Section attorney who is observing elections at poll sites on Election Day is required to submit. He would not discuss in any manner any current investigations or cases the section is involved in. He also did not believe it was his position to offer us recommendations as to how his office, elections, or the voting process might be improved.

Authority and Process

The Voting Section, in contrast to the Public Integrity section as Craig Donsanto described it, typically looks only at systemic problems, not problems caused by individuals. Indeed, the section never goes after individuals because it does not have the statutory authority to do so. In

situations in which individuals are causing problems at the polls and interfering with voting rights, the section calls the local election officials to resolve it.

Federal voting laws only apply to state action, so the section only sues local governments – it does not have any enforcement power over individuals. Most often, the section enters into consent agreements with governments that focus on poll worker training, takes steps to restructure how polls are run, and deals with problems on Election Day on the spot. Doing it this way has been most effective – for example, while the section used to have the most observers in the South, systematic changes forced upon those jurisdictions have made it so now the section does not get complaints from the South.

The section can get involved even where there is no federal candidate on the ballot if there is a racial issue under the 14th and 15th Amendments.

When the section receives a complaint, attorneys first determine whether it is a matter of individuals or systemic. When deciding what to do with the complaint, the section errs on the side of referring it criminally because they do not want civil litigation to complicate a possible criminal case.

When a complaint comes in, the attorneys ask questions to see if there are even problems there that the complainant is not aware are violations of the law. For example, in the Boston case, the attorney did not just look at Spanish language cases under section 203, but also brought a Section 2 case for violations regarding Chinese and Vietnamese voters. When looking into a case, the attorneys look for specificity, witnesses and supporting evidence.

Often, lawsuits bring voluntary compliance.

Voter Intimidation

Many instances of what some people refer to as voter intimidation are more unclear now. For example, photographing voters at the polls has been called intimidating, but now everyone is at the polls with a camera. It is hard to know when something is intimidation and it is difficult to show that it was an act of intimidation.

The fact that both parties are engaging in these tactics now makes it more complicated. It makes it difficult to point the finger at any one side.

The inappropriate use of challengers on the basis of race would be a violation of the law. Mr. Tanner was unaware that such allegations were made in Ohio in 2004. He said there had never been an investigation into the abusive use of challengers.

Mr. Tanner said a lot of the challenges are legitimate because you have a lot of voter registration fraud as a result of groups paying people to register voters by the form. They turn in bogus registration forms. Then the parties examine the registration forms and challenge them because 200 of them, for example, have addresses of a vacant lot.

However, Mr. Tanner said the Department was able to informally intervene in challenger situations in Florida, Atkinson County, Georgia and in Alabama, as was referenced in a February 23 Op-Ed in USA Today. Mr. Tanner reiterated the section takes racial targeting very seriously.

Refusal to provide provisional ballots would be a violation of the law that the section would investigate.

Deceptive practices are committed by individuals and would be a matter for the Public Integrity Section. Local government would have to be involved for the voting section to become involved.

Unequal implementation of ID rules, or asking minority voters only for ID would be something the section would go after. Mr. Tanner was unaware of allegations of this in 2004. He said this is usually a problem where you have language minorities and the poll workers cannot understand the voters when they say their names. The section has never formally investigated or solely focused a case based on abuse of ID provisions. However, implementation of ID rules was part of the Section 2 case in San Diego. Mr. Tanner reiterated that the section is doing more than ever before.

When asked about the section's references to incidents of vote fraud in the documents related to the new state photo identification requirements, Mr. Tanner said the section only looks at retrogression, not at the wisdom of what a legislature does. In Georgia, for example, everyone statistically has identification, and more blacks have ID than whites. With respect to the letter to Senator Kit Bond regarding voter ID, the section did refer to the perception of concern about dead voters because of reporting by the Atlanta Journal-Constitution. It is understandable that when you have thousands of bogus registrations that there would be concerns about polling place fraud. Very close elections make this even more of an understandable concern. Putting control of registration lists in the hands of the states will be helpful because at this higher level of government you find a higher level of professionalism.

It is hard to know how much vote suppression and intimidation is taking place because it depends on one's definition of the terms – they are used very loosely by some people. However, the enforcement of federal law over the years has made an astounding difference so that the level of discrimination has plummeted. Registration of minorities has soared, as can be seen on the section's website. Mr. Tanner was unsure if the same was true with respect to turnout, but the gap is less. That information is not on the section's website.

The section is not filing as many Section 2 cases as compared to Section 203 cases because many of the jurisdictions sued under Section 2 in the past do not have issues anymore. Mr. Tanner said that race based problems are rare now.

NVRA has been effective in opening up the registration process. In terms of enforcement, Mr. Tanner said they do what they can when they have credible allegations. There is a big gap between complaints and what can be substantiated. Mr. Tanner stated that given the high quality of the attorneys now in the section, if they do not investigate it or bring action, that act complained of did not happen.

Recommendations
Mr. Tanner did not feel it was appropriate to make recommendations.

Interview with Kevin Kennedy, State Elections Director, State of Wisconsin

April 11, 2006

Background

Kennedy is a nonpartisan, appointed official. He has been in this position since 1983.

Complaints of fraud and intimidation do not usually come to Kennedy's office. Kennedy says that complainants usually take their allegations to the media first because they are trying to make a political point.

2004 Election Incidents of Fraud

The investigations into the 2004 election uncovered some cases of double voting and voting by felons who did not know they were not eligible to vote, but found no concerted effort to commit fraud. There have been a couple of guilty pleas as a result, although not a number in the double digits. The task force and news reports initially referred to 100 cases of double voting and 200 cases of felon voting, but there were not nearly that many prosecutions. Further investigation since the task force investigation uncovered that in some instances there were mis-marks by poll workers, fathers and sons mistaken for the same voter, and even a husband and wife marked as the same voter. The double votes that are believed to have occurred were a mixture of absentee and polling place votes. It is unclear how many of these cases were instances of voting in two different locations.

In discussing the case from 2000 in which a student claimed – falsely – that he had voted several times, Kennedy said that double voting can be done. The deterrent is that it's a felony, and that one person voting twice is not an effective way to influence an election. One would need to get a lot of people involved for it to work.

The task force set up to investigate the 2004 election found a small number of illegal votes but given the 7,000 alleged, it was a relatively small number. There was no pattern of fraud.

The one case Kennedy could recall of an organized effort to commit fraud was in the spring of 2003 or 2004. A community service agency had voters request that absentee ballots be sent to the agency instead of to the voters and some of those ballots were signed without the voters' knowledge. One person was convicted, the leader of the enterprise.

In Milwaukee, the main contention was that there were more ballots than voters. However, it was found that the 7,000 vote disparity was tied to poll worker error. The task force found that there was no concerted effort involved. Kennedy explained that there are many ways a ballot

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can get into a machine without a voter getting a number. These include a poll worker forgetting to give the voter one; someone does Election Day registration and fills out a registration form but does not get a number because the transaction all takes place at one table; and in Milwaukee, 20,000 voters who registered were not put on the list in time and as a short term solution the department sent the original registration forms to the polling places to be used instead of the list to provide proof of registration. This added another element of confusion that might have led to someone not getting a voter number.

The Republican Party used this original list and contracted with a private vendor to do a comparison with the U.S. postal list. They found initially that there were 5,000 bad addresses, and then later said there were 35,000 illegitimate addresses. When the party filed a complaint, the department told them they could force the voters on their list to cast a challenge ballot. On Election Day, the party used the list but found no actually voting from those addresses. Kennedy suspects that the private vendor made significant errors when doing the comparison.

In terms of noncitizen voting, Kennedy said that there is a Russian community in Milwaukee that the Republican Party singles out every year but it doesn't go very far. Kennedy has not seen much in the way of allegations of noncitizen voting.

However, when applying for a drivers license, a noncitizen could register to vote. There is no process for checking citizenship at this point, and the statewide registration database will not address this. Kennedy is not aware of any cases of noncitizen voting as a result, but it might have happened.

Kennedy said that the biggest concern seemed to be suspicions raised when groups of people are brought into the polling site from group homes, usually homes for the disabled. There are allegations that these voters are being told how to vote.

Incidents of Voter Intimidation

In 2004, there was a lot of hype about challenges, but in Wisconsin, a challenger must articulate a basis under oath. This acts as a deterrent, but at the same time it creates the potential that someone might challenge everyone and create long lines, keeping people from voting. In 2004, the Republican Party could use its list of suspect addresses as a legitimate basis for challenges, so there is the potential for abuse. It is also hard to train poll workers on that process. In 2004, there were isolated cases of problems with challengers.

In 2002, a flyer was circulated only in Milwaukee claiming that you had vote by noon. This was taken as an intimidation tactic by the Democrats.

Reforms

Wisconsin has had difficulty with its database because 1) they have had a hard time getting a good product out of the vendor and 2) until now there was no registration record for one-quarter of the voters. Any jurisdiction with fewer than 5000 voters was not required to have a registration list.

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In any case, once these performance issues are worked out, Kennedy does believe the statewide voter registration database will be very valuable. In particular, it will mean that people who move will not be on more than one list anymore. It should also address the double voting issue by identifying who is doing it, catching people who do it, and identifying where it could occur.

Recommendations

Better trained poll workers
Ensure good security procedures for the tabulation process and more transparency in the vote counting process
Conduct post-election audits

Interview with Lori Minnite, Barnard College

February 22, 2006

Background

Ms. Minnite is an assistant professor of political science at Barnard College. She has done substantial research on voter fraud and wrote the report "Securing the Vote." Ms. Minnite also did work related to an election lawsuit. The main question that she was asked to address in the lawsuit was---did election-day registration increase the possibility of fraud?

Securing the Vote

In Securing the Vote, Ms. Minnite found very little evidence of voter fraud because the historical conditions giving rise to fraud have weakened over the past twenty years. She stated that for fraud to take root a conspiracy was needed with a strong local political party and a complicit voter administration system. Since parties have weakened and there has been much improvement in the administration of elections and voting technology, the conditions no longer exist for large scale incidents of polling place fraud.

Ms. Minnite concentrates on fraud committed by voters not fraud committed by voting officials. She has looked at this issue on the national level and also concentrated on analyzing certain specific states. Ms. Minnite stressed that it is important to keep clear who the perpetrators of the fraud are and where the fraud occurs because that effects what the remedy should be. Often, voters are punished for fraud committed by voting officials.

Other Fraud Issues

Ms. Minnite found no evidence that NVRA was leading to more voter fraud. She supports non-partisan election administration. Ms. Minnite has found evidence that there is absentee ballot fraud. She can't establish that there is a certain amount of absentee ballot fraud or that it is the major kind of voter fraud.

Recommendations

Assure there are accurate voter records and centralize voter databases

Reduce partisanship in electoral administration.

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

March 7, 2006

Background

Ms. Perales is an attorney with the Mexican American Legal Defense Fund (MALDEF). MALDEF's mission is to foster sound public policies, laws and programs to safeguard the civil rights of the 40 million Latinos living in the United States and to empower the Latino community to fully participate in our society. One of the areas MALDEF works in is electoral issues, predominately centered on the Voting Rights Act. Ms. Perales did not seem to have a sense of the overall electoral issues in her working region (the southwest) effecting Hispanic voters and did not seem to want to offer her individual experiences and work activities as necessarily a perfect reflection of the challenges Hispanic voters face.

Largest Election Problems Since 2000

Santa Anna County, New Mexico-2004-intimidated voters by video taping them.

San Antonio-One African American voter subjected to a racial slur.

San Antonio-Relocated polling places at the last minute without Section 5 pre-clearance.

San Antonio-Closed polls while voters were still in line.

San Antonio-2003-only left open early voting polls in predominantly white districts.

San Antonio-2005-racially contested mayoral run-off election switched from touch screen voting to paper ballots.

Voter Fraud and Intimidation

In Texas, the counties are refusing to open their records with respect to Section 203 compliance (bilingual voting assistance), and those that did respond to MALDEF's request submitted incomplete information. Ms. Perales believes this in itself is a form of voter intimidation.

Ms. Perales said it is hard to say if the obstacles minorities confront in voting are a result of intentional acts or not because the county commission is totally incompetent. There have

continuously been problems with too few ballots, causing long lines, especially in places that had historically lower turnout. There is no formula in Texas for allocating ballots – each county makes these determinations.

When there is not enough language assistance at the polls, forcing a non-English speaker to rely on a family member to vote, that can suppress voter turnout.

Ms. Perales is not aware of deceptive practices or dirty tricks targeted at the Latino community.

There have been no allegations of illegal noncitizen voting in Texas. Indeed, the sponsor of a bill that would require proof of citizenship to vote could not provide any documentation of noncitizen voting in support of the bill. The bill was defeated in part because of the racist comments of the sponsor. In Arizona, such a measure was passed. Ms. Perales was only aware of one case of noncitizen voting in Arizona, involving a man of limited mental capacity who said he was told he was allowed to register and vote. Ms. Perales believes proof of citizenship requirements discriminate against Latinos.

Recommendations

Ms. Perales feels the laws are adequate, but that her organization does not have enough staff to do the monitoring necessary. This could be done by the federal government. However, even though the Department of Justice is focusing on Section 203 cases now, they have not even begun to scratch the surface. Moreover, the choices DOJ has made with respect to where they have brought claims do not seem to be based on any systematic analysis of where the biggest problems are. This may be because the administration is so ideological and partisan.

Ms. Perales does not believe making election administration nonpartisan would have a big impact. In Texas, administrators are appointed in a nonpartisan manner, but they still do not always have a nonpartisan approach. Each administrator tends to promote his or her personal view regardless of party.

Interview with Pat Rogers, private attorney

March 3, 2006

Background

In addition to his legal practice with *Modrall, Sperling, Roehl, Harris & Sisk*, Rogers also does some state-level lobbying for Verizon Wireless, GM, Dumont and other companies. His experience in election law goes back to 1988, where his first elections case was a defense against Bill Richardson, who had sued to get another candidate tossed off a ballot because of petition fraud. Since 1988, he has been involved in election cases at least once every two years.

2004 Litigation

In a case that ended before the New Mexico Supreme Court, Rogers represented the Green Party and other plaintiffs against the New Mexico Secretary of State for sending a directive telling local boards not to require ID for first time voters registering by mail. He argued that this watered-down ID check conflicted with what seemed fairly clear statutory requirements for first time voters. In 2004 these requirements were especially important due to the large presence of 3rd party organizations registering voters such as a 527 funded by Governor Richardson, ACORN, and others.

Plaintiffs were seeking a temporary restraining order requiring Secretary of State to follow the law. Yet the Supreme Court ultimately decided that, whether the directive was right or wrong, it was too late to require ID lest Bush v. Gore issues be raised.

Today, the issue is moot as the state legislature has changed the law, and the Secretary of State will no longer be in office. It seems unlikely they will send any policy directives to county clerks lest they violate due process/public notice.

Major issues in NM w/ regard to vote fraud

Registration fraud seems to be the major issue, and while the legislature has taken some steps, Rogers is skeptical of the effect they will have, considering the history of unequal application of election laws. He also believes there are holes in the 3rd party registration requirement deadlines.

Rogers views a national law requiring ID as the best solution to registration problems. Rather than imposing a burden he contends it will enhance public confidence in the simplest way possible.

Registration Fraud in 2004 election

It came to light that ACORN had registered a 13 year old. The father was an APD officer and received the confirmation, but it was sent to the next door address, a vacant house. They traced this to an ACORN employee and it was established that this employee had been registering others under 18.

Two weeks later, in a crack cocaine bust of Cuban nationals, one of those raided said his job was registering voters for ACORN, and the police found signatures in his possession for fictitious persons.

In a suspicious break-in at an entity that advertised itself as nonpartisan, only GOP registrations were stolen.

In another instance, a college student was allegedly fired for registering too many Republicans.

Rogers said he believed these workers were paid by the registration rather than hourly.

There have been no prosecution or convictions related to these incidents. In fact, there have been no prosecutions for election fraud in New Mexico in recent history. However, Rogers is

skeptical that much action can be expected considering the positions of Attorney General, Governor, and Secretary of State are all held by Democrats. Nor has there been any interest from the U.S. attorney—Rogers heard that U.S. attorneys were given instruction to hold off until after the election in 2004 because it would seem too political.

As part of the case against the Secretary of State regarding the identification requirement, the parties also sued ACORN. At a hearing, the head of ACORN, and others aligned with the Democratic Party called as witnesses, took the 5th on the stand as to their registration practices.

Other incidents

Very recently, there have been reports of vote buying in the town of Espanola. Originally reported by the *Rio Grande Sun*, a resident of a low-income housing project is quoted as saying it has been going on for 10-12 years. The Albuquerque Journal is now reporting this as well. So far the investigation has been extremely limited.

In 1996, there were some prosecutions in Espanola, where a state district judge found registration fraud.

In 1991, the chair of Democratic Party of Bertolino County was convicted on fraud. Yet she was pardoned by Clinton on same day as Marc Rich.

Intimidation/Suppression

Rogers believes the most notable example of intimidation in the 2004 election was the discovery of a DNC Handbook from Colorado advising Democratic operatives to widely report intimidation regardless of confirmation in order to gain media attention.

In-person polling place fraud

There have only been isolated instances of people reporting that someone had voted in their name, and Rogers doesn't believe there is any large scale conspiracy. Yet he contends that perspective misses the larger point of voter confidence. Although there has been a large public outcry for voter ID in New Mexico, it has been deflected and avoided by Democrats.

In 2004, there were more Democratic lawyers at the polls than there are lawyers in New Mexico. Rogers believes these lawyers had a positive impact because they deterred people from committing bad acts.

Counting Procedures

The Secretary of State has also taken the position that canvassing of the vote should be done in private. In NM, they have a 'county canvas' where they review and certify, after which all materials—machine tapes, etc.,—are centralized with the Secretary of State who does a final canvass for final certification. Conducting this in private is a serious issue, especially considering the margin in the 2000 presidential vote in New Mexico was only 366 votes. They wouldn't be

changing machine numbers, but paper numbers are vulnerable.

On a related note, NM has adopted state procedures that will ensure their reports are slower and very late, considering the 2000 late discovery of ballots. In a close race, potential for fraud and mischief goes up astronomically in the period between poll closing and reporting. Rogers believes these changes are going to cause national embarrassment in the future.

Rogers attributes other harmful effects to what he terms the Secretary of State's incompetence and inability to discern a nonpartisan application of the law. In the 2004 election, no standards were issued for counting provisional ballots. Furthermore, the Secretary of State spent over $1 million of HAVA money for 'voter education' in blatant self-promotional ads.

Recommendations

Rogers believes it would be unfeasible to have nonpartisan election administration and favors transparency instead. To make sure people have confidence in the election, there must be transparency in the whole process. Then you don't have the 1960 vote coming down to Illinois, or the Espanola ballot or Dona Anna County (ballots found there in the 2000 election). HAVA funds should also be restricted when you have an incompetent, partisan Secretary of State.

There should be national standards for reporting voting results so there is less opportunity for fraud in a close race. Although he is not generally an advocate of national laws, he does agree there should be more national uniformity into how votes are counted and recorded.

Interview with Rebecca Vigil-Giron, Secretary of State, New Mexico

March 24, 2006

Background

Vigil-Giron has been Secretary of State for twelve years and was the President of the National Association of Secretaries of State in 2004. Complaints of election fraud and intimidation are filed with the SOS office. She then decides whether to refer it to the local district attorney or the attorney general. Because the complaints are few and far between, the office does not keep a log of complaints; however, they do have all of the written complaints on file in the office.

Incidents of Fraud and Intimidation

During the 2004 election, there were a couple of complaints of polling place observers telling people outside the polling place who had just voted, and then the people outside were following the voters to their cars and videotaping them. This happened in areas that are mostly second and third generation Latinos. The Secretary sent out the sheriff in one instance of this. The perpetrators moved to a different polling place. This was the only incident of fraud or intimidation Vigil-Giron was aware of in New Mexico.

There have not been many problems on Native reservations because, unlike in many other states, in New Mexico the polling place is on the reservation and is run by local Native Americans. Vigil-Giron said that it does not make sense to have non-Natives running those polls because it is necessary to have people there who can translate. Because most of the languages are unwritten, the HAVA requirement of accessibility through an audio device will be very helpful in this regard. Vigil-Giron said she was surprised to learn while testifying at the Voting Rights Act commission hearings of the lack of sensitivity to these issues and the common failure to provide assistance in language minority areas.

In 2004 the U.S. Attorney, a Republican, suddenly announced he was launching an investigation into voter fraud without consulting the Secretary of State's office. After all of that, there was maybe one prosecution. Even the allegations involving third party groups and voter registration are often misleading. People doing voter registration drives encourage voters to register if they are unsure if they are already registered, and the voter does not even realize that his or her name will then appear on the voter list twice. The bigger problem is where registrations do not get forwarded to election administrators and the voter does not end up on the voting list on Election Day. This is voter intimidation in itself, Vigil-Giron believes. It is very discouraging for that voter and she wonders whether he or she will try again.

Under the bill passed in 2004, third parties are required to turn around voter registration forms very quickly between the time they get them and when they must be returned. If they fail to return them within 48 hours of getting them, they are penalized. This, Vigil-Giron believes, is unfair. She has tried to get the Legislature to look at this issue again.
Regarding allegations of vote buying in Espanola, Vigil-Giron said that the Attorney General is investigating. The problem in that area of New Mexico is that they are still using rural routes, so they have not been able to properly district. There has, as a result, been manipulation of where people vote. Now they seem to have pushed the envelope too far on this. The investigation is not just about vote buying, however. There have also been allegations of voters being denied translators as well as assistance at the polls.

Vigil-Giron believes there was voter suppression in Ohio in 2004. County officials knew thirty days out how many people had registered to vote, they knew how many voters there would be. Administrators are supposed to use a formula for allocation of voting machines based on registered voters. Administrators in Ohio ignored this. As a result, people were turned away at the polls or left because of the huge lines. This, she believes, was a case of intentional vote suppression.

A few years ago, Vigil-Giron heard that there may have been people voting in New Mexico and a bordering town in Colorado. She exchanged information with Colorado administrators and it turned out that there were no cases of double voting.

Recommendations

Vigil-Giron believes that linking voter registration databases across states may be a way to see if people who are registered twice are in fact voting twice.

The key to improving the process is better trained poll workers, who are certified, and know what to look for on Election Day. These poll workers should then work with law enforcement to ensure there are no transgressions.

There should be stronger teeth in the voter fraud laws. For example, it should be more than a fourth degree felony, as is currently the case.

Interview with Sarah Bell Johnson Interview

April 19, 2006

Procedures for Handling Fraud

Fraud complaints are directed first to the state Board of Elections. Unlike boards in other states, Kentucky's has no investigative powers. Instead, they work closely with both the Attorney General and the U.S. Attorney. Especially since the current administration took office, they have found the U.S. Attorney an excellent partner in pursuing fraud cases, and have seen many prosecutions in the last six years. She believes that there has been no increase in the incidence of fraud, but rather the increase in prosecutions is related to increased scrutiny and more resources.

Major Types of Fraud and Intimidation

Johnson says that vote buying and voter intimidation go hand in hand in Kentucky. While historically fraud activity focused on election day, in the last 20 years it has moved into absentee voting. In part, this is because new voting machines aren't easy to manipulate in the way that paper ballots were open to manipulation in the past, especially in distant rural counties. For this reason, she is troubled by the proliferation of states with early voting, but notes that there is a difference between absentee ballot and early voting on machines, which is far more difficult to manipulate.

Among the cases of absentee ballot fraud they have seen, common practice involves a group of candidates conspiring together to elect their specific slate. Nursing homes are an especially frequent target. Elderly residents request absentee ballots, and then workers show up and 'help' them vote their ballots. Though there have been some cases in the Eastern district of election day fraud, most have been absentee.

Johnson argues that it is hard to distinguish between intimidation and vote buying. They have also seen instances where civic groups and church groups intimidate members to vote in a specific manner, not for reward, but under threat of being ostracized or even telling them they will go to hell.

While she is aware of allegations of intimidation by the parties regarding minority precincts in Louisville, the board hasn't received calls about it and there haven't been any prosecutions.

Challengers

Challengers are permitted at the polls in Kentucky. Each party is allowed two per location, and they must file proper paperwork. There is a set list of defined reasons for which they can challenge a voter, such as residency, and the challengers must also fill out paperwork to conduct a challenge.

As for allegations of challengers engaging in intimidation in minority districts, Johnson notes that challengers did indeed register in Jefferson County, and filed the proper paperwork, although they ultimately did not show up on election day.

She finds that relatively few challengers end up being officially registered, and that the practice has grown less common in recent years. This is due more to a change of fashion than anything. And after all, those wishing to affect election outcomes have little need for challengers in the precinct when they can target absentee voting instead.

In the event that intimidation is taking place, Kentucky has provisions to remove disruptive challengers, but this hasn't been used to her knowledge.

Prosecutions

Election fraud prosecutions in Kentucky have only involved vote buying. This may be because that it is easier to investigate, by virtue of a cash and paper trail which investigators can follow. It is difficult to quantify any average numbers about the practice from this, due in part to the five year statute of limitations on vote buying charges. However, she does not believe that vote-buying is pervasive across the state, but rather confined to certain pockets.

Vote-hauling Legislation

Vote hauling is a common form of vote buying by another name. Individuals are legally paid to drive others to the polls, and then divide that cash in order to purchase votes. Prosecutions have confirmed that vote hauling is used for this purpose. While the Secretary of State has been committed to legislation which would ban the practice, it has failed to pass in the past two sessions.

Paying Voter Registration Workers Legislation

A law forbidding people to pay workers by the voter registration card or for obtaining cards with registrations for a specific party was passed this session. Individuals working as part of a registration campaign may still be paid by hour. Kentucky's experience in the last presidential election illustrates the problems arising from paying individuals by the card. That contest included a constitutional amendment to ban gay marriage on the ballot, which naturally attracted the attention of many national groups. One group paying people by the card resulted in the registrar being inundated with cards, including many duplicates in the same bundle, variants on names, and variants on addresses. As this practice threatens to overwhelm the voter registration process, Kentucky views it as constituting malicious fraud.

Deceptive practices

Other than general reports in the news, Johnson hasn't received any separate confirmation or reports of deceptive practices, i.e., false and misleading information being distributed to confuse voters.

Effect of Kentucky's Database

Johnson believes Kentucky's widely praised voter registration database is a key reason why the state doesn't have as much fraud as it might, especially the types alleged elsewhere like double and felon voting. While no database is going to be perfect, the connections with other state databases such as the DMV and vital statistics have been invaluable in allowing them to aggressively purge dead weight and create a cleaner list. When parties use their database list they are notably more successful. Johnson wonders how other states are able to conduct elections without a similar system.

Some factors have made especially important to their success. When the database was instituted in 1973, they were able to make everyone in the state re-register and thus start with a clean database. However, it is unlikely any state could get away with this today.

She is also a big supporter of a full Social Security number standard, as practiced in Kentucky. The full Social Security, which is compared to date of birth and letters in the first and last name, automatically makes matching far more accurate. The huge benefits Kentucky has reaped make Johnson skeptical of privacy concerns arguing for an abbreviated Social Security number. Individuals are willing to submit their Social Security number for many lesser purposes, so why not voting? And in any event, they don't require a Social Security number to register (unlike others such as Georgia). Less than a percent of voters in Kentucky are registered under unique identifiers, which the Board of Elections then works to fill in the number through cross referencing with the DMV.

Recommendations

Johnson believes the backbone of effective elections administration must be standardized procedures, strong record keeping, and detailed statutes. In Kentucky, all counties use the same database and the same pre election day forms. Rather than seeing that as oppressive, county officials report that the uniformity makes their jobs easier.

This philosophy extends to the provisional ballot question. While they did not have a standard in place like HAVA's at the time of enactment, they worked quickly to put a uniform standard in place.

They have also modified forms and procedures based on feedback from prosecutors. Johnson believes a key to enforcing voting laws is working with investigators and prosecutors and ensuring that they have the information they need to mount cases.

She also believes public education is important, and that the media could do more to provide information about what is legal and what is illegal. Kentucky tries to fulfill this role by information in polling places, press releases, and high profile press conferences before elections. She notes that they deliberately use language focusing on fraud *and* intimidation.

Johnson is somewhat pessimistic about reducing absentee ballot fraud. Absentee ballots do have a useful function for the military and others who cannot get to the polling place, and motivated individuals will always find a way to abuse the system if possible. At a minimum, however, she recommends that absentee ballots should require an excuse. She believes this has helped reduce abuse in Kentucky, and is wary of no-excuse practices in other states.

Interview with Steve Ansolobohere and Chandler Davidson
February 17, 2006

Methodology suggestions

In analyzing instances of alleged fraud and intimidation, we should look to criminology as a model. In criminology, experts use two sources: the Uniform Crime Reports, which are all reports made to the police, and the Victimization Survey, which asks the general public whether a particular incident has happened to them. After surveying what the most common allegations are, we should conduct a survey of the general public that asks whether they have committed certain acts or been subjected to any incidents of fraud or intimidation. This would require using a very large sample, and we would need to employ the services of an expert in survey data collection. Mr. Ansolobohere recommended Jonathan Krosnick, Doug Rivers, and Paul Sniderman at Stanford; Donald Kinder and Arthur Lupia at Michigan; Edward Carmines at Indiana; and Phil Tetlock at Berkeley. In the alternative, Mr. Ansolobohere suggested that the EAC might work with the Census Bureau to have them ask different, additional questions in their Voter Population Surveys.

Mr. Chandler further suggested it is important to talk to private election lawyers, such as Randall Wood, who represented Ciro Rodriguez in his congressional election in Texas. Mr. Ansolobohere also recommended looking at experiments conducted by the British Election Commission.

Incidents of Fraud and Intimidation

Mr. Davidson's study for the Lawyers Committee for Civil Rights on the Voting Rights Act documented evidence of widespread difficulty in the voting process. However, he did not attempt to quantify whether this was due to intentional, malevolent acts. In his 2005 report on ballot security programs, he found that there were many allegations of fraud made, but not very many prosecutions or convictions. He saw many cases that did go to trial and the prosecutors lost on the merits.

In terms of voter intimidation and vote suppression, Mr. Davidson said he believes the following types of activities do occur: videotaping of voters' license plates; poll workers asking

intimidating questions; groups of officious-looking poll watchers at the poll sites who seem to be some sort of authority looking for wrongdoing; spreading of false information, such as phone calls, flyers, and radio ads that intentionally mislead as to voting procedures.

Mr. Ansolobohere believes the biggest problem is absentee ballot fraud. However, many of these cases involve people who do not realize what they are doing is illegal, for example, telling someone else how to vote. Sometimes there is real illegality occurring however. For example, vote selling involving absentee ballots, the filling out of absentee ballots en masse, people at nursing homes filling out the ballots of residents, and there are stories about union leaders getting members to vote a certain way by absentee ballot. This problem will only get bigger as more states liberalize their absentee ballot rules. Mr. Chandler agreed that absentee ballot fraud was a major problem.

Recommendations

Go back to "for cause" absentee ballot rules, because it is truly impossible to ever ensure the security of a mail ballot. Even in Oregon, there was a study showing fraud in their vote by mail system.

False information campaigns should be combated with greater voter education. Los Angeles County's voter education program should be used as a model.

Interview with Tracy Campbell, author

March 3, 2006

Background

Campbell's first book on election fraud looked at Ed Pritchard, a New Deal figure who went to jail for stuffing ballot boxes. While his initial goal in writing that book was to find out why Pritchard had engaged in vote stealing, his growing understanding of a pervasive culture of electoral corruption led him to consider instead how it was that Pritchard was ever caught. In 1998, he started working on a book regarding fraud in Kentucky, which quickly became a national study. He hoped to convey the 'real politics' which he feels readers, not to mention academics, have little sense about. While less blatant than in previous eras, fraud certainly still occurs, and he mentions some examples in his book. The major trend of the past 60-70 years has been that these tactics have grown more subtle.

While he hasn't conducted any scientific study of the current state of fraud, his sense as a historian is that it is seems naive, after generations of watching the same patterns and practices influence elections, to view suspect election results today as merely attributable to simple error.

Vote-buying and absentee fraud

Campbell sees fraud by absentee ballot and vote buying as the greatest threats to fair elections today. He says vote fraud is like real estate: location, location, location—the closer you can keep the ballots to the courthouse the better. Absentee ballots create a much easier target for vote brokers who can manage voting away from the polling place, or even mark a ballot directly, in exchange for, say, $50—or even more if an individual can bring their entire family. He has noted some small counties where absentee ballots outnumber in-person ballots.

However, few people engaged in this activity would call it 'purchasing' a vote. Instead, it is candidate Jones' way of 'thanking' you for a vote you would have cast in any event. The issue is what happens if candidate Smith offers you more. Likewise, the politicians who engage in vote fraud don't see it as a threat to the republic but rather as a game they have to play in order to get elected.

Regional patterns

Campbell suggests such practices are more prevalent in the South than the Northern states, and even more so compared to the West. The South has long been characterized as particularly dangerous in intimidation and suppression practices—throughout history, one can find routine stories of deaths at the polls each year. While he maintains that fraud seems less likely in the Western states, he sees the explosion of mail in and absentee ballots there as asking for trouble.

Poll site closings as a means to suppress votes

Campbell points to a long historical record of moving poll sites in order to suppress votes. Polling places in the 1800s were frequently set-up on rail cars and moved further down the line to suppress black votes.

He would include door-to-door canvassing practices here, as well as voting in homes, which was in use in Kentucky until only a few years ago. All of these practices have been justified as making polling places 'more accessible' while their real purpose has been to suppress votes.

Purge lists

Purge lists are, of course, needed in theory, yet Campbell believes the authority to mark names off the voter rolls presents extensive opportunity for abuse. For this reason, purging must be done in a manner that uses the best databases, and looks at only the most relevant information. When voters discover their names aren't on the list when they go to vote, for example, because they are "dead," it has a considerable demoralizing effect. Wrongful purging takes place both because of incompetence and as a tool to intentionally disenfranchise.

Campbell believes transparency is the real issue here. An hour after the polls close, we tend to just throw up our hands and look the other way, denying voters the chance to see that discrepancies are being rectified. He believes the cost in not immediately knowing election outcomes is a small price to pay for getting results rights and showing the public a transparent process.

Deceptive practices

Today's deceptive practices have are solidly rooted in Reconstruction-era practices—i.e. phony ballots, the Texas 'elimination' ballot. The ability to confuse voters is a powerful tool for those looking to sway elections.

Language minorities

Campbell argues there is a fine line between offering help to non-English speakers and using that help against them. A related issue, particularly in the South, is taking advantage of the illiterate.

Current intimidation

Another tactic Campbell considers an issue today is polling place layout: the further vote suppressers can keep people away from the polls, the better. Practices such as photographing people leaving a polling place may also tie into vote-buying, where photos are used to intimidate and validate purchased votes. A good way to combat such practices is by keeping electioneering as far from the polls as possible.

Recommendations

Specific voting administration recommendations Campbell advocates would include reducing the use of absentee ballots and improving the protective zone around polling places.

Campbell would also like to see enforcement against fraud stepped up and stiffer penalties enacted, as current penalties make the risk of committing fraud relatively low. He compares the risk in election fraud similar to steroid use in professional sports—the potential value of the outcome is far higher than the risk of being caught or penalized for the infraction, so it is hard to prevent people from doing it. People need to believe they will pay a price for engaging in fraud or intimidation. Moreover, we need to have the will to kick people out of office if necessary.

He is skeptical of the feasibility of nonpartisan election administration, as he believes it would be difficult to find people who care about politics yet won't lean one way or the other—such an attempt would be unlikely to get very far before accusations of partisanship emerged. He considers the judiciary the only legitimate check on election fraud.

Interview with Wade Henderson, Executive Director, Leadership Conference for Civil Rights

February 14, 2006

Data Collection

Mr. Henderson had several recommendations as to how to better gather additional information and data on election fraud and intimidation in recent years. He suggested interviewing the

following individuals who have been actively involved in Election Protection and other similar efforts:

- Jon Greenbaum, Lawyers Committee for Civil Rights
- Tanya Clay, People for the American Way
- Melanie, Campbell, National Coalition for Black Political Participation
- Larry Gonzalez, National Association of Latino Election Officers
- Jacqueline Johnson, National Congress of American Indians
- Chellie Pingree, Common Cause
- Jim Dickson, disability rights advocate
- Mary Berry, former Chair of the US Commission on Civil Rights, currently at the University of Pennsylvania
- Judith Browne and Eddie Hailes, Advancement Project (former counsel to the US Commission on Civil Rights)
- Robert Rubin, Lawyers Committee for Civil Rights – San Francisco Office
- Former Senator Tom Daschle (currently a fellow at The Center for American Progress)

He also recommended we review the following documents and reports:

- The 2004 litigation brought by the Advancement Project and SEIU under the 1981 New Jersey Consent Decree
- Forthcoming LCCR state-by-state report on violations of the Voting Rights Act
- Forthcoming Lawyers Committee report on violations of the Voting Rights Act (February 21)

Types of Fraud and Intimidation Occurring

Mr. Henderson said he believed that the kinds of voter intimidation and suppression tactics employed over the last five years are ones that have evolved over many years. They are sometimes racially based, sometimes based on partisan motives. He believes the following types of activity have actually occurred, and are not just a matter of anecdote and innuendo, and rise to the level of either voter intimidation or vote suppression:

- Flyers with intentional misinformation, such as ones claiming that if you do not have identification, you cannot vote, and providing false dates for the election
- Observers with cameras, which people associate with potential political retribution or even violence
- Intimidating police presence at the polls
- Especially in jurisdictions that authorize challenges, the use of challenge lists and challengers goes beyond partisanship to racial suppression and intimidation
- Unequal deployment of voting equipment, such as occurred in Ohio. Also, he has seen situations in which historically Black colleges will have one voting machine while other schools will have more.

Mr. Henderson believes that these matters are not pursued formally because often they involve activities that current law does not reach. For example, there is no law prohibiting a Secretary of State from being the head of a political campaign, and then deploying voting machines in an uneven manner. There is no way to pursue that. Also, once the election is over, civil litigation

becomes moot. Finally, sometimes upon reflection after the campaign, some of the activities are not as sinister as believed at the time.

Mr. Henderson believes government does not engage in a sustained investigation of these matters or pursue any kind of resolution to them. LCCR has filed a FOIA request with both the Civil Rights Division and the Criminal Division of the Department of Justice to examine this issue.

Election Protection activities will be intensified for the 2006 elections, although the focus may shift somewhat given the implementation of new HAVA requirements.

Recommendations for Reform

There was tremendous concern after the 2004 election about conflicts of interest – the "Blackwell problem" – whereby a campaign chair is also in charge of the voting system. We need to get away from that.

He also supports Senator Barak Obama's bill regarding deceptive practices, and is opposed to the voter identification laws passing many state legislatures.

- States should adopt election-day registration, in order to boost turnout as well as to allow eligible voters to immediately rectify erroneous or improperly purged registration records
- Expansion of early voting & no-excuse absentee voting, to boost turnout and reduce the strain on election-day resources.
- Provisional ballot reforms:
    - Should be counted statewide – if cast in the wrong polling place, votes should still be counted in races for which the voter was eligible to vote (governor, etc.)
    - Provisional ballots should also function as voter registration applications, to increase the likelihood that voters will be properly registered in future elections
- Voter ID requirements: states should allow voters to use signature attestation to establish their identity
- The Department of Justice should increase enforcement of Americans with Disabilities Act and the accessibility requirements of the Help America Vote Act
- Statewide registration databases should be linked to social service agency databases
- Prohibit chief state election officials from simultaneously participating in partisan electoral campaigns within their states
- Create and enforce strong penalties for deceptive or misleading voting practices

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

Brennan Center findings on fraud

The Brennan Center's primary work on fraud is their report for the Carter Baker Commission with commissioner Spencer Overton, written in response to the Commission's ID

recommendations. Brennan reviewed all existing reports and election contests related to voter fraud. They believe the contests serve as an especially good record of whether or not fraud exists, as the parties involved in contested elections have a large incentive to root out fraudulent voters. Yet despite this, the incidence of voter impersonation fraud discovered is extremely low—something on the order 1/10000th of a percentage of voters. See also the brief Brennan filed on 11th circuit in Georgia photo ID case which cites sources in Carter Baker report and argues the incidence of voter fraud too low to justify countermeasures.

Among types of fraud, they found impersonation, or polling place fraud, is probably the least frequent type, although other types, such as absentee ballot fraud are also very infrequent. Weiser believes this is because impersonation fraud is more likely to be caught and is therefore not worth the risk. Unlike in an absentee situation, actual poll workers are present to disrupt impersonation fraud, for instance, by catching the same individual voting twice. She believes perhaps one half to one quarter of the time the person will be caught. Also, there is a chance the pollworker will have personal knowledge of the person. Georgia Secretary of State Cathy Cox has mentioned that there are many opportunities for discovery of in person fraud as well. For example, if one votes in the name of another voter, and that voter shows up at the polls, the fraud will be discovered.

Weiser believes court proceedings in election contests are especially useful. Some are very extensive, with hundreds of voters brought up by each side and litigated. In both pre-election challenges and post-election contests, parties have devoted extraordinary resources into 'smoking out' fraudulent voters. Justin Leavitt at Brennan scoured such proceedings for the Carter Baker report, which includes these citations. Contact him for answers to particular questions.

Countermeasures/statewide databases

Brennan has also considered what states are doing to combat impersonation fraud besides photo ID laws, although again, it seems to be the rarest kind of fraud, beyond statistically insignificant. In the brief Brennan filed in the Georgia case, the Center detailed what states are already doing to effectively address fraud. In another on the web site includes measures that can be taken that no states have adopted yet. Weiser adds that an effort to look at strategies states have to prevent fraud, state variations, effectiveness, ease of enforcement would be very useful.

Weiser believes the best defense against fraud will be better voter lists—she argues the fraud debate is actually premature because states have yet to fully implement the HAVA database requirement. This should eliminate a great deal of 'deadwood' on voter rolls and undermine the common argument that fraud is made possible by this deadwood. This was the experience for Michigan, which was able to remove 600,000 names initially, and later removed almost 1 million names from their rolls. It is fairly easy to cull deadwood from lists due to consolidation at the state level—most deadwood is due to individuals moving within the state and poor communication between jurisdictions. (Also discuss with Chris Thomas, who masterminded the Michigan database for more information and a historical perspective.)

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Regarding the question of whether the effect of this maintenance on fraud in Michigan can be quantified, Weiser would caution against drawing direct lines between list problems and fraud. Brennan has found various groups abusing the existence of list deadwood to make claims about fraudulent voting. This is analyzed in greater detail in the Brennan Center's critique of a purge list produced by the NJ Republican party, and was illustrated by the purge list produced by the state of Florida. When compiling such lists and doing comparisons, sound statistical methods must be utilized, and often are not.

The NJ GOP created a list and asked NJ election officials to purge names of ineligible voters on it. Their list assumed that people appearing on the list twice had voted twice. Brennan found their assumptions shoddy and based on incorrect statistical practices, such as treating individuals with the same name and birthdays as duplicates, although this is highly unlikely according to proper statistical methods. Simply running algorithms on voter lists creates a number of false positives, does not provide an accurate basis for purging, and should not be taken as an indicator of fraud.

Regarding the Florida purge list, faulty assumptions caused the list to systematically exclude Hispanics while overestimating African Americans. Matching protocols required that race fields match exactly, despite inconsistent fields across databases.

The kinds of list comparisons that are frequently done to allege fraud are unreliable. Moreover, even if someone is on a voter list twice, that does not mean that voter has voted twice. That, in fact, is almost never the case.

Ultimately, even matching protocols without faulty assumptions will have a 4 percent to 35 percent error rate —that's simply the nature of database work. Private industry has been working on improving this for years. Now that HAVA has introduced a matching requirement, even greater skepticism is called for in judging the accuracy of list maintenance.

Intimidation and Suppression

Brennan does not have a specific focus here, although they do come across it and have provided assistance on bills to prevent suppression and intimidation. They happen to have an extensive paper file of intimidating fliers and related stories from before the 2004 election. (They can supply copies after this week).

Challengers

Brennan has analyzed cases where challenger laws have been beneficial and where they have been abused. See the decision and record from the 1982 NJ vs. RNC case for some of the history of these laws. Brennan is currently working on developing a model challenger law.

Weiser believes challenge laws with no requirement that the challenger have any specific basis for the challenge or showing of ineligibility are an invitation to blanket harassing challenges and have a range of pitfalls. State laws are vague and broad and often involve arcane processes such as where voters are required to meet a challenge within 5 days. There are incentives for political abuse, potential for delaying votes and disrupting the polls, and they are not necessarily directed

toward the best result. Furthermore, when a voter receives a mailer alleging vote fraud with no basis, even the mere fact of a challenge can be chilling. A voter does not want to have to go through a quasi-court proceeding in order to vote.

Brennan recommends challenge processes that get results before election, minimize the burden for voters, and are restricted at polling place to challenges by poll workers and election officials, not voters. They believe limitless challenges can lead to pandemonium—that once the floodgates are open they won't stop.

Recommendations

Intimidation— Weiser believes Sen. Barak Obama's bill is a good one for combating voter harassment and deceptive practices. Many jurisdictions do not currently have laws prohibiting voter harassment and deceptive practices.

Fraud— Current state and federal codes seem sufficient for prosecuting fraud. Weiser doesn't consider them under-enforced, and sees no need for additional laws.

Voter lists— New legislation or regulations are needed to provide clear guidance and standards for generating voter lists and purging voters, otherwise states could wrongfully disenfranchise eligible voters.

Challengers—Challenge laws need to be reformed, especially ones that allow for pre-election mass challenges with no real basis. There is no one size fits all model for challenger legislation, but some bad models involving hurdles for voters lead to abuse and should be reformed. There should be room for poll workers to challenge fraudulent voters, but not for abuse.

Also useful would be recommendations for prosecutors investigating fraudulent activity, How should they approach these cases? How should they approach cases of large scale fraud/intimidation? While there is sufficient legislative cover to get at any election fraud activity, questions remain about what proper approaches and enforcement strategies should be.

Interview with Bill Groth, Attorney for the Plaintiffs in Indiana Identification Litigation
February 22, 2006

Fraud in Indiana

Indiana has never charged or prosecuted anyone for polling place fraud. Nor has any empirical evidence of *voter impersonation* fraud or dead voter fraud been presented. In addition, there is no record of any credible complaint about *voter impersonation* fraud in Indiana. State legislators signed an affidavit that said there had never been impostor voting in Indiana. At the same time, the Indiana Supreme Court has not necessarily required evidence of voter fraud before *approving* legislative attempts to address fraud.

The state attorney general has conceded that there is no concrete fraud in Indiana, but has instead referred to instances of fraud in other states. Groth filed a detailed motion to strike evidence such as John Fund's book relating to other states, arguing that none of that evidence was presented to the legislature and that it should have been in the form of sworn affidavits, so that it would have some indicia of verifiability.

Photo ID law

By imposing restrictive ID measures, Groth contends you will discourage 1,000 times more legitimate voters than illegitimate voters you might protect against. He feels the implementation of a REAL ID requirement is an inadequate justification for the law, as it will not affect the upcoming 2006 election where thousands of registered voters will be left without proper ID. In addition, he questions whether REAL ID will be implemented as planned in 2008 considering the backlash against the law so far. He also feels ID laws are unconstitutional because of inconsistent application.

Statewide database as remedy

Groth believes many problems will be addressed by the statewide database required under HAVA. To the extent that the rolls in Indiana are bloated, it is because state officials have not complied with NVRA list maintenance requirements. Thus, it is somewhat disingenuous for them to use bloated voter rolls as a reason for imposing additional measures such as the photo ID law. Furthermore, the state has ceded to the counties the obligation to do maintenance programs, which results in a hit or miss process (see discussion in reply brief, p 26 through p. 28).

Absentee fraud

To the extent that there has been an incidence of fraud, these have all been confined to absentee balloting. Most notably the East Chicago mayoral election case where courts found absentee voting fraud had occurred. See: Pabey vs. Pastrick 816 NE 2nd 1138 Decision by the Indiana Supreme Court in 2004.

Intimidation and vote suppression

Groth is only aware of anecdotal evidence supporting intimidation and suppression activities. While he considers the sources of this evidence credible, it is still decidedly anecdotal. Instances he is aware of include police cars parked in front of African American polling places. However, most incidents of suppression which are discussed occurred well in the past. Trevor Davidson claims a fairly large scale intimidation program in Louisville.

Challengers

There was widespread information that the state Republican Party had planned a large scale challenger operation in Democratic precincts for 2004, but abandoned the plan at the last minute.

Last year the legislature made a crucial change to election laws which will allow partisan challengers to be physically inside the polling area next to members of the precinct board. Previously, challengers at the polling place have been restricted to the 'chute,' which provides a buffer zone between voting and people engaging in political activity. That change will make it much easier to challenge voters. As there is no recorded legislative history in Indiana, it is difficult to determine the justification behind this change. As both chambers and the governorship are under single-party control, the challenger statute was passed under the radar screen.

Photo ID and Challengers

Observers are especially concerned about how this change will work in conjunction with the photo ID provision. Under the law, there are at least two reasons why a member of the precinct board or a challenger can raise object to an ID: whether a presented ID conforms to ID standards, and whether the photo on an ID is actually a picture of the voter presenting it. The law does not require bipartisan agreement that a challenge is valid. All it takes is one challenge to raise a challenge to that voter, and that will lead to the voter voting by provisional ballot.

Provisional ballot voting means that voter must make a second trip to the election board (located at the county seat) within 13 days to produce the conforming ID or to swear out an affidavit that they are who they claim to be. This may pose a considerable burden to voters. For example, Indianapolis and Marion County are coterminous—anyone challenged under the law will be required to make second trip to seat of government in downtown Indianapolis. If the voter in question did not have a driver's license in the first place, they will likely need to arrange transportation. Furthermore, in most cases the election result will already be known.

The law is vague about acceptable cause for challenging a voter's ID. Some requirements for valid photo ID include being issued by state or fed gov't, w/ expiration date, and the names must conform exactly. The League of Women Voters is concerned about voters with hyphenated names, as the Indiana DMV fails to put hyphens on driver's licenses potentially leading to a basis for challenge. Misspelling of names would also be a problem. The other primary mode of challenge is saying the photo doesn't look like the voter, which could be happen in a range of instances. Essentially, the law gives unbridled discretion to challengers to decide what conforms and what does not.

Furthermore, there is no way to determine whether a challenge is in good or bad faith, and *there is* little penalty for making a bad faith challenge. The fact that there are no checks on the challenges at the precinct level, or even a requirement of concurrence from an opposing party challenger leads to the concern that challenge process will be abused. The voter on the other hand, will need to get majority approval of county election board members to defeat the challenge.

Groth suggests the political situation in Indianapolis also presents a temptation to abuse this process, as electoral margins are growing increasingly close due to shifting political calculus.

Other cases

Groth's other election law work has included a redistricting dispute, a dispute over ballot format, NVRA issues, and a case related to improper list purging, but nothing else related to fraud or intimidation. The purging case involved the election board attempting to refine its voter list by sending registration postcards to everyone on the list. When postcards didn't come back they wanted to purge those voters. Groth blames this error more on incompetence, than malevolence, however, as the county board is bipartisan. (The Indiana Election Commission and the Indiana election division are both bipartisan, but the 92 county election boards which will be administering photo id are controlled by one political party or the other—they are always an odd number, with the partisan majority determined by who controls the clerk of circuit court office.)

Recommendations

Supports nonpartisan administration of elections. Indiana specific recommendations including a longer voting day, time off for workers to vote, and an extended registration period.

He views the central problem of the Indiana photo ID law is that the list of acceptable forms of ID is too narrow and provides no fallback to voters without ID. At the least, he believes the state needs to expand the list so that most people will have at least one. If not, they should be allowed to swear an affidavit regarding their identity, under penalty of perjury/felony prosecution. This would provide sufficient deterrence for anyone considering impersonation fraud. He believes absentee ballot fraud should be addressed by requiring those voters to produce ID as well, as under HAVA.

His personal preference would be signature comparison. Indiana has never encountered an instance of someone trying to forge a name in the poll book, and while this leaves open the prospect of dead voters, that danger will be substantially diminished by the statewide database. But if we are going to have some form of ID, he believes we should apply it to everyone and avoid disenfranchisement, provided they swear an affidavit.

Interview with Neil Bradley, February 21, 2004

Voter Impersonation Cases (issue the Georgia ID litigation revolves around)

Mr. Bradley asserted that Georgia Secretary of State Cox stated in the case at issue: that she clearly would know if there had been any instances of voter impersonation at the polls; that she works very closely with the county and local officials and she would have heard about voter impersonation from them if she did not learn about it directly; and that she said that she had not heard of "any incident"---which includes acts that did not rise to the level of an official investigation or charges.

Mr. Bradley said that it is also possible to establish if someone has impersonated another voter at the polls. Officials must check off the type of voter identification the voter used. Voters without ID may vote by affidavit ballot. One could conduct a survey of those voters to see if they in fact voted or not.

The type of voter fraud that involves impersonating someone else is very unlikely to occur. If someone wants to steal an election, it is much more effective to do so using absentee ballots. In order to change an election outcome, one must steal many votes. Therefore, one would have to have lots of people involved in the enterprise, meaning there would be many people who know you committed a felony. It's simply not an efficient way to steal an election.

Mr. Bradley is not aware of any instance of voter impersonation anywhere in the country except in local races. He does not believe it occurs in statewide elections.

Voter fraud and intimidation in Georgia

Georgia's process for preventing ineligible ex-felons from casting ballots has been improved since the Secretary of State now has the power to create the felon purge list. When this was the responsibility of the counties, there were many difficulties in purging felons because local officials did not want to have to call someone and ask if he or she was a criminal.

The State Board of Elections has a docket of irregularity complaints. The most common involve an ineligible person mailing in absentee ballots on behalf of another voter.

In general, Mr. Bradley does not think voter fraud and intimidation is a huge problem in Georgia and that people have confidence in the vote. The biggest problems are the new ID law; misinformation put out by elections officials; and advertisements that remind people that vote fraud is a felony, which are really meant to be intimidating. Most fraud that does occur involves an insider, and that's where you find the most prosecutions. Any large scale fraud involves someone who knows the system or is in the courthouse.

Prosecution of Fraud and Intimidation

Mr. Bradley stated that fraud and intimidation are hard to prosecute. However, Mr. Bradley made contradictory statements. When asked whether the decision to prosecute on the county level was politically motivated, he first said "no." Later, Mr. Bradley reversed himself stating the opposite.

Mr. Bradley also stated that with respect to US Attorneys, the message to them from the top is that this is not a priority. The Georgia ACLU has turned over information about violations of the Voting Rights Act that were felonies, and the US Attorney has done nothing with the information. The Department of Justice has never been very aggressive in pursuing cases of vote suppression, intimidation and fraud. But, the Georgia ACLU has not contacted Craig Donsanto in DC with information of voter fraud.

Mr. Bradley believes that voter fraud and intimidation is difficult to prove. It is very hard to collect the necessary factual evidence to make a case, and doing so is very labor-intensive.

Recommendations

In Georgia, the Secretary of State puts a lot of work into training local officials and poll workers,

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and much of her budget is put into that work. Increased and improved training of poll workers, including training on how to respectfully treat voters, is the most important reform that could be made.

Mr. Bradley also suggested that increased election monitoring would be helpful.

Interview with Justice Evelyn Stratton, Supreme Court of Ohio

February 17, 2006

The 2004 Election

Justice Stratton stated that usually in the period right before an election filings die down due to the Ohio expedited procedures for electoral challenges. However, the 2004 election was unusual because there were motions and cases decided up to the day of the election. Justice Stratton believed that most of the allegations were knee-jerk reactions without any substance. For example, without any factual claims, suit was brought alleging that all voter challengers posed a threat to voters. Thematically, allegations were either everyday voting problems or "conspiracies" depending on where the complaint came from. The major election cases in 2004 revolved around Secretary of State Blackwell.

Justice Stratton made a point that the Ohio Supreme Court bent over backwards in the 2004 election to be fair to both sides. There was never any discussion about a ruling helping one political party more than the other.

Justice Stratton cited two cases that summarize and refute the 2004 complaints---819 NE 2d 1125 (Ohio 2004) and 105 Ohio St. 3d 458 (2004).

General Election Fraud Issues

Justice Stratton has seen very few fraud cases in Ohio. Most challenges are for technical statutory reasons. She remembered one instance where a man who assisted handicapped voters marked the ballot differently than the voter wanted. Criminal charges were brought against this man and the question that the Ohio Supreme Court had to decide was whether ballots could be opened and inspected to see how votes were cast.

Justice Stratton claimed she knew of isolated incidences of fictitious voter registration but these were not prosecuted. She has not seen any evidence of ballots being stuffed, dead people voting, etc.

Suggestions for Changes in Voting Procedures

The Ohio Supreme Court is very strict about latches---if a person sits on their rights too long, they loose the right to file suit. The Ohio expedited procedures make election challenges run very smooth. Justice Stratton does not remember any suits brought on the day of the election. She supports a non-partisan head of state elections. Justice Stratton believes that last minute

challenges should not be permitted and that lower courts need to follow the rules for the expedited procedures. Even given the anomalies with lower courts permitting late election challenges in 2004, the Ohio Supreme Court does not want to make a new rule unless this pattern repeats itself in 2008.

Interview with Tony Sirvello, Executive Director, IACREOT

April 12, 2006

Biographical

Sirvello is currently the executive director of the International Association of Clerks, Recorders, Election Officials and Treasurers, an organization of 1700 members. Formerly, he ran elections in Harris County, Texas for 29 years.

Incidents of Election Fraud

Sirvello stated that one problem with election crimes is that they are not high on the priority list of either district attorneys or grand juries. Therefore, complaints of election crime very rarely are prosecuted or are indicted by the grand jury. In 1996 in Harris County, 14 people voted twice but the grand jury refused to indict. One woman voted twice, once during early voting and once on Election Day. She said she thought there were two elections. The jury believed her. Sirvello believes none of the people intentionally voted more than once. He said that he believes double voting is not as big of an issue as people make it out to be.

In 1986, it was found that there were 300 more ballots than voter signatures. It was clear that the elections officials stuffed the ballot boxes. The case was brought before a grand jury, but there was no indictment because all of the defendants were friends and relatives of each other and none would admit what had been done.

Sirvello stated that there have been isolated circumstances where a voter would show up at the poll and his name had already been signed and he had voted.

Finally, Sirvello indicated that some people who worked in Houston but did not live in Harris County were permitted to vote.

Specific Absentee Ballot/Vote By Mail Issues

Sirvello said that mail voting presents the largest problem. With mail voting there is too much opportunity to influence voters or to fraudulently request a ballot.

If one applied for an absentee ballot, their name and address was made available to candidates and political consultants who would often send people to collect the ballot. Many did not want to give up the ballot but wanted to mail it personally. The result was to discourage voting.

In Texas, a person could only apply for an absentee ballot if over 65 years of age. Parties, candidates and consultants would get the list of voters over 65 and send them a professional mail piece telling them they could vote by mail and a ballot with everything filled out except the signature. Problems ensued -- for example, voters would print their names rather than sign them, and the ballot was rejected. In other cases, the elderly would give their absentee ballot to someone else.

If a person applied for an absentee ballot but then decided not to cast it but to vote in person, that person had to bring the non-voted absentee ballot to the poll and surrender it. If they did not they would not be permitted to vote at the polling place.

Incidents of Voter Intimidation

Sirvello only reported isolated cases of intimidation or suppression in Harris County. These mostly occurred in Presidential elections. Some people perceived intimidation when being told they were not eligible to vote under the law. Sirvello stated that the big issue in elections now is whether there should be a paper trail for touch screen voting.

Recommendations

District attorneys need to put more emphasis on election crime so people will not believe that it goes unpunished.

There should be either a national holiday for Election Day or a day should be given off of work without counting as a vacation day so that better poll workers are available and there can be more public education on election administration procedures.

Interview with Craig Donsanto, Director, Elections Crimes Branch, Public Integrity Section, U.S. Department of Justice
January 13, 2006

The Department of Justice's (DOJ) Election Crimes Branch is responsible for supervising federal criminal investigations and prosecutions of election crimes.

Questions

How are Prosecution Decisions Made?

Craig Donsanto must approve all investigations that go beyond a preliminary stage, all charges, search warrant applications and subpoenas and all prosecutions. The decision to investigate is very sensitive because of the public officials involved. If a charge seems political, Donsanto will reject it. Donsanto gives possible theories for investigation. Donsanto and Noel Hillman will decide whether to farm out the case to an Assistant U.S. Attorney (AUSA). Donsanto uses a concept called predication. In-other-words, there must be enough evidence to suggest a crime has been committed. The method of evaluation of this evidence depends on the type of evidence and its source. There are two types of evidence---factual (antisocial behavior) and legal (antisocial behavior leading to statutory violations). Whether an indictment will be brought depends on the likelihood of success before a jury. Much depends on the type of evidence and the source. Donsanto said he "knows it when he sees it." Donsanto will only indict if he is confident of a conviction assuming the worst case scenario – a jury trial.

A person under investigation will first receive a target letter. Often, a defendant who gets a target letter will ask for a departmental hearing. The defendant's case will be heard by Donsanto and Hillman. On occasion, the assistant attorney general will review the case.

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The Civil Rights Division, Voting Rights Section makes its own decisions on prosecution. The head of that division is John Tanner. There is a lot of cooperation between the Voting Section and the Election Crimes Branch.

Does the Decision to Prosecute Incorporate Particular Political Considerations within a State Such as a One Party System or a System in which the Party in Power Controls the Means of Prosecution and Suppresses Opposition Complaints?

Yes. Before, the department would leave it to the states. Now, if there is racial animus involved in the case, there is political bias involved, or the prosecutor is not impartial, the department will take it over.

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Does it Matter if the Complaint Comes from a Member of a Racial Minority?

No. But if the question involves racial animus, that has also always been an aggravating factor, making it more likely the department will take it over

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Deliberative Process Privilege

What Kinds of Complaints Would Routinely Override Principles of Federalism?

Federalism is no longer big issue. DOJ is permitted to prosecute whenever there is a candidate for federal office on the ballot.

Are There Too Few Prosecutions?

DOJ can't prosecute everything.

What Should Be Done to Improve the System?

The problem is asserting federal jurisdiction in non-federal elections. It is preferable for the federal government to pursue these cases for the following reasons: federal districts draw from a bigger and more diverse jury pool; the DOJ is politically detached; local district attorneys are hamstrung by the need to be re-elected; DOJ has more resources – local prosecutors need to focus on personal and property crimes---fraud cases are too big and too complex for them; DOJ can use the grand jury process as a discovery technique and to test the strength of the case.

In *U.S. v. McNally*, the court ruled that the mail fraud statute does not apply to election fraud. It was through the mail fraud statute that the department had routinely gotten federal jurisdiction over election fraud cases. 18 USC 1346, the congressional effort to "fix" *McNally*, did not include voter fraud.

As a result, the department needs a new federal law that allows federal prosecution whenever a federal instrumentality is used, e.g. the mail, federal funding, interstate commerce. The department has drafted such legislation, which was introduced but not passed in the early 1990s. A federal law is needed that permits prosecution in any election where any federal instrumentality is used.

Other Information

The Department has held four symposia for District Election Officers (DEOs) and FBI agents since the initiation of the Ballot Access and Voting Integrity Initiative. In 2003, civil rights leaders were invited to make speeches, but were not permitted to take part in the rest of the symposium. All other symposia have been closed to the public.

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There are two types of attorneys in the division: prosecutors, who take on cases when the jurisdiction of the section requires it; the US Attorney has recused him or herself; or when the US Attorney is unable to handle the case (most frequent reason) and braintrust attorneys who analyze the facts, formulate theories, and draft legal documents.

Cases

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Donsanto provided us with three case lists: cases still being investigated as of January

13, 2006 – confidential; election fraud prosecutions and convictions as a result of the Ballot Access and Voting Integrity Initiative October 2002-January 13, 2006; and cases closed for lack of evidence as of January 13, 2006.

Although the number of election fraud related complaints have not gone up since 2002, nor has the proportion of legitimate to illegitimate complaints of fraud, *the number of cases that the department is investigating and the number of indictments the department is pursuing are both up dramatically.*

Since 2002, the department has brought more cases against alien voters, felon voters, and double voters than ever before. Previously, cases were only brought against conspracies to corrupt the process rather than individual offenders acting alone. For deterrence purposes, the Attorney General decided to add the pursuit of individuals who vote when not eligible to vote (noncitizens, felons) or who vote more than once. The department is currently undertaking three pilot projects to determine what works in developing the cases and obtaining convictions and what works with juries in such matters to gain convictions:

1. Felon voters in Milwaukee.

2. Alien voters in the Southern District of Florida. FYI – under 18 USC 611, to prosecute for "alien voting" there is no intent requirement. Conviction can lead to deportation. Nonetheless, the department feels compelled to look at mitigating factors such as was the alien told it was OK to vote, does the alien have a spouse that is a citizen.

3. Double voters in a variety of jurisdictions.

The department does not maintain records of the complaints that come in from DEOs, U.S attorneys and others during the election that are not pursued by the department. Donsanto asserted that U.S. attorneys never initiate frivolous investigations.

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If we want more documents related to any case, we must get those documents from the states. The department will not release them to us.¶

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Interview with John Tanner, Chief, Voting Section, Civil Rights Division, U.S. Department of Justice

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February 24, 2006

The Department of Justice's (DOJ) Voting Section is charged with the civil enforcement of the Voting Rights Act, the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), the National Voter Registration Act (NVRA), and Title III of the Help America Vote Act (HAVA).

Authority and Process

The Voting Section, in contrast to the Public Integrity Section as Craig Donsanto described it, typically focuses only on systemic problems resulting from government action or inaction, not problems caused by individuals. Indeed, the section never goes after individuals because it does not have the statutory authority to do so. In situations in which individuals are causing problems at the polls and interfering with voting rights, the section calls the local election officials to resolve it.

Federal voting laws enforced by the section only apply to state action, so the section only sues state and local governments – it does not have any enforcement power over individuals. Most often, the section enters into consent agreements with governments that focus on poll worker training, takes steps to restructure how polls are run, and deals with problems on Election Day on the spot. Doing it this way has been most effective – for example, while the section used to have the most observers in the South, with systematic changes forced upon those jurisdictions, the section now does not get complaints from the South.

The section can get involved even where there is no federal candidate on the ballot if there is a racial issue under the 14th and 15th Amendments.

When the section receives a complaint, attorneys first determine whether it is a matter that involves individual offenders or a systemic problem. When deciding what to do with the complaint, the section errs on the side of referring it criminally to avoid having any civil litigation complicate a possible criminal case.

When a complaint comes in, the attorneys ask questions to see if there are even problems there that the complainant is not aware are violations of the law. For example, in the Boston case, the attorney did not just look at Spanish language cases under section 203, but also brought a Section 2 case for violations regarding Chinese and Vietnamese voters. When looking into a case, the attorneys look for specificity, witnesses and supporting evidence.

Often, lawsuits bring voluntary compliance.

Voter Intimidation

Deleted: Note: Mr. Tanner's reluctance to share data, information and his perspective on solving the problems presented an obstacle to conducting the type of interview that would help inform this project as much as we would have hoped. Mr. Tanner would not give us any information about or data from the section's election complaint in-take phone logs; data or even general information from the Interactive Case Management (ICM) system-its formal process for tracking and managing work activities in pursuing complaints and potential violations of the voting laws; and would give us only a selected few samples of attorney-observer reports, reports that every Voting Section attorney who is observing elections at poll sites on Election Day is required to submit. He would not discuss in any manner any current investigations or cases the section is involved in. He also did not believe it was his position to offer us recommendations as to how his office, elections, or the voting process might be improved.¶
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Many instances of what some people refer to as voter intimidation are more unclear now. For example, photographing voters at the polls has been called intimidating, but now everyone is at the polls with a camera. It is hard to know when something is intimidation and it is difficult to show that it was an act of intimidation.

The fact that both parties are engaging in these tactics now makes it more complicated. It makes it difficult to point the finger at any one side.

The inappropriate use of challengers on the basis of race would be a violation of the law. Mr. Tanner was unaware that such allegations were made in Ohio in 2004. He said there had never been a formal investigation into the abusive use of challengers.

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Mr. Tanner said a lot of the challenges are legitimate because you have a lot of voter registration fraud as a result of groups paying people to register voters by the form. They turn in bogus registration forms. Then the parties examine the registration forms and challenge them because 200 of them, for example, have addresses of a vacant lot.

However, Mr. Tanner said the department was able to informally intervene in challenger situations in Florida, Atkinson County, Georgia and in Alabama, as was referenced in a February 23 Op-Ed in USA Today. Mr. Tanner reiterated the section takes racial targeting very seriously.

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Refusal to provide provisional ballots would be a violation of the law that the section would investigate.

Deceptive practices are committed by individuals and would be a matter for the Public Integrity Section. Local government would have to be involved for the Voting Section to become involved.

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Unequal implementation of ID rules, or asking minority voters only for ID would be something the section would go after. Mr. Tanner was unaware of allegations of this in 2004. He said this is usually a problem where you have language minorities and the poll workers cannot understand the voters when they say their names. The section has never formally investigated or solely focused a case based on abuse of ID provisions. However, implementation of ID rules was part of the Section 2 case in San Diego. Mr. Tanner reiterated that the section is doing more than ever before.

When asked about the section's references to incidents of vote fraud in the documents related to the new state photo identification requirements, Mr. Tanner said the section only looks at retrogression, not at the wisdom of what a legislature does. In Georgia, for example, everyone statistically has identification, and more blacks have ID than whites. With respect to the letter to Senator Kit Bond regarding voter ID, the section did refer to the perception of concern about dead voters because of reporting by the Atlanta Journal-Constitution. It is understandable that when you have thousands of bogus registrations that there would be concerns about polling place fraud. Very close elections make this even more of an understandable concern. Putting control of registration lists in the hands

of the states will be helpful because at this higher level of government you find a higher level of professionalism.

It is hard to know how much vote suppression and intimidation is taking place because it depends on one's definition of the terms – they are used very loosely by some people. However, the enforcement of federal law over the years has made an astounding difference so that the level of discrimination has plummeted. Registration of minorities has soared, as can be seen on the section's website. Mr. Tanner was unsure if the same was true with respect to turnout, but the gap is less. That information is not on the section's website.

The section is not filing as many Section 2 cases as compared to Section 203 cases because many of the jurisdictions sued under Section 2 in the past do not have issues anymore. Mr. Tanner said that race based problems are rare now.

NVRA has been effective in opening up the registration process. In terms of enforcement, Mr. Tanner said they do what they can when they have credible allegations. There is a big gap between complaints and what can be substantiated. Mr. Tanner stated that given the high quality of the attorneys now in the section, if they do not investigate it or bring action, that act complained of did not happen.

Recommendations

Mr. Tanner did not feel it was appropriate to make recommendations.

Note: We contend that Mr. Tanner's reluctance to share data, information and his perspective on solving the problems presented an obstacle to conducting the type of interview that would help inform this project as much as we would have hoped. We did not have access to any information about or data from the section's election complaint in-take phone logs or data or even general information from the Interactive Case Management (ICM) system its formal process for tracking and managing work activities in pursuing complaints and potential violations of the voting laws. Only a selected few samples of attorney-observer reports were provided, reports that every Voting Section attorney who is observing elections at poll sites on Election Day is required to submit. Mr. Tanner would not discuss any current investigations or cases the section is involved in.

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Rough Summary of Department of Justice, Public Integrity Section Activities, October 2002-January 2006*

Prosecutions and Convictions-- Individuals
Noncitizen voting: 20
Vote buying: 49
Double voting: 12
Registration fraud: 13
Civil Rights: 4
Voter Intimidation: 2
Unclear: 1

Open Investigations (note: a few cases overlap with prosecutions and convictions)
Noncitizen voting: 3
Vote buying: 25
Double voting: 15
Registration fraud: 29
Absentee ballot fraud: 9
Official: 8
Ineligibles: 4
Deceptive Practices: 1
Civil Rights: 14
Intimidation: 6
Other: 2

Cases and Investigations Closed for Lack of Evidence
Civil Rights: 8
Official: 12
Registration Fraud: 12
Absentee Ballot Fraud: 14
Ineligible Voting: 3
Intimidation: 8
Double Voting: 5
Ballot Box Stuffing: 1
Vote Buying: 14
Ballot/machine tampering: 2
Other: 8
Unclear: 3

*Based upon information available as of January 2006

Name of Case	District	Case Number	Date	Facts	Statutory Basis (if of Note)	Other Notes	Should the Case be Researched Further
United States v. Rogelio Mejorada-Lopez	Alaska	05-CR-074	December 5, 2005	Mejorada-Lopez, a Mexican citizen, completed several voter registration applications to register to vote in Alaska and voted in the 2000, 2002, and 2004 general elections. He was charged with three counts of voting by a non-citizen in violation of 18 U.S.C. section 611 and pled guilty. Mejorada-Lopez was sentenced to probation for one year.	No	N/A	No
United States v. Shah	Colorado	1:04-CR-00458	March 1, 2005	Shah was indicted on two counts of providing false information concerning United States citizenship in order to register to vote in violation of 18 U.S.C. section 911 and 1015(f). Shah was convicted on both counts.	No	N/A	No
United States v. Mohsin Ali	Northern Florida	4:05-CR-47	January 17, 2006	A misdemeanor was filed against Ali charging him with voting by a non-citizen of 18 U.S.C. section	No	N/A	Yes-need information on the outcome of the trial.

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Name of Case	District	Case Number	Date	Facts	Statutory Basis (if of Note)	Other Notes	Should the Case be Researched Further
				611. Trial was set for January 17, 2006			
United States v. Chaudhary	Northern Florida	4:04-CR-00059	May 18, 2005	Chaudhary was indicted for misuse of a social security number in violation of 42 U.S.C. section 408 and for making a false claim of United States citizenship on a 2002 driver's license application in violation of 18 U.S.C. section 911. A superceding indictment was returned, charging Chaudhary with falsely claiming United States citizenship on a driver's license application and on the accompanying voter registration application. He was convicted of the false citizenship claim on his voter registration application.	No	N/A	No
United States v. Velasquez	Southern Florida	1:03-CR-20233	September 9, 2003	Velasquez, a former 1996 and 1998 candidate for the Florida legislature, was indicted on charges of	No	N/A	No

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Name of Case	District	Case Number	Date	Facts	Statutory Basis (if of Note)	Other Notes	Should the Case be Researched Further
				misrepresenting United States citizenship in connection with voting and for making false statements to the Immigration and Naturalization Service, in violation of 18 U.S.C. section 911, 1015(f) and 1001. Velasquez was convicted on two counts of making false statements on his naturalization application to the INS concerning his voting history.			
United States v. McKenzie; United States v. Francois; United States v. Exavier; United States v. Lloyd Palmer; United States v. Velrine Palmer; United states v. Shivdayal;	Southern Florida	0:04-CR-60160; 1:04-CR-20488; 0:04-CR-60161; 0:04-CR-60159; 0:04-CR-60162; 0:04-CR-60164; 1:04-CR-20491; 1:04-CR-20490;	July 15, 2004	Fifteen non-citizens were charged with voting in various elections beginning in 1998 in violation of 18 U.S.C. section 611. Four of the defendants were also charged with making false citizenship claims in violation of 18 U.S.C. sections 911 or 1015(f). Ten defendants were convicted, one defendant	No	N/A	No

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Name of Case	District	Case Number	Date	Facts	Statutory Basis (if of Note)	Other Notes	Should the Case be Researched Further
United States v. Rickman; United States v. Knight; United States v. Sweeting; United States v. Lubin; United States v. Bennett; United States v. O'Neil; United States v. Torres-Perez; United States v. Phillip; United States v. Bain Knight		1:04-CR-20489; 0:04-CR-60163; 1:04-CR-14048; 0:04-CR-60165; 2:04-CR-14046; 9:04-CR-80103; 2:04-CR-14047		was acquitted, and charges against four defendants were dismissed upon motion of the government.			
United States v. Brooks	Southern Illinois	3:03-CR-30201	February 12, 2004	East St. Louis election official Leander Brooks was indicted for submitting fraudulent ballots in the 2002 general election in violation of 42 U.S.C. section 1973i(c), 1973i(e), 1973gg-10(2)(B), and 18 U.S.C. sections 241 and 371. Brooks pled guilty to	No	N/A	No

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Name of Case	District	Case Number	Date	Facts	Statutory Basis (if of Note)	Other Notes	Should the Case be Researched Further
				all charges.			
United States v. Scott; United States v. Nichols; United States v. Terrance Stith; United States v. Sandra Stith; United States v. Powell, et al.	Southern Illinois	3:05-CR-30040; 3:05-CR-30041; 3:05-CR-30042; 3:05-CR-30043; 3:05-CR-30044	June 29, 2005	Four Democrat precinct committeemen in East St. Louis were charged with vote buying on the 2004 general election in violation of 42 U.S.C. section 1973i(c). All four pled guilty. Also indicted were four additional Democrat committeemen, Charles Powell, Jr., Jesse Lewis, Sheila Thomas, Kelvin Ellis, and one precinct worker, Yvette Johnson, on conspiracy and vote buying charges in violation of 18 U.S.C. section 371 and 42 U.S.C. section 1973i(c). All five defendants were convicted. Kelvin Ellis also pled guilty to one count of 18 U.S.C. section 1512(c)(2) relative to a scheme to kill one of the trial witnesses and two counts of 18	No	N/A	No

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Name of Case	District	Case Number	Date	Facts	Statutory Basis (if of Note)	Other Notes	Should the Case be Researched Further
				U.S.C. section 1503 relative to directing two other witnesses to refuse to testify before the grand jury.			
United States v. McIntosh	Kansas	2:04-CR-20142	December 20, 2004	A felony information was filed against lawyer Leslie McIntosh for voting in both Wyandotte County, Kansas and Jackson County, Missouri, in the general elections of 2000 and 2002 in violation of 42 U.S.C. section 1973i(e). A superseding misdemeanor information was filed, charging McIntosh with causing the deprivation of constitutional rights in violation of 18 U.S.C. section 242, to which the defendant pled guilty.	No	N/A	No
United States v. Conley; United States v. Slone; United States v. Madden; United	Eastern Kentucky	7:03-CR-00013; 7:03-CR-00014; 7:03-CR-00015; 7:03-	March 28, 2003 and April 24, 2003	Ten people were indicted on vote buying charges in connection with the 1998 primary election in Knott County, Kentucky, in	No	N/A	No

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Name of Case	District	Case Number	Date	Facts	Statutory Basis (if of Note)	Other Notes	Should the Case be Researched Further
States v. Slone et al.; United States v. Calhoun; United States v. Johnson; United States v. Newsome, et al.		CR-00016; 7:03-CR-00017; 7:03-CR-00018; 7:03-CR-00019		violation of 42 U.S.C. section 1973i(c). Five of the defendants pled guilty, two were convicted, and three were acquitted.			
United States v. Hays, et al.	Eastern Kentucky	7:03-CR-00011	March 7, 2003	Ten defendants were indicted for conspiracy and vote buying for a local judge in Pike County, Kentucky, in the 2002 general election, in violation of 42 U.S.C. section 1973i(c) and 18 U.S.C. section 371. Five defendants were convicted, one defendant was acquitted, and charges against four defendants were dismissed upon motion of the government.	No	N/A	No
United States v. Turner, et al.	Eastern Kentucky	3:05-CR-00002	May 5, 2005	Three defendants were indicted for vote buying and mail fraud in connection with the 2000	No	N/A	Yes-need update on case status.

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Name of Case	District	Case Number	Date	Facts	Statutory Basis (if of Note)	Other Notes	Should the Case be Researched Further
				elections in Knott, Letcher, Floyd, and Breathitt Counties, Kentucky, in violation of 42 U.S.C. section 1973i(c) and 18 U.S.C. section 341.			
United States v. Braud	Middle Louisiana	3:03-CR-00019	May 2, 2003	Tyrell Mathews Braud was indicted on three counts of making false declarations to a grand jury in connection with his 2002 fabrication of eleven voter registration applications, in violation of 18 U.S.C. section 1623. Braud pled guilty on all counts.	No	N/A	No
United States v. Thibodeaux	Western Louisiana	6:03-CR-60055	April 12, 2005	St. Martinsville City Councilwoman Pamela C. Thibodeaux was indicted on two counts of conspiring to submit false voter registration information, in violation of 18 U.S.C. section 371 and 42 U.S.C. section 1973i(c). She pled guilty to both charges.	No	N/A	No

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Name of Case	District	Case Number	Date	Facts	Statutory Basis (if of Note)	Other Notes	Should the Case be Researched Further
United States v. Scherzer; United States v. Goodrich; United States v. Jones; United States v. Martin	Western Missouri	4:04-CR-00401; 4:04-CR-00402; 4:05-CR-00257; 4:05-CR-00258	January 7, 2005; March 28, 2005; September 8, 2005; October 13, 2005	Two misdemeanor informations were filed charging Lorraine Goodrich and James Scherzer, Kansas residents who voted in the 2000 and 2002 general elections on both Johnson County, Kansas and in Kansas City, Missouri. The informations charged deprivation of a constitutional right by causing spurious ballots, in violation of 18 U.S.C. sections 242 and 2. Both pled guilty. Additionally, similar misdemeanor informations were filed against Tammy J. Martin, who voted in both Independence and Kansas City, Missouri in the 2004 general election and Brandon E. Jones, who voted both in Raytown and Kansas City, Missouri in the 2004 general election.	No	N/A	No

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Name of Case	District	Case Number	Date	Facts	Statutory Basis (if of Note)	Other Notes	Should the Case be Researched Further
				Both pled guilty.			
United States v. Raymond; United States v. McGee; United States v. Tobin; United States v. Hansen	New Hampshire	04-CR-00141; 04-CR-00146; 04-CR-00216; 04-CR-00054	December 15, 2005	Two informations were filed charging Allen Raymond, former president of a Virginia-based political consulting firm called GOP Marketplace, and Charles McGee, former executive director of the New Hampshire State Republican Committee, with conspiracy to commit telephone harassment using an interstate phone facility in violation of 18 U.S.C. section 371 and 47 U.S.C. section 223. The charges stem from a scheme to block the phone lines used by two Manchester organizations to arrange drives to the polls during the 2002 general election. Both pled guilty. James Tobin, former New England Regional Director	No	N/A	No

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Name of Case	District	Case Number	Date	Facts	Statutory Basis (if of Note)	Other Notes	Should the Case be Researched Further
				of the Republican National Committee, was indicted on charges of conspiring to commit telephone harassment using an interstate phone facility in violation of 18 U.S.C. section 371 and 47 U.S.C. section 223. An information was filed charging Shaun Hansen, the principal of an Idaho telemarketing firm called MILO Enterprises which placed the harassing calls, with conspiracy and aiding and abetting telephone harassment, in violation of 18 U.S.C. section 371 and 2 and 47 U.S.C. section 223. The information against Hansen was dismissed upon motion of the government. A superseding indictment was returned against Tobin charging conspiracy to			

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Name of Case	District	Case Number	Date	Facts	Statutory Basis (if of Note)	Other Notes	Should the Case be Researched Further
				impede the constitutional right to vote for federal candidates, in violation of 18 U.S.C. section 241 and conspiracy to make harassing telephone calls in violation of 47 U.S.C. section 223. Tobin was convicted of one count of conspiracy to commit telephone harassment and one count of aiding and abetting of telephone harassment.			
United States v. Workman	Western North Carolina	1:03-CR-00038	June 30, 2003	A ten-count indictment was returned charging Joshua Workman, a Canadian citizen, with voting and related offenses in the 200 and 2002 primary and general elections in Avery County, North Carolina, in violation of 18 U.S.C. sections 611, 911, 1001, and 1015(f). Workman pled guilty to providing false information to	No	N/A	No

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Name of Case	District	Case Number	Date	Facts	Statutory Basis (if of Note)	Other Notes	Should the Case be Researched Further
				election officials and to a federal agency.			
United States v. Shatley, et al.	Western North Carolina	5:03-CR-00035	May 14, 2004	A nine-count indictment was returned charging Wayne Shatley, Anita Moore, Valerie Moore, Carlos "Sunshine" Hood and Ross "Toogie" Banner with conspiracy and vote buying in the Caldwell County 2002 general election, in violation of 42 U.S.C. section 1973i(c) and 18 U.S.C. section 371. Anita and Valerie Moore pled guilty. Shatley, Hood, and Banner were all convicted.	No	N/A	No
United States v. Vargas	South Dakota	05-CR-50085	December 22, 2005	An indictment was filed against Rudolph Vargas, for voting more than once at Pine Ridge in the 2002 general election in violation of 42 U.S.C. section 1973i(e). Vargas pled guilty.	No	N/A	No
United States v.	Southern	02-CR-	July 22,	Danny Ray Wells, Logan	No	N/A	No

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Name of Case	District	Case Number	Date	Facts	Statutory Basis (if of Note)	Other Notes	Should the Case be Researched Further
Wells; United States v. Mendez; United States v. Porter; United States v. Hrutkay; United States v. Porter; United States v. Stapleton; United States v. Thomas E. Esposito; United States v. Nagy; United States v. Adkins; United States v. Harvey	West Virginia	00234; 2:04-CR-00101; 2:04-CR-00145; 2:04-CR-00149; 2:04-CR-00173; 2:05-CR-00002; 05-CR-00019; 05-CR-00148; 05-CR-00161	2003; July 19, 2004; December 7, 2004; January 7, 2005; March 21, 2005; October 11, 2005; December 13, 2005	County, West Virginia, magistrate, was indicted and charged with violating 18 U.S.C. section 1962. Wells was found guilty. A felony indictment was filed against Logan County sheriff Johnny Mendez for conspiracy to defraud the United States in violation 18 U.S.C section 371. Mendez pled guilty. An information was filed charging former Logan County police chief Alvin Ray Porter, Jr., with making expenditures to influence voting in violation of 18 U.S.C. section 597. Porter pled guilty. Logan County attorney Mark Oliver Hrutkay was charged by information with mail fraud in violation of 18 U.S.C. section 1341. Hrutkay pled guilty.			

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Name of Case	District	Case Number	Date	Facts	Statutory Basis (if of Note)	Other Notes	Should the Case be Researched Further
				Earnest Stapleton, commander of the local VFW, was charged by information with mail fraud. He pled guilty. An information was filed charging Thomas E. Esposito, a former mayor of the City of Logan, with concealing the commission of a felony, in violation of 18 U.S.C. section 4. Esposito pled guilty. John Wesley Nagy, Logan County Court marshall, pled guilty to making false statements to a federal agent, a violation of 18 U.S.C. section 1001. An information charging Glen Dale Adkins, county clerk of Logan County, with accepting payment for voting, in violation of 18 U.S.C. section 1973i(c). Adkins pled guilty. Perry French Harvey, Jr., a			

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Name of Case	District	Case Number	Date	Facts	Statutory Basis (if of Note)	Other Notes	Should the Case be Researched Further
				retired UMW official, pled guilty to involvement in a conspiracy to buy votes.			
United States v. Adkins, et al.	Southern West Virginia	2:04-CR-00162	December 28 & 30, 2005	Jackie Adkins was indicted for vote buying in Lincoln County, West Virginia, in violation of 42 U.S.C. section 1973i(c). A superceding indictment added Wandell "Rocky" Adkins to the indictment and charged both defendants with conspiracy to buy votes in violation of 18 U.S.C. section 371 and vote buying. A second superseding indictment was returned which added three additional defendants, Gegory Brent Stowers, Clifford Odell "Groundhog" Vance, and Toney "Zeke" Dingess, to the conspiracy and vote buying indictment. Charges were later dismissed against Jackie Adkins. A	No	N/A	No

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Name of Case	District	Case Number	Date	Facts	Statutory Basis (if of Note)	Other Notes	Should the Case be Researched Further
				third superseding indictment was returned adding two additional defendants, Jerry Allen Weaver and Ralph Dale Adkins. A superseding information was filed charging Vance with expenditures to influence voting, in violation of 18 U.S.C. section 597. Vance pled guilty. Superseding informations were filed against Stowers and Dingess for expenditures to influence voting, in violation of 18 U.S.C. section 597. Both defendants pled guilty. Weaver also pled guilty. Superseding informations were filed against Ralph and Wandell Adkins for expenditures to influence voting, in violation of 18 U.S.C. section 597. Both defendants pled guilty.			

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Name of Case	District	Case Number	Date	Facts	Statutory Basis (if of Note)	Other Notes	Should the Case be Researched Further
United States v. Davis; United States v. Byas; United States v. Ocasio; United States v. Prude; United States v. Sanders; United States v. Alicea; United States v. Brooks; United States v. Hamilton; United States v. Little; United States v. Swift; United States v. Anderson; United States v. Cox; United States v. Edwards; United States v. Gooden	Eastern Wisconsin	2:05-MJ-00454; 2:05-MJ-00455; 2:05-CR-00161; 2:05-CR-00162; 2:05-CR-00163; 2:05-CR-00168; 2:05-CR-00170; 2:05-CR-00171; 2:05-CR-00172; 2:05-CR-00177; 2:05-CR-00207; 2:05-CR-00209; 2:05-CR-00211; 2:05-CR-00212	September 16, 2005; September 21, 2005; October 5, 2005; October 26, 2005; October 31, 2005, November 10, 2005	Criminal complaints were issued against Brian L. Davis and Theresa J. Byas charging them with double voting, in violation of 42 U.S.C. section 1973i(e). Indictments were filed against convicted felons Milo R. Ocasio and Kimberly Prude, charging them with falsely certifying that they were eligible to vote, in violation of 42 U.S.C. section 1973gg-10(2)(B), and against Enrique C. Sanders, charging him with multiple voting, in violation of 42 U.S.C. section 1973i(e). Five more indictments were later returned charging Cynthia C. Alicea with multiple voting in violation of 42 U.S.C. section 1973i(e) and convicted felons Deshawn B. Brooks, Alexander T.	No	N/A	Need updated status on Gooden and the Anderson, Cox, Edwards, and Little cases.

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Name of Case	District	Case Number	Date	Facts	Statutory Basis (if of Note)	Other Notes	Should the Case be Researched Further
				Hamilton, Derek G. Little, and Eric L. Swift with falsely certifying that they were eligible to vote in violation of 42 U.S.C. section 1973gg-10(2)(B). Indictments were filed against Davis and Byas charging them with double voting. Four more indictments were returned charging convicted felons Ethel M. Anderson, Jiyto L. Cox, Correan F. Edwards, and Joseph J. Gooden with falsely certifying that they were eligible to vote. Ocasio and Hamilton pled guilty. Prude was found guilty. A mistrial was declared in the Sanders case. Brooks was acquitted. Byas signed a plea agreement agreeing to plead to a misdemeanor 18 U.S.C. section 242 charge. Swift moved to change his			

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Name of Case	District	Case Number	Date	Facts	Statutory Basis (if of Note)	Other Notes	Should the Case be Researched Further
				plea. Davis was found incompetent to stand trial so the government dismissed the case. Gooden is a fugitive. Alicea was acquitted. Four cases are pending ---Anderson, Cox, Edwards, and Little.			

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Voting Fraud and Voter Intimidation

Report to the U.S. Election Assistance Commission on Preliminary Research & Recommendations

DRAFT

By

Job Serebrov and Tova Wang

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Deliberative Process Privilege

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Introduction

Charge Under HAVA

Under the Help America Vote Act, Pub. L. No. 107-252, 116 Stat. 1666 (2002) ("HAVA"), the United States Election Assistance Commission is charged with developing national statistics on voter fraud and developing methods of deterring and investigating voter fraud. Also, the Commission is charged with developing methods of identifying, deterring, and investigating methods of voter intimidation.

Scope of Project

The Commission employed a bipartisan team of legal consultants, Tova Wang and Job Serebrov to develop a preliminary overview work product to determine the quantity and quality of vote fraud and voter intimidation that is present on a national scale. The consultants' work is neither comprehensive nor conclusive. This first phase of an envisioned two-phase project was constrained by both time and funding. The consultants' conclusions and recommendations for phase II will be contained in this report.

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

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

***Nexis*:** Initially, the consultants developed an enormous list of possible Nexis search terms. It soon became obvious that it would be impossible to conduct the research that way. As a result, consultant Wang performed the Nexis search by finding search term combinations that would yield virtually every article on a particular subject from the last

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five years. Consultant Serebrov approved the search terms. Then Wang created an excel spreadsheet in order to break down the articles in way in which they could be effectively analyzed for patterns. Each type of fraud is broken down in a separate chart according to where it took place, the date, the type of election it occurred in, what the allegation was, the publication it came from. Where there was a follow up article, any information that that suggested there had been some further action taken or some resolution to the allegation was also included. For four very complicated and long drawn out situations – Washington State, Wisconsin, South Dakota in 2004, and the vote buying cases in a couple of particular jurisdictions over the last several years –written summaries with news citations are provided.

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

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

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Working Definition of Fraud and Intimidation

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

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

Examples include the following:

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

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

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Summaries of Research Conducted

Interviews

Common Themes

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

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implementation of the new requirements of HAVA – done well, a major caveat – will reduce this problem dramatically.

Common Recommendations:

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

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

Nexis Research

Absentee Ballot Fraud

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

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

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

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

Voter Registration Fraud

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

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

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

Voter Intimidation and Suppression

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

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

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

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

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

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

"Dead Voters and Multiple Voting"

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

Nonetheless there were a few cases of people actually being charged and/or convicted for these kinds of activities. Most of the cases involved a person voting both by absentee ballot and in person. A few instances involved people voting both during early voting and on Election Day, which calls into question the proper marking and maintenance of the voting lists. In many instances, the person charged claimed not to have voted twice on purpose. A very small handful of cases involved a voter voting in more than one county and there was one substantiated case involving a person voting in more than one state. Other instances in which such efforts were alleged were disproved by officials.

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

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

Vote Buying

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

Deceptive Practices

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

Non-citizen Voting

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

Felon Voting

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

Election Official Fraud

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

Existing Research

There are many reports and books that describe anecdotes and draw broad conclusions from a large array of incidents. There is little research that is truly systematic or scientific. The most systematic look at fraud is the report written by Lori Minnite. The most systematic look at voter intimidation is the report by Laughlin McDonald. Books

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written about this subject seem to all have a political bias and a pre-existing agenda that makes them somewhat less valuable.

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

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

Other items of note:

- There is as much evidence, and as much concern, about structural forms of disenfranchisement as about intentional abuse of the system. These include felon disenfranchisement, poor maintenance of databases and identification requirements.

- There is tremendous disagreement about the extent to which polling place fraud, e.g. double voting, intentional felon voting, noncitizen voting, is a serious problem. On balance, more researchers find it to be less of problem than is commonly described in the political debate, but some reports say it is a major problem, albeit hard to identify.

- There is substantial concern across the board about absentee balloting and the opportunity it presents for fraud.

- Federal law governing election fraud and intimidation is varied and complex and yet may nonetheless be insufficient or subject to too many limitations to be as effective as it might be.

- Deceptive practices, e.g. targeted flyers and phone calls providing misinformation, were a major problem in 2004.

- Voter intimidation continues to be focused on minority communities, although the American Center for Voting Rights uniquely alleges it is focused on Republicans.

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Cases

After reviewing over 40,000 cases, the majority of which came from appeals courts, I have found comparatively very few which are applicable to this study. Of those that are applicable, no apparent thematic pattern emerges. However, it seems that the greatest areas of fraud and intimidation have shifted from past patterns of stealing votes to present problems with voter registration, voter identification, the proper delivery and counting of absentee and overseas ballots, provisional voting, vote buying, and challenges to felon eligibility. But because so few cases provided a picture of these current problems, I suggest that case research for the second phase of this project concentrate on state trial-level decisions.

Methodology

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

- In analyzing instances of alleged fraud and intimidation, we should look to criminology as a model. In criminology, experts use two sources: the Uniform Crime Reports, which are all reports made to the police, and the Victimization Survey, which asks the general public whether a particular incident has happened to them. After surveying what the most common allegations are, we should conduct a survey of the general public that ask whether they have committed certain acts or been subjected to any incidents of fraud or intimidation. This would require using a very large sample, and we would need to employ the services of an expert in survey data collection. (Stephen Ansolobohere, MIT)

- Several political scientists with expertise in these types of studies recommended a methodology that includes interviews, focus groups, and a limited survey. In determining who to interview and where the focus groups should be drawn from, they recommend the following procedure:

    - Pick a number of places that have historically had many reports of fraud and/or intimidation; from that pool pick 10 that are geographically and demographically diverse, and have had a diversity of problems
    - Pick a number of places that have not had many reports of fraud and/or intimidation; from that pool pick 10 places that match the geographic and demographic make-up of the previous ten above (and, if possible, have comparable elections practices)

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- Assess the resulting overall reports and impressions resulting from these interviews and focus groups, and examine comparisons and differences among the states and what may give rise to them.

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

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

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

- Another political scientist recommended employing a methodology that relies on qualitative data drawn from in-depth interviews with key critics and experts on all sides of the debate on fraud; quantitative data collected through a survey of state and local elections and law enforcement officials; and case studies. Case studies should focus on the five or ten states, regions or cities where there has been a history of election fraud to examine past and present problems. The survey should be mailed to each state's attorney general and secretary of state, each county district attorney's office and each county board of elections in the 50 states. (Lorraine Minnite, Barnard College)

- The research should be a two-step process. Using LexisNexis and other research tools, a search should be conducted of news media accounts over the past decade. Second, interviews with a systematic sample of election officials nationwide and in selected states should be conducted. (Chandler Davidson, Rice University)

- One expert in the field posits that we can never come up with a number that accurately represents either the incidence of fraud or the incidence of voter intimidation. Therefore, the better approach is to do an assessment of what is most likely to happen, what election violations are most likely to be committed – in other words, a risk analysis. This would include an analysis of what it would actually take to commit various acts, e.g. the cost/benefit of each kind of violation. From there we could rank the likely prevalence of each type of activity and examine what measures are or could be effective in combating them. (Wendy Weiser, Brennan Center of New York University)

- Replicate a study in the United States done abroad by Susan Hyde of the University of California- San Diego examining the impact of impartial poll site observers on the incidence of election fraud. Doing this retrospectively would require the following steps:

  - Find out where there were federal observers
  - Get precinct level voting information for those places

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- Analyze whether there was any difference in election outcomes in those places with and without observers, and whether any of these results seem anomalous.

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

For example, if intimidation is occurring, and if reputable monitors make intimidation less likely or voters more confident, then turnout should be higher on average in monitored precincts than in unmonitored precincts. If polling station officials are intentionally refusing to issue provisional ballots, and the polling station officials are more likely to adhere to regulations while being monitored, the average number of provisional ballots should be higher in monitored precincts than in unmonitored precincts. If monitors cause polling station officials to adhere more closely to regulations, then there should be fewer complaints (in general) about monitored than unmonitored precincts (this could also be reversed if monitors made voters more likely to complain).

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

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

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

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

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or purging of voter registration rolls by list matching almost assuredly will find a large proportion of false positives: people who voted legally or are registered to vote legally.

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

This same political scientist also recommends another way to examine the problem: look at statistics on provisional voting: the number cast might provide indications of intimidation (people being challenged at the polls) and the number of those not counted would be indications of "vote fraud." One could look at those jurisdictions in the Election Day Survey with a disproportionate number of provisional ballots cast and cross reference it with demographics and number of provisional ballots discarded. (Michael McDonald, George Mason University)

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

1. Investigations and Prosecutions of Voter Fraud

Policymakers should develop databases that record all investigations, allegations, charges, trials, convictions, acquittals, and plea bargains regarding voter fraud. Existing studies are incomplete but provide some insight. For example, a statewide survey of each of Ohio's 88 county boards of elections found only four instances of ineligible persons attempting to vote out of a total of 9,078,728 votes cast in the state's 2002 and 2004 general elections. This is a fraud rate of 0.00000045 percent. The Carter-Baker Commission's Report noted that since October 2002, federal officials had charged 89 individuals with casting multiple votes, providing false information about their felon status, buying votes, submitting false voter registration information, and voting improperly as a non-citizen. Examined in the context of the 196,139,871 ballots cast between October 2002 and

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August 2005, this represents a fraud rate of 0.0000005 percent (note also that not all of the activities charged would have been prevented by a photo identification requirement).

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

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

2. *Random Surveys of Voters*

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

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

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

Instead of surveying all voters to determine the amount of fraud, researchers might reduce the margin of error by focusing on a random sampling of voters who signed affidavits in the three states that request photo identification but also allow voters to establish their identity through affidavit—Florida, Louisiana, and South Dakota. In

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South Dakota, for example, only two percent of voters signed affidavits to establish their identity. If the survey indicates that 95 percent of those who signed affidavits are legitimate voters (and the other 5 percent were shown to be either fraudulent or were non-responsive), this suggests that voter fraud accounts for, at the maximum, 0.1 percent of ballots cast.

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

3. Examining Death Rolls

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

Imagine that one million people live in state A, which has no documentary identification requirement. Death records show that 20,000 people passed away in state A in 2003. A cross-referencing of this list to the voter rolls shows that 10,000 of those who died were registered voters, and these names remained on the voter rolls during the November 2004 election. Researchers would look at what percentage of the 10,000 dead-but-registered people who "voted" in the November 2004 election. A researcher should distinguish the votes cast in the name of the dead at the polls from those cast absentee (which a photo identification requirement would not prevent). This number would be extrapolated to the electorate as a whole.

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

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Recommendations for Further EAC Activity on Voting Fraud and Voter Intimidation

Consultants' Recommendations

Recommendation 1: Conduct More Interviews

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

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

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

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

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

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

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

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

Recommendation 2: Follow Up on Nexis Research

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

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

Recommendation 3: Follow Up on Allegations Found in Literature Review

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

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

Recommendation 4: Review Complaints File With MyVote1 Project Voter Hotline

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

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In 2004, this resulted in over 200,000 calls received and over 56,000 recorded complaints.[ii] The researchers in charge of this project have done a great deal of work to parse and analyze the data collected through this process, including going through the audio messages and categorizing them by the nature of the complaint. These categories include registration, absentee ballot, poll access, ballot/screen, coercion/intimidation, identification, mechanical, provisional (ballot).

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

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

Although according to a recent GAO report the Voting Section of the Civil Rights Division of the Department of Justice has a variety in ways it tracks complaints of voter intimidation,[iii] the Section was extremely reluctant to provide the consultants with useful information. Further attempts should be made to obtain relevant data. This includes the telephone logs of complaints the Section keeps and information from the database – the Interactive Case Management (ICM) system – the Section maintains on complaints received and the corresponding action taken. We also recommend that further research include a review and analysis of the observer and monitor field reports from Election Day that must be filed with the Section.

Recommendation 6: Review Reports Filed By District Election Officers

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

Recommendation 7: Attend Ballot Access and Voting Integrity Symposium

The consultants also believe it would be useful for any further activity in this area to include attendance at the next Ballot Access and Voting Integrity Symposium. According to the Department,[iv]

> Prosecutors serving as District Election Officers in the 94 U.S. Attorneys' Offices are required to attend annual training conferences on fighting election fraud and voting rights abuses... These conferences are sponsored by the Voting Section of the Civil Rights Division and the Public Integrity

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> Section of the Criminal Division, and feature presentations by Civil Rights officials and senior prosecutors from the Public Integrity Section and the U.S. Attorneys' Offices. As a result of these conferences, there is a nationwide increase in Department expertise relating to the prosecution of election crimes and the enforcement of voting rights.

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

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

Recommendation 8: Employ Academic or Individual to Conduct Statistical Research

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

Recommendation 9: Explore Improvements to Federal Law

Finally, consultant Tova Wang recommends that future researchers review federal law to explore ways to make it easier to impose either civil or criminal penalties for acts of intimidation that do not necessarily involve racial animus and/or a physical or economic threat.

According to Craig Donsanto, long-time Director of the Election Crimes Branch, Public Integrity Section, Criminal Division of the U.S. Department of Justice:

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

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

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

In the alternative to finding a way to criminalize such behavior, researchers might examine ways to invigorate measures to deter and punish voter intimidation under the civil law. For example, there might be a private right of action created for voters or groups who have been subjected to intimidation tactics in the voting process. Such an action could be brought against individual offenders; any state or local actor where there is a pattern of repeated abuse in the jurisdiction that such officials did not take sufficient action against; and organizations that intentionally engage in intimidating practices. As a penalty upon finding liability, civil damages could be available plus perhaps attorney's fees.

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

Working Group Recommendations

Recommendation 1: Employ Observers To Collect Data in the 2006 and/or 2008 Elections

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

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

Moreover, it was pointed out, many of the problems we see now with respect to fraud and intimidation does not take place at the polling place, e.g. absentee ballot fraud and deceptive practices. Poll site monitoring would not capture this activity. Moreover, with

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