

The Federal Crime of Election Fraud

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The material that follows addresses the role of the United States Department of Justice in criminal matters that arise out of the balloting process, i.e. election fraud.»¹

This paper seeks to answer the most frequently asked questions concerning the federal law enforcement role in election matters. Particularly, what sort of election-related conduct is potentially actionable as a federal crime, what specific statutory theories apply to «frauds» occurring in elections lacking federal candidates on the ballot, what federalism, procedural, and policy considerations impact on the federalization of this type of case, and how Assistant United States Attorneys (AUSAs) should respond to this type of complaint.

An effective federal role in prosecuting crimes against the electoral process is critical to the proper functioning of American democracy. The integrity of the voting process stands at the very heart of our system of representative government. Where elections are corrupted, arbitrary and corrupt government inevitably follow. Rooting out corruption in the election process, and bringing those responsible for it to swift and sure justice, is an important national law enforcement priority.

* What sort of activities are prosecutable as federal «voter fraud» crimes?

The federal concept of «voter fraud» applies only to activity that is appropriately remedied through criminal prosecution, as distinguished from other less severe remedies such as election contest litigation or administrative relief.

In assessing the appropriateness of the criminal remedy to a given set of facts, federal prosecutors should keep in mind that our society tolerates behavior in election campaigns that it does not tolerate in commercial, personal, or government relations. Thus as a general rule, the federal crime of «voter fraud» embraces only organized efforts to corrupt of the election process itself: i.e., the registration of voters, the casting of ballots, and the tabulation and certification of election results.

This definition excludes all activities that occur in connection with the political campaigning process, unless those activities are themselves illegal under some other specific law or prosecutive theory. Examples of the latter would include such things as stealing an opponent's campaign property, breaking into an opponent's headquarters, some transactions that are illegal under campaign financing laws. On the other hand, most things that candidates do or say about one another on the campaign trail, are generally not appropriated remedied through criminal prosecution.

This definition also excludes isolated acts of individual wrongdoing that are not part of an organized effort to corrupt the voting process. If such isolated acts of «fraud» are to be subjected to criminal penalties, that is a task for the states not the federal government to do. Indeed, there is a still-unresolved constitutional issue that dates back to the 19th century concerning whether the federal courts have authority to hear criminal cases involving isolated incidents of electoral fraud. See e.g., *Blitz v. United States*, 153 U.S. 308 (1894).

Finally, this definition excludes mistakes and other gaffs which inevitably occur in the administration of the usually hectic election day polling process. Mistakes happen. They can have significant impact on the outcome of close elections. Where mistakes occur on a significant enough level to potentially affect the outcome of an election, the appropriate remedy is an election contest brought by the loser seeking civil judicial redress through the appropriate state election contest process. But mistakes in election administration are not appropriately remedied through criminal prosecution.

In addition to the qualitative limitations on the concept of «criminal» election fraud set out above, the task of prosecuting election fraud offenses in federal court is further complicated by the constitutional limits that are placed on federal power over the election process. The conduct of elections is primarily a state rather than a federal activity. See U.S. Const. Art I, Sees. 2 and 4. Consequently, there are only a limited number of federal statutes and prosecutive theories available to address «voter frauds,» and an overall imperative for federal authorities to give way to state and local enforcement in most - but not all - situations involving voting. With these considerations in mind, there are essentially four types of federal «election fraud:»

- **First**, there are schemes to purposely and corruptly register voters who either do not exist, or who are known by the putative defendant to be ineligible to vote under applicable state law.

- **Second**, there are schemes to cast, record or fraudulently tabulate votes for voters who do not participate in the voting act at all. This includes such activities as schemes by poll managers to stuff ballot boxes, schemes to impersonate nonvoting individuals either at the polls or via absent voter ballot, and schemes by vote canvassers to alter vote tallies.

- **Third**, there are schemes to corrupt the voting act of voters who do participate in the voting act to a limited extent. These include such things as schemes to «assist» voters in such a manner that the voter does not knowingly consent to electoral preferences that are placed on the ballot, schemes to pay voters for voting, schemes to intimidate voters through physical or economic means, schemes to cast multiple ballots, and schemes to induce voters to validate ballot documents (usually absentee ballots) by misrepresenting what the document is.

- Finally, there are schemes to knowingly prevent voters qualified voters from voting. These include such activities as destroying voter registrations or ballots, preventing people known to be qualified to vote from doing so, and physically disrupting order within open polling locations.

*** When is it appropriate for federal prosecutors to intervene in election «fraud» matters?**

The Constitution gives primary responsibility for conducting elections and safeguarding the voting process to the states, not to the federal government. The federal role in matters involving the conduct of elections is a limited one. See e.g., ACORN v. Edgar, 56 F.3d 791 (7th Cir. 1995); Voting Rights Coalition v. Wilson, 60 F.3d 1411 (9th Cir. 1995). Thus, as a general rule the task of policing the integrity of the election process - including the prosecution of people who violate local or state election laws carrying criminal penalties - lies with local and state authorities, to which federal power normally should yield.

There are four principal situations where deferral to state or local enforcement authorities may not be appropriate. If any of these factors is present in a pattern of conduct, it may be appropriate to prosecute it federally -to the extent that this is possible under available federal laws. These four situations are:

1. Federal affect. Where the objective of the conduct is to corrupt the outcome of a federal elective contest, or where the consequential effect of the corrupt conduct impacts upon the vote count for federal office (e.g., Anderson v. United States, 411 U.S. 211 (1974)).

2. Civil rights. Where the object of the scheme is to discriminate against racial, ethnic or language minority groups, the voting rights of which have been specifically protected by federal statutes such as the Voting Rights Act, 42 U.S.C. §1973 et seq.

3. Prosecutor of last resort. Where federalization is required in order to redress longstanding patterns of electoral fraud, either at the request of state or local authorities, or in the face of longstanding inaction by state authorities who appear to be unwilling or unable to respond under local law.

4. Link to other crimes. Where there is a factual basis to believe that fraudulent registration or voting activity is sufficiently connected to other form of criminal activity that perusing the voter fraud angle will yield evidence useful in the prosecution of other categories of federal offense.

*** What are the advantages of prosecuting election frauds in federal courts?**

There are four procedural advantages to prosecuting election frauds in federal courts. These are:

- Voter fraud investigations are labor intensive. Local law enforcement agencies often lack the manpower and the financial resources to take these cases on.
- Voter fraud matters are always politically sensitive and very high profile endeavors at the local level. Local prosecutors (who are usually themselves elected) often shy away from prosecuting them for that reason.
- The successful prosecution of voter fraud cases demands that critical witnesses (including voters whose voting acts have been co-opted) be examined under oath before criminal charges based on their testimony are filed. Many states lack the broad grand jury process which exists in the federal system.
- The defendants in voter fraud cases are apt to be politicians - or agents of politicians - and it is often impossible for either the government or the defendant to obtain a fair trial in a case that is about politics and is tried to a locally-drawn jury. The federal court system provides for juries to be drawn from broader geographic base, thus often avoiding this problem.

*** What federal statutes are available to federalize frauds that occur of all elections?**

The fact that the United States Constitution leaves election administration primarily with the states severely diminishes the number and scope of federal laws on this subject where there are no federal candidates on the ballot. Most elections in the United States are nonfederal in the sense that no candidates for federal office are on the ballot. Moreover, as a general rule election fraud is a far more common feature of local elections than it is of federal ones since local politics usually affects people's daily lives more directly than does national politics.

Federal criminal laws dealing directly with elections are generally confined to prohibiting fraudulent activities that occur in «mixed» elections, where federal candidates (i.e., Senate, Congress or President), are on the ballot. National elections such as these occur only two or three times in a two-year election cycle. Thus, a major challenge to the development of an effective federal law enforcement initiative against electoral fraud has been to adapt federal criminal statutes aimed at activities other than voting to the most common varieties of election frauds identified above.

The federal criminal prosecutive theories currently in use to federalize election frauds in all elections include the following:

- Schemes by polling officers to violate their duty under state law to safeguard the integrity of the election process through purposefully allowing void ballots to be cast («stuffed») in the ballot box, or by intentionally rendering fraudulent vote tallies, can be prosecuted as civil rights violations under 18 U.S.C. 241/242 per U.S. v. Olinger, 759 F.2d 1293 (7th Cir. 1985) and its progeny. These two statutes prohibit, among many other things, intentional denigration by public officers acting under color of law of the «one-person-one-vote» principle of Equal Protection that is guaranteed in the 5th and 14th Amendments of the Constitution. Schemes to manipulate voting equipment and to stuff ballot boxes normally require physical access to voting equipment that can only be achieved through authority conferred by state law, thus satisfying the «state action» jurisdictional peg in these two statute in ballot manipulation schemes. Due to a quirk in the law, this theory is not available for use when the object of the scheme is to obtain and record illegal votes obtained through vote buying - even where an election officer is used to ensure that bought voters vote right. The cases that require this result are United States v. Bathgate, 246 U.S. 220 (1918); United states v. McLean, 808 F.2d 1044 (4th Cir. 1988).

- Schemes to stimulate or reward voter registration by offering or giving voters things having monetary value violate the «payment for registering» clause of 42 U.S.C. §19731 (c). Some states are currently considering enacting procedural reforms that will establish separate voting lists of voters who are entitled to vote only in federal elections for those who register under the «relaxed» procedures mandated by the 1993 National Voter Registration Act. However, most voter registrations are still «unitary» in nature, in the sense that a registrant becomes simultaneously entitled to vote for all candidates - federal and nonfederal alike. In these situations, the «unitary» nature of the registration act provides a sufficient federal nexus to permit federal regulation, and it thus does not matter what particular election the subjects were interested in affecting or when the payments were made. See United States v. Cianciulli. 482 F.Supp. 585 (E.D. Pa. 1979).
- Schemes to register voters fraudulently through providing election officials materially false information about the voter's eligibility for the franchise can be prosecuted in some situations without regard to when the underlying activity took place. As with payments for registering, this is because of the «unitary» nature of the registration act. However, the specific federal statutes that apply to fraudulent registration schemes do impose some limits on the prosecution of this type of case in nonfederal election years:
 - The «false registration information» clause of 42 U.S.C. §19731(c) reaches only schemes to provide false information concerning a voter's «name, address or period of residence in the voting district.» Schemes to provide other categories of false information (e.g.. citizenship) are not reached by this statute, regardless of how material that information may be to determining voter eligibility.
 - The recently-enacted National Voter Registration Act (NVRA) contains a new criminal provision that reaches schemes to provide any materially significant piece of information concerning entitlement to the federal franchise under state law. 42 U.S.C. §1973gg-10(2)(B). This new criminal law is broader than Section 1973i(c) in terms of the categories of false information to which it applies. It took effect on January 1, 1995.
 - Schemes to obtain and cast ballots that are materially defective (and thus «void» under local law) in nonfederal elections can in theory still be prosecuted under 18 U.S.C. §1341 post McNally v. United States. 483 U.S. 350 (1987). The «fraud» in this situation lies in generating ballots that the defendants can be shown to have known were materially deficient under state election law, and in causing a false vote count by concealing those material defects from the vote tabulating authority. Federal jurisdiction rests on the fact that the mails are a federal instrumentality.

In order to successfully use the mail fraud statute in election cases post McNally, it is essential that the conduct constituting the «voter fraud» focus on securing a pecuniary object. There are two such objects that courts have to date recognized as satisfying McNally:

- Securing for a specific candidate a salary and pecuniarily valuable emoluments of the elected position being sought (see e.g., United States v. Cranberry. 908 F.2d 278 (6th Cir. 1990; United States v. Doherty. 867 F.2d 47, 54-57 (1st Cir. 1989); Ingber v. Enzor. 644 F.Supp. 814, 815-816, aff'd 841 F.2d 450 (2d Cir. 1988));
- Causing a local election jurisdiction to expend pecuniary resources to run an election that the defendants knew would produce a defective result (see. e.g., United States v. DeFries, 43 F.3d. 707 (D.C. Cir. 1995)².

The Travel Act, 18 U.S.C. §1951, is a federal statute that makes it a felony to travel across state lines or to mail items intrastate in aid of activity that constitutes «bribery» under the law of one or more of the states involved in the interstate travel. Schemes to pay voters can be prosecuted under this statute in those states where paying voters is treated as a «bribery» offense. At the current time (1996), 30 of the 50 states treat vote buying as a «bribery» offense, and in those states this activity can thus be prosecuted under Section 1951. Most vote buying schemes do not involve inter-state travel. However, they do often rely on the absentee voting process, and thereby use the United States Mails. Thus the availability of the Travel Act allows for the federalization of vote buying schemes using the absentee balloting process.

*** What additional statutes are available to federalize election fraud when federal candidates are on the ballot?**

In addition to the statutes and prosecutive theories given above, there are several specific criminal laws in the United States Code that address electoral frauds which take place when a federal candidate is on the ballot.

42 U.S.C. §1973i (c) prohibits specific types of voter frauds, when they occur in connection with an election where there are federal candidates on the ballot. The most prominent of these are schemes to provide election officers with false information concerning voters' names, addresses, or one's period of residence in the election district in order to qualify to vote; and schemes to pay voters. The payment for voting portion of this statute requires only that the payment be intended to influence the voter to participate in the election. It does not require that the voter be paid to vote for federal candidates, or for any specific candidate. United States v. Bowman, 636 F.2d 1003 (5th/11 Cir. 1981); Dansereau v. Ulmer, (Ak. S.Ct. 1995). The statute does not, however, criminalize payments that are intended merely to make it easier for a voter to get to the polls, United States v. Lewin, 467 F.2d 1132 (7th Cir. 1972). Nor does it prohibit payments made for actions short of voting - such as endorsing candidates.

- 18 U.S.C. §597 prohibits making expenditures for the specific purpose of stimulating voters to cast ballots for candidates seeking the federal offices of Senator, Congressman or President. This is an old statute that does not require a specific intent to affect a specific election.
- 42 U.S.C. 1973i (e) prohibits «voting more than once» in elections where federal candidates are on the ballot.
- 42 U.S.C. §1973gg-10(2) prohibits furnishing any significantly false information to an election officer for the purpose of voting in a federal election. Whether a statement is significantly false is determined by whether its importance to voter eligibility under the law of the state in which the vote was tendered. This is a new statute that was added by the National Voter Registration Act of 1993, and it took effect in most states on January 1, 1995.
- 18 U.S.C. 594 prohibits intimidating voters for the specific purpose of inducing them to cast ballots for one or more federal officers (i.e. Senators, Congressman, Presidents).
- 42 U.S.C. §1973gg-10(l) prohibits voter intimidation in any election where federal candidates are on the ballot regardless of the objective of the defendant to influence specific election contests. This is another facet of the new statute criminal law enacted through the NVRA. With respect to both this statute and Section 594, «intimidation» means actual duress caused by physical or economic threats.
- Finally, 18 U.S.C. §608 prohibits all the above forms of election fraud when they occur in connection with votes cast by Americans living abroad under the provisions of the Uniformed and Overseas Citizens Absentee Voting Act, which in the principle means by which American citizens living abroad vote by absentee ballot.

*** How should federal prosecutors evaluate election fraud complaints?**

Information concerning election irregularities comes from a wide variety of sources of varying degrees of credibility and in varying degrees of factual specificity. The evaluation of such complaints usually requires prosecutors to address four questions:

- First, does the substance of the complaint assuming it can be proven through investigation - suggest a potential crime? The sort of activity that is usually treated as «criminal» under federal law is summarized above.
- Second, is the complaint sufficiently fact-specific that it provides leads for investigators to pursue? In order to support a criminal investigation, a complaint must be reliable, as well as sufficiently fact-specific to provide logical leads by which a federal preliminary investigation can confirm - or disprove - that a federal crime may have occurred along the lines of the offenses discussed above. As most of these offenses deal with frauds that are aimed at defects in individual registration or voting acts, the incoming facts in a complaint should normally be specific to registration or voting acts that the complainant believes to have been corrupted, or provide leads to the detection of such specific corrupted voting acts. If the facts contained in the complaint fail to meet this standard, the complainant is normally told that (s)he has not sufficient information to allow evaluation and is encouraged to obtain and provide the additional factual detail needed for preliminary evaluation.

- Third, is there a federal statute that can be used to federalize the criminal activity at issue?
- Finally, is a special federal interest in the matter that warrants federalization rather than deferral to state law enforcement? The four most commonly asserted bases for federalization of election «fraud» crimes are also discussed above.

* **What investigative procedures should be avoided in election fraud matters?**

Investigation of election irregularities by federal authorities always present unique issues of federalism insofar as this principle concerns the constitutionally based primacy of state responsibility over election administration. Such investigations also have the potential to «chill» lawful voting activity and to interfere with the state vote certification process. All federal election fraud investigations must avoid the following procedural pitfalls:

- Non-interference in elections. Overt federal investigation of election fraud matters should be held to a bare minimum necessary to preserve evidence and elicit the evaluative facts until the election in which the alleged «fraud» occurred has been certified. Once a federal criminal investigation is conducted openly in a matter concerning an as-yet unresolved election, the investigation will inevitably become a central feature in the election's outcome. Yet the issue of «who won» is an issue for state - not a federal prosecutor - to perform. Absent allegations of civil rights abuse actionable under the Voting Rights Act, it is not a proper function of federal criminal justice to interfere with the conduct of elections, the tabulation of votes, the resolution of election contest litigation, or the certification of winners. In most instances, this process is concluded within a few weeks of an election.

Thus, in election matters lacking Voting Rights Act overtones, and except where as is absolutely necessary to preserve evidence or to round out a seemingly valid complaint to a point where an analysis can be performed on it, no overt federal investigation should be conducted in election fraud matters before the outcome of the election at issue has been certified by appropriate state authorities. The only exception to this rule is where a very limited pre-election inquiry is determined to be absolutely necessary in order to preserve evidence or to round out a seemingly valid complaint to a point where an federalization evaluation can be performed.

- Interviewing voters during active voting periods. Most voting fraud investigations require that individual voters at some point be questioned concerning the circumstances under which they voted (or did not vote). Such interviews should generally not be conducted immediately prior to an election or while voting is taking place. This is because having federal agents interview citizens about the circumstances under which they voted (or did not vote) can easily «chill» lawful voting activity by the interviewees, as well as voters similarly situated. This is not an appropriate result. Thus, the Public Integrity Section should be consulted before any investigative action is taken that anticipates interviews of individual voters during a period of active voting in their respective jurisdiction.

- Seizing official election documentation. The investigation and proof of election «fraud» matters customarily rely heavily upon the usually voluminous documentation that the election process produces. Usually, this documentation - or at least a part of it - must at some point be obtained by federal authorities perusing criminal election fraud matters. In federal election years, a federal statute enacted in 1960 requires that this important documentation be retained intact for at least 22 months following the election. However, in nonfederal election years, the retention of this documentation is governed solely by state laws which in most states allow its destruction following 30 to 90 days after the election. This means that in nonfederal elections, there is a time-sensitivity to securing federal possession of important election records once a decision has been made to federalize a given inquiry. However, seizing or subpoenaing official election records into federal custody may deprive state authorities of materials they may require to tabulate, canvass and certify the results of elections. No action should be taken that deprives the state of records it needs to perform this state activity, and Public Integrity should be consulted before any attempt to secure such records is made.

- Investigative activity inside open polls. As noted previously in this paper, the task of conducting elections and determining their outcomes is a uniquely state function. Most states closely regulate who may be inside polling places while they are open and during the time when ballots are being tabulated and

election results canvassed. In most states³, these «poll access» provisions do not anticipate that federal law enforcement personnel be admitted to such places at such times⁴.

In addition, 18 U.S.C. §592 prohibits the stationing of «armed men» at places where voting activity is taking place. The FBI has determined that this statute applies to Special Agents, who are authorized to carry arms. Anyone who directs an «armed force» to enter a polling location can be subject under this old post Civil War statute to felony penalties.

In view of the above, no federal investigative activity should be done inside open polling places, or in locations where votes are being processed, tabulated or canvasses, without prior consultation with the Public Integrity Section.

Along similar lines, there is no authority for federal criminal law enforcement personnel to serve as poll watchers in elections. This is probably the most frequently asked question concerning the federal role in election matters. The only exception lies in Illinois (where state law is uniquely broad), and in matters of racial and language minority voting discrimination falling under the Voting Rights Act.

*** What is the correct course to follow if a complaint of election fraud appears to be grounded in discrimination based on race or language minority status?**

Such matters are not handled as election crimes. Rather, they should be treated - at least initially - as civil rights matters arising under the Voting Rights Act. This civil rights law affords a broad range of noncriminal federal remedies for activities that are designed to prevent racial and language minorities from exercising their voting rights. Those matters are handled by the Voting Section of the Civil Rights Division.

*** What do I do if I don't know what to do?**

Call me at the Public Integrity Section: 202-514-1421, or fax me at 202-514-3003.

1 This text supplements the discussion of this subject in the 1995 edition of my book: Federal Prosecution of Election Offenses.

2 On the subject of the parameters of the concept of «fraud» in election matters, please also read the discussion which appears in the 1995 edition of Federal Prosecution of Election Offenses at pages 21-24 and 45-48, and the recent federal appellate decisions in United States v. Cole, 41 F.3d 303 (7th Cir. 1995); United States v. Salisbury, 983 F.2d 1369 (6th Cir. 1993); and United States v. Boards, 10 F.3d 587 (8th Cir. 1994).

3 Illinois is a notable exception.

4 These state poll access laws are superseded by the federal Voting Rights Act in matters involving discrimination in the franchise based on racial or language minority status. However, absent evidence of an intent to discriminate based on these federal statutory factors, the administration of the election process is a function of local and state law to which we in the federal law enforcement community should defer.