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FEDERAL JURISDICTION OVER LOCAL VOTE FRAUD

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During the past several years, the United States Department of Justice has placed significant emphasis on the detection and prosecution of election fraud which is motivated by political corruption, rather than by racial factors. This relatively new law enforcement interest in corruption of the franchise has, in turn, required federal courts to address and resolve significant questions concerning the extent to which the federal Constitution and statutes permit federal prosecutorial intervention in local electoral matters. In this article the author traces the history of federal prosecution of vote fraud crimes, and analyzes the current legal theories which serve as the basis for a federal presence in this area. ‡

I. INTRODUCTION

The right to vote is one of the most important aspects of United States citizenship. Its free exercise through honest elections is perhaps the single aspect of democracy that most distinguishes our system of government from the totalitarian and communist ideologies. Vigilant and vigorous measures to protect the integrity of the franchise are therefore significant priorities of the United States Department of Justice.

Primary responsibility for establishing qualifications for the franchise and for conducting elections is left by the Constitution to the states.[1] The federal government enters this field deferentially to protect the integrity of significant federal interests and programs and to assure that voting rights secured by the Constitution are not willfully abridged.

While the federal role in these matters is an emerging one, the assertion of federal jurisdiction in this area routinely involves resort to

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‡ Opinions expressed in this article are those of the author, and not necessarily those of the Justice Department.

1. U.S. CONST. art. I, §§ 2, 4.

statutes that were enacted decades ago. In addition, federal election fraud prosecutions often entail resolution of novel questions of federalism and the difficult job of enforcing federal criminal laws in the context of partisan political contests.[2]

Criminal laws dealing with the conduct of elections, election irregularities, and patronage abuses are scattered throughout the federal statutes. These federal statutes fall into four groupings: (1) criminal statutes which relate to corruption of the franchise;[3] (2) criminal statutes which relate to misuse of federal property, programs, or employment for political purposes;[4] (3) campaign financing statutes with both criminal and civil penalties;[5] and (4) disclosure statutes for federal candidates and political committees.[6] This article focuses on those federal criminal statutes which relate to corruption of the franchise, and emphasizes those which may be employed to prosecute vote fraud in local elections.

II. FEDERAL JURISDICTION OVER ABUSE OF THE FRANCHISE

A. History of Federal Intervention

Federal concern over the integrity of the franchise has had two quite distinct points of focus. One has been to assure blacks and other racial minorities the right to vote; the federal government has long taken an extremely activist posture under the powers specifically granted by the fifteenth amendment.[7] The second has been to ensure that general public elections are run fairly, impartially, and free from dilution resulting from corrupt, irregular, or fraudulent practices. This article is concerned exclusively with this second type of election abuse.

Public interest in the integrity of the franchise was first manifested immediately after the Civil War. Between 1868 and 1870, while it was

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2. Election matters are administered on a nationwide basis by the Election Crimes Branch, a component of the Public Integrity Section of the Justice Department.
3. 18 U.S.C. §§ 241-42, 245, 592-94, 596-99 (1976); 42 U.S.C. § 1973i(c), 1973i(e) (1976).
4. 18 U.S.C. §§ 595, 598, 604-05 (1976); 18 U.S.C. §§ 600-03, 607 (1976 & Supp. 1981).
5. 2 U.S.C. §§ 437g, 439a, 441a-441h (1976 & Supp. 1982).
6. *Id.* §§ 431-39.
7. The Voting Rights Act provides, in part:

> All citizens of the United States who are otherwise qualified by law to vote at any election in any State, Territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color or previous condition of servitude; any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding.

42 U.S.C. § 1971(a)(1) (1976). Congress enacted this law in 1965 to rid the country of racial discrimination in voting. City of Port Arthur v. United States, 517 F. Supp. 987 (D.D.C. 1981).

enacting laws to ensure implementation of the fifteenth amendment, Congress adopted legislation to deal with various types of electoral abuses. Referred to as the Enforcement Act,[8] this federal election fraud law served as the basis for a relatively activist federal posture in the investigation and prosecution of corruption of the franchise until the 1890's when the most significant sections of it were repealed.[9]

The Enforcement Act had a broad jurisdictional predicate, permitting it to be applied to a wide variety of corrupt election practices as long as a federal candidate was on the ballot at the time these practices occurred. In *In re Coy*,[10] the Supreme Court held that Congress possessed the constitutional authority to regulate any corrupt activity occurring during a mixed federal/state election which exposed the federal election to potential harm, regardless of whether that harm actually materialized.[11]

Reconstruction ended as a matter of national policy in 1878, and federal activism in election matters retrenched. A large portion of the Enforcement Act was repealed in 1894,[12] and with its demise the federal system lost most of the statutory tools which had made possible an activist federal posture in election fraud matters. The two provisions which survived[13] covered only intentional deprivations of rights guaranteed directly by the Constitution. The constitutional philosophy pursued by the courts at this time generally held that the Constitution directly conferred a right to vote only for federal officers (*i.e.*, representatives, senators, and the president). Therefore, electoral abuse aimed at corrupting nonfederal contests was not judicially considered to be prosecutable in the federal courts under federal statutes which remained in force after most of the Enforcement Act had been repealed.[14]

In *United States v. Newberry*,[15] the Supreme Court aggravated this state of affairs by holding that primary elections were not an integral part of the official election process.[16] Further limitations were imposed by *United States v. Bathgate*,[17] which read the entire subject of vote buying out of federal criminal law, even when it was directed at cor-

8. Act of May 31, 1870, 16 Stat. 140, ch. 114 (repealed 1894).
9. *See, e.g., In re* Coy, 127 U.S. 731 (1888); *Ex parte* Yarbrough, 110 U.S. 651 (1884); *Ex parte* Siebold, 100 U.S. 371 (1880).
10. 127 U.S. 731 (1888).
11. This power derives essentially from the necessary and proper clause. U.S. CONST. art. I, § 8, cl. 18. *See* United States v. Carmichael, 685 F.2d 903 (4th Cir. 1982); United States v. Malmay, 671 F.2d 869 (5th Cir. 1982); United States v. Bowman, 636 F.2d 1003 (5th Cir. 1981).
12. Act of Feb. 8, 1894, 28 Stat. 36.
13. 18 U.S.C. §§ 241-42 (1976).
14. *See* United States v. Gradwell, 243 U.S. 476 (1917); Guinn v. United States, 238 U.S. 347 (1915).
15. 256 U.S. 232 (1921).
16. *Id.* at 258.
17. 246 U.S. 220 (1918).

rupting the outcome of congressional contests.[18]

In 1941, in *United States v. Classic*,[19] the Supreme Court overruled *Newberry* and recognized for the first time that primary elections were a fundamental part of the election process.[20] The *Classic* opinion represented a reversal in the judicial attitude regarding federal intervention in election matters, and it signaled a new period of federal activism in the field. Federal courts have come to recognize that the right to vote in fairly conducted elections is a fundamental feature of United States citizenship and, as such, is broadly protected by the Constitution.[21] Federal prosecutions of election fraud under 18 U.S.C. §§ 241 and 242[22] have increased, and these two statutes have been given an expansive interpretation where locally directed election fraud is concerned.[23] New criminal laws with broad jurisdictional bases have been enacted by Congress to combat false registrations, multiple voting, and vote buying.[24] Finally, existing statutes, such as the mail fraud law under 18 U.S.C. § 1341, have been held applicable to a wide variety of electoral abuse.[25]

B. What is "Election Fraud"?

Most election fraud is easily recognized. Indeed, several especially noxious methods of defeating the will of the electorate have been made the subject of specific criminal statutes. Examples include vote buying,[26] multiple voting,[27] and fraudulent registrations.[28] Other methods of subverting elections, such as ballot-box stuffing, destruction of ballots, falsifying tally reports, and intimidating voters, fit easily within concepts of "fraud" that have been previously recognized as being criminally actionable under various laws in this area.[29] Other methods

18. *Id.* at 226.
19. 313 U.S. 299 (1941).
20. *Id.* A primary election, which involves a necessary step in the choice of candidates for election as representatives in Congress and which controls that choice, is an election within the meaning of U.S. CONST. art. I, § 4.
21. *See* Reynolds v. Sims, 377 U.S. 533 (1965); Duncan v. Poythress, 657 F.2d 691 (5th Cir. 1981), *cert. granted,* 455 U.S. 937 (1982), *cert. dismissed as improvidently granted,* 455 U.S. 998 (1983); Griffin v. Burns, 570 F.2d 1065 (1st Cir. 1978); Smith v. Cherry, 489 F.2d 1098 (7th Cir.), *cert. denied,* 417 U.S. 910 (1973).
22. 18 U.S.C. §§ 241-242 (1976); *see infra* notes 33-39 and accompanying text.
23. United States v. Stollings, 501 F.2d 954 (4th Cir. 1974); United States v. Anderson, 481 F.2d 685 (4th Cir. 1973), *aff'd on other grounds,* 417 U.S. 211 (1974); United States v. Morado, 454 F.2d 167 (5th Cir.), *cert. denied,* 406 U.S. 917 (1972).
24. 42 U.S.C. § 1973i(c), (e) (1976); *see* United States v. Mason, 673 F.2d 737 (4th Cir. 1982); United States v. Bowman, 636 F.2d 1003 (5th Cir. 1981).
25. 18 U.S.C. § 1341 (1976); *see* United States v. States, 488 F.2d 761 (8th Cir. 1973), *cert. denied,* 417 U.S. 909 (1974); United States v. Lewis, 514 F. Supp. 169 (M.D. Pa. 1981).
26. *See infra* note 58 and accompanying text.
27. *See infra* note 93 and accompanying text.
28. *See infra* note 72 and accompanying text.
29. *See, e.g.,* United States v. Classic, 313 U.S. 299 (1941); Wilkins v. United States, 376 F.2d 552 (5th Cir. 1967); United States v. Ryan, 99 F.2d 864 (8th Cir. 1938),

of corrupting the franchise, however, are less clearly actionable. Since the essence of the democratic franchise is the free expression of "electoral will" by each voter participating in an election, any pattern of conduct which has as its intended effect defeating or ignoring the "electoral will" of individual voters can generally be considered potentially actionable under the federal prosecutive theories discussed below.

C. *Statutes Which Implement Rights Flowing Directly from the Constitution*

1. Conspiracy Against Rights of Citizens

Section 241 was originally enacted as part of the post-Civil War Reconstruction legislation. This statute makes it unlawful for two or more persons to conspire to injure, oppress, threaten, or intimidate any citizen in the exercise of a right or privilege secured to him by the Constitution or federal laws.[30]

The Supreme Court has long recognized that the constitutionally secured right to vote in a primary or general election for the federal offices of representatives, senators, and the president[31] is protected by section 241.[32] Conspiracies to intentionally disrupt fair elections which impact, directly or indirectly, on these federal contests violate the Constitution, and thus section 241.

Section 241 embraces conspiracies to stuff ballot boxes with forged ballots,[33] to impersonate qualified voters,[34] to alter legal ballots,[35] to fail to count votes and to alter votes counted,[36] to prevent the official count of ballots in primary elections,[37] to illegally register voters and cast absentee ballots in their names,[38] and to injure, threaten, or intimidate voters in the exercise of their right to vote.[39] It has been held that section 241 reaches vote fraud even when the fraud does not affect the

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cert. denied, 306 U.S. 635 (1939); Walker v. United States, 93 F.2d 383 (8th Cir. 1937), *cert. denied,* 303 U.S. 644 (1938); United States v. Powell, 81 F. Supp. 288 (E.D. Mo. 1948).

30. 18 U.S.C. § 241 (1976). Violations are felonies punishable by fines up to $10,000 or imprisonment up to 10 years, or both, or for any term of years or life if death results.
31. U.S. CONST. art. I, §§ 2, 4.
32. 18 U.S.C. § 241 (1976); *see* United States v. Classic, 313 U.S. 299 (1941); *Ex parte* Yarbrough, 110 U.S. 651 (1884).
33. United States v. Saylor, 322 U.S. 385 (1944).
34. Crolich v. United States, 196 F.2d 879 (5th Cir.), *cert. denied,* 344 U.S. 830 (1952).
35. United States v. Powell, 81 F. Supp. 288 (E.D. Mo. 1948).
36. United States v. Ryan, 99 F.2d 864 (8th Cir. 1938), *cert. denied,* 306 U.S. 635 (1939); Walker v. United States, 93 F.2d 383 (8th Cir. 1937), *cert. denied,* 303 U.S. 644 (1938).
37. United States v. Classic, 313 U.S. 299 (1941).
38. United States v. Morado, 454 F.2d 167 (5th Cir.), *cert. denied,* 406 U.S. 917 (1972); United States v. Weston, 417 F.2d 181 (4th Cir. 1969), *cert. denied,* 396 U.S. 1062 (1970); Fields v. United States, 228 F.2d 544 (4th Cir. 1955).
39. Wilkens v. United States, 376 F.2d 552 (5th Cir. 1967).

actual outcome of the election,[40] and that the vote fraud conspiracy need not be successful to violate this statute.[41]

Section 241 reaches conduct affecting the integrity of the federal election process as a whole. Fraudulent action with respect to, or directed at, specific individual voters is not required.[42] In addition, several courts have held that section 241 does not require proof of an overt act.[43]

The question that most frequently arises concerning the use of section 241 in election fraud prosecutions involves its application to frauds directed at local candidates when the fraud does not affect federal contests. The problem arises because section 241 prohibits only conspiracies to deprive persons of rights actually flowing *directly* from the Constitution. Many courts have speculated over the extent to which the Constitution directly reaches or protects the right to vote for candidates running for nonfederal offices.[44] With the exception of *United States v. Morado,*[45] every case that has been prosecuted under section 241 has entailed proof that the pattern of illegal activity at least consequentially affected the votes tabulated in one of the federal races on the ballot. Indeed, most of the cases prosecuted under this statute involved specific attempts to alter the outcome of the federal race.[46]

Although in *Anderson v. United States*[47] the Supreme Court was given an opportunity to address directly the reach of the federally secured franchise to nonfederal contests, it refused to do so.[48] Consequently, the use of section 241 in the area of election fraud is normally confined to situations where the conduct in question not only took place during an election where federal candidates were being voted upon, but where there is also proof that a federal elective contest was at least indirectly affected by the fraud.

An exception to this rule exists when a pattern of vote fraud affecting only local contests is perpetrated through the necessary participation of state agents acting under color of law. When fraudulent state

40. Anderson v. United States, 417 U.S. 211 (1974); United States v. Morado, 454 F.2d 167 (5th Cir.), *cert. denied,* 406 U.S. 917 (1972).
41. United States v. Bradberry, 517 F.2d 498 (7th Cir. 1975).
42. United States v. Nathan, 238 F.2d 401 (7th Cir.), *cert. denied,* 353 U.S. 910 (1957).
43. United States v. Morado, 454 F.2d 167 (5th Cir.), *cert. denied,* 406 U.S. 917 (1972); Williams v. United States, 179 F.2d 644 (5th Cir. 1950), *aff'd on other grounds,* 341 U.S. 70 (1951).
44. *Compare* Reynolds v. Sims, 377 U.S. 533 (1965) (broad view that all rights flow from the Constitution) *with* Blitz v. United States, 153 U.S. 308 (1894) (narrow view). *See also* Oregon v. Mitchell, 400 U.S. 112 (1970); *In re* Coy, 127 U.S. 731 (1888); *Ex parte* Siebold, 100 U.S. 371 (1880); United States v. Anderson, 481 F.2d 685 (4th Cir. 1973), *aff'd on other grounds,* 417 U.S. 211 (1974).
45. 454 F.2d 167 (5th Cir.), *cert. denied,* 406 U.S. 917 (1972).
46. *E.g.,* United States v. Saylor, 322 U.S. 385 (1944); United States v. Bradberry, 517 F.2d 498 (7th Cir. 1975).
47. 417 U.S. 211 (1974).
48. *Id.* at 213-14, 228.

action is present, the dilution of the vote which results violates the principle of one-person-one-vote embodied in the fourteenth amendment.[49] The intentional deprivation of this constitutional right through misusing official access to ballots to commit vote fraud has been held to be cognizable under section 241.[50] Along similar lines, the use of state authority to interfere intentionally and corruptly with the integrity of the democratic election process may also violate the due process clause of the fifth and fourteenth amendments.[51] This theory of prosecution under section 241 is normally used in prosecuting cases involving ballot-box stuffing and the mishandling of ballots by election officials.

2. Deprivation of Rights Under Color of Law

Section 242 of Title 18 of the United States Code was likewise originally enacted as a post-Civil War Reconstruction statute. It proscribes anyone acting under color of law, statute, ordinance, regulation, or custom from willfully depriving a person of any right, privilege, or immunity secured or protected by the Constitution or laws of the United States.[52]

Prosecutions under section 242 need not demonstrate the existence of a conspiracy. While the defendant must have acted illegally under color of law, this element does not require that the accused be a *de jure* officer of a governmental agency. Rather, it is sufficient that an accused had acted jointly with state agents in committing the offense,[53] or that his actions were made possible because they were clothed with the authority of state law.[54] Violations are punishable by fines up to $1,000 or imprisonment up to one year, or both, or for any term of years or for life if death results.[55]

For most purposes relevant to election frauds, section 242 can be considered and treated as a substantive offense for conspiracies prosecutable under section 241. As such, the cases cited in the discussion of section 241 are equally relevant to this statute.[56]

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49. Reynolds v. Sims, 377 U.S. 533 (1965); Baker v. Carr, 369 U.S. 186 (1962).

50. United States v. Anderson, 481 F.2d 685 (4th Cir. 1973), *aff'd on other grounds,* 417 U.S. 211 (1974); United States v. Stollings, 501 F.2d 954 (4th Cir. 1974).

51. Duncan v. Poythress, 657 F.2d 691 (5th Cir. 1981), *cert. granted,* 455 U.S. 937 (1982), *cert. dismissed as improvidently granted,* 455 U.S. 998 (1983); Gamza v. Aguirre, 619 F.2d 449 (5th Cir. 1980); Griffin v. Burns, 570 F.2d 1065 (1st Cir. 1978); Smith v. Cherry, 489 F.2d 1098 (7th Cir.), *cert. denied,* 417 U.S. 910 (1973); Briscoe v. Kusper, 435 F.2d 1046 (7th Cir. 1970).

52. 18 U.S.C. § 242 (1976).

53. United States v. Price, 383 U.S. 787, 793-95 (1966).

54. United States v. Williams, 341 U.S. 97 (1951); United States v. Classic, 313 U.S. 299 (1941).

55. 18 U.S.C. § 242 (1976).

56. *See supra* notes 30-51 and accompanying text.

D. Anti-Fraud Provisions of the 1965 Voting Rights Act: Fraud in "Mixed" Federal/Local Elections

The Voting Rights Act of 1965 (Act)[57] is concerned primarily with guaranteeing a meaningful franchise to racial minorities. The Act, however, contains two subsections which prohibit fraudulent election practices where corruption rather than race is the focus: 42 U.S.C. § 1973i(c) and 1973i(e). Unlike sections 241 and 242, these subsections apply to fraudulent conduct which is directed at local and state elections where one or more federal candidates are on the ballot. These provisions state that it is unlawful (1) to knowingly and willfully give false information as to name, address, or period of residence to an election official for the purpose of establishing one's eligibility to vote; (2) to pay, offer to pay, or accept payment for registering to vote, or for voting; (3) to conspire with another person to vote illegally; or (4) to vote more than once. Violations are felonies punishable by a fine up to $10,000 or imprisonment up to five years, or both.[58]

Because of their broad jurisdictional base, subsections 1973i(c) and 1973i(e) are today two of the most useful federal ballot security laws. Indeed, these statutes are preferred in prosecuting all matters involving corrupt disruptions of the election process that occur during elections where federal candidates are on the ballot.

1. The Basis for Federal Jurisdiction

Unlike laws such as 18 U.S.C. §§ 241 and 242, 42 U.S.C. § 1973i(c) and 1973i(e) do not implement rights that flow directly from the Constitution. Thus, their scope is not tied to the parameters of the "federal right to vote," whatever that concept may be. Instead, subsections 1973i(c) and 1973i(e) rest on the necessary and proper clause[59] as a measure to protect federal contests from exposure to the *risk* or *potential* of corruption. Whenever the destructive elective practices that

57. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified and amended at 42 U.S.C. §§ 1971-1974 (1976)).

58. 42 U.S.C. § 1973i(c) (1976) provides:

> Whoever knowingly or willfully gives false information as to his name, address, or period of residence in the voting district for the purpose of establishing his eligibility to register to vote, or conspires with another individual for the purpose of encouraging his false registration to vote or illegal voting, or pays or offers to pay or accepts payment either for registration to vote or for voting shall be fined not more than $10,000 or imprisoned not more than five years or both: *Provided, however,* that this provision shall be applicable only to general, special, or primary elections held solely or in part for the purpose of selecting or electing any candidate for the office of President, Vice President, presidential elector, Member of the United States House of Representatives, Delegate from the District of Columbia, Guam, or the Virgin Islands, or Resident Commissioner of the Commonwealth of Puerto Rico.

For the text of section 1973i(e), see *infra* note 93.

59. U.S. CONST. art. I, § 8, cl. 18.

are described in the statutes take place at the same time as federal balloting, that exposure is present.[60]

These provisions of the Act are useful to federal prosecutors in two principal ways. First, they eliminate from federal election fraud cases the need to delve into arcane questions concerning the scope of the "federal right to vote." Second, they eliminate the need to prove that a given pattern of otherwise corrupt conduct had an actual impact on an elective contest protected directly by the "federal right to vote." It is sufficient under subsections 1973i(c) and 1973i(e) that a pattern of corrupt conduct occurred during a "mixed" federal/state election where both federal and nonfederal contests were being voted upon, and that the functional effect of the fraud exposed the federal races mentioned in the statutes to the *risk of potential harm.*[61]

In this regard, the United States Courts of Appeal for the Fourth and Fifth Circuits have both recently affirmed the convictions of defendants who had been successfully prosecuted under subsection 1973i(c) for buying votes in "mixed" federal/state elections, but whose conduct had not been shown to have been directed at the federal contests which were on the ballot involved. In *United States v. Mason*,[62] a defendant in South Carolina was charged with soliciting voters to apply for absentee ballots and giving them money after they handed him their absentee ballots.[63] In *Mason* the government argued that:

> [t]he prophylactic intent of Congress is well illustrated by the fact that the statute reaches 'offers' to pay for voting as well as actual payments [and that the] defendant's argument, that some impact on a Federal race is required by statute, is wholly inconsistent with the language itself since a mere 'offer' to pay could not in itself impact on the election.[64]

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60. *In re* Coy, 127 U.S. 731 (1888); United States v. Garcia, 719 F.2d 99 (5th Cir. 1983); United States v. Carmichael, 685 F.2d 903 (4th Cir. 1982); United States v. Malmay, 671 F.2d 869 (5th Cir. 1982); United States v. Bowman, 636 F.2d 1003 (5th Cir. 1981); *see also* United States v. Blanton, 77 F. Supp. 812 (E.D. Mo. 1948).

61. United States v. Garcia, 719 F.2d 99 (5th Cir. 1983); United States v. Carmichael, 685 F.2d 903 (4th Cir. 1982); United States v. Mason, 673 F.2d 737 (4th Cir. 1982); United States v. Malmay, 671 F.2d 869 (5th Cir. 1982); United States v. Bowman, 636 F.2d 1003 (5th Cir. 1981); United States v. Sayre, 522 F. Supp. 973 (W.D. Mo. 1981); United States v. Sims, 508 F. Supp. 179 (W.D. La. 1979); United States v. Cianciulli, 482 F. Supp. 585 (E.D. Pa. 1979).

62. 673 F.2d 737 (4th Cir. 1982).

63. None of the voters was eligible to vote absentee under state law, which permits absentee voting only if the voter is disabled or out of the country on election day. *See* S.C. CODE ANN. § 15-320 (Law. Co-op. 1976).

64. Brief for Appellee at 14, United States v. Mason, 673 F.2d 737 (4th Cir. 1982). The United States relied on the following cases from the Fifth and Seventh Circuits: United States v. Bowman, 636 F.2d 1003 (5th Cir. 1981) (42 U.S.C. § 1973i(c) prohibits any activities which have the *potential* to affect federal races); United States v. Barker, 514 F.2d 1077 (7th Cir. 1975) (court conceded local thrust of illegal conduct but affirmed convictions, noting merely that the prosecution had

United States v. Carmichael[65] involved the same vote-buying scheme as that in *Mason*. The *Carmichael* court noted that there was a possibility of corruption of the two federal contests because "many of the envelopes containing the absentee ballots were unsealed when they were picked up from the voters and when they were turned in. . . ."[66] In *United States v. Garcia*,[67] the Fifth Circuit upheld the conviction under subsection 1973i(c) of a county welfare director who had purchased votes for county officials in the 1982 Texas democratic primary by using food stamp vouchers. The only federal race on the ballot—a lopsided contest between the incumbent senator and an unknown challenger—was of no interest to either the defendant or the voters whose votes were bought.

The Eighty-ninth Congress fully intended the broad reach of subsection 1973i(c). As part of the 1965 Act,[68] subsection 1973i(c) was enacted to ensure that the integrity of the balloting process would be secured in the setting of the expanded franchise which that Act sought to achieve. Indeed, the original version of subsection 1973i(c) simply prohibited irregular and corrupt practices during any election without regard to the extent of impact on federal contests. The present statute, by contrast, contains a jurisdictional predicate restricting its scope to "mixed" federal/state elections when there is a potential risk to federal balloting. The addition of this jurisdictional predicate reflected congressional concern regarding the constitutionality of the unrestrictive nature of the statute as originally proposed.[69]

The report which accompanied the first draft of the 1965 Act contained the following observations concerning the power of Congress to act broadly in this area:

> The power of Congress to reach intimidation by private individuals in purely local elections derives from article I, section 4, and the implied power of Congress to protect Federal elections against corrupt influences . . . . While article I, section 4 and the implied power of Congress to prevent corruption in elections *normally* apply only to Federal elections, and Section 1973i applies to all elections, *these powers are plenary in their scope and where intimidation is concerned it is impractical to separate its pernicious effects between Federal and purely local elections.*[70]

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proven that a federal contest was on the ballot at which the pattern of conduct was directed).

65. 685 F.2d 903 (4th Cir. 1982).
66. *Id.* at 908.
67. 719 F.2d 99 (5th Cir. 1983).
68. 42 U.S.C. §§ 1973-1973p (1976).
69. For a detailed discussion of the legislative history of this statute, see United States v. Cianciulli, 482 F. Supp. 585 (E.D. Pa. 1979); 1965 U.S. CODE CONG. & AD. NEWS 2478.
70. H.R. Rep. No. 439, 89th Cong., 1st sess., *reprinted in* 1965 U.S. CODE CONG. & AD. NEWS 2437, 2462 (emphasis supplied).

Every court that has addressed the question has specifically upheld the constitutionality of subsection 1973i(c) as a necessary and proper exercise of congressional authority.[71]

2. False Registration Information

The "false information" provision of subsection 1973i(c) reaches any person who furnishes materially false data to a voting official to establish eligibility to register or to vote. As it presently reads, the false information must relate to one of the three items listed in this portion of the statute: name, address, or period of residence in the voting district.[72] False information concerning other requisites to voting, such as United States citizenship, non-felon status, mental competence and the like, do not necessarily fall within the ambit of subsection 1973i(c). These additional matters may be prosecuted as mail fraud provided jurisdictional mailings are present (as frequently is the case with post card or mail registrations).[73]

In virtually all electoral districts, registration to vote in the United States is "unitary" in the sense that a single registration qualifies an applicant to cast ballots for all local, state, and federal contests.[74] Therefore, the jurisdictional requirement that the false information at issue have been made to establish eligibility to vote for one or more of the federal officers named in the statute is satisfied automatically in practically all instances where a false statement is made to place a person's name on the registration rolls.[75] By comparison, false data may be furnished to poll officials on election day for the purpose of enabling a voter to cast a ballot in a particular election. For instance, when a voter attempts to impersonate another voter, a special showing is usually required that a federal candidate was being voted upon at the time. In this situation, it is usually necessary to demonstrate that the course

71. United States v. Bowman, 636 F.2d 1003 (5th Cir. 1981); United States v. Lewin, 467 F.2d 1132 (7th Cir. 1972); United States v. Sayre, 522 F. Supp. 973 (W.D. Mo. 1981); United States v. Simms, 508 F. Supp. 1179 (W.D. La. 1979). Subsection 1973i(c) has been routinely upheld in its application to vote fraud schemes aimed solely at nonfederal contests which occur in joint federal/state elections. *See, e.g.,* United States v. Garcia, 719 F.2d 99 (5th Cir. 1983); United States v. Carmichael, 685 F.2d 903 (4th Cir. 1982); United States v. Mason, 673 F.2d 737 (4th Cir. 1982); United States v. Thompson, 615 F.2d 329 (5th Cir. 1980); United States v. Barker, 514 F.2d 1077 (7th Cir. 1975); United States v. Lewin, 467 F.2d 1132 (7th Cir. 1972); United States v. Lewis, 514 F. Supp. 169 (M.D. Pa. 1981); United States v. Cianciulli, 482 F. Supp. 585 (E.D. Pa. 1979).

72. 42 U.S.C. § 1973i(c) (1976); *see supra* note 58.

73. *E.g.,* United States v. States, 488 F.2d 761 (8th Cir. 1973), *cert. denied,* 417 U.S. 909 (1974); United States v. Clapps, No. 82-172 (M.D. Pa. Aug. 23, 1983); United States v. Lewis, 514 F. Supp. 169 (M.D. Pa. 1981).

74. *E.g.,* MD. ANN. CODE art. 33, § 3-1 (1983) (registration procedure); *id.* § 1-1 ("election" means primary, general, special, local, congressional, presidential, or state-wide).

75. United States v. Barker, 514 F.2d 1077 (7th Cir. 1975); United States v. Cianciulli, 482 F. Supp. 585 (E.D. Pa. 1979).

of fraudulent conduct was functionally sufficient to expose the federal race to potential danger.[76] Isolated instances involving nothing more than one voter impersonating another to allow him to vote for a nonfederal candidate may be inadequate to establish federal jurisdiction, even under a law that is as broadly cast as subsection 1973i(c).[77]

3. Commercialization of the Vote

Subsection 1973i(c) prohibits "vote buying" in the broadest possible terms. The statutory text covers any "payment" or "offer to pay" that is made to a would-be voter "for voting," as well as payments that are made to induce unregistered individuals to get onto the electoral rolls.[78] The concept of "payment" broadly embraces any medium of exchange which possesses pecuniary value.[79]

This aspect of subsection 1973i(c) is directed at eliminating commercial considerations from the voting process.[80] In *United States v. Bowman*,[81] the court held the statute rested on the premise that potential voters have a legitimate option to abstain from electoral participation; that those who choose to participate have a right to be protected from the saturation of the voting process with ballots that have been artificially stimulated through offers or gifts; and that the selection of public officials should not degenerate into a spending contest, with the victor being the candidate who can give the most value to the most voters.[82] With these considerations in mind, subsection 1973i(c) has been applied to any offer or gift made for the personal benefit of a would-be voter, for the purpose of stimulating participation in the voting process. Included are offers or gifts of money, food, food stamps, liquor, and chances to win prizes given out in a lottery-type format. Subsection 1973i(c), however, does not apply to rides to the polls or time off from work, which are given to make it *easier* for those who have decided to vote to do so.[83]

Subsection 1973i(c) does not require that an offer or payment have been made to influence the federal contest. Indeed, this statute does

76. *See, e.g., In re* Coy, 127 U.S. 731 (1888); United States v. Carmichael, 685 F.2d 903 (4th Cir. 1982).
77. *See* Blitz v. United States, 153 U.S. 308 (1894).
78. 42 U.S.C. § 1973i(c) (1976); *see* United States v. Bowman, 636 F.2d 1003 (5th Cir. 1981) (Congress may regulate any activity which exposes the federal aspects of the election to the possibility of corruption).
79. United States v. Garcia, 719 F.2d 99 (5th Cir. 1983).
80. United States v. Malmay, 671 F.2d 869 (5th Cir. 1982); United States v. Bowman, 636 F.2d 1003 (5th Cir. 1981); United States v. Sayre, 522 F. Supp. 973 (W.D. Mo. 1981).
81. 636 F.2d 1003 (5th Cir. 1981); *see also* United States v. Blanton, 77 F. Supp. 812, 816 (E.D. Mo. 1948).
82. United States v. Bowman, 636 F.2d 1003, 1012 (5th Cir. 1981).
83. United States v. Lewin, 467 F.2d 1132, 1136 (7th Cir. 1972) (42 U.S.C. § 1973i(c) proscribes payment but not assistance rendered by civic groups to prospective voters).

not even require that the payment be shown to have been made for the purpose of influencing any particular contest. For example, in *Bowman*[84] the defendant paid voters to induce them to go to the polls to vote in a "mixed" federal/state election. Other cases have involved defendants who had paid voters to cast their ballots for candidates running for sheriff,[85] district judge,[86] school board member,[87] and county executive officer.[88] All of these cases were considered sufficient to support a conviction under subsection 1973i(c) since vote buying is a pernicious electoral practice which has the potential to corrupt all of the contests occurring at the same time. Provided a pattern of vote buying exposes federal contests to the opportunity or chance for abuse,[89] an offense under subsection 1973i(c) is not dependent upon the identity of the candidate or contest in which the payor is principally interested.

4. Conspiracy to Encourage Illegal Voting

Subsection 1973i(c) specifically proscribes conspiracies to encourage illegal voting,[90] although the definition of "illegal voting" is not given in the statute. To date, no federal prosecutions have been brought under this clause of the statute.

Since the Constitution expressly entrusts the states with the authority to establish the time, place, and manner of holding elections, most of the standards, rules, and criteria which govern eligibility to vote derive from state and local laws. The illegal voting clause of subsection 1973i(c) may apply to criminal enterprises that have as their object registering or voting persons in conscious derogation of these voter qualification laws. The statute's language requires that the voter involved have been part of the conspiracy charged.[91] This means that in cases brought under this clause, the Government must prove that the voter affected was actively aware that he was not eligible to vote and that he was "illegally" registering or voting, or both.

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84. United States v. Bowman, 636 F.2d 1003 (5th Cir. 1981).

85. United States v. Carmichael, 685 F.2d 903 (4th Cir. 1982); United States v. Mason, 673 F.2d 737 (4th Cir. 1982); United States v. Thompson, 615 F.2d 329 (5th Cir. 1980); United States v. Sayre, 522 F. Supp. 973 (W.D. Mo. 1981).

86. United States v. Simms, 508 F. Supp. 1179 (W.D. La. 1981).

87. United States v. Malmay, 671 F.2d 869 (5th Cir. 1982); *see also* United States v. Blanton, 77 F. Supp. 812 (E.D. Mo. 1948) (mere presence of a congressional race on the official ballot is sufficient to invoke the criminal prohibition and no showing that the federal election was actually affected is necessary).

88. United States v. Garcia, 719 F.2d 99 (5th Cir. 1983).

89. United States v. Carmichael, 685 F.2d 903 (4th Cir. 1982).

90. *See supra* note 58. To date, there have been no prosecutions under this clause of the statute.

91. *Id.*

5. Voting More than Once

In 1975, the 1965 Act was amended to add 42 U.S.C. § 1973i(e).[92] Subsection 1973i(e) prohibits a person from voting more than once in connection with any general, special, or primary election in which a federal candidate is on the ballot.[93] Violations are felonies punishable by fines up to $10,000 or imprisonment up to five years, or both.

Similar to subsection 1973i(c), subsection 1973i(e) finds its constitutional roots as a necessary and proper congressional enactment, directed at ensuring that corrupt electoral practices are physically isolated from elections when federal candidates may be affected thereby. It is unnecessary to prove under subsection 1973i(e) that the multiple vote in question actually affected a federal contest.[94]

Subsection 1973i(e) is a particularly useful prosecutive tool for addressing schemes to stuff ballot boxes or to cast fraudulent absentee ballots. The concept of voting more than once, however, is not restricted to those situations where one or more members of a criminal enterprise actually marks more than one ballot. Analogous to subsection 1973i(c), subsection 1973i(e) is a broad statute[95] which Congress enacted to give "the widest possible protection to the franchise of American citizens."[96] Therefore, subsection 1973i(e) has potential application to situations involving intimidation of voters, or those where it can otherwise fairly be said that a defendant purposely sought to subvert the free exercise of electoral will by other voters, and thereby to multiply the value of his own franchise beyond the one vote accorded to him by the electoral system.

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92. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 443 (codified as amended at 42 U.S.C. § 1973i(e) (1976)).

93. 42 U.S.C. § 1973i(e) (1976) provides:

> (1) Whoever votes more than once in an election referred to in paragraph (2) shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> (2) The prohibition of this subsection applies with respect to any general, special, or primary election held solely or in part for the purpose of selecting or electing any candidate for the office of President, Vice President, presidential elector, Member of the United States Senate, Member of the United States House of Representatives, Delegate from the District of Columbia, Guam, or the Virgin Islands, or Resident Commissioner of the Commonwealth of Puerto Rico.
>
> (3) As used in this subsection, the term 'votes more than once' does not include the casting of an additional ballot if all prior ballots of that voter were invalidated, nor does it include the voting in two jurisdictions under section 1973aa-1 of this title, to the extent two ballots are not cast for an election to the same candidacy or office.

94. *See* United States v. Lewis, 514 F. Supp. 169 (M.D. Pa. 1981); *see also* United States v. Carmichael, 685 F.2d 903 (4th Cir. 1982); United States v. Mason, 673 F.2d 737 (4th Cir. 1982); United States v. Malmay, 671 F.2d 869 (5th Cir. 1982); United States v. Sayre, 522 F. Supp. 973 (W.D. Mo. 1981).

95. United States v. Cianciulli, 482 F. Supp. 585 (E.D. Pa. 1979).

96. United States v. Lewis, 514 F. Supp. 169, 178 (M.D. Pa. 1981).

E. Other Statutory Vehicles for Achieving Federal Jurisdiction Over Local Election Fraud

1. Mail Fraud

Even in instances where the ballot includes no candidates for federal office, a federal court may assert prosecutive jurisdiction over corruptions of the balloting process under the mail fraud statute, 18 U.S.C. § 1341.[97] The mail fraud law rests on Congress' power to regulate the mails rather than upon its authority to regulate the electoral process. Therefore, a scheme to intentionally disrupt even a purely local election may be reached under section 1341, provided the mails were used in the furtherance of the fraudulent electoral objective involved.[98]

The mail fraud statute prohibits using the United States mails to execute or further schemes to defraud.[99] Each mailing in the furtherance of a fraudulent scheme may serve as the basis for a separate violation of section 1341.[100]

It is well settled that the concept of "scheme and artifice to defraud" as used in section 1341 is to be interpreted broadly. This statute embraces any conduct which employs deceit, trickery, misrepresentation, material omission, or breach of fiduciary duties of loyalty or trust.[101] The "fraudulent" character of a given scheme is measured by nontechnical standards, and is not necessarily restricted by common law concepts of false pretenses. The law places its imprimatur on socially accepted moral standards, and condemns conduct which fails to match the "reflection of moral uprightness, of fundamental honesty,

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97. 18 U.S.C. § 1341 (1974).

98. Badders v. United States, 240 U.S. 391 (1916); United States v. States, 488 F.2d 761 (8th Cir. 1973), *cert. denied,* 417 U.S. 909 (1974); United States v. Lewis, 514 F. Supp. 169 (M.D. Pa. 1981).

99. 18 U.S.C. § 1341 (1976) provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

100. Pereira v. United States, 347 U.S. 1 (1954); Durland v. United States, 161 U.S. 306 (1896).

101. United States v. Boffa, 688 F.2d 919 (3d Cir. 1982); United States v. Ballard, 663 F.2d 754 (5th Cir. 1982); United States v. Pintar, 630 F.2d 1270 (8th Cir. 1980); United States v. Mandel, 591 F.2d 1347 (4th Cir. 1979); United States v. Bush, 522 F.2d 641 (7th Cir. 1975); United States v. Isaacs, 493 F.2d 1124 (7th Cir. 1974).

fair play and right dealing in the general and business life of members of society."[102]

It is equally well settled that the mail fraud statute is not directed solely at schemes that have as their objective the attainment of pecuniary gain. Corrupt interference with the normal functioning of governmental processes deprives a body politic of the fiduciary loyalty owed by public servants to those they serve. Such schemes are therefore within the ambit of section 1341.[103] Similarly, schemes to deprive an electoral body of its political rights to fair and impartially conducted elections, free from dilution from the intentional casting and tabulation of false, fictitious, or spurious ballots, have been held to fall within the mail fraud statute.[104]

Most state laws require that the mails be used to cast, and often to apply for, absentee ballots.[105] Thus, section 1341 is particularly useful in prosecuting schemes to cast irregular absentee ballots. Care must be taken, however, to avoid predicating substantive mail fraud counts on mailings which are both required by law and which are not inherently fraudulent.[106] The mailing for tabulation of absentee ballots which have been manipulated, altered, obtained through vote buying, or otherwise handled in violation of applicable state laws satisfies this standard, as does the mailing of absentee ballot applications which contain false information concerning entitlement to vote absentee, or which have been submitted by the voter as a result of voter bribery.

Section 1341 may apply to schemes devised by purported political fundraisers to embezzle money they have solicited for stated political causes. In *United States v. Curry*,[107] the Fifth Circuit held that a scheme involving the intentionally false reporting of embezzled campaign contributions, in derogation of state financial disclosure laws, was properly cognizable as a criminally actionable "fraud" under sec-

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102. United States v. Curry, 681 F.2d 406, 410 (5th Cir. 1982) (citing Blackly v. United States, 380 F.2d 665, 671 (5th Cir. 1967)); Gregory v. United States, 253 F.2d 104, 109 (5th Cir. 1958).

103. United States v. Mandel, 591 F.2d 1347 (4th Cir. 1979); United States v. Caldwell, 544 F.2d 691 (4th Cir. 1976); United States v. McNeive, 536 F.2d 1245 (8th Cir. 1976).

104. United States v. States, 488 F.2d 761 (8th Cir. 1973), *cert. denied,* 417 U.S. 909 (1974); United States v. Lewis, 514 F. Supp. 169 (M.D. Pa. 1981); *see also* United States v. Curry, 681 F.2d 406 (5th Cir. 1982) (dictum); United States v. Clapps, No. 82-172 (M.D. Pa. Aug. 23, 1983) (same). Two recent decisions from the Fifth and Sixth Circuits have likewise approved the use of the mail fraud statute to prosecute the casting of illegal ballots in local elections. United States v. McNeeley, 660 F.2d 49 (5th Cir. 1981); United States v. Castle, No. 82-5011 (6th Cir. Aug. 12, 1982). In addition, this issue is presently under consideration by the Fourth Circuit. United States v. Odom, Nos. 83-5218 to -5220 (4th Cir. filed Sept. 6, 1983).

105. *See, e.g.,* MD. ANN. CODE art. 33, §§ 27-2, 27-6 (1983).

106. Parr v. United States, 363 U.S. 370 (1960); United States v. Curry, 681 F.2d 406, 411-13 (5th Cir. 1982).

107. 681 F.2d 406 (5th Cir. 1982).

tion 1341.[108]

2. Intentional Deprivation of Due Process and Equal Protection Rights

As discussed above,[109] a pattern of vote fraud which relies upon the necessary participation of local election judges and poll officials to corrupt the ballot box may be prosecuted under 18 U.S.C. §§ 241 and 242 without regard to the identity of the election or candidates affected.[110] The gravamen of offenses under these statutes is the intentional deprivation of rights secured directly by the Constitution. Since ballot fraud is by definition *malum in se*, the element of intent is satisfied whenever ballot fraud can be proved.

Several problems conceivably might arise in utilizing sections 241 and 242 to address fraud that is directed at nonfederal elections, since the extent to which the right to vote in nonfederal elections flows directly from the Constitution is unclear. Nevertheless, when a vote fraud scheme necessarily depends upon the participation and assistance of persons clothed with official authority, the due process and equal protection clauses of the fifth[111] and fourteenth amendments are implicated. In these circumstances, the requisite constitutional predicate is present for prosecution of locally directed vote fraud under these statutes.

In *United States v. Anderson*,[112] the Fourth Circuit affirmed the convictions of several West Virginia defendants who had focused their energies on corrupting poll managers at a precinct in Logan County. The object of the scheme was to affect the outcome of several local contests that were on the ballot. While the scheme also involved a consequential impact on two federal contests, the court concluded that the conspiracy for which the defendants had been charged remained "active" after the results of the federal race had been certified. It was sufficient, ruled the court, that the defendants' conduct focused on corrupting the proper discharge of the poll judges' duties, thereby implicating the equal protection clause. After the Supreme Court affirmed the case on other grounds, the Fourth Circuit in a subsequent decision, *United States v. Stollings*,[113] held that an intentional deprivation of the one-person-one-vote principle was actionable under 18 U.S.C. § 241 without regard to whether a federal contest was affected thereby.

This theory of prosecution is especially useful in prosecuting

108. *Id.* at 414.
109. *See supra* notes 49-50 and accompanying text.
110. United States v. Stollings, 501 F.2d 954 (4th Cir. 1974); United States v. Anderson, 481 F.2d 685 (4th Cir. 1973), *aff'd on other grounds,* 417 U.S. 211 (1974).
111. Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975) (fifth amendment due process clause imposes equal protection guarantee on federal government); Bolling v. Sharpe, 347 U.S. 497 (1954) (same).
112. 481 F.2d 685 (4th Cir. 1973), *aff'd on other grounds,* 417 U.S. 211 (1974).
113. 501 F.2d 954 (4th Cir. 1974).

schemes to stuff ballots in nonfederal elections. Ballot box stuffing schemes normally rely heavily on the necessary cooperation and participation of poll officials who, by virtue of state laws, have access to and custody of the voting machinery and paraphernalia.

III. CONCLUSION

Vote fraud represents an intentional and direct assault on one of the institutional foundations of American democracy. Prosecution of those who seek to disparage and corrupt the elective process is a law enforcement priority of the federal government.

The task of federal law enforcement in this area has recently been made substantially easier. Courts have answered the previously unresolved questions concerning the extent to which abuse of the franchise aimed at local and state elections may be prosecuted under federal law. The potential for a federal presence in this area of law enforcement has increased accordingly. For the first time since the repeal of the Enforcement Act in the late 19th Century, it is accurate to state that the federal prosecutor possesses the statutory tools through which federal jurisdiction can be asserted over most abuses of the franchise.