

THE POLITICS OF VOTER FRAUD

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KEY FINDINGS

- ***Voter fraud is the “intentional corruption of the electoral process by the voter.”*** This definition covers knowingly and willingly giving false information to establish voter eligibility, and knowingly and willingly voting illegally or participating in a conspiracy to encourage illegal voting by others. All other forms of corruption of the electoral process and corruption committed by elected or election officials, candidates, party organizations, advocacy groups or campaign workers fall under the wider definition of ***election*** fraud.
- ***Voter fraud is extremely rare.*** At the federal level, records show that only 24 people were convicted of or pleaded guilty to illegal voting between 2002 and 2005, an average of eight people a year. The available state-level evidence of voter fraud, culled from interviews, reviews of newspaper coverage and court proceedings, while not definitive, is also negligible.
- ***The lack of evidence of voter fraud is not because of a failure to codify it.*** It is not as if the states have failed to detail the ways voters could corrupt elections. There are hundreds of examples drawn from state election codes and constitutions that illustrate the precision with which the states have criminalized voter and election fraud. If we use the same standards for judging voter fraud crime rates as we do for other crimes, we must conclude that the lack of evidence of arrests, indictments or convictions for any of the practices defined as voter fraud means very little fraud is being committed.
- ***Most voter fraud allegations turn out to be something other than fraud.*** A review of news stories over a recent two year period found that reports of voter fraud were most often limited to local races and individual acts and fell into three categories: unsubstantiated or false claims by the loser of a close race, mischief and administrative or voter error.
- ***The more complex are the rules regulating voter registration and voting, the more likely voter mistakes, clerical errors, and the like will be wrongly identified as “fraud.”*** Voters play a limited role in the electoral process. Where they interact with the process they confront an array of rules that can trip them up. In addition, one consequence of expanding voting opportunities, i.e. permissive absentee voting systems, is a corresponding increase in opportunities for casting unintentionally illegal ballots if administrative tracking and auditing systems are flawed.
- ***There is a long history in America of elites using voter fraud allegations to restrict and shape the electorate.*** In the late nineteenth century when newly freed black Americans were swept into electoral politics, and where blacks were the majority of the electorate, it was the Democrats who were threatened by a loss of power, and it was the Democratic party that erected new rules said to be necessary to respond to alleged fraud by black voters. Today, the success of voter registration drives among minorities and low income people in recent years threatens to expand the base of the Democratic party and tip the balance of power away from the Republicans. Consequently, the use of baseless voter fraud allegations for partisan advantage has become the exclusive domain of Republican party activists.

- ***The historically disenfranchised are often the target of voter fraud allegations.*** Fraud allegations today typically point the finger at those belonging to the same categories of voters accused of fraud in the past – the marginalized and formerly disenfranchised, urban dwellers, immigrants, blacks, and lower status voters. These populations are mostly found among those still struggling for full inclusion in American life.
- ***Better data collection and election administration will improve the public discussion of voter fraud and lead to more appropriate policies.*** We need better data, better election administration, transparency and more responsible journalism to improve public understanding of the legitimate ways in which electoral outcomes can be distorted and manipulated. This will help ensure that new laws and rules to prevent fraud are narrowly targeted to solve legitimate problems rather than used as a strategy to shape the electorate for partisan advantage.

INTRODUCTION

The claim that voter fraud threatens the integrity of American elections is itself a fraud. It is being used to persuade the public that deceitful and criminal voters are manipulating the electoral system. No available evidence suggests that voters are intentionally corrupting the electoral process, let alone in numbers that dilute and cancel out “the lawful votes of the vast majority of Americans.”¹ The lack of evidence is not due to a failure to codify voter fraud as a crime, nor is it due to the inability or unwillingness of local law enforcement agencies to investigate or prosecute potential cases of voter fraud. In fact, when we probe most allegations of voter fraud we find errors, incompetence and partisanship. The exaggerated fear of voter fraud has a long history of scuttling efforts to make voting easier and more inclusive, especially for marginalized groups in American society. With renewed partisan vigor fantasies of fraud are being spun again to undo some of the progress America has made lowering barriers to the vote.

The purpose of this report is to disentangle the myth from the reality and to separate the politics of voter fraud from legitimate administrative concerns about the integrity of the electoral process. To make the argument, we present a usable definition of voter fraud, discuss the problem of evidence, and explain how and why the dynamics of electoral competition drive the use of baseless fraud claims in American politics. We present several contemporary examples to illustrate how poor election administration and voter mistakes are misleadingly labeled “fraud.” Recent allegations against voter registration campaigns highlight the need for an analysis sensitive to the partisanship and race and class issues just beneath the surface of most voter fraud claims. The last section of the report makes policy recommendations for improving public understanding and removing the canard of voter fraud from the election reform debate. The appendix discusses what to look for in evaluating voter fraud allegations.

¹ U.S. Senate Republican Policy Committee, “Putting An End to Voter Fraud,” (February 15, 2005); available online at http://rpc.senate.gov/_files/Feb1504VoterFraudSD.pdf.

DEFINING VOTER FRAUD

Conceptual clarity is important in evaluating evidence of fraud. We begin with a discussion of what voter fraud is and what it is not. The first problem in defining voter fraud is that as a crime, it defies precise legal meaning. In fact, there is no single accepted legal definition of voter fraud. We have fifty different state electoral systems and fifty state criminal codes governing the administration of elections, plus a federal code that applies in national elections, and no uniform standards. In fact, some states do not actually criminalize 'voter fraud,' although they all criminalize acts that are commonly lumped together under the term, such as illegal voting, providing false information to register to vote, and multiple voting.² The legal incoherence contributes to popular misunderstandings.

We need a basic definition of voter fraud that cuts through the confusion without violating the way voter fraud is diversely treated in state and federal law. We can start with the U.S. Department of Justice's definition of **election fraud** and apply it to election crimes committed by **voters**. The Justice Department defines election fraud as "conduct that corrupts the process by which ballots are obtained, marked, or tabulated; the process by which election results are canvassed and certified; or the process by which voters are registered."³ Voter fraud is a sub-category of election fraud, or the intentional corruption of the electoral process by voters.

Voter fraud is the intentional corruption of the electoral process by voters.

This covers **knowingly and willingly** giving false information to establish voter eligibility, and **knowingly and willingly** voting illegally or participating in a conspiracy to encourage illegal voting by others.⁴ Apparent acts of fraud that result from voter mistakes or isolated individual wrongdoing or mischief making not aimed at corrupting the voting process should not be considered fraud, though sometimes these acts are prosecuted as such.⁵ All other forms of corruption of the electoral process and corruption committed by elected or election officials, candidates, party organizations, advocacy groups or campaign workers fall under the wider definition of **election** fraud.⁶

² There are many examples of states that criminalize what we think of as voter fraud without calling it voter fraud. Georgia, for example, has no election code offense for "voter fraud," but it does provide stiff penalties for "repeat voting" and "voting by unqualified elector." See, for example O.C.G.A. § 21-2-560 et seq. In New Hampshire, the crime of voting more than once is called "wrongful voting." See, N.H.R.S. § 63-659.34. In Alaska, voter impersonation, voting more than once, and registering to vote without being entitled to register are all simply called "voter misconduct." See, Ala. Statutes § 15.56.040 et seq.

³ Craig C. Donsanto and Nancy Stewart, *Federal Prosecution of Election Offenses*, 6th Edition, U.S. Department of Justice, Criminal Division, Public Integrity Section (January 1995), 21 (herein cited as 'DOJ Manual').

⁴ Fraud is commonly defined as "deception *deliberately* practiced with a view to gaining an unlawful or unfair advantage" (*emphasis added*). See *Webster's Revised Unabridged Dictionary*, Version published 1913 by the C. & G. Merriam Co. (Springfield, Mass.), under the direction of Noah Porter, D.D., LL.D. Criminal intent is a feature of the election crime codes of most states and the federal system, although a showing of intent is not always required to obtain a conviction for some forms of voter fraud such as "alien voting" (voting by a non-citizen).

⁵ The proper venue for challenging mistakes that may have affected the outcome of an election is to follow state statutory procedures for an election challenge or contest. See, Barry H. Weinberg, *The Resolution of Election Disputes: Legal Principles That Control Election Challenges* (Washington, D.C.: IFES, 2006).

⁶ This definition of voter fraud is simpler and more coherent than others offered. See, for example, U.S. Election Assistance Commission, *Election Crimes: An Initial Review and Recommendations for Future Study* (December 2006), 13-16; available online

Allegations of “voter fraud” should be analyzed to determine 1) who is alleged to have committed the fraud, and 2) which stage of the electoral process is alleged to have been corrupted. This approach will go a long way toward clarifying whether electoral integrity is being breached and what needs to be done to secure the process (see the appendix for further discussion of how to identify fraud).

at www.eac.gov/docs/Voter%20Fraud%20&%20Intimidation%20Report%20-POSTED.pdf (herein cited as ‘EAC Report’). Moreover, although it is simple, it preserves the meaning of “fraud” in the electoral context as outlined by the Justice Department. The Department’s manual for training U.S. Attorneys in investigating and prosecuting election crimes divides “election frauds” into two categories, one that involves the participation of voters and another that does not. Those election fraud crimes involving the participation of voters include vote buying schemes, absentee ballot frauds, voter intimidation schemes, migratory-voting (or floating-voter) schemes, and voter ‘assistance’ frauds, in which the wishes of the voters are ignored or not sought. See, Donsanto and Stewart (1995), 22-24. Acts of voter intimidation which are included in the election fraud definitions offered in both the EAC Report and the DOJ Manual are excluded here. While the intimidation of voters certainly corrupts the electoral process, it is a crime that more directly involves the deprivation of rights guaranteed by law and for that reason should be treated separately from acts of deceit.

VOTER FRAUD AND THE PROBLEM OF EVIDENCE

How prevalent is voter fraud? A 2005 U.S. Senate Republican Policy Committee report claimed that “voter fraud continues to plague our nation’s federal elections, diluting and canceling out the lawful votes of the *vast majority of Americans*” (emphasis added).⁷ This would be shocking if it were true. But the Committee made it without providing a single piece of evidence to support or clarify the claim. It cited no surveys, no statistics, no studies, no credible evidence whatsoever to back up its warning that election results are routinely distorted by fraud in the United States.

Evidence of voter fraud like all other crimes comes from law enforcement efforts to combat it

The Committee cited no data because there is very little to cite. Evidence of voter fraud like evidence of other forms of criminal behavior is primarily produced by law enforcement efforts to detect and prosecute it. And the available evidence here suggests that voters rarely commit voter fraud.⁸ As in the case of all other kinds of crime, it is simply unacceptable to allege law breaking without providing at least some supporting evidence.

What is that evidence? At the national level, a major new project at the U.S. Department of Justice, the Ballot Access and Voting Integrity Initiative (BAVII) has resulted in only a handful of convictions.⁹ According to the Attorney General, since the inception of the program in 2002, “we’ve made enforcement of election fraud and corruption offenses a top priority.”¹⁰ The result? Government records show that only 24 people were convicted of or pleaded guilty to illegal voting between 2002 and 2005, an average of eight people a year. This includes 19 people who were ineligible to vote, five because they were still under state supervision for felony convictions, and 14 who were not U.S. citizens; and five people who voted twice in the same election, once in Kansas and again in Missouri.¹¹

⁷ U.S. Senate Republican Policy Committee (2005).

⁸ The idea that voter fraud is first and foremost a crime reaches substantially the federal concept of election fraud which “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.” See, Craig C. Donsanto, “The Federal Crime of Election Fraud,” prepared for the Russian election reform website, Democracy.Ru, n.d.; available online at www.democracy.ru/english/library/international/eng_1999-11.html.

⁹ On the origins of BAVII, see Jeffrey Toobin, “Annals of Law: Poll Positions,” *The New Yorker* (September 20, 2004). Very little information about the program’s overall scope and performance has been released by the Justice Department’s Public Integrity Section; annual press releases announce the numbers of investigations and convictions obtained, and the Public Integrity Section’s annual reports to Congress briefly discuss some of the cases, but efforts to acquire more information about the program have been stymied by the Criminal Division’s failure to respond to a Freedom of Information Act request filed in July 2005. Nevertheless, it is difficult to imagine that the Department would withhold information about closed cases of deceitful voters, and therefore likely that the limited information it has released so far is all there is.

¹⁰ Prepared Remarks of Attorney General Alberto R. Gonzales, Ballot Access and Voting Integrity Symposium, Washington, D.C. (October 4, 2005).

¹¹ U. S. Department of Justice, Criminal Division, Public Integrity Section, *Election Fraud Prosecutions & Convictions, Ballot Access & Voting Integrity Initiative, October 2002 – September 2005* (n.d.).

Federal Prosecutions for Illegal Voting 2002 – 2005

| CASTING A FALSE BALLOT | DISPOSITION | | | | |
|-----------------------------------|-------------|-----------|----------------|-----------|-----------|
| | Dismissed | Acquitted | Pleaded Guilty | Convicted | Total |
| False claim of eligibility | | | | | |
| Non-citizen | 4 | 1 | 3 | 11 | 19 |
| Felon | 4 | 1 | 3 | 2 | 10 |
| Multiple voting | 3 | 1 | 5 | | 9 |
| TOTAL | 11 | 3 | 11 | 13 | 38 |

Source: U. S. Department of Justice, Criminal Division, Public Integrity Section, *Election Fraud Prosecutions & Convictions, Ballot Access & Voting Integrity Initiative, October 2002 – September 2005* (n.d).

In addition, the BAVII uncovered several vote buying schemes that have resulted in the convictions or guilty pleas of about 30 people, though most of those convicted were party and election officials, candidates for public office and elected officials, and in one case, the commander of a local VFW post. The vote buying cases involved a handful of elections in the Appalachia regions of eastern Kentucky and West Virginia, East St. Louis, Illinois and Caldwell County, North Carolina.

The available state-level evidence of voter fraud, culled from interviews, reviews of newspaper coverage and court proceedings, while not definitive, is also negligible.¹² There are no reliable, officially compiled, national or even statewide statistics on voter fraud.¹³ Even though many criminal acts associated with “voter fraud” are classified as felonies, voter fraud fails to appear in the F.B.I.’s uniform crime reports. There are no publicly available criminal justice databases that include voter fraud as a category of crime. No states collect and publish statistics on voter fraud.¹⁴

The lack of evidence is not due to a failure to codify voter fraud as a crime

If fraud is such a persistent concern of those who run elections, government agencies responsible for election administration should collect statistics on it, as they do in other serious matters, certainly other crimes. It is not as if the states have failed to detail the ways voters could corrupt elections. There are hundreds of examples drawn from state election codes and constitutions that illustrate the precision with which the states have criminalized voter and election fraud.

If we use the same standards for judging voter fraud crime rates as we do for other crimes, which is to calculate the incidence of crime from law enforcement statistics on arrests, indictments and convictions, we must conclude that the lack of evidence of arrests, indictments or convictions for any of the practices defined as voter fraud means very little fraud is being committed relative to the millions of votes cast each year in state, local and federal elections.

¹² Lori Minnite and David Callahan, *Securing the Vote: An Analysis of Election Fraud* (New York: Dēmos: A Network for Ideas and Action, 2003). The author is engaged in a more thorough analysis of state-level voter fraud data and investigations which will be published in her forthcoming book. To-date, the findings only confirm Minnite and Callahan’s earlier conclusions.

¹³ This is an urgent concern. Law professor Spencer Overton persuasively argues for a more empirical cost-benefit approach to evaluating the value and constitutionality of new restrictive photo identification voting requirements. As Overton notes, this approach is hampered by the lack of systematic data on fraud. See, Spencer Overton, “Voter Identification,” *Michigan Law Review* 105(2007), 631-682.

¹⁴ The California Secretary of State’s Office compiled information on electoral fraud cases referred to its office from 1994 to 2003. The data were analyzed in an unpublished conference paper (see, R. Michael Alvarez and Frederick J. Boehmke, “Contemporary Election Fraud: A Quantitative Analysis of Election Fraud Cases in California,” paper prepared for Election Fraud Conference, Center for Public Policy and Administration, The University of Utah, and the Caltech/MIT Voting Technology Project, Salt Lake City, Utah, September 29-30, 2006; available online at www.vote.caltech.edu/events/2006/FraudConf/AlvBmk-paper.pdf), but they are not publicly available.

Examples Of How States Criminalize “Voter Fraud”

- In Texas, a person can be convicted of a third degree felony if he or she “votes or attempts to vote in an election in which the person knows the person is not eligible to vote; knowingly votes or attempts to vote more than once in an election; or knowingly impersonates another person and votes or attempts to vote as the impersonated person.”ⁱ
- California's election code has dozens of provisions that prohibit illegal activity associated with elections. It prohibits fraudulent registration, including registering under a false name, registering under a false address, and registering a non-existent person. It makes it a felony for a person to vote in an election that he or she is not entitled to vote in, to vote more than once, or impersonate another voter. Moreover, it is a felony in California to “give, offer, or promise any office, place, or employment, or promise to procure or endeavor to procure any office, place, or employment to or for any voter, or to or for any other person, in order to induce that voter at any election to” vote or not vote for a particular candidate.ⁱⁱ
- Pennsylvania law gives the power to monitor elections to county boards of elections, and imposes a substantial number of penalties on people engaging in election fraud. Giving or receiving money in exchange for voting a certain way in an election can bring up to seven years in prison and \$15,000 in fines. Any person convicted of perjury “regarding any material matter or thing relating to any subject being investigated, heard, determined or acted upon by any county board of elections, or member thereof, or by any court or judge thereof, judge of election, inspector of election, or overseer” can receive up to five years in prison and a \$10,000 fine. Any person voting when they are not registered to vote, or voting more than once can be punished the same.ⁱⁱⁱ
- Nineteenth century language in the Alabama Constitution disqualifies from voting “all idiots and insane persons” and those convicted of crimes like murder, arson, and rape, but also wife battering, bigamy, sodomy, miscegenation and vagrancy. It also disqualifies from voting any person convicted of “selling or offering to sell his vote or the vote of another, or of buying or offering to buy the vote of another, or of making or offering to make a false return in any election by the people or in any primary election to procure the nomination or election of any person to any office, or of suborning any witness or registrar to secure the registration of any person as an elector.”^{iv}
- In Minnesota, it is a felony to submit more than one absentee ballot, assist another in submitting more than one absentee ballot, or alter another’s absentee ballot in any way.^v

ⁱ Tex. Gov't Code Ann. § 64.012.

ⁱⁱ Cal. Gov't Code § 18520.

ⁱⁱⁱ 25 Pa. Stat. Ann. Art. XVIII, generally.

^{iv} Constitution of Alabama (1901), Section 182.

^v Minn. Stat. Ann. § 203B.03.

The lack of evidence of voter fraud is not due to law enforcement agencies ignoring their duties

Even if crime reports underestimate true crime rates because some crimes go unreported or undetected, or because criminal behavior is sometimes addressed by means other than prosecution, crime is still measured as a function of law enforcement efforts to address it. Under the rule of law, enforcement efforts establish the core evidence of crime. It is difficult to conceive of whole categories of criminal behavior that go almost completely undetected or ignored by law enforcement officials at all levels of government across the U.S. today. And yet, those who believe there is a lot of voter fraud despite the lack of evidence frequently fall back on this argument. When confronted they charge the paucity of evidence is due to the government's failure to undertake the investigations and prosecutions that would produce it.¹⁵ A more plausible explanation is that voters are not committing fraud, leaving little to investigate or prosecute.

The lack of evidence of voter fraud is not due to the inability of law enforcement agencies to pursue voter fraud investigations

Some argue that local officials are ill-equipped to detect voter fraud and poorly motivated to pursue investigations and prosecutions of voter fraud given their lack of expertise and resources and the public's demand for attention to more serious or violent crimes.¹⁶ If election crime, perhaps like international securities fraud or organized crime, were beyond the ken of local officials to investigate, then we might expect a dearth of prosecutions and little evidence of voter fraud. This is another explanation offered by those who argue that there is a lot of fraud despite the lack of evidence. Local officials, the argument goes, can't or won't prosecute fraud for a variety of reasons. The detection and prosecution of voter fraud, however, is not beyond the ken of local officials. In fact, as the Justice Department manual on how to investigate and prosecute election crime argues, "there are several reasons why election crime prosecutions may present an easier means of obtaining convictions than do other forms of public corruption." They are, 1) "election crimes usually occur largely in public," 2) "election crimes often involve many players," and 3) "election crimes tend to leave a paper trail."¹⁷ Without any evidence to support it, the notion that local law enforcement officials are unable or unwilling to investigate or prosecute voter fraud lacks merit. But, as the saying goes, if you repeat a rumor enough times people will start to believe it.

¹⁵ Recently, a federal appeals court judge repeated the rumor that, "...the absence of [voter fraud] prosecutions [in Indiana] is explained by the endemic under enforcement of minor criminal laws (minor as they appear to the public and prosecutors, at all events)." See, *Indiana Democratic Party v. Rokita*, U.S. Court of Appeals, 7th Circuit, Case No. 06-2218, 7. This is a contentious issue, but like most allegations of voter fraud, one that fails to rise above the level of anecdote.

¹⁶ For example, in affirming the lower court's decision upholding Indiana's new photo identification law, U.S. Court of Appeals Judge Richard Posner proposed the idea that as a crime, voter fraud is analogous to littering. See also Donsanto and Stewart, asserting, "...local law enforcement is often not equipped to prosecute election offenses" (1995, 8), and Donsanto's subsequent statement that, "Voter fraud investigations are labor intensive. Local law enforcement agencies often lack the manpower and the financial resources to take these cases on." (Donsanto, n.d.) Here, Donsanto, the director of the Elections Crimes Branch of the Justice Department's Public Integrity Section since its inception in 1978, undermines a claim he makes earlier in a *University of Baltimore Law Review* article, that, "Most election fraud is easily recognized." If it's easily recognized, why would local law enforcement agencies lack the manpower and resources to take on investigations and prosecutions? See, Craig C. Donsanto, "Federal Jurisdiction Over Local Vote Fraud," *University of Baltimore Law Review* 13(1), 4.

¹⁷ Donsanto and Stewart (1995), 6.

“FRAUD” THAT IS NOT FRAUD

A review of hundreds of news reports on voter fraud appearing over a recent two year period found that with few exceptions, fraud allegations and cases reported in the press were limited to local electoral contests and individual acts, and fell into three basic categories:

- 1) *unsubstantiated or false allegations of voter fraud made by the losers of close elections;*¹⁸
- 2) *mischief; and,*
- 3) *claims that later turn out to be based on cases of voter error or administrative mistakes, not fraud.*

Here are some examples:

Examples of fraud alleged by election losers

- Pittsburgh City Council President Bob O'Connor lost a close primary race to incumbent Mayor Tom Murphy and charged voter fraud cost him the election. Pittsburgh election officials allowed the two campaigns to review balloting while monitoring each other. Mayor Murphy's campaign found 81 ineligible voters in a sampling of 71 of the city's 404 precincts. The **Pittsburgh Post-Gazette** reviewed Murphy's data and found only three clearly improper ballots. The O'Connor campaign claimed it found 142 votes cast by people whose voter registration cards were missing but would not share its data with the **Post-Gazette** for independent verification.¹⁹
- The Pasco County Canvassing Board of Port Richey, Florida, denied a request for a recount filed by Bob Leggiere who lost to the incumbent by nine votes. Leggiere claimed that voter fraud and 11 ballots that did not register a vote for mayor were the cause of his defeat. He charged that owners of a gambling boat operation voted illegally because their boat, which was their legal residence, was outside the city limits, suggesting that "because of their gambling boat interests, they have attempted to take control of the city elections." The canvassing board informed Leggiere that he needed to file a protest with the board or a complaint in court, which he declined to do.²⁰

Examples of fraud as mischief

- A Ventura County, California woman was arrested and charged with voter fraud when her ex-husband noticed the names of two of their underage children on a list of registered voters in the March 2000 primary and turned her in. The woman was charged with fraudulently registering her 10- and 15-year old daughters, one of her daughter's friends, her ex-husband who was already registered, and a number of fictitious people.²¹

¹⁸ For a discussion of fraud and the sore loser, see Michelle L. Robinson, "Issue in the Third Circuit: Election Fraud – Winning At All Costs," *Villanova Law Review* 40 (1995), 869+.

¹⁹ James O'Toole, "Voting Errors Suggest No Fraud," *Pittsburgh Post-Gazette* (June 17, 2001), B17.

²⁰ Chase Squires and Matthew Waite, "Fraud Alleged in Port Richey Vote," *St. Petersburg Times* (April 12, 2001), B4.

²¹ "Woman Faces Vote Fraud Charges," *The San Diego Union-Tribune* (October 29, 2000), A3.

- Prosecutors in West Palm Beach, Florida agreed not to charge a woman who registered her poodle, "Cocoa Fernandez," as a Republican on the condition that the woman stay out of trouble for a year. She averted a third-degree felony charge carrying a maximum 5-year prison term and a \$5,000 fine.²²
- A story appeared in the Marquette University student paper that 174 of 1,000 students surveyed said they voted more than once in the November 2000 presidential election. Another 170 claimed to have voted for write-in candidates, but the official canvass of the voting precincts surrounding the Marquette campus recorded only 12 write-in votes for president. One student told ABC News, the *Milwaukee Journal Sentinel* and the Marquette student paper that he voted four times. He later recanted when a list of voters from his precinct did not include his name at all. The Milwaukee County District Attorney said he had no evidence of any student voting more than once. The student who told the media he voted four times was later charged with selling other students fake Ohio drivers licenses he printed using his dorm room computer.²³

Examples of fraud as voter error

- The *Milwaukee Journal Sentinel* conducted a two-month review of 203,000 votes cast in Milwaukee and found that 361 felons still under state supervision cast votes in 2000. This was in violation of an "often misunderstood state law" that disqualifies felons on probation or parole from voting. Ninety percent of the 361 illegal votes were cast by African Americans living in central city neighborhoods, most with convictions for welfare fraud, forgery and other property offenses. The newspaper reasoned that the illegal votes probably went to Al Gore, since 92 percent of African Americans in the state voted for Gore. They estimated that if disqualified felons elsewhere in the state voted illegally at the same rate obtained in Milwaukee, as many as 1,100 illegal votes could have been cast statewide, a significant number given Gore's margin of victory was only 5,708 votes. None of the illegal voters contacted by the paper knew they were prohibited from voting, and a review of parole and probation procedures suggested they were never informed.²⁴ Charges were filed against three people but later dropped when prosecutors couldn't prove those charged knew they were breaking the law.
- A voter inadvertently filled out five ballots in a local election in Montgomery County, Texas. "It (the five ballots, *sic*) was just handed to me and I just put them in the box," said the culprit, 52-year old Ruben Jones, "I wasn't paying attention." An election judge allowed one of Jones' votes to count resulting in a tie at 83 votes each between two candidates who were then forced into a run-off. Fraud was charged. The city attorney acknowledged the judge's mistake but could not overturn his decision to allow one of the votes to count. There was no provision in Texas election law for overruling an election judge on such matters.²⁵

Examples of cases of administrative incompetence and mistakes leading to misplaced allegations of voter fraud in St. Louis and Milwaukee are discussed in detail below.

²² "In Brief/Florida: No Charges, But Pooch Can't Punch Ballot," *Los Angeles Times* (December 17, 2001), A23.

²³ "Marquette Student Admits He Didn't Vote Four Times," *Chicago Sun-Times* (November 16, 2000), 3; "Voter Fraud Inquiries Lead to Charges Against 3 in Milwaukee," *St. Louis Post-Dispatch* (December 21, 2000), A8.

²⁴ Dave Umhoefer and Jessica McBride, "361 Felons Voted Illegally in Milwaukee; Law Is Poorly Understood, Rarely Invoked Here," *Milwaukee Journal Sentinel* (January 21, 2001), 1A.

²⁵ Harvey Rice, "Ballot Error Won't Change Deadlocked Race," *The Houston Chronicle* (May 12, 2001), 33.

THE POLITICS OF VOTER FRAUD CLAIMS

There are many reasons why electoral reform is difficult to achieve, chief among them the benefits the *status quo* bestows on politicians in charge of making the rules. Voting rights advocates working to expand the electorate and make voting easier for more citizens must also overcome recurring arguments that reform will encourage more voter fraud. Indeed, the specter of voter fraud has been manipulated by elites to restrict and shape the electorate for nearly two centuries.

The Late Nineteenth Century and the “Good Government” Defense

The electoral reforms of the Progressive era dismantled Populist voting majorities and reflected the reformers' class and anti-immigrant biases. Following the turmoil of the election of 1896 when new immigrants, struggling farmers, and wage workers flooded into the electorate, wealthy elites pressed for tighter regulation of the electoral process. They promoted personal voter registration systems that had the effect of de-mobilizing the poor and working classes.²⁶ The reformers' rhetoric fastened on fraud and the need to eliminate it in order to protect 'the Democracy.' The perception of fraud and widespread electoral corruption gave their efforts moral ballast which obscured the class conflict at the center of the struggle for the vote.

The specter of voter fraud has been manipulated by elites to restrict and shape the electorate for nearly two centuries.

For Progressive era elites, voter registration was good government and universal voting was directly associated with corruption and voter fraud.²⁷

Municipal reformers drawn from the ranks of the new middle and upper class professional strata assumed the lower classes possessed inferior moral capacities that produced unscrupulous behavior in politics. They wrestled control of government away from the older political machine organizations by imposing administrative reforms on the electoral process. These reforms deliberately privatized and personalized the social act of voting in order to undercut the machine's capacity to mobilize majorities through ethno-religious and other group-based appeals.²⁸

²⁶ Frances Fox Piven and Richard A. Cloward, *Why Americans Don't Vote and Why Politicians Want It That Way* (Boston: Beacon Press, 2000), 91-2.

²⁷ Dayna Cunningham, "Who Are To Be Electors? A Reflection on the History of Voter Registration in the U.S.," *Yale Law and Policy Review* 9(2) (1991), 383.

²⁸ After the Civil War, the electorate was demobilized in different ways in the North and South. Black disenfranchisement was pursued through the use of violence and terror, and institutionalized through the re-writing of Southern state constitutions between 1890 and 1910. Mississippi pioneered the "Southern system" of burdensome residency requirements, periodic registration, poll taxes, literacy and "understanding" requirements, and exacting disqualification provisions, all designed to strip black men of the vote without reliance on overt racial classifications (Cunningham (1991), 377). There is a large scholarly literature on this subject. See, for example, classic works by V.O. Key, *Southern Politics in State and Nation*. (New York: A.A. Knopf, 1949); and J. Morgan Kousser, *The Shaping of Southern Politics: Suffrage Restriction and the Establishment of the One-Party South, 1880-1910* (New Haven: Yale University Press, 1974). On efforts to reshape the electorate outside of the South during this period, see, Walter Dean Burnham, "The Appearance and Disappearance of the American Voter," in Walter Dean Burnham, *The Current Crisis in American Politics* (New York: Oxford University Press, 1983); and Paul Kleppner, *Who Voted? The Dynamics of Electoral Turnout, 1870-1980* (New York: Praeger, 1982). For a fascinating account of how nineteenth century voters behaved at the polls on Election Day, see Richard Franklin Bensel, *The American Ballot Box in the Mid-Nineteenth Century* (New York: Cambridge University Press, 2004).

Much has been written about the colorful and varied forms of political corruption in the nineteenth century.²⁹ The debate over the extent of fraud among scholars, however, has failed to settle the question of whether it accounted for the extraordinarily high levels of turnout that disappeared with the adoption of personal voter registration systems.³⁰ Nor is it certain that the new voter registration laws were responsible for reducing the election fraud they were aimed at eliminating. But, election fraud documented by the reformers usually involved organized efforts by election officials and politicians, not by the voters who were the intended target of restrictive reforms like voter registration.³¹

Nevertheless, voting rights have been won. Most of the conditions that once gave rise to what we would characterize as fraudulent practices today, such as ballots produced and distributed by the political parties, have changed. In the nineteenth century, election fraud was sometimes perpetrated by partisans acting together to steal elections. Local party organizations competed for voters and controlled votes through patronage, and the stakes were high. In those days, parties, patronage and fraud were intertwined. Today, local party organizations are weak to nonexistent, in part because their access to patronage has all but disappeared. They no longer control lucrative franchises, run police and fire departments, set utility rates or build large-scale public works. The demise of local parties and patronage over the last century has undermined the logic and eroded the means of committing voter fraud.

The demise of local parties and patronage over the last century has undermined the logic and eroded the means of committing voter fraud.

The Civil Rights Era and Beyond

With each significant effort to protect and extend the right to vote, opponents have argued that the expansion of the franchise, whether through federal protections for voting rights or through reduced structural barriers to the franchise, would lead to more voter fraud. The threat of fraud was taken up by congressional opponents of the Voting

Rights Act of 1965; it was raised in the conflict over extending the Act during the first Reagan Administration; and again, in more recent debates over the National Voter Registration Act.³² It is the very success of these reforms that explains why fraud claims have re-emerged as a principle form of voter intimidation. The victories of the civil rights movement make it no longer easy or acceptable to suppress voting through the use of terrorism or violence, or with a poll tax or a literacy test. Today the intimidation is more subtle.

The dynamics of electoral competition in a two-party plurality system also contribute to the resurrection of the specter of voter fraud. When elections are close, the logic of competition drives opponents to fierce conflict. The winner in a two-party system needs only one vote more than his or her opponent; 51 percent of the votes wins it all, 49 percent wins nothing. Competing parties in

²⁹ See, for example, Glenn C. Altschuler and Stuart M. Blumin, *Rude Republic: Americans and Their Politics In the Nineteenth Century* (Princeton: Princeton University Press, 2000); and Tracy Campbell, *Deliver the Vote: A History of Election Fraud, an American Political Tradition – 1724-2004* (New York: Carroll & Graf, 2005).

³⁰ See, Piven and Cloward (2000), 25-6, discussing the work of Walter Dean Burnham, Philip Converse, Paul Kleppner and Jerrold G. Rusk. See also, Howard W. Allen and Kay Warren Allen, "Vote Fraud and Data Validity," in Jerome M. Clubb, William H. Flanigan, and Nancy H. Zingale, eds., *Analyzing Electoral History: A Guide to the Study of American Voter Behavior* (Beverly Hills: Sage Publications, Inc., 1981), 153-194.

³¹ See Cunningham (1991), 384, citing Joseph P. Harris, *Election Administration in the United States* (Washington, D.C.: The Brookings Institution, 1934).

³² For an important account of the movement to reform voter registration laws leading to the passage of the National Voter Registration Act of 1993, see Margaret M. Groarke, *Expanding Access to the Vote: An Analysis of Voter Registration Reform in the United States, 1970-1993* (Ph.D. diss., Department of Political Science, City University of New York, 2000).

close elections fight hard to maximize their chances of winning that 51 percent³³ because the closer the election, the fewer the number of voters that are needed to shift victory to one party or the other. Tight elections produce the biggest pay-off for the smallest shifts in vote share.

Theoretically, parties or campaigns can produce a shift by expanding votes for themselves or constraining votes for their opponents, or even pursuing both practices at the same time. But expanding the vote carries higher risks for incumbents. Elected officials try to preserve the majorities that elect them and are wary of the threat new voters pose. Both parties, therefore, are wary of expansion. Since the success of the Voting Rights Act prohibits them from carving out their majorities in ways that directly violate laws protecting voting rights, they shape and manage their electorates by more subtle means, through the rules that govern the electoral process. Both parties seek to control, enforce and bend electoral rules to their advantage. As the political scientist, E.E. Schattschneider once observed,

In politics as in everything else it makes a great difference whose game we play. The rules of the game determine the requirements for success. . . . and go to the heart of political strategy.³⁴

For example, today, Republican party officials and incumbents support restrictive interpretations of the rules governing voter qualifications when they anticipate that tightening access to the vote will hurt their rivals.

They insist that the votes of legitimate, qualified voters are threatened by the votes of ineligible voters, justifying their support for restrictive identification requirements.³⁵

The Democrats resist these efforts when they think the new rules will threaten their own party base; but if the new rules aren't likely to threaten the base, the Democrats, whose elected officials share the same interest in a stable, predictable electorate as their Republican colleagues, compromise and endorse new restrictions. The Democrats' concession to the inclusion of an identification requirement for first time voters who register to vote by mail in the Help America Vote Act of 2002 (HAVA), in the face of widespread opposition on the part of voting rights advocates, is a case in point.³⁶ New HAVA voter identification requirements apply to a diffuse category of new voters whose party loyalties were unknown and therefore in adding this rule at the national level, neither party could claim an uncontested advantage or disadvantage. In the partisan wrangling over the bill, the important questions about the extent of voter fraud and the effectiveness of new rules in combating it were lost.

Given the particular party and competitive dynamics of the current period, the use of baseless voter fraud allegations for partisan advantage has become the exclusive domain of Republican party activists.

³³ Or a plurality when the occasional third party candidate is in the race.

³⁴ E.E. Schattschneider, *The Semisovereign People: A Realist's View of Democracy in America* (New York: Holt, Rinehart and Winston, 1960), 48-49.

³⁵ U.S. Senate, Republican Policy Committee (2005).

³⁶ Emily Pierce, "Senate Standoff Over Voter Fraud Provision Threatens to Sink Election Bill," *CQ Monitor News* (February 28, 2002); Karen Foerstel with Emily Pierce, "Hopes for Quick Accord on Election Standards Bill Face Liberals' Objections," *CQ Weekly – Elections* (April 13, 2002), 957; Geoffrey Gray, "Schumer's Identity Politics: Civil Rights Advocates Fight Compromise on Election Reform," *The Village Voice* (April 3-9, 2002), 42; Gabrielle B. Ruda, "Note: Picture Perfect: A Critical Analysis of the Debate on the 2002 Help America Vote Act," *Fordham Urban Law Journal* 31 (November 2003), 235.

In a competitive electoral environment it is easier and safer for the parties to try to stabilize the base and reduce the opposition's support than it is for either to recruit new voters. Given the particular party and competitive dynamics of the current period, the use of baseless voter fraud allegations for partisan advantage has become the exclusive domain of Republican party activists.

Take the American Center for Voting Rights (ACVR). This organization established a presence on the Internet in March 2005, just six days before a Republican-controlled U.S. House Administration Committee hearing on problems in the 2004 Ohio election, and was the only "voting rights" group allowed to testify. Although ACVR claims it is nonpartisan, its founders, leadership, and staff have strong ties to the Republican party.³⁷ Its report on "Voter Fraud, Intimidation and Suppression in the 2004 Presidential Election," professes to be "the most comprehensive and authoritative review of the facts surrounding allegations of vote fraud, intimidation and suppression made during the 2004 presidential election." It is little more than a compendium of poorly scrutinized newspaper articles sensationalizing election shenanigans allegedly instigated in all but two instances by Democrats.³⁸ Despite the not so veiled partisanship and absence of credentials, ACVR has achieved remarkable influence advocating for strict, government-issued photo identification requirements and promoting the idea that American elections are riddled with voter fraud. Its leader, attorney and political operative, Mark F. (Thor) Hearne, II, is a serial expert witness before Congress and other government bodies on the need for photo ID. His testimony repeatedly relies for evidence on anecdotes and misleading news reports that grossly overstate the problem of voter fraud.³⁹

The systematic use of baseless voter fraud allegations is strategic and in this sense rational, if unethical. In the late nineteenth century when freedmen were swept into electoral politics and where blacks were the majority of the electorate, it was the Democrats who were threatened by a loss of power, and it was the Democratic party that erected new rules they claimed were necessary to respond to the alleged fraud of black voters.

Today, the success of voter registration drives among minorities and low income people in recent years threatens to expand the base of the Democratic party and tip the balance of power away from the Republicans. Therefore, it is not difficult to understand why party operatives might seek to strategically generate enough public support for new restrictions on the vote that will disproportionately hinder opposition voters.⁴⁰ These efforts are misleadingly labeled "the electoral integrity" movement because after two hundred years struggling for the vote and winning it from below, ordinary voters are not so easily discredited in the name of democracy. Efforts to do so must appeal to misplaced moral sensibilities like the idea that "integrity" trumps rights. In the end, baseless voter fraud claims are essentially political acts because the contested history of party, race and class in American politics makes them so.

³⁷ See bradblog.com (www.bradblog.com/ACVR.htm) for a collection of articles on the ACVR by Brad Friedman and his colleagues.

³⁸ Dimitri Vassilaros, "'Study' is Political Fraud," *Pittsburgh Tribune-Review* (August 8, 2005); available online at: www.pittsburghlive.com/x/pittsburghtrib/s_360812.html.

³⁹ Hearne is listed as an "academic advisor" to the Commission on Federal Election Reform (the Carter-Baker Commission), despite his lack of academic credentials. For Hearne's testimony before government bodies, see, Testimony of Mark F. (Thor) Hearne, II, on "Voter Fraud in Ohio in the 2004 Presidential Election," U. S. House of Representatives, Committee on House Administration, March 21, 2005; "Regarding the Continuing Need for Federal Examiners and Observers to Ensure Electoral Integrity," Testimony of Mark F. (Thor) Hearne, II, Before the U.S. Senate Committee on the Judiciary, Subcommittee on the Constitution Civil Rights and Property Rights, July 10, 2006; "Assessing the Conduct of the 2006 Mid-term Elections," Testimony of Mark F. (Thor) Hearne, II, Before the U.S. Elections Assistance Commission, December 7, 2006.

⁴⁰ There is strong empirical evidence suggesting restrictive photo identification requirements place a disproportionate burden on low income people and minorities. See, Brennan Center for Justice at NYU School of Law and Spencer Overton, "Response to the Report of the 2005 Commission on Federal Election Reform," 2005; available online at www.carterbakerdissent.com. Overton served as a commissioner on the 2005 Commission on Federal Election Reform.

THE USUAL SUSPECTS

The Historically Disenfranchised Are Often the Alleged Perpetrators of Voter Fraud

Fraud allegations typically point the finger at those belonging to the same categories of voters accused of fraud in the past – the marginalized and formerly disenfranchised, urban dwellers, immigrants, blacks, and lower status voters. The targeting is not overt, the language is rarely explicitly racial. Instead, fraud claims tap into older elite associations of political corruption with minorities, big city machine organizations, and the poor. Allegations of voter fraud resonate with the public because they revive a familiar culture of corruption and legends about election fraud that enliven American political history. Today, the alleged culprits are mostly found among those still struggling for full inclusion in American life. This makes them suspect. That they are more likely to identify with one party than the other makes them doubly vulnerable to fraud accusations and to the collateral damage of high stakes competitive partisan politics.

Fraud claims tap into older elite associations of political corruption with minorities, big city machine organizations, and the poor.

Why Voter Registration Drives Are Vulnerable to Fraud Claims

Since at least the 1960s, the voter registration drive has played a central role in black politics and broader efforts to engage the electoral participation of low-income groups.⁴¹ The intensity of voter registration activities has waxed and waned over the years, with a recent upsurge in third party voter registration drive activity since the disputed 2000 presidential election. By 2004, approximately 12 million registered voters (or 8.5 percent of all registered voters) had registered as a result of a voter registration drive.⁴²

How Americans Were Registered To Vote in 2004 (Numbers in Thousands)⁴³

| | Voters | Percent |
|--|----------------|-------------|
| Went to a town hall or county/government registration office | 34,657 | 24.5 |
| At a department of motor vehicles agency | 27,126 | 19.2 |
| By mail | 17,642 | 12.5 |
| Filled out form at a registration drive | 11,973 | 8.5 |
| Registered at polling place | 9,118 | 6.4 |
| Filled out a form at a school, hospital, or on campus | 8,078 | 5.7 |
| Through a public assistance agency | 1,094 | 0.8 |
| Other | 8,819 | 6.2 |
| Don't Know | 22,901 | 16.2 |
| TOTAL | 141,408 | 100% |

Source: U.S. Dept. of Commerce, Bureau of the Census. Current Population Survey, November 2004: Voter Supplement File.

⁴¹ In the 1980s, white Christian conservatives and other middle class groups adopted the registration drive with considerable success, but it remains an iconic expression of black political aspiration.

⁴² U.S. Dept. of Commerce, Bureau of the Census. Current Population Survey, November 2004: Voter Supplement File [Computer file]. ICPSR04272-v1. Washington, DC: U.S. Dept. of Commerce, Bureau of the Census [producer], 2005. Ann Arbor, MI: Inter-university Consortium for Political and Social Research [distributor], 2006-01-16; author's calculations.

⁴³ The table reports method of registration for all registered voters, excluding missing cases. The data are estimates with sampling and non-sampling error, and are weighted by age, sex, race, Hispanic ancestry, and state of residence to partially correct for bias due to under-coverage.

Those registering through drives were more likely to be people of color and of lower income than other registered voters.

Method of Registration by Race and Income⁴⁴

| Filled Out Form at Registration Drive | |
|---------------------------------------|------|
| Race | |
| Whites only, non-Hispanic | 8.9 |
| Blacks only, non-Hispanic | 15.2 |
| Hispanic (all races) | 15.5 |
| Asian only, non-Hispanic | 12.7 |
| Others | 10.1 |
| Total Annual Family Income | |
| Less than \$15,000 | 11.6 |
| \$15,000 or more | 10.0 |

Source: U.S. Dept. of Commerce, Bureau of the Census. Current Population Survey, November 2004: Voter Supplement File.

The number of low income drive registrants is three times the number of low income voters registering at public assistance agencies mandated by the National Voter Registration Act of 1993 (NVRA) to provide registration opportunities. Just four percent of registered voters with total annual family income below \$15,000 (approximately 470,000 people) were registered to vote through a public assistance agency. This compares to approximately 1,328,000 low income voters, or 11.6 percent of those with less than \$15,000 in annual family income, who said they were registered through a registration drive.⁴⁵ It is clear that despite the intent of NVRA to open registration opportunities to low income Americans, thousands of eligible citizens would be left out of the electoral process were it not for the third party groups who register and encourage them to vote.

Competitive or high interest elections like those of the last six years increase incentives to mobilize voters, including the recruitment of new voters – not only to the parties, but to all the other groups who believe they have a stake in the outcome. The use of thousands of volunteers and temporary workers in these drives contributes to the potential for mistakes and duplication in the registration process. This is one of the consequences of essentially “outsourcing” voter registration to the private sector rather than placing the burden of registration on the state as is done in many of the European democracies.⁴⁶ If voter registration were mandatory like paying taxes, voter registration drives would not be necessary.

⁴⁴ The table compares only those registered voters who could identify their method of registration. Data on income are limited to people living in families. Family income is the combined income of all family members over the previous year and includes money from jobs, net income from business, farm or rent, pensions, dividends, interest, Social Security payments and any other money income received by family members who are 15 years of age or older.

⁴⁵ U.S. Dept. of Commerce (2005); author’s calculations. For an analysis of the recent drop off in implementation of the agency-based requirements of the NVRA, see *Ten Years Later, A Promise Unfulfilled: The National Voter Registration Act in Public Assistance Agencies, 1995-2005*, a report compiled by Dēmos, A Network for Ideas and Action; ACORN; and Project Vote (July 2005); available online at http://projectvote.org/fileadmin/ProjectVote/pdfs/Tens_Years_Later_A_Promise_Unfulfilled.pdf.

⁴⁶ The National Commission on Election Reform Task Force on the Federal Election System notes that, “the registration laws in force throughout the United States are among the world’s most demanding... [and are] one reason why voter turnout in the United States is near the bottom of the developed world.” National Election Commission, *Report of the Task Force on the Federal Election System*, chapter 2 “Voter Registration,” (July 2001), 3; available online at www.tcf.org/Publications/ElectionReform/NCFER/hansen_chap2_voter.pdf.

With the upsurge in voter registration activity has come more media attention to the handful of cases in which organizations have been accused of submitting fraudulent registration applications to local elections officials. No amount of fraud in the registration process is acceptable, but the accusations that voter fraud “is breaking out all over”⁴⁷ as a result of “a coordinated effort by members of some organizations to rig the electoral system through voter registration fraud” that put “thousands of fictional voters”⁴⁸ on the rolls are unsupported by any credible evidence anyone has been able to bring to bear. In fact, the suspicions about a vast “left-wing” or “Liberal Democrat-sponsored” conspiracy to commit voter registration fraud border on the paranoid.⁴⁹

According to available government data, between October 2002 and September 2005, the federal government prosecuted just 33 people for various misdemeanor and felony crimes related to any form of election fraud that could have involved voter registration.⁵⁰ All but two people indicted were prosecuted for falsifying information about *their own* eligibility to vote, including: 20 people in four states who were prosecuted for registering or voting but who were ineligible under state law because they lacked U.S. citizenship; and ten people who voted in the 2004 presidential election in Milwaukee who were prosecuted for falsely certifying that they were eligible to vote when they were still under state supervision for felony convictions.⁵¹ Ten of the 33 – five of the non-citizen cases and five of the felon cases – were either acquitted of the charges against them or had their indictments dismissed.⁵² At least 19 of the 23 people convicted were alleged to have voted illegally because they were ineligible to vote, but notably, these people registered to vote and voted using their real names, hardly acts of conspiracy or of criminals trying to get away with committing fraud. Only two people were prosecuted for crimes related to fabricated voter registration applications for other people. One pleaded guilty to making false statements to a grand jury in connection with 11 fraudulent registration forms. The other, a St. Martinsville, Louisiana city councilwoman running in a hotly contested race for re-election in 2002, pleaded guilty to conspiring to submit false address

Between October 2002 and September 2005, the federal government prosecuted just 33 people for various misdemeanor and felony crimes related to any form of election fraud that could have involved voter registration.

⁴⁷ Michelle Malkin, September 29, 2004 blog entry; available online at <http://michellemalkin.com/archives/000596.htm>.

⁴⁸ American Center for Voting Rights Legislative Fund, “Vote Fraud, Intimidation and Suppression in the 2004 Presidential Election,” *ACVR Legislative Fund Report* (August 2, 2005), 35; available online at www.ac4vr.com/reports/072005/080205report.pdf.

⁴⁹ See, for example, the postings of “Dean,” on democratvotefraud.blogspot.com (accessed in October 2006). This blog collects dozens of news articles from the 2004 election, most of which report allegations of campaign dirty tricks and voter registration fraud, and discuss protests against new “anti-fraud” measures adopted in some states like Ohio, all perpetrated by Democrats or their supporters. Under the title, “Liberal Democrat Vote Fraud,” Dean explains, “We all saw the results of the 2000 American election. This time, I’m personally going to fight back in the only way that I can, with a blog that documents as many news reports about Democrat fraud as I can.”

⁵⁰ U.S. Department of Justice, Criminal Division, Public Integrity Section, “Election Fraud Prosecutions and Convictions; Ballot Access and Voting Integrity Initiative, October 2002 – September 2005” (n.d.); available online at <http://cha.house.gov/media/pdfs/DOJdoc.pdf>. Several of these people technically were not charged with voter registration fraud, but with making false statements to government agencies (i.e., a driver’s license bureau or the INS) regarding their citizenship status or eligibility to vote. This number includes cases of illegal voting due to ineligibility, assuming they must have involved registration fraud, even if it wasn’t charged.

⁵¹ One of those convicted, Kimberly Prude, worked as an election inspector in Milwaukee. As of February 2006, Prude was appealing her conviction. See, *United States of America v. Kimberly E. Prude*, “Criminal Complaint,” United States District Court, Eastern District of Wisconsin, Case No. 2:05-CR-00162-RTR (June 22, 2005).

⁵² In the ten cases of alleged illegal felon voting in Milwaukee, one defendant was acquitted at trial and four had their charges dismissed. Among the dismissals evidence was presented which suggested defendants did not knowingly commit fraud.

information on two voter registration cards for people who did not live in her district. Those people voted to help the councilwoman win re-election by a slim margin.⁵³

Federal Prosecutions of Voter Registration Fraud 2002 – 2005

| VOTER REGISTRATION | DISPOSITION | | | | |
|--|-------------|-----------|----------------|-----------|-----------|
| | Dismissed | Acquitted | Pleaded Guilty | Convicted | Total |
| False claim of eligibility* | | | | | |
| Non-citizen | 4 | 1 | 3 | 13 | 21 |
| Felon | 4 | 1 | 3 | 2 | 10 |
| False statements to grand jury about (11) voter registration forgeries | | | 1 | | 1 |
| Conspiracy to submit false information on (2) voter registration applications | | | 1 | | 1 |
| TOTAL | 8 | 2 | 8 | 15 | 33 |

* All but two of those charged with making false claims about their eligibility to register (two non-citizens who were convicted) were also charged with casting a false or fraudulent ballot, as reported above.

Source: U. S. Department of Justice, Criminal Division, Public Integrity Section, *Election Fraud Prosecutions & Convictions, Ballot Access & Voting Integrity Initiative, October 2002 – September 2005* (n.d).

Registration drives in recent years have been more effective in registering low income voters than the agency-based requirements of the NVRA. Successful voter drives hold the potential for adding significant new numbers of voters to the rolls and threatening the balance of power between the two parties. Their effectiveness has made them a target for fraud allegations. Their own sporadic failings in the production of duplicate or improperly filled out registration cards, sloppy oversight, poor quality control, and occasional fraud have only fueled the allegations. Such problems are inevitable as long as voter registration is not mandated or universal.

⁵³ Press Release, "St. Martinsville Woman Sentenced in Federal Court for Voter Fraud Charges," U.S. Attorney's Office, Western District of Louisiana (January 18, 2006); available online at: www.usdoj.gov/usao/law/news/wdl20060118c.html.

CASE STUDIES

The following case studies are illustrative of the politics of voter fraud claims. They do not tell us anything about the incidence of voter fraud in American elections today. That question is central and addressed above. It has always been difficult to measure fraud or even specify it, and it is important to stress that until better evidence comes to light, we will not be able to compile comprehensive statistics on levels of cheating by voters. Researchers are hampered in studying voter fraud because government agencies fail to track it and are often unresponsive to information requests. We can, however, make educated guesses from the available evidence, and what studies there are suggest voters rarely commit fraud. It is only in the public interest that we learn from real cases of voter fraud so that we can better understand where our electoral systems are truly vulnerable. Spurious cases of fraud like those discussed here are equally instructive because they expose the shrewd and partisan manipulation that makes real election reform so difficult.

The case studies presented below demonstrate the ways these partisan interests, database and clerical errors and incompetent electoral administration are sometimes exploited to exaggerate the problem of voter fraud. The intent of the exaggeration is to intimidate the general public and even law makers into believing that American elections face a security threat from a rising tide of deceitful and criminal voters. Unfortunately, in numerous places election administration is in crisis, and in general, faces much larger challenges from changing technology, inadequate resources, poor staffing and training, and especially, partisan manipulation. These are real issues deserving of attention, good ideas, resources and a democratic spirit. They won't be adequately addressed as long as the voter fraud hoax confuses and distracts us from confronting them.

ACORN and the Mac Stuart Affair

One important example of how the politics of fraud claims are used to manipulate the public about the threat of voter fraud is the political pillorying of ACORN for alleged wide scale registration fraud in the 2004 and 2006 election cycles.

ACORN (Association of Community Organizations for Reform Now) is the largest community-based organization of low and moderate income people in the U.S. It organizes locally and has developed ballot campaigns for a range of issues such as campaign finance reform and raising the minimum wage. Opponents of ACORN's minimum wage ballot initiative program deployed allegations of voter registration fraud, which then generated official investigations, media coverage and litigation, as a strategy to undermine ACORN's ability to qualify and pass referenda in several states.⁵⁴ One of these cases involved a disgruntled former employee named Mac Stuart who for a while became a cause célèbre of ACORN's enemies and the pundits who fuel the fraud paranoia. The Mac Stuart affair is instructive because it highlights how politics construct the fraud debate.

In November 2003, Mac Stuart was hired by Florida ACORN and put to work as a petition gatherer collecting signatures supporting the placement of a Florida Minimum Wage Amendment on the

⁵⁴ "ACORN Defeats Anti-Voter Legal Attacks; Group's Voter Registration Efforts Vindicated as Baseless Lawsuits Collapse," *Common Dreams Progressive Newswire* (December 14, 2005); Joni James, "Voter Fraud Charges Collapse," *St. Petersburg Times* (December 15, 2005).

2004 ballot. When Stuart was fired for suspicion of his involvement in an illegal check cashing scheme a few months later, he filed a Florida whistleblower lawsuit against ACORN claiming the organization engaged in a variety of illegal practices. He was represented by partisan attorneys at Rothstein, Rosenfeldt, Adler, a Fort Lauderdale law firm, and spoke secretly with an official at the Florida Chamber of Commerce which was in the midst of opposing ACORN's efforts to raise the state's minimum wage. Stuart provided his attorneys with 179 applications, many of them for Republican registrants, he claimed had been collected and withheld by ACORN.⁵⁵

In the course of petitioning for signatures, ACORN workers conducted voter registration activities to ascertain whether signatories were registered to vote. Stuart's lawsuit claimed that petitioners were paid an additional \$2.00 for each completed registration card they collected; that ACORN illegally copied the voter registration cards its workers collected and sold its lists for a profit; that ACORN committed fraud by failing to deliver registration cards for people who designated "Republican" as their party affiliation, and otherwise collected cards from ineligible individuals such as convicted felons. Stuart maintained that in July 2004, he refused to participate in these illegal activities and was fired in retaliation under the pretext that he had attempted to cash another person's check.⁵⁶

His lawyers filed a second suit against ACORN on behalf of 11 people whose names were among the allegedly withheld voter registration applications Stuart had provided.⁵⁷ Rothstein, Rosenfeldt, Adler attorneys claimed ACORN had deprived their clients of their constitutional right to vote and committed fraud against them.

After Stuart was fired, he held a news conference and contacted television and print news reporters claiming that "[t]here was a lot of fraud committed" by ACORN, asserting the organization knowingly submitted thousands of invalid registration cards while storing away cards for people designating their party affiliation as Republican. Stuart's allegations were immediately picked up by news organizations such as the *Washington Times*, the *Florida Times-Union*, and other Florida newspapers, and began to spread on rightwing Internet blogs. The Florida Department of Law Enforcement took the unusual step of announcing an investigation into ACORN.⁵⁸ In fact, for a while, Stuart's assertions were taken as fact and repeatedly reported as evidence that ACORN routinely engaged in fraud to promote its "radical political agenda."⁵⁹ That is, until the real facts about Stuart came to light and his case collapsed in court.

Fraud charges collapse but the damage continues

ACORN denied, and Stuart failed to prove, that canvassers were paid by the card to collect voter registration applications. ACORN's copying of voter registration applications was an element of their quality control program and well within the bounds of Florida law.⁶⁰ Finally, ACORN denied, and Stuart failed to produce evidence, that the organization prejudiced Republican voter registration applicants or misleadingly solicited registration cards from ineligible applicants. ACORN countersued Stuart for defamation and libel. On December 6, 2005, the matter of

⁵⁵ Brittany Wallman and Alva James-Johnson, "Filled-In Voter Forms Surface," *South Florida Sun-Sentinel* (October 27, 2004); Jeremy Milarsky, "Ex-Worker Sues Activist Group," *South Florida Sun-Sentinel* (October 21, 2004).

⁵⁶ *Mac Stuart v. ACORN*, U.S. District Court, Southern District of Florida, Miami Division, Case No. 04-2276-civ (2004).

⁵⁷ *Charles Rousseau, et al. v. ACORN*, U.S. District Court, Southern District of Florida, Miami Division, Case No. 04-61636-civ (2004).

⁵⁸ News Release, "FDLE Investigates Statewide Voter Fraud," Florida Department of Law Enforcement (October 21, 2004).

⁵⁹ Quoting Mike Flynn, Director of Legislative Affairs for the Employment Policies Institute; see Press Release, "ACORN's Voter Fraud in Ohio is Part of Larger Pattern," Employment Policies Institute (August 11, 2006). See, also, Meghan Clyne, "ACORN and the Money Tree," *National Review Online* (October 31, 2004); and American Center for Voting Rights, "Vote Fraud, Intimidation and Suppression in the 2004 Presidential Election," ACVR Legislative Fund Report (August 2, 2005), 41-44; available online at www.ac4vr.com/reports/072005/080205report.pdf.

⁶⁰ Nothing in Florida's election code prohibits private, third-party voter registration organizations from photocopying the voter registration applications they collect before submitting them to local elections officials.

Mac Stuart v. ACORN was dismissed with prejudice by a federal judge, exonerating ACORN of any and all wrongdoing.⁶¹ ACORN prevailed in their counterclaims and won a judgment of defamation against Stuart.

ACORN also prevailed in the second Rothstein, Rosenfeldt, Adler suit. Shortly after it was filed, nine of the 11 plaintiffs asked to be dismissed from the case. As ACORN's lawyers deposed the remaining two plaintiffs it became clear that their lawyers had not asked them if they were qualified to vote, if they had completed the applications Stuart had given the attorneys or whether the plaintiffs were in fact Republicans. One of the two was not qualified to vote, neither remembered completing the application used as the basis for the complaint and both said that, inconsistent with their applications, they were not Republicans and never would have checked off that they were. Stuart was inconsistent in his testimony in how he obtained the applications in the first place.⁶² This case, too, was dismissed with prejudice.

The Florida Department of Law Enforcement investigation found no evidence of illegal or fraudulent activity by ACORN. A public records request by Project Vote asking all Florida counties for any documents related to voter fraud elicited just three alleged cases of illegal activity, only one of which involved temporary ACORN workers.⁶³

The problem is that the end of this story has received considerably less media attention than the unfounded claims of organized voter fraud on the part of ACORN. Opponents of ACORN continue to spread false rumors that the organization engages in voter fraud. For example, the Employment Policies Institute (EPI) issues dozens of press releases and "reports" attacking ACORN every year. EPI is a non-profit organization that in 2004 paid over \$600,000 in "management" fees to its executive director's publicity firm which lobbies on behalf of the hotel, restaurant, alcoholic beverages and tobacco industries.⁶⁴ Those industries are opposed to ACORN's efforts to raise the minimum wage in Florida and elsewhere. As late as July 2006, months after ACORN was fully vindicated in court, EPI was still claiming they engaged in a "pattern and practice" of voter fraud, citing the Mac Stuart affair as more evidence of ACORN's "widespread practice of fraud."⁶⁵

Voter fraud allegations used to restrict voter registration programs

With ACORN under a cloud, Florida passed a law that carried stiff penalties for organizations failing to turn in voter registration applications later than ten days after they were collected. The law's reporting requirements were so draconian the League of Women Voters ended 77 years of voter registration activity in the state because it feared it could not comply and would be bankrupted if there were problems with just 16 registration forms collected by its volunteers. A federal judge later blocked the implementation of the law as unconstitutional.⁶⁶

⁶¹ Joni James, "Voter Fraud Charges Collapse," *St. Petersburg Times* (December 15, 2005).

⁶² Telephone interview with Brian Mellor, Senior Counsel, Project Vote (April 13, 2006).

⁶³ Mellor interview (2006).

⁶⁴ Employment Policies Institute, "2004 Form 990, Return of Organization Exempt From Income Tax," U.S. Department of the Treasury, Internal Revenue Service, Schedule A.

⁶⁵ A "pattern and practice" of wrongdoing evokes conspiracy and as a legal term refers to the crime of racketeering. See, Employment Policies Institute, *Rotten ACORN: America's Bad Seed* (July 2006), 18-19; available online at www.rottenacorn.com/downloads/060728_badSeed.pdf. In fact, ACORN, along with America Coming Together, the NAACP Voter Fund, and the Ohio AFL-CIO were defendants in an Ohio lawsuit that alleged the groups conspired to engage in a series of "predicate" or related acts of forgery, document tampering and drug trafficking in order to produce fraudulent voter registration cards. See, *Rubick v. America Coming Together, et al.*, State of Ohio, County of Wood, Court of Common Pleas, Case No. 04-CV650 (2004). Plaintiffs' complaint argued each fraudulent card submitted represented a predicate act. Under the federal Racketeer Influenced and Corrupt Organizations Act or RICO, a person or group can be charged with racketeering by a U.S. Attorney if they commit any two of 35 crimes (27 federal crimes and eight state crimes) within a 10-year period and the prosecutor believes those charged committed the crimes with similar purpose or results.

⁶⁶ *League of Women Voters of Florida v. Cobb*, U.S. District Court, Southern District of Florida, "Order Granting in Part and Denying in Part Plaintiff's Motion for Preliminary Injunction and Granting in Part and Denying in Part Defendant's Motion to

The Perils of List Matching

A common source of fraud claims is a list matching exercise gone wrong. The ready availability of high powered computing capacity and an ever expanding range of public records databases, have created a cottage industry of software programs and list management consultants ready to match lists for hire.

When databases contain errors or compile data differently, matching them against one another can cause a high degree of what statisticians call “false positive” errors or matches that are not really matches. A prime example is the infamous felon purge list compiled by a private firm for the Florida Secretary of State’s office in 2000. That list joined data on convicted felons with the voter registration rolls using rules that matched only the first four letters of the first name, 90 percent of the last name and an approximate date of birth.⁶⁷ The result was a highly inaccurate list of people whom the Secretary of State wanted to prevent from voting.⁶⁸

Voting in Connecticut and beyond

In October 2002, the Republican National Committee (RNC) claimed that in the course of “updating” its voter files, it discovered over 722,000 people nationwide were registered to vote in more than one state, and that at least 600 of these had voted more than once in a single election. In Connecticut, the Secretary of State was alarmed. The RNC released a report that said 7,700 registered voters in Connecticut were also on the rolls in other states and that 54 of them had voted more than once in the 2000 election. Secretary Susan Bysiewicz, a Democrat, asked the RNC for the names of the duplicate registrants and voters. “I am surprised by the numbers,” she said, “it sounds like a lot. We have two million (registered) voters, so I suppose it’s possible; but in four years we haven’t prosecuted one instance of voter fraud.”⁶⁹

At first the RNC refused to release the names and criticized Bysiewicz for not finding the problem first. When they finally turned over the names of the 54 alleged double voters, Bysiewicz found their claims baseless. Her office conducted a week long investigation of every suspect voter produced by the RNC and found that 29 had never voted in Connecticut, but did vote in another state; 18 voted in Connecticut, but not in the other state named in the report; four names had different birth dates than those on the RNC list, and three were turned over to criminal investigators because out-of-state data could not be obtained for verification.⁷⁰

Dismiss,” Case No. 06-21265-CIV (August 28, 2006).

⁶⁷ Greg Palast, “Florida’s ‘Disappeared Voters’: Disenfranchised by the GOP,” *The Nation*, (February 5, 2001); and Palast, *The Best Democracy Money Can Buy* (Sterling, Virginia: Pluto Press, 2002), 6-43.

⁶⁸ The U.S. Civil Rights Commission conducted an investigation into the 2000 election in Florida and concluded, “Many people appear on the [felon purge] list incorrectly.” One in seven people on the felon purge list supplied to the supervisor of the Miami-Dade election office was erroneously listed and therefore put at risk of disenfranchisement. These people were disproportionately African American. See, U.S. Civil Rights Commission, *Voting Irregularities in Florida During the 2000 Presidential Election* (2001), chapter 1. See also a disclaimer for the inaccuracy of the felon purge list posted on ChoicePoint’s website (“Choicepoint’s Mythical Role in Elections Past and Present,” posted August 7, 2006; available online at www.choicepoint.com/news/statement_08072006.html). ChoicePoint is the parent company of Database Technologies (DBT), the firm hired for the period 1998 to 2000 by the Florida Division of Elections to create its voter exception list. ChoicePoint claims, “DBT Online was not required to provide a list of exact name matches. Rather, the matching logic only required a 90 percent name match, which produced “false positives” or partial matches of the data. Moreover, the Division of Elections required that DBT Online perform ‘nickname matches’ for first names and to ‘make it go both ways.’ Thus, the name Deborah Ann would also match the name Ann Deborah. At a meeting in early 1999, the supervisors of elections expressed a preference for exact matches on the list as opposed to a ‘fairly broad and encompassing’ collection of names. DBT Online advised the Division of Elections that it could produce a list with exact matches. Despite this, the Division of Elections nevertheless opted to cast a wide net for the exclusion lists.”

⁶⁹ “Thousands Registered to Vote in Two or More States,” *The Associated Press State and Local Wire* (October 9, 2002).

⁷⁰ Press release, “Voter Fraud Claims by Republican Party Unfounded,” Office of the Secretary of State Susan Bysiewicz (October 22, 2002); see also, “Bysiewicz: Double Voting Report Wrong,” *The Associated Press State and Local Wire* (October 22, 2002).

Double dipping in New Jersey

A few years later, in time for the next federal election cycle, the New Jersey state Republican party (RSC) claimed it had researched voter registration files in a number of states and found evidence of multiple voting. In September 2005, the state party sent a stern letter to New Jersey Attorney General Peter Harvey threatening a lawsuit for failing to enforce state election laws governing the voter registration rolls.⁷¹

The basis for the RSC claims was their own “exhaustive investigation” of voter files from New Jersey’s 21 counties, matched internally county to county on first name, last name and date of birth, as well as against the voter registration files of five other states, New York, Pennsylvania, Florida, North Carolina and South Carolina. In addition, the RSC matched the New Jersey county files against lists of deceased persons from state and federal databases and other commercially available lists. Based on their analysis, the RSC said it found evidence of widespread multiple voting in the November 2004 general election – 4,397 people alleged to have voted more than once in New Jersey, and 6,572 people who “appear to have” voted in New Jersey and another state. Moreover, the RSC claimed that 4,755 dead people had voted and warned the problem could be even worse since the state’s rolls contained tens of thousands of duplicate records and the names of some well known felons in the state.

There is little doubt that New Jersey’s county voter registration lists contained registration records for people who moved away or died. The existence of so-called “deadwood” on voter registration records across the country is well-known. But the presence of deadwood is not in and of itself evidence of voter fraud.

A subsequent more thorough analysis of the data files the RSC supplied to the state suggests major problems with the accuracy of the RSC analysis and therefore the veracity of their claims. The Brennan Center for Justice working with Dr. Michael McDonald, an elections expert at George Mason University, concluded that “these lists simply do not prove what they purport to prove.”⁷² Their report uncovered methodological errors in the RSC’s list matching techniques, such as omitting middle initials and suffixes like “Jr.,” which resulted in the listing of duplicate records for the same person then counted by the RSC as voting twice (from the same address). Mismatches of different people were presumed to be the same person, and again counted as voting twice. Statistical and database experts know that relying solely on non-unique identifiers such as name and date of birth to match records produces a high rate of false positives.⁷³ The Brennan Center/McDonald detailed analysis of the alleged 4,397 double votes recorded in the New Jersey county voter files accounted for them all as the likely product of false positives, errors in the data, duplicate records for the same person, and the statistical likelihood that two people will share the same name and birth date.

Voting from the grave in Detroit

Yet one more example of the damage flawed list matching efforts can inflict comes from an oft-cited news item appearing in the *Detroit News* in February 2006. The article, written by Lisa M. Collins, was headlined, “In Mich. Even Dead Vote,” and continued, “From Holland to Detroit,

⁷¹ Letter from Mark D. Sheridan to Hon. Peter C. Harvey, dated September 15, 2005. Copy in author’s possession. Election administration is decentralized to the county level in New Jersey, with the Attorney General serving as the state’s chief elections officer.

⁷² The Brennan Center for Justice at NYU School of Law and Dr. Michael McDonald, “Analysis of the September 15, 2005 Voter Fraud Report Submitted to the New Jersey Attorney General,” December 2005, 11; available online at www.brennancenter.org/dynamic/subpages/download_file_35010.pdf.

⁷³ Ted Selker and Alexandre Buer, “Voter Removal From Registration List Based on Name Matching Is Unreliable,” Voting Technology Project – MIT Media Laboratory, October 28, 2004; available online at <http://72.14.209.104/search?q=cache:diE40vkjeLoJ:www.vote.caltech.edu/reports/purging-vrdb.pdf+hl=en&gl=us&ct=clnk&cd=1>.

votes were cast by 132 dead people; Detroit's voting records are riddled with inaccuracies, casting doubt on elections' integrity."⁷⁴ The allegations of voting from the grave in Detroit, a poor and majority black city, are repeatedly cited by conservative bloggers in their litany of purported evidence that voter fraud is rampant in America.

But a full reading of the article itself indicates that the *News* did not attribute these irregularities to voter fraud. Instead, they suggested the irregularities were more likely due to clerical errors.⁷⁵ Influential Republican political operative, Mark F. (Thor) Hearne, paid counsel to the Bush-Cheney 2004 re-election campaign and a member of the U.S. Elections Assistance Committee's Voter Fraud – Voter Intimidation Working Group, as well as Missouri's HAVA Advisory Commission, nevertheless repeated the misleading allegations of dead people voting in Detroit when he testified before a U.S. Senate panel in July 2006.⁷⁶ Versions of his testimony have appeared as a feature article in the magazine of the Bar Association of Metropolitan St. Louis,⁷⁷ and again as testimony given to the U.S. Elections Assistance Commission in December 2006.⁷⁸

This time the list matching was not performed by an elected official and presidential campaign co-chair, as it was in Florida, or a political party, as it was in the Connecticut and New Jersey examples. It was done by a newspaper which presented no assurances that it had the kind of expertise in computer programming, statistics, or records management required to make an accurate evaluation.⁷⁹

On March 5, 2006, the *News* printed a letter from Kelly Chesney, the Communications Director for the Michigan's Republican Secretary of State, which challenged the implication that dead people were voting in Michigan. Chesney reported that an analysis of the 132 alleged deceased voters found that this was the number of absentee ballots mailed out to voters who subsequently died in the weeks before Election Day. Of the 132 absentee ballots, she said "97 were never returned, and 27 were voted and returned prior to the voters' deaths."⁸⁰ This substantial correction to the implications of voter fraud in Michigan has been roundly ignored by activists who continue to cite what is now an out-dated news item reporting erroneous information.

⁷⁴ Lisa M. Collins, "In Mich. Even Dead Vote," *The Detroit News* (February 6, 2006).

⁷⁵ "Clerical errors [in the Michigan voter file are] so pervasive that it is difficult to determine in many instances who actually voted;" and citing Mark Grebner, the list vendor and political consultant upon whose research the *News* relied, "...Grebner says he's never found evidence of organized fraud in Detroit." See, Collins (2006).

⁷⁶ Testimony of Mark F. (Thor) Hearne, II, Before the U.S. Senate Committee on the Judiciary, Subcommittee on the Constitution, Civil Rights and Property Rights, "Regarding the Continuing Need for Federal Examiners and Observers to Ensure Electoral Integrity," July 10, 2006.

⁷⁷ Mark F. (Thor) Hearne, II, "The Missouri Voter's Protection Act: Real Election Reform for All Missouri Voters," *St. Louis Lawyer*, June, 2006; available online at www.bamsl.org/members/stlawyer/archive/06/june06.html#feature.

⁷⁸ Testimony of Mark F. (Thor) Hearne, II, Before the U.S. Elections Assistance Commission, "Assessing the Conduct of the 2006 Mid-term Elections," December 7, 2006.

⁷⁹ In fact, the *News* admitted in the article that they "did not review every vote cast, but instead targeted voter records based on several factors, such as the voter's birth year or voting history. Though limited and somewhat random searches were done, each search found voting records in error or highlighted names of voters who in fact could not have voted." This is hardly an adequate methodology.

⁸⁰ Editorial and Opinions, Special Letter, "Claims That the 'Dead' Voted Were Wrong," *Detroit News* (March 5, 2006).

St. Louis: More Bad Lists, Even Worse Election Administration

St. Louis, another majority black city with budget problems, presents a case study for how the mishandling of voter registration and elections procedures can be misperceived as fraud.

Whose mess on Election Day 2000?

There is little doubt that in the past St. Louis experienced election fraud and public corruption. St. Louis politics were long organized by political machines and fraud has a storied past which for some, at least, condemns the politics of the present.⁸¹ In 2000, the historical memory of fraudulent elections, bribery, conspiracies, ballot tampering, and voting from the grave colored the rush to judgment when administrative mismanagement and shockingly poor record-keeping combined to produce troubling election irregularities.⁸² Before the irregularities could be sorted out, they were seized upon by partisans. One of them, Missouri's senior Republican senator, Kit Bond, claimed the problems were evidence of a [Democratic party-driven] "major criminal enterprise designed to defraud voters," instead of what an extensive federal probe later determined to them to be – procedural incompetence and official failure to abide by the law.⁸³

For many voters attempting to cast ballots in the 2000 presidential election, Election Day in St. Louis was a chaotic mess. Many long-time voters were told that they were not registered to vote when they showed up at polling sites where they had cast ballots in the past. To re-establish their legitimacy, many of these rejected voters were told to go down to the St. Louis Election Board's headquarters at 300 North Tucker Boulevard and cast a ballot there since the phone lines to the Board were jammed and election judges staffing the polling sites were unable to establish whether such voters' names had been moved to an "inactive" list of registered voters.⁸⁴

The illegal "Inactive" list

It was this controversial inactive list and the failure of the St. Louis Elections Board to comply with the NVRA that later formed the basis for a federal lawsuit alleging the Board "denied or significantly impaired the voting rights" of thousands of city voters before the election.⁸⁵

Missouri law requires bi-partisan control of election administration. Local boards of election have equal representation of Democrats and Republicans as do positions staffed by the boards. The St. Louis Board has had problems maintaining accurate voter registration rolls, and leading up to the 2000 election, there were still no clear rules for specifying when a voter should be dropped from the rolls.⁸⁶

⁸¹ Secretary of State Matt Blunt, *Mandate For Reform: Election Turmoil in St. Louis, November 7, 2000* (July 24, 2001); available online at (herein cited as 'Blunt Report'), 39-46.

⁸² For an excellent example of the rush to judgement, see chapter four, 'Politically Active after Death,' in John Fund's *Stealing Elections: How Voter Fraud Threatens Our Democracy* (San Francisco: Encounter Books, 2004).

⁸³ For a tale of Depression-era ballot tampering linked to public corruption and waterfront development schemes in St. Louis, see chapter 7 "The Real Foundations of the Gateway Arch," in Tracy Campbell, *Deliver the Vote: A History of Election Fraud, An American Political Tradition, 1742-2004* (New York: Carroll & Graf Publishers, 2005). See also, Bruce Rushton, "Dead Man Voting," *Riverfront Times* (April 24, 2002). For Sen. Bond's remarks, see Carolyn Tuft, "Bond Wants Federal Investigation of Problems at City Polls; He Accuses Democrats of 'Criminal Enterprise' in Keeping Polls Open Late; Democrats Criticize Election Board," *St. Louis Post-Dispatch* (November 10, 2000), A1. According to the *Riverfront Times*, "In his letters to...two federal agencies, Bond wrote...of a 'deliberate scheme' planned in advance so unregistered voters could vote illegally: 'There is reason to believe that collusion existed to commit voter fraud and voter fraud occurred on a wide scale throughout the city of St. Louis.'" See, Safir Ahmed, "Slimin' the City: When It Comes to Election Day Problems in St. Louis, the Politicians' Rhetoric Doesn't Match the Reality," *Riverfront Times* (November 15, 2000).

⁸⁴ *U.S. v. Board of Election Commissioners for the City of St. Louis*, U.S. District Court, Eastern District of Missouri, "Stipulation of Facts and Consent Order," Civil Action No. 4:026V001235 CEJ (August 14, 2002), 5; (herein cited as 'St. Louis Election Board Consent Order').

⁸⁵ Karen Branch-Brioso and Doug Moore, "Board Denied Voters' Rights, U.S. Says: Election Officials Here Say They've Already Taken Steps to Correct Deficiencies From 2000," *St. Louis Post-Dispatch* (May 23, 2002), C1.

⁸⁶ Office of the State Auditor of Missouri, Board of Election Commissioners, City of St. Louis, Missouri, Report No. 2004-40 (May

Between 1994 and 2000, the Board conducted a series of mail canvasses of its voter registration rolls, none of which complied with the requirements of the NVRA.⁸⁷ Based on these improper canvasses, the Board removed more than 50,000 names of voters who had been on the rolls in 1996, and “made no effort to notify inactive voters that their registration status had changed, that their names would not appear on the voter registration lists provided to election judges in each voting precinct, or that they would face additional administrative steps on election day before they would be permitted to vote.”⁸⁸ This number represented roughly 40 percent of the total number of votes cast in St. Louis in the 1996 election, and was about twice the national and state averages for the proportion of inactive voters on the rolls.⁸⁹ Moreover, for all elections it conducted after 1994, the Board failed to provide precinct election judges a list of any of the voters it had designated as “inactive.” This failure created mass confusion at polling sites when many legitimate voters showed up to vote and were told they were no longer registered.⁹⁰

In the days leading to the November 7, 2000, election, the unprecedented administrative reclassification of thousands of active voter registration records in the overwhelmingly Democratic city was seen by Democrats, including national party officials with the Gore-Lieberman campaign, as an illegitimate Republican party-sponsored effort to restrict Democratic voting. When he spoke at a Gore-Lieberman campaign event, Democratic Congressional hopeful William Lacy Clay, Jr., told supporters not to “let anyone turn you away from the polls,” and warned, “If it requires leaving the polls open a little longer, we’re going to get a court order to do it.”⁹¹

The showdown

In fact, this is exactly what happened. Voters stood in line for hours. First, they had to check in with precinct workers, then, for those whose names were no longer on the precinct voter registration lists, they stood in another line to plead their case before their precinct’s election judge.⁹² When many of these officials were unable to confirm their registration status with headquarters because they couldn’t get through to elections officials at the Board, they sent voters down to the Board’s office to try to resolve the problems on their own. According to news reports, “It made for a wild hour at Board’s downtown office,

where hundreds of voters turned away from the polls because they were not registered or had problems voting filled the lobby throughout the day. By early evening, the lobby was shoulder to shoulder with people who wanted to vote.”⁹³

In the afternoon, the Democrats and the Gore-Lieberman campaign filed suit in a state circuit court requesting the polls remain open for an additional three hours to accommodate voters victimized by the inaccessible and inaccurate inactive list.

26, 2004), 10; (herein cited as ‘Mo. State Auditor’s Report’).

⁸⁷ Section 8(d)(2) of 42 U.S.C. 1973gg-6(d). See, St. Louis Election Board Consent Order, 3.

⁸⁸ St. Louis Election Board Consent Order, 4.

⁸⁹ In 1996, 122,003 votes were cast in the general election in the City of St. Louis. In 2002, according to records from the Federal Election Commission, both nationwide and for the state of Missouri, 12 percent of all voters on the rolls were classified as “inactive,” compared to 22 percent in the City of St. Louis. See, Mo. State Auditor’s Report, 15.

⁹⁰ St. Louis Election Board Consent Order, 4.

⁹¹ David Scott, “Ashcroft, Talent Decide Against Pursuing St. Louis Voter Fraud Claims,” *Associated Press* (November 8, 2000).

⁹² The State Auditor found that the St. Louis Election Board frequently failed to secure the minimum number of precinct-level election judges as required by state law. Section 115.081, RSMo 2000, mandates four election judges, two from each major political party, for each polling place at each primary and general election, or about 1,600 election judges per major election. The Auditor found that the Board has not been able to attract more than 1,200 such judges in recent elections. See, Mo. State Auditor’s Report, 24.

⁹³ Scott (2000); see also, Ahmed (2000).

St. Louis Circuit Judge Evelyn Baker complied, but her order was overturned within 45 minutes of the regular poll closing time (7 PM) by a three-judge appeals panel. The St. Louis City Board of Elections successfully argued she lacked jurisdiction to change state law. Elections officials estimated that only about 100 extra people had been permitted to vote by Judge Baker's order. Republican officials charged there may have been a "preconceived plan" to misuse the judicial process to keep the polls open longer than their statutorily mandated closing time, as well as an "organized campaign" (by the Democrats) to abuse the procedure by which voters obtain court orders to vote, resulting in voter fraud and the casting of hundreds of illegal votes.⁹⁴

In a 51-page report, Republican Secretary of State Matt Blunt outlined the possible violations of law committed in the City of St. Louis by alleged illegal voters. He referred to an unspecified conspiracy "to create bedlam so that election fraud could be perpetrated,"⁹⁵ and to corrupt election judges put in place to manipulate the results of the election. The report claimed that, 1) 342 persons obtained court orders to vote even though the information provided by them on affidavits suggested they were properly disqualified from voting; 2) 62 convicted federal felons and 52 Missouri felons voted in either the City of St. Louis or St. Louis County; 3) 14 votes were cast in the names of dead people; 4) that there was a high probability of multiple voting by dozens of people; 5) 79 votes were cast by people registering to vote from vacant lots; and 6) 45 election judges were not registered to vote and therefore disqualified to serve.

Many of Blunt's allegations have been disproved or significantly weakened by the discovery of major records management problems at the Elections Board that resulted in grossly inaccurate voter rolls. The *St. Louis Post-Dispatch* conducted a canvass of over 2,000 alleged vacant lot addresses from which thousands of St. Louis voters were supposedly registered and found buildings on virtually all of them. The lots had been misclassified by the city assessor or misread by elections officials. They concluded that "most of the 79 people on the state's suspect voter list from last fall probably shouldn't be on it," including the city's budget director whose ten-year old condominium was mislabeled as a vacant lot.⁹⁶

The claim that more than 100 felons may have illegally voted is also unreliable since the data upon which it was based was inconclusive, as the report itself admits.⁹⁷ Later investigations by the State Auditor did find that three years after the 2000 election fiasco, St. Louis's voter rolls still included the names of over 2,000 felons prohibited by state law from voting or registering to vote. But the Auditor found no conspiracy to commit voter fraud on the part of voters and questioned instead why the Elections Board had failed to remove the names from their lists when they had been provided with monthly and quarterly felony conviction reports from state and federal authorities.

Like the Blunt Commission, the State Auditor also found thousands of duplicate records of voters registered to vote in St. Louis and elsewhere in the state, but only 28 instances across three recent election cycles in which a voter may have voted more than once. Without further investigation it is impossible to know whether these 28 cases represent actual illegal behavior or are more likely the product of clerical errors in the Board's voter registration files.

Throughout the months following the election, Republicans and Democrats alike called for a federal investigation, each side charging the other with fraud or with suppressing the vote. Both sides expected to be vindicated. The federal investigation provided a decisive end to the Blunt Commission's allegation that corrupt election judges allowed hundreds of patently unqualified voters to vote.

⁹⁴ Blunt Report, 21-35.

⁹⁵ Blunt Report, 36.

⁹⁶ Jo Mannies and Jennifer LaFleur, "City Mislabeled Dozens as Voting From Vacant Lots; Property Records Appear To Be In Error; Survey Finds; Just 14 Ballots Are Found Suspect," *St. Louis Post-Dispatch* (November 5, 2001): A1.

⁹⁷ Blunt Report, 24, note 63.

St. Louis Board of Elections forced into federal consent decree

After an F.B.I. investigation that involved subpoenaing *all* of the registration and voting records from the St. Louis Elections Board for the months before the election, the Justice Department made a surprise announcement. They told the Board they were planning to sue them for violating the NVRA and threatening the voting rights of thousands of eligible voters in St. Louis by erroneously purging their records from the active voter file. The Board was forced into a consent decree that stipulated how they would change their procedures for maintaining accurate registration records, complying with federal requirements for notifying voters of their status on the list, and with handling voters whose names are not on the active voter list on election day.

Four years after the St. Louis Elections Board signed the consent decree acknowledging these failures, Mark (Thor) Hearne, the St. Louis lawyer and influential Republican activist, submitted Senate testimony that included citations to materials he produced after 2002 that ignored the Board's culpability and repeated misleading allegations of voter fraud in St. Louis.⁹⁸

Four years after the St. Louis Elections Board signed the consent decree acknowledging these failures, Mark (Thor) Hearne, the St. Louis lawyer and influential Republican activist, submitted Senate testimony that included citations to materials he produced after 2002 that ignored the Board's culpability and repeated misleading allegations of voter fraud in St. Louis.

⁹⁸ Hearne (June 2006), (July 10, 2006), and (December 2006).

Milwaukee: The Coup de Grâce

In 2000, Vice President Al Gore won Wisconsin by just under 6,000 votes out of more than 2.5 million cast. Heading into the last months of the 2004 presidential campaign candidates George W. Bush and John Kerry were neck-and-neck in the polls in Wisconsin and the race was once again projected to be razor close. As a battleground state Wisconsin attracted attention from the national campaigns and a host of non-profit and political consulting organizations that poured money, staff and volunteers into the state to increase voter registration before Election Day.

By September, the voter registration drives and heightened national interest in Wisconsin as a battleground state led elections director Kevin Kennedy to report that elections officials across the state had been swamped by an unprecedented increase of over 200,000 new applications submitted by mail.⁹⁹ The intensified focus on Wisconsin by outside voter registration groups pouring their volunteers into the state was unparalleled in recent elections, an anomaly associated with Wisconsin's swing state status and the closeness of the presidential contest – in Wisconsin and the nation – just four years before.¹⁰⁰

Pre-election news coverage in Wisconsin focused on three controversies: problems associated with some of the voter registration drives; a dispute between county and city officials over the number of ballots to be printed and provided to the city of Milwaukee; and a flap over thousands of alleged “bad addresses” on Milwaukee's voter registration list.

Procedural breakdowns and discrepancies in the voter registration records were associated with what Kennedy called “volume” problems, but they helped create a climate of suspicion about the quality of record keeping at the Milwaukee elections commission and the commission's ability to run a “clean” election.¹⁰¹ The pre-election disputes repeatedly invoked the language of “voter fraud,” though no evidence was produced that voters were intentionally committing it. The climate of distrust made it difficult to see clerical mistakes, illegible handwriting, and workload problems leading to backlogged voter registration applications as human error or problems related to resource issues. Instead, foul-ups and mistakes were assumed to be evidence of fraud perpetrated by partisans trying to “steal elections.”

Imperfect voter registration drives and simple human error, however, are not the same as voter fraud, nor do they inevitably lead to fraudulent voting.

Voter registration problems

Intensified political competition and the influx of outside organizations, campaign workers and volunteers into Wisconsin in the months and weeks before the election contributed to an inevitably flawed voter registration process. Duplicate registration cards, improperly filled out cards, cards from people who are not eligible to vote or who don't live in the district in which the card was submitted are not uncommon in the chaotic pre-election atmosphere of an intense political campaign. Imperfect voter registration drives and simple human error, however, are not the same as voter fraud, nor do they inevitably lead to fraudulent voting. As the Milwaukee case demonstrates, however, these deficiencies are easily exploited by partisans.

⁹⁹ Tom Kertscher, “Deputy Registrar May Have Violated State Election Law; He Says He Didn't Witness Forms He Signed,” *Milwaukee Journal-Sentinel* (October 1, 2004), B1.

¹⁰⁰ Jenny Price, “Voter Registration Efforts Ramped Up In Wisconsin,” *Associated Press State & Local Wire* (October 10, 2004). Since voters can register to vote on Election Day, pre-election voter registration drives have been less common in Wisconsin than elsewhere.

¹⁰¹ Price (2004).

How many ballots for Milwaukee?

As stories of potential voter registration fraud circulated in the press, a political fight erupted in Milwaukee. In October the chief elections official in Milwaukee asked the county elections board for 260,000 extra ballots in anticipation of record turnout. Under Wisconsin law counties print and pay for all ballots for their localities. Milwaukee county elections officials rejected the request, with County Executive Scott Walker writing in support of the county board's decision to give Milwaukee roughly the same number of ballots it had received in the previous presidential election. In 2000, the number of ballots on hand exceeded the eligible voting population in Milwaukee by at least 200,000. But in planning for the number of ballots needed, local officials must compensate for the fact that in order to scan and count the ballots after they are cast, a bar code is assigned that prevents ballots from being counted outside the ward in which they are issued. In other words, unused ballots can't be moved around from ward to ward to cover shortfalls. Estimating probable turnout involves estimating turnout in each ward rather than citywide. This could have the effect of inflating the overall estimated number of ballots needed citywide. In 2004 Milwaukee requested 938,000 ballots for a voting population of about 424,000. The county board agreed to give the city 679,000 ballots, and a firestorm of protest erupted when County Executive Walker defended the decision by suggesting that he was concerned about potential voter fraud and didn't want people to be able to "grab" extra ballots at the polling site.¹⁰²

Milwaukee Mayor Tom Barrett accused Walker of trying to foment chaos at the polls and suppress the central city vote. Barrett is a Democrat and served as a state co-chair of John Kerry's campaign, while Walker is a Republican and served as state co-chair of George W. Bush's campaign. In press reports, the dispute was repeatedly referred to as "ugly," generating partisan recrimination on both sides. On the morning of October 14, about a hundred protesters, including students, elected officials and union activists, stormed Walker's office while he was meeting with municipal election clerks, chanting, "Let the people have their voice!" and demanding that Walker issue the extra ballots to Milwaukee. Wisconsin Governor Jim Doyle intervened by asking the state elections board to help resolve the dispute and offered state aid to pay for the extra ballots. The next day Walker and Barrett held a joint press conference on the steps of Milwaukee city hall to announce a compromise between the city and county: the county would supply the extra ballots, giving the city the 938,000 ballots it originally requested, the city would split the cost, estimated at about \$40,000, and promise to return all unused ballots to the county election commission to ensure that all ballots were accounted for.¹⁰³ Approximately 665,000 unused ballots were later returned to the county board of elections.¹⁰⁴

Inaccurate lists of "potentially fraudulent voters"

At 4:57 p.m. on Wednesday, October 27, 2004, three minutes before the legal deadline for filing a complaint with the city elections commission, the state Republican Party challenged the validity of 5,619 names on the city voter rolls. State GOP chairman Rick Graber said, "This is a black eye on the city of Milwaukee and the state of Wisconsin. These 5,600 addresses could be used to allow fraudulent voting. Whether it's deliberate or not, something's wrong when you have people

¹⁰² Dave Umhoefer and Greg J. Borowski, "City, County Spar Over Ballot Supply; Walker Cites Fraud Concerns; Barrett Cries Foul," *Milwaukee Journal-Sentinel* (October 13, 2004), A1; Greg J. Borowski and Dave Umhoefer, "Walker-Barrett Ballot Dispute Heats Up More; County, City Accuse the Other of Trying to Make Election Day Controversy," *Milwaukee Journal-Sentinel* (October 14, 2004), B1.

¹⁰³ Associated Press, "Governor Sends Election Board Into Milwaukee Ballot Fray," *Capital Times* (October 15, 2004), 4A; Dave Umhoefer and Steve Schultze, "Doyle Joins Rift Over Ballot Supply; Governor Seeks State Inquiry; After Protest, Walker Agrees to Review City's Request," *Milwaukee Journal-Sentinel* (October 15, 2004), A1.

¹⁰⁴ Greg J. Borowski, "665,000 Unused Ballots Returned; Review Finds City's Original Allotment Would Have Been Sufficient," *Milwaukee Journal-Sentinel* (November 25, 2004), B1.

from addresses that don't exist."¹⁰⁵ First the local elections board voted 3-0 when the board's lone Republican appointee joined the two Democrats in finding the challenge lacked sufficient evidence. The Milwaukee City Attorney, Grant Langley, conducted a review that he said in a letter to the city elections commission executive director casts "doubt on the overall accuracy" of the list supplied by the state GOP.¹⁰⁶

Then, just four days before Election Day the state GOP demanded that Milwaukee city officials require identification from 37,180 people it said its review of the city's voter rolls turned up as living at questionable addresses. The list was produced in the same manner as the first list of 5,619 names using a computer program to match data from the city's voter database with a U.S. Postal Service list of known addresses. It included 13,300 cases of incorrect apartment numbers and 18,200 cases of missing apartment numbers. City Attorney Langley, a non-partisan officeholder, called the GOP's request, "outrageous," adding, "We have already uncovered hundreds and hundreds and hundreds of addresses on their (original list) that do exist. Why should I take their word for the fact this new list is good? I'm out of the politics on this, but this is purely political."¹⁰⁷ Langley's review did find some addresses that do not appear to exist, and the *Milwaukee Journal-Sentinel* did its own limited investigation, finding 68 questionable addresses. "Others, though," it said, "were likely to be clerical errors."¹⁰⁸

By Monday, officials from the state GOP and the City of Milwaukee worked out an agreement on how the registrations of voters with addresses challenged by the GOP would be dealt with at the polls. The list of 37,000 was pared back down to 5,512 and the city agreed to provide poll workers with the names of people in their wards from the list whose addresses appeared to be incomplete or inaccurate. Those people would be flagged if they showed up to vote and asked to show identification and/or re-register to update their records.¹⁰⁹ At the time Wisconsin law did not require pre-registered voters to show identification to vote at the polls, they only needed to state their name and address to receive a ballot.¹¹⁰ The compromise deal with the Republican party imposed an identification requirement not mandated by law on people who made their way onto the GOP's list.

Who bears responsibility for sloppy records and procedural meltdown?

The Journal-Sentinel reviewed Milwaukee's voting records and found a number of unexplained discrepancies. The most troubling finding from the newspaper's detailed computer analysis was that as many as 1,242 votes, three-quarters of them cast by people registering on site on election day, appeared to have come from invalid addresses. Another 1,305 registration cards with discernible flaws such as missing addresses or missing names were accepted from voters on election day who were then allowed to vote.¹¹¹

¹⁰⁵ Greg J. Borowski, "GOP Fails To Get 5,619 Names Removed From Voting Lists: City Commission Says Party Didn't Prove Case; Challenges Could Move to Polling Places," *Milwaukee Journal-Sentinel* (October 29, 2004), A1.

¹⁰⁶ Greg J. Borowski, "Vote Inquiry Sharpens Focus; Prosecutors Find Many Disputed Addresses Exist," *Milwaukee Journal-Sentinel* (October 30, 2004), A1.

¹⁰⁷ Greg J. Borowski, "Election 2004: GOP Demands IDs of 37,000 in City; City Attorney Calls New List of Bad Addresses 'Purely Political,'" *Milwaukee Journal-Sentinel* (October 31, 2004): A1.

¹⁰⁸ Borowski (October 31, 2004).

¹⁰⁹ "Milwaukee Vote Deal Reached on Dubious Addresses," *The Capital Times* (November 1, 2004), 5A.

¹¹⁰ Wisconsin allows for election day registration. Same-day registration rules require new registrants to show some form of proof of residency, or, for those lacking proof, another registered voter may vouch for them.

¹¹¹ Greg J. Borowski, "Over 1,200 Voters Addresses Found Invalid; Some Mistakes Easily Explained, But Milwaukee Flaws Raise Concerns About Shoddy Record Keeping, Possible Fraud," *Milwaukee Journal-Sentinel* (January 25, 2005), A1; Greg J. Borowski, "Fraud or Bumbling, Voter Problems Still Unnerving to Public," *Milwaukee Journal-Sentinel* (January 30, 2005), A1.

The newspaper opined on its own investigation and reporting:

Republicans are quick to jump on the discrepancies, real or imagined, in voting data in Milwaukee as proof of widespread fraud in the big city. In their minds, the *Journal Sentinel's* findings fit that pattern. A more plausible explanation, however, is that the findings reflect the unfortunate tendency of voting systems throughout America to err.¹¹²

By the end of January, the Mayor had appointed an internal task force to review the city's electoral procedures, and federal and county law enforcement agencies began a joint investigation into whether breakdowns in procedure, poor record-keeping, human error or fraud explained the discrepancies. On February 10, the bipartisan Joint Legislative Audit Committee of the state legislature voted unanimously to direct auditors to review voter registration and address verification procedures. All of these investigations produced clear evidence that Milwaukee's Board of Elections was overwhelmed by its own incompetence and under-staffing on election day, resulting in massive record-keeping problems. Poll workers failed to follow procedures; the number of votes cast in Milwaukee failed to match the number of people recorded as voting; same day registration cards were not filled out properly and follow up was not performed when post-registration address verification efforts identified address discrepancies; some voters were allowed to register to vote in the wrong ward.

The dénouement

The scrutiny from federal, state and local law enforcement and elections officials produced several reports, an intensive review of voter registration practices in a number of Wisconsin cities, many recommendations for improving election administration and voter registration procedures, several later-vetoed photo ID bills in the state legislature, a variety of other legislative proposals, and very little conclusive evidence of voter fraud.

Widespread ignorance among the public and elections officials alike of Wisconsin's seldom enforced felony disenfranchisement laws account for the hundreds of ineligible felons post-election audits have found voted since 2000. Alleged illegal felon voting constitutes nearly all of the "voter fraud" reported on by the media in Wisconsin over the last six years, and represents most of the handful of cases prosecuted by the federal government. Wisconsin election crime laws require the establishment of a willful effort to defraud. Most of those identified as ineligible have not been prosecuted because they were never informed that they lost their voting rights until they completed their entire sentence. Until recently, Wisconsin's voter registration application form did not clearly indicate that felons on probation or parole were ineligible to vote. One of the federal cases against the dozen or so people charged with illegal (felon) voting in the 2004 election was dropped when it was revealed that the defendant had registered to vote on election day in Milwaukee using his state offender ID card.¹¹³

¹¹² Staff, "Widen Election Day Focus," *Milwaukee Journal-Sentinel* (January 26, 2005), A14.

¹¹³ Gina Barton, "A Felon But Not A Fraud: No Charges For Voter With Prison I.D.," *Milwaukee Journal-Sentinel* (March 17, 2006). See, *United States of America v. Derek G. Little*, "Motion to Dismiss Indictment," United States District Court, Eastern District of Wisconsin, Case No. 05-CR-172 (LSA) (March 14, 2006).

POLICY RECOMMENDATIONS

This report has illustrated how the public is being manipulated about the problem of voter fraud.

Voting is a right, it's not a gift and it's not a privilege. Moreover, we can't have a democracy without the voters, and that means all voters, contributing to self-government. Therefore, layers upon layers of rules and bureaucracy to administer elections do not serve us well if they hinder electoral participation, which they do especially when the electorate expands. It is simply naïve to argue that the rules have nothing to do with turnout. On the other hand, it's true, the rules don't on their own increase turnout – issues, passion, competition, good candidates, effective communication and a diverse media – these are some of the factors that contribute to higher levels of electoral participation. But high interest campaigns and elections present precisely those conditions under which a complex regime of rules will have a depressing effect. When voter interest is high, partisans exploit the rules to determine the size and shape of the electorate they want.

Today partisans use the threat of voter fraud as an intimidation tactic. As our history shows, it is an old and reliable instrument for shaping the electorate by influencing the rules and procedures governing access to the vote. It is difficult to openly suppress voting in a democratic culture. The threat of fraud, however, if it's real, is enough to scare most people into accepting new rules that undermine the electoral participation of other voters - the unfortunate price, we are told, we must pay to keep our elections clean. The unraveling logic of this argument should be obvious. Unfortunately, reason flies out the window when we're scared.

We need better data, better election administration, transparency and more responsible journalism to improve public understanding of the legitimate ways in which electoral outcomes can be distorted and manipulated. Specifically:

1. States' chief elections officers should collect and maintain data on fraud allegations and enforcement activities and routinely report this information to the public. The data and methods used to collect it should be transparent and in the public domain.
2. To protect the right to vote and improve public confidence in the electoral process improvements to statewide, centralized voter registration databases must continue. Accurate registration records and methods for instantaneously certifying voter eligibility are the best defense against voter fraud.
3. To minimize mistakes, clerical errors, and duplication, state and local elections officials need to develop good, cooperative working partnerships with third party voter registration organizations that do a service to democracy by encouraging more people to register and vote.
4. States can go further and reduce the need for registration drives by fully implementing the agency-based voter registration requirements of NVRA and instituting same-day voter registration procedures. Ultimately, the states and federal government should provide a means to automatic universal voter registration.
5. To improve public understanding of voter fraud and more balanced reporting, state elections and law enforcement officials should educate journalists to ask for and recognize evidence of fraud when reporting on fraud allegations.

APPENDIX: HOW TO IDENTIFY VOTER FRAUD

Elections are instruments of democracy. They are the mechanisms for choosing representatives of the people's will, and they are widely regulated by law. Many different actors participate in the electoral process. Legislators and administrators make and implement the rules, candidates organize campaigns to run for office, voters cast their ballots, administrators count the ballots and elected officials certify the results.

The voters' role is simple – to make choices about candidates by casting legal ballots. Voters don't set deadlines for registering to vote, nor do they make the rules about how ballots are designed, displayed, or marked. They don't decide where the polls are located, when they are open, or what voting technology will be used. Voters have nothing to do with receiving completed ballots, determining valid ballots, counting or recounting ballots, tallying election results, or ensuring that the vote totals are accurate.

Voters, like all other actors or groups in the electoral process, can only corrupt that part to which they have access.

Voters, like all other actors or groups in the electoral process, can only corrupt that part to which they have access. They can do this directly, for example, by providing false information about their identity and/or eligibility in order to vote illegally, or indirectly through participation in a conspiracy, usually with others who have more authority and access to the marking and counting of ballots than the voters themselves possess.

If the alleged fraud does not involve voters it should not be considered voter fraud.

The first step in confronting any allegation of voter fraud is to identify who is alleged to have committed the fraud and to figure out if any voters are involved. If the alleged fraud does not involve voters it should not be considered voter fraud.

The second step is to identify which part of the electoral process was corrupted by fraud. Given their limited access, voters can only corrupt the registration and voting phases. They can't corrupt the vote tallying and counting phases where most election fraud has occurred in the past because they lack access to votes after they've cast them.¹¹⁴ A fraudulent ballot

¹¹⁴ The most thorough analysis of election fraud in the early twentieth century is the landmark 1929 study of voter registration procedures for the Brookings Institution by the inventor of the punch card voting machine, Joseph P. Harris. See, Joseph P. Harris, *The Registration of Voters in the U.S.* (Baltimore: The Lord Baltimore Press, 1929). Harris was a public administration reformer who promoted government modernization and the use of scientific administrative practices to remove politics from the business of governing. He concluded that elections were more badly managed than just about any other area of public administration and that political machines were responsible for much of the fraud he analyzed. The case studies of election fraud in Chicago, Philadelphia and Louisville, Kentucky, Harris presents all involved large scale conspiracies orchestrated by politicians and political machines which Harris thought rigged elections through ballot box stuffing and the manipulation of the count. His conclusion that most fraud occurred during the vote counting stage spurred him to invent the Votomatic Vote Recorder (the first punch card voting machine) which Harris hoped would reduce opportunities for election fraud by removing the ballot counting function from precinct workers. See, Joseph P. Harris, *Oral History*, interview by Harriet Nathan, Regional Oral History Office, The Bancroft Library, University of California, Berkeley, California, 1980, available from <http://bancroft.berkeley.edu/ROHO/Vote/>.

is one that was not cast legally. But the definition of a legal ballot varies according to the rules that qualify eligible voters to vote and govern the procedures for casting a ballot in the different states.

Fraud in Voter Registration

To its earliest proponents, voter registration was intended as an anti-fraud safeguard. Registration fraud is typically punished less severely than fraud in voting and this is as it should be. What matters most to the integrity of electoral outcomes is the casting and counting of an illegal ballot. A person who provides false information on a voter registration application but never casts a ballot is less of a threat to electoral integrity than one who negates or dilutes the will of the voters by casting an illegal ballot. This is not to say that voter registration fraud is a negligible crime or should be tolerated. The available evidence suggests voter registration fraud is rare, but when it does occur, if it goes undetected it can compromise the accuracy of the voter rolls. When it's caught it burdens the elections and law enforcement officials who find it and must address it.

Since voters can perpetrate it, even if they rarely do, for purposes of this report we will consider voter registration fraud a form of voter fraud, along with all forms of illegal voting. However, when voter registration fraud is committed by a campaign volunteer or a paid canvasser, we should not consider the crime 'voter fraud.'¹¹⁵ Doing so only adds to public confusion about what should be done to eliminate opportunities for fraud.

Fraud in Voting

Under most state and federal laws a vote is considered illegal when it is cast improperly by an unqualified or ineligible voter. The voter must be qualified and the vote cast according to the rules governing the act of voting under state and federal law. Both elements – the voter and the act of voting – must be legal or the vote is illegal.

The difference between an eligible and a qualified voter

To be legal, an **eligible** voter must be **qualified** by the state to vote. This raises questions about the difference between an 'eligible' voter and a 'qualified' voter. The centuries long struggle for the franchise in the U.S. established a common law right to vote and constitutional bans on voter discrimination by race, color, gender, or age (over the age of 18), but no constitutional right to vote. The lack of an affirmative right to vote in the Constitution and the delegation of authority to the states to determine voter qualifications and oversee election administration are peculiar features of American democracy. The Constitution explicitly grants the states the power to set voter qualifications, reserving authority to Congress to regulate only "the times, places and manner of holding elections for Senators and Representatives."¹¹⁶

“Eligible” voters are those whose age and citizenship status, and in some cases absence of a felony conviction allows them to be credentialed or “qualified” by the states as legitimate or legal voters. “Qualified” voters, therefore, are those eligible voters who complete a state’s procedures for casting a legal ballot.

Because the Constitution vests power to 'qualify' voters in the states, as long as they do not unconstitutionally discriminate against people by race, color, gender or age, they may make different rules for qualifying voters, and they do. This is why the definition of a legal vote varies across the states, especially with regard to residency and felony disqualification rules. Consider,

¹¹⁵ For an example of how the voter fraud label is commonly misused, see "2 Signature Gatherers Sentenced in Orange County Voter Fraud Case," *Associated Press* (1/4/07), 17 News Online, available online at www.kget.com/news/state/story.aspx?content_id=6b487526-37ac-43e9-a5b0-496674b9d5e1.

¹¹⁶ But, "the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators." See, U.S. Constitution, Article I, section 4.

for example, the ballot of an otherwise eligible and qualified voter with a felony conviction who is no longer under state supervision. If that citizen lived in Maine and registered to vote by or on Election Day, his or her vote would count as a legal ballot. If that citizen lived and voted in Florida where a felony conviction eliminates the right to vote until clemency is granted, he or she could be prosecuted for casting an illegal ballot.

In fact, states make lots of rules for qualifying voters. The most important is the requirement that all eligible voters register. All states except North Dakota require eligible voters to register before casting a ballot.¹¹⁷ Thus, all states except North Dakota qualify eligible voters by requiring them to meet certain conditions in order to register their names on the rolls of legitimate or valid voters. Voter registration, therefore, is a means of voter qualification, and in nearly all states, otherwise eligible voters must be registered properly or the vote they cast is illegal.¹¹⁸ In addition, ineligible voters, such as those disqualified by state law for a felony conviction or because they do not possess U.S. citizenship,¹¹⁹ could register to vote either mistakenly or by deceit, thus appearing on the voter rolls as 'qualified' voters despite their ineligibility. Their votes would be treated as legal votes when in fact they would be illegal.

There are a few known cases of ineligible persons such as non-citizens making it on to the voter registration rolls due to a misunderstanding about who has the right to vote in American elections, or to mistakes made by elections officials who misinformed such applicants or failed to note their lack of citizenship. One involves the case of Mohsin Ali, a long-time legal permanent resident living in Florida at the time of his arrest for "alien voting." He pleaded guilty but claimed a clerk in the Department of Motor Vehicles issued a voter registration application to him when he renewed his license. In a letter begging the judge to intercede with immigration authorities considering Ali's deportation back to Pakistan, Ali claimed he told the clerk he was a Florida resident but not a U.S. citizen.¹²⁰ He states that the clerk told him as the husband of an American citizen he was eligible to vote. When Ali received a voter registration card in the mail he assumed he was qualified to vote and voted in the 2000 presidential election.¹²¹

Voters have limited access to the electoral process, but where they do interact with it they confront an array of rules that can trip them up and change depending on where they live. The more rules and restrictions, the more stumbling blocks voters face when trying to cast legal ballots. For example, in Pennsylvania where a voter must qualify with an excuse when applying for an absentee ballot, it is illegal to vote that ballot if the voter's plans change and he or she remains physically present at home (barring a disability that prohibits the voter from visiting the polling place). A voter must apply for an absentee ballot a full week before Election Day. What happens if plans change or the business trip gets canceled and the voter is present on Election Day, after all? If that voter then mails in the ballot instead of striking out for the line at the polling place, that voter is breaking the law in Pennsylvania. Who knew? Who wouldn't make

¹¹⁷ North Dakota repealed its voter registration law in 1951. To vote in North Dakota eligible voters must have proper identification showing their name and current address. If they lack identification, they may still vote by filing a voter's affidavit attesting to their identity and address, or if a poll worker knows them and can vouch for them. Poll workers use lists of previous voters to track voting on Election Day.

¹¹⁸ The courts have dealt with the question of whether voter registration is an unconstitutional burden on the vote by using a balancing test, weighing the alleged burden on rights against a state's legitimate interest in ensuring electoral integrity. State laws mandating voter registration have been upheld repeatedly by the Supreme Court as reasonable administrative burdens on the right to vote ("a person does not have a federal constitutional right to walk up to a voting place on election day and demand a ballot," *Marston v. Lewis*, 410 U.S. 679, 680. (1973)).

¹¹⁹ Federal law does not require persons be U.S. citizens to vote, but all states do, as it is their constitutional prerogative to set citizenship as a condition for voter eligibility and qualification.

¹²⁰ Letter from Mohsin Ali to the Honorable William C. Sherrill, Jr., Chief U.S. Magistrate Judge, U.S. District Court, Tallahassee, Florida; dated November 3, 2006. The judge denied Ali's request.

¹²¹ *U.S. v. Mohsin Ali*, U.S. District Court, Northern District of Florida, Tallahassee Division, Case No. 4:05cr47-WCS.

things easier and drop the ballot in the mailbox? The more complex are the rules regulating voter registration and voting, the more likely voter mistakes, clerical errors, and the like will be wrongly identified as “fraud.”

Eligible voters may nevertheless fail to *qualify* as legal voters because they fail to register properly – usually their ballots would be considered illegal. Illegal ballots, however, may also result from qualified – or properly registered – voters failing to follow the rules for casting a ballot under state law. As the following table suggests, expanding rules create more ways to cast an illegal ballot than a legal one.

Voter Eligibility, Voter Registration and Legal Balloting

| Voter | Registered | Voter Is | Vote Is Cast | Ballot |
|---------------------|-------------------|----------------------|------------------------|---------------|
| Eligible | Yes | Qualified | Properly | Legal |
| | | | Improperly | Illegal |
| | No | Not Qualified | Properly or Improperly | Illegal |
| Not Eligible | Yes | Improperly Qualified | Properly | Illegal |
| | | | Improperly | Illegal |
| | No | Not Qualified | Properly or Improperly | Illegal |

As states and localities continue to loosen restrictions on the time and place for casting a legal ballot, qualified voters will face more options for casting their ballots. The lack of uniformity increases complexity of the rules and unintended consequences proliferate. For example, the growth of early and mail voting is generally considered positive because these reforms make voting more convenient by opening up more avenues for casting legal ballots. Voters in many

But one consequence of expanding voting opportunities is a corresponding increase in opportunities for casting unintentionally illegal ballots if administrative tracking and auditing systems are flawed.

states may now cast their ballots at a town clerk’s office two weeks before the election, by mail, or in person at the polling booth on Election Day. But one consequence of expanding voting opportunities is a corresponding increase in opportunities for casting unintentionally illegal ballots if administrative tracking and auditing systems are flawed.

In fact, several recent cases of alleged voter fraud involved legal voters who mailed in their ballots and then showed up at the polls on Election Day because they either forgot mailing in their ballots or, distrusting the absentee balloting process, wanted to be sure that their votes were counted by voting again. They used their real names to try to vote twice because they were confused.¹²² Poor record management on the part of elections officials was the problem, but voters got the blame. As the options and rules expand they increase the possibility that voter misunderstandings will be labeled ‘voter fraud.’

¹²² See, for example, Susan Greene and Karen Crummy, “Voter Fraud Probed in State; Double Dippers, Felons Targeted,” *Denver Post* (March 24, 2005).

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