

## Chapter 18

# The Criminal Enforcement of Federal Campaign Finance and Election Laws\*

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## I. INTRODUCTION

### § 18:1 Background

In 2002, Congress enacted the Bipartisan Campaign Reform Act (“BCRA”). While primarily aimed at plugging loopholes in the federal election laws regarding “soft money” and “electioneering communications,” which are covered elsewhere in this Guide, the BCRA also strengthened the criminal enforcement regime which had defined the landscape for the prosecution of campaign finance violations for the previous quarter of a century. First, the BCRA repealed the three year statute of limitations which had governed criminal violations of the Federal Election Campaign Act (“FECA”) and replaced it with a five year limitations period, the same period applicable to most other federal criminal offenses under 18 U.S.C.A. § 3282.<sup>1</sup> Second, the Act created both a two-year felony offense for violations of the FECA prohibition against conduit contributions that aggregate over \$10,000 in a calendar year and a five-year felony offense for any FECA violations involving contributions or expenditures aggregating \$25,000 or more

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#### [Section 18:1]

<sup>1</sup>See Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (codified as amended at 2 U.S.C.A. § 455).

during a calendar year.<sup>2</sup> Third, it directed the United States Sentencing Commission to promulgate a new guideline expressly covering federal election and campaign finance offenses, which the Commission did in a manner that significantly increased the likely punishment for such violations.<sup>3</sup> Along with some additional expansions to the definitions of prohibited conduct (such as clarifying that the FECA ban on contributions from foreign nationals applied to donations to non-federal candidates as well as federal candidates), the BCRA significantly enhanced the ability of federal law enforcement authorities to prosecute and punish efforts to corrupt the campaign financing process.

Congress further expanded the tools available to law enforcement through the Honest Leadership and Open Government Act of 2007, passed in August 2007 immediately prior to the summer recess and signed by the President on September 14, 2007. While the Act is primarily focused on strengthening the provisions of the Lobbying Disclosure Act of 1995 (“LDA”) by increasing the restrictions on lobbyists and former Members of Congress and is discussed at length elsewhere in this Guide, the new statute includes a few provisions of particular interest to the criminal law practitioner representing clients in campaign finance-related investigations. It creates new disclosure and certification obligations under both the FECA and the LDA, and creates a five-year felony for “knowingly and corruptly” failing to comply with the provisions of the LDA.

The first section of this Chapter will present a discussion of the substantive provisions of the federal criminal law that are of principal interest to defense lawyers representing clients in campaign finance violation cases, including the provisions of the BCRA. It will also review the relatively new provision of the sentencing guidelines that addresses these offenses. Finally, the first section of this Chapter will address some considerations with which most defense attorneys practicing in this area must be familiar, including dealing with the Federal Election Commission (“FEC”), the regulatory agency charged with enforcing the civil and administrative provisions of the laws governing campaign finance.

In the wake of the difficulties experienced in counting votes during the 2000 Presidential election, renewed attention has been placed on voting rights and fair elections. Along with this new attention by the federal government has come an additional

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<sup>2</sup>BCRA, §§ 315 and 312 (codified as amended at 2 U.S.C.A. §§ 437g(d)(1)(D) and 437g(d)(1)(A)(i)).

<sup>3</sup>See U.S.S.G. § 2C1.8.

focus on the prosecution of voting rights and election law offenses. Thus, the second half of this Chapter reviews the primary provisions of the federal criminal laws used to punish persons who intentionally interfere with a qualified voter's right to cast his/her vote and to have that vote be counted.

## II. FEDERAL PROSECUTION OF CAMPAIGN FINANCE VIOLATIONS

### § 18:2 Key statutes

Federal prosecutors use a variety of statutes to enforce the federal campaign finance laws. While most of the federal laws regulating the financing of federal election campaigns are contained within the FECA, the criminal provisions, until amended by the BCRA, only carried a maximum one year penalty and were governed by a three year statute of limitation. Thus, federal prosecutors historically often turned to provisions of Title 18, such as the false statement statute, 18 U.S.C.A. § 1001, or the conspiracy to defraud statute, 18 U.S.C.A. § 371, to prosecute complex campaign finance offenses. They may also now utilize the new felony provision of the LDA. While our discussion of federal campaign finance prosecutions must begin with the provisions of the FECA, we describe the two most often used Title 18 offenses, as well as the new LDA provision.

### § 18:3 Key statutes—The Federal Election Campaign Act

The FECA contains a series of provisions regulating campaign financing and expenditures.<sup>1</sup> Any violation which “involves the making, receiving, or reporting of any contribution, donation, or expenditure . . . aggregating \$2,000 or more during a calendar year” (or \$250 or more a calendar year for certain specified violations), may be punishable by criminal sanctions.<sup>2</sup> However, criminal penalties may only be imposed when the person “knowingly and willfully,” commits a violation of any provision of this act.<sup>3</sup> This “knowingly and willfully” language requires that subjects of prosecution know what the law required and violated the statute

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#### [Section 18:3]

<sup>1</sup>See 2 U.S.C.A. §§ 431 to 455.

<sup>2</sup>See 2 U.S.C.A. § 437g(d)(1)(A), (d)(1)(B).

<sup>3</sup>2 U.S.C.A. § 437g(d)(1)(A).

notwithstanding that knowledge.<sup>4</sup> The “knowing and willful” requirement makes it difficult to prosecute many of the more obscure regulatory requirements of the FECA. Thus, prosecutions under the FECA are generally confined to violations of certain clearly established and well-known provisions, which we review briefly below.

**§ 18:4 Key statutes—The Federal Election Campaign Act—Contribution limits**

The FECA limits the amount that potential contributors can give to candidates seeking federal office and to political committees supporting federal candidates. Section 441a contains three sets of so-called “hard money” contribution limits, which are defined elsewhere in this Guide. As with any violations of the Act, the defendant must be proven to have known of the limitations set forth in the applicable subsections to be punished criminally. Thus, cases prosecuted under Section 441a generally involve not only excessive contributions, but contributions which are made either surreptitiously, such as through the use of conduits, or in furtherance of some other alleged criminal objective.<sup>1</sup>

**§ 18:5 Key statutes—The Federal Election Campaign Act—Ban on contributions and expenditures by corporations and unions**

Corporations and unions may not make contributions or expenditures in connection with federal election campaigns.<sup>1</sup> In addition, national banks and federally chartered corporations may not make any contributions or expenditures in connection with state or local elections.<sup>2</sup> There are, of course, statutory exemptions that allow corporations, labor unions and national banks to establish separate segregated funds, commonly known

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<sup>4</sup>National Right to Work Committee, Inc. v. Federal Election Com’n, 716 F.2d 1401 (D.C. Cir. 1983). See also, *Ratzlaf v. U.S.*, 510 U.S. 135, 114 S. Ct. 655, 126 L. Ed. 2d 615 (1994) (“knowing and willful” violation of a regulatory law concerning reporting of currency transactions required proof that offender knew of legal duty and violated that legal duty notwithstanding that knowledge).

**[Section 18:4]**

<sup>1</sup>See, e.g., *U.S. v. Goland*, 959 F.2d 1449, 1452 (9th Cir. 1992).

**[Section 18:5]**

<sup>1</sup>See 2 U.S.C.A. § 441b(a).

<sup>2</sup>2 U.S.C.A. § 441b(a).

as PACs, which may contribute to campaigns.<sup>3</sup> Most cases involving the criminal prosecution of corporate or labor organizations involve reimbursement of individuals who contribute to a candidate and, thus, often violate the prohibition against making contributions in the name of another as well.<sup>4</sup>

**§ 18:6 Key statutes—The Federal Election Campaign Act—Ban on contributions by foreign nationals**

Section 441e prohibits contributions and donations by foreign nationals to all elections, whether federal, state, or local. Prior to the enactment of the BCRA, the statute prohibited a foreign national from making, directly or indirectly, a contribution “in connection with any federal, state, or local election.”<sup>1</sup> The BCRA expanded the statute to prohibit four additional types of political activity by foreign nationals, including contributions to a committee of a political party and expenditures for an electioneering communication.<sup>2</sup> The statute also prohibits any person from knowingly soliciting or accepting a contribution from a “foreign national,” which is broadly defined.<sup>3</sup> While the FEC has not expanded the definition of “foreign principal” to include a domestic subsidiary of a foreign-owned entity, § 441e does prohibit contributions of a domestic subsidiary if the parent foreign corporation provides funding for the contribution, or if foreign nationals are involved in any way in making the contribution.<sup>4</sup> As a result of the numerous investigations by the United States Congress and the Justice Department’s Campaign Finance Task Force of foreign national contributions to the Democratic Party during the 1996 Presidential campaign, knowledge of this prohibition has increased, making criminal prosecution in this area a continuing focus of federal prosecutors.

**§ 18:7 Key statutes—The Federal Election Campaign Act—Ban on contributions in the name of another**

Section 441f makes it unlawful for any person to make a con-

<sup>3</sup>2 U.S.C.A. § 441b(2)(C).

<sup>4</sup>See, e.g. *U.S. v. Sun-Diamond Growers of California*, 138 F.3d 961 (D.C. Cir. 1998), judgment aff’d, 526 U.S. 398, 119 S. Ct. 1402, 143 L. Ed. 2d 576 (1999); *U.S. v. Mariani*, 212 F. Supp. 2d 361 (M.D. Pa. 2002).

**[Section 18:6]**

<sup>1</sup>*U.S. v. Kanchanalak*, 192 F.3d 1037 (D.C. Cir. 1999).

<sup>2</sup>2 U.S.C.A. § 441e(a)(1)(B), (a)(1)(C).

<sup>3</sup>See 2 U.S.C.A. § 441e(b).

<sup>4</sup>2 U.S.C.A. § 441e(b).

tribution in the name of another, or for any person to permit his or her name to be used to make such a contribution. This provision bars both individuals and corporations from reimbursing someone else for making a contribution.<sup>1</sup> This prohibition of “conduit” contributions is the most frequently prosecuted violation of the FECA. Violations occur when a person gives money to “straw donors” for the purpose of disguising the true donor’s identity, and often involve a corporate official who instructs employees to make contributions to a candidate and then reimburses the employees through pay raises or bonuses.<sup>2</sup> Congress gave particular attention to these types of violations and in the BCRA created a separate felony penalty with a lower monetary floor than the felony for all other FECA offenses. Thus, conduit violations aggregating over \$10,000 in a single calendar year are now punishable by two years imprisonment and a mandatory fine,<sup>3</sup> whereas other violations of FECA are not felonies unless they involve contributions or expenditures aggregating more than \$25,000 in a calendar year.<sup>4</sup> Conduit contributions involving amounts over \$25,000 are five year felonies, as are other “knowing and willful” violations of the FECA.<sup>5</sup>

#### **§ 18:8 Key statutes—The Federal Election Campaign Act—Reporting requirements**

Federal candidates and political committees supporting federal candidates are required to register with the FEC and to designate a treasurer, who must file periodic reports with the FEC detailing all contributions received, and all expenditures made, that aggregate over \$200 in a calendar year.<sup>1</sup> While persons who cause the filing of false reports with the FEC are often prosecuted under the federal false statement statute,<sup>2</sup> pleas to know-

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##### **[Section 18:7]**

<sup>1</sup>See *U.S. v. Sun-Diamond Growers of California*, 138 F.3d 961 (D.C. Cir. 1998), judgment *aff’d*, 526 U.S. 398, 119 S. Ct. 1402, 143 L. Ed. 2d 576 (1999).

<sup>2</sup>See *Federal Election Com’n v. Odzer*, 2006 WL 898049 (E.D. N.Y. 2006).

<sup>3</sup>2 U.S.C.A. § 437g(d)(1)(D).

<sup>4</sup>2 U.S.C.A. § 437(a)(d)(1)(A).

<sup>5</sup>2 U.S.C.A. § 437g(d)(1)(A).

##### **[Section 18:8]**

<sup>1</sup>2 U.S.C.A. §§ 432, 433, 434.

<sup>2</sup>18 U.S.C.A. § 1001.



ing and willful violations of the Act's reporting requirements are not uncommon.<sup>3</sup>

**§ 18:9 Key statutes—Criminal enforcement outside of the FECA**

While the recent amendments to the FECA expanding the statute of limitations and increasing the maximum punishment may make the statute more useful to the government, prosecutors are still likely to employ other federal statutes in their indictments for campaign finance violations. We review the three most often used statutes below.

**§ 18:10 Key statutes—Criminal enforcement outside of the FECA—False statement prosecutions**

Various provisions of the FECA require reports to be filed with the Commission.<sup>1</sup> The submission of reports to the Commission are, like reports required to be made to numerous other federal agencies, subject to 18 U.S.C.A. § 1001, the statute prohibiting the knowing and willful submission of materially false statements to a federal official.

Prior to the BCRA, when all FECA crimes were misdemeanors and subject to a three year statute of limitation, prosecutions of campaign finance offenses were often brought as violations of 18 U.S.C.A. § 1001. Since the allegedly culpable party was rarely the person who actually made the allegedly false statement, most often the treasurer of a campaign, prosecutors combined 18 U.S.C.A. § 1001 with 18 U.S.C.A. § 2(b), which punishes those who “willfully cause[ ]” another to commit a criminal act.<sup>2</sup> Having been successful in using these statutes in combination to prosecute election law violations in the past, there is no reason to

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<sup>3</sup>Press Release, United States Department of Justice, Former Senior Vice President of Mattel, Inc. Sentenced for Causing the Submission of False Financial Reports to the Federal Election Commission (July 11, 2005) (available at [http://www.usdoj.gov/opa/pr/2005/July/05\\_crm\\_366.htm](http://www.usdoj.gov/opa/pr/2005/July/05_crm_366.htm)); Press Release, United States Department of Justice, Former Political Fundraiser Thomas Noe Sentenced To 27 Months In Prison For Illegal Campaign Contributions (Sept. 12, 2006), available at [http://www.usdoj.gov/opa/pr/2006/September/06\\_crm\\_615.html](http://www.usdoj.gov/opa/pr/2006/September/06_crm_615.html).

**[Section 18:10]**

<sup>1</sup>See e.g., 2 U.S.C.A. § 432(a) (requiring treasurer of a political action committee to file periodic reports with the Commission regarding contributions (over \$200) to and expenditures by the political action committee).

<sup>2</sup>See e.g., *U.S. v. Kanchanalak*, 192 F.3d 1037 (D.C. Cir. 1999); *U.S. v. Hsia*, 176 F.3d 517 (D.C. Cir. 1999).



believe that prosecutions for aiding and abetting the making of a false statement will be any less prevalent in campaign finance cases in the future.

When the government charges a violation of the false statement statute, it must prove both that the statement is false and material. While the government need only prove that a statement is false “under a reasonable interpretation,”<sup>3</sup> it is incumbent on the government to negate any reasonable interpretation that could make the statement factually correct.<sup>4</sup> “Literal truth” is therefore a defense.<sup>5</sup>

Additionally, 18 U.S.C.A. § 1001 expressly includes materiality as an element. The test of materiality is not high—a misrepresentation is material “if it has a natural tendency to influence, or was capable of influencing, the decision of the decision-making body to which it is addressed.”<sup>6</sup> Materiality may nonetheless prove to present a significant hurdle for the government, since it must be proven to the jury beyond a reasonable doubt.<sup>7</sup>

The most common issue in a false statement case is, of course, whether the maker of the statement or the alleged aider and abettor acted with the required intent. Both 18 U.S.C.A. § 1001 and 18 U.S.C.A. § 2(b) require that the criminal conduct be done “willfully,” which in the context of a regulatory requirement, generally means that the act be done with the specific intent to do something the law forbids.<sup>8</sup> In *U.S. v. Curran*,<sup>9</sup> the Third Circuit decided that “willful” meant the government had to prove in a false statement case that the defendant had knowledge of the specific FEC requirement or prohibition involved in the violation. Curran was the CEO of a company who asked his employees to contribute to federal candidates and then reimbursed them. He was convicted of causing a false statement to be made to the FEC because he furnished false information about the source of the

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<sup>3</sup>*U.S. v. Adler*, 623 F.2d 1287, 1289 (8th Cir. 1980).

<sup>4</sup>*U.S. v. Anderson*, 579 F.2d 455 (8th Cir. 1978). See also, *U.S. v. Race*, 632 F.2d 1114 (4th Cir. 1980).

<sup>5</sup>But cf. *U.S. v. Hsia*, 176 F.3d 517, 524 (D.C. Cir. 1999) (ruling that forms requiring the names of persons who give contributions to political campaigns require the names of the actual source of the money, not simply the name of person who wrote the check.).

<sup>6</sup>*Kungys v. U.S.*, 485 U.S. 759, 770, 108 S. Ct. 1537, 99 L. Ed. 2d 839 (1988).

<sup>7</sup>*U.S. v. Gaudin*, 515 U.S. 506, 522–23, 115 S. Ct. 2310, 132 L. Ed. 2d 444 (1995).

<sup>8</sup>*Ratzlaf v. U.S.*, 510 U.S. 135, 114 S. Ct. 655, 126 L. Ed. 2d 615 (1994).

<sup>9</sup>*U.S. v. Curran*, 20 F.3d 560 (3d Cir. 1994).

contribution to an intermediary, who furnished it to the FEC. On appeal, the Third Circuit vacated the conviction, finding the district court's instruction inadequate, because it failed to advise the jury that to find a contributor guilty, the contributor must have been aware that the campaign treasurer was bound by the law to accurately report the source of the contribution.

The *Curran* standard, however, has not withstood the critical eye of other Circuits. Thus, it appears relatively well-settled elsewhere that a person can be convicted of aiding and abetting the making of a false statement to the FEC so long as the defendant intended to cause the recipient of the political contributions to misstate their source, even if the defendant did not know the reporting requirements of the statute.<sup>10</sup>

Absence of intent nonetheless remains a powerful defense to charges of causing campaign officials to file false statements in violation of 18 U.S.C.A. § 1001 and 18 U.S.C.A. § 2(b). This was illustrated in the 2005 acquittal of David Rosen, an experienced professional fundraiser charged with causing false campaign finance reports to be filed with the Federal Election Commission. In that case, Rosen was the National Finance Director for the 2000 United States Senate campaign of Hillary Clinton and was allegedly responsible for all fundraising, planning and costs of an event in Los Angeles which benefited, in part, her campaign. While the event was alleged to have cost over \$1.2 million, paid for with over \$1.1 million of "in-kind" contributions from entertainers, hotels, restaurants, and others, the indictment alleged that Rosen underreported the in-kind contributions to be about \$400,000 to the joint fundraising committee's compliance officer, knowing this figure to be false. Prosecutors argued that Rosen panicked over the mounting costs for the fundraiser and lied to conceal its true cost both from the campaign and the FEC.

The indictment charged Rosen with four counts of violating 18 U.S.C.A. §§ 1001 and 1002. Counts One and Two charged Rosen with causing compliance officers of the Joint Finance Committee with filing a false initial and amended report with the FEC regarding the in-kind contributions. Count Three charged Rosen with causing a false letter to be filed with the FEC in response to an FEC request for information. Count Four charged Rosen with causing individuals to create a fictitious invoice, which he

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<sup>10</sup>U.S. v. Hsia, 176 F.3d 517 (D.C. Cir. 1999); U.S. v. Gabriel, 125 F.3d 89, 47 Fed. R. Evid. Serv. 1307 (2d Cir. 1997).

provided to the compliance officers in support of the expenses incurred.<sup>11</sup>

Rosen, who testified on his own behalf, argued that he left much of the fundraising to others, was not aware of all the details of the in-kind contributions, and, while he made some mistakes, he did not intend to hide anything. Count Four was dismissed pretrial and the Judge granted a defense motion for judgment of acquittal pursuant to Fed. R. Crim. P. 29 on Count Three. Thus, the only issue for the jury was whether Rosen had caused the compliance officer to file a false report and a false amended report with the FEC. As to both Counts, Rosen was acquitted, the jury apparently satisfied that while Rosen had failed to provide accurate information regarding the in-kind contributions for the event, he was simply over his head and had not intentionally avoided the requirements of the applicable reporting regulations.<sup>12</sup> This case demonstrated the hurdles prosecutors must overcome in seeking to criminally punish campaign finance violations.

**§ 18:11 Key statutes—Criminal enforcement outside of the FECA—Conspiracy to defraud prosecutions**

The general conspiracy statute,<sup>1</sup> not only criminalizes conspiracies to commit offenses against the United States, but “to defraud the United States or any agency thereof in any manner or for any purpose.” In two early cases, the Supreme Court defined the meaning of a “conspiracy to defraud” to include impairing, interfering or obstructing the lawful functions of any governmental agency.<sup>2</sup> Thus, the “defraud section” of 18 U.S.C.A. § 371 criminalizes any willful impairment of a legitimate government function, regardless of whether the conduct is designed to obtain money or property. Because the FEC must receive accurate information to perform its legitimate functions of enforcing the FECA’s campaign financing and disclosure requirements, it is unlawful

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<sup>11</sup>Indictment at 7–9, 2:03-cr-01219-AHM-1 (C.D. Cal. Dec. 4, 2003).

<sup>12</sup>Leslie Eaton, *Mrs. Clinton’s Former Top Fund-Raiser Is Acquitted of False-Filing Charges*, N.Y. Times, May 28, 2005.

**[Section 18:11]**

<sup>1</sup>18 U.S.C.A. § 371.

<sup>2</sup>*Haas v. Henkel*, 216 U.S. 462, 479–80, 30 S. Ct. 249, 54 L. Ed. 569 (1910); *Hammerschmidt v. U.S.*, 265 U.S. 182, 188, 44 S. Ct. 511, 68 L. Ed. 968 (1924).

under Section 371 to disguise contributions in order to evade the FEC's reporting requirements.<sup>3</sup>

The statute's prohibition against conspiracies to defraud is a favorite of prosecutors for several reasons. First, it allows prosecution of conduct that might not be addressed by other statutes, including the FECA. As set forth by the Ninth Circuit, for instance, [t]he "defraud part of section 371 criminalizes any willful impairment of a legitimate function of government, whether or not the improper acts or objective are criminal under another statute."<sup>4</sup> Second, it may not be necessary to prove that the defendant knew the intricacies of campaign finance law in order to obtain a conviction. Whereas conspiracy to commit an offense against the United States under the first clause of 18 U.S.C.A. § 371 requires the government to prove the intent element of the substantive offense that was the alleged purpose of the conspiracy, a conspiracy to defraud need only show that the defendant intended to disrupt and impede the lawful functioning of, in a campaign finance case, the Federal Election Commission.<sup>5</sup> Finally, charging a violation of 18 U.S.C.A. § 371 often expands the scope of admissible evidence, as otherwise inadmissible hearsay can be admitted pursuant to Federal Rule of Evidence 801(d)(2)(E) as co-conspirator hearsay.<sup>6</sup>

**§ 18:12 Key statutes—Criminal enforcement outside of the FECA—Mail fraud, wire fraud and 18 U.S.C.A. § 1346**

In *McNally v. U.S.*,<sup>1</sup> the Supreme Court ruled that a scheme to defraud citizens of the honest services of a public official was not, in itself and in the absence of a proven pecuniary loss, a violation of the mail fraud statute. *Carpenter v. U.S.*<sup>2</sup> extended *McNally* to the wire fraud statute. In response, Congress passed Section 1346 of Title 18, which provides that "[f]or the purposes of this chapter, the term 'scheme or artifice to defraud' includes a scheme

<sup>3</sup>United States v. Hopkins, 916 F.2d 201 (5th Cir. 1990); U.S. v. Trie, 23 F. Supp. 2d 55 (D.D.C. 1998).

<sup>4</sup>U.S. v. Tuohey, 867 F.2d 534 (9th Cir. 1989).

<sup>5</sup>See U.S. v. Oakar, 111 F.3d 146, 149 (D.C. Cir. 1997).

<sup>6</sup>See *Bourjaily v. U.S.*, 483 U.S. 171, 107 S. Ct. 2775, 97 L. Ed. 2d 144, 22 Fed. R. Evid. Serv. 1105 (1987).

**[Section 18:12]**

<sup>1</sup>*McNally v. U.S.*, 483 U.S. 350, 107 S. Ct. 2875, 97 L. Ed. 2d 292 (1987).

<sup>2</sup>*Carpenter v. U.S.*, 484 U.S. 19, 25, 108 S. Ct. 316, 98 L. Ed. 2d 275 (1987).

or artifice to deprive another of the intangible right of honest services.”

As a result of the passage of 18 U.S.C.A. § 1346, mail and wire fraud prosecutions for corruption of the campaign and electoral process are not uncommon. This is due in part to the flexibility provided to prosecutors by the mail and wire fraud statutes. The essential elements of a mail or wire fraud are (1) having devised (or intending to devise) a scheme to defraud; and (2) using the mails or the wires for the purpose of executing or attempting to execute the scheme.<sup>3</sup> As use of the mails or wires is generally easy for the government to prove, the only issue of consequence in mail or wire fraud case (including those involving public officials or candidates for public office) is whether the defendant had the specific intent to defraud. However, courts are not known to be overly demanding of proof of fraudulent intent. The statement in *U.S. v. Alston*,<sup>4</sup> is typical: “the requisite intent under the federal mail and wire fraud statutes may be inferred from the totality of the circumstances and need not be proven by direct evidence.”<sup>5</sup> Thus, prosecutors have begun to expand the statute into unusual arenas, including even schemes to violate state campaign finance laws.<sup>6</sup>

While the full reach of Section 1346 has yet to be determined, at least one court has shown a reluctance to expand it to campaign finance fraud. In *U.S. v. Turner*,<sup>7</sup> the Sixth Circuit vacated the defendant’s convictions for mail fraud in violation of 18 U.S.C.A. §§ 1341 and 1346. The defendant, Turner, was charged with having deprived the citizens of Kentucky of their intangible right to honest services by engaging in various schemes to rig the elections of Hays, a candidate for district judge, and Newsome, a candidate for county executive. It was the government’s theory that by arranging for straw donors, among other misconduct, Turner had deprived citizens of their right to the honest candidacy of an individual running for elected office. The government claimed Turner’s conduct had been a clear violation of the mail fraud statute prior to *McNally* and that the passage of 18

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<sup>3</sup>*Schmuck v. U.S.*, 489 U.S. 705, 721, 109 S. Ct. 1443, 103 L. Ed. 2d 734 (1989).

<sup>4</sup>*U.S. v. Alston*, 609 F.2d 531, 538 (D.C. Cir. 1979).

<sup>5</sup>See also *U.S. v. D’Amato*, 39 F.3d 1249, 1257 (2d Cir. 1994) (fraudulent intent may be inferred from the scheme itself).

<sup>6</sup>See *U.S. v. Walker*, 97 F.3d 253 (8th Cir. 1996) (upholding federal mail fraud convictions under salary and intangible rights theories for scheme to ensure local candidate’s election by secretly financing straw candidate).

<sup>7</sup>*U.S. v. Turner*, 465 F.3d 667, 2006 FED App. 0377A (6th Cir. 2006).

U.S.C.A. § 1346 had revived that theory. The Sixth Circuit disagreed. It held that “the plain terms of the statute, the Supreme Court’s discussion in *Cleveland v. U.S.*,<sup>8</sup> and the legislative history of the statute, all demonstrated that Congressional enactment of § 1346 did not revive those cases involving prosecutions under the mail fraud statute for deprivations of the intangible right of honest elections.” The Court reasoned that, as candidates—instead of elected officials—neither Hays nor Newsome owed a duty of honest services to the public. Because neither candidate owed a duty of honest services, Turner could not be convicted of mail fraud under § 1346 for activities that corrupted their election.

**§ 18:13 Key statutes—Criminal enforcement outside of the FECA—New Lobbying Disclosure Act felony provision**

As noted in the introduction to this chapter, the new Honest Leadership and Open Government Act of 2007 includes several provisions, which taken together, expose registered lobbyists who engaged in campaign-finance related activities to felony prosecution for “knowing and corrupt” violations of the Lobbying Disclosure Act of 1995 (“LDA”).<sup>1</sup>

The new law amends the LDA to require that registrants (the entities that employ lobbyists) and their employees file reports disclosing certain federal campaign contributions of \$200 or more with the House and Senate twice a year.<sup>2</sup> The requirement applies to individual as well as PAC contributions.<sup>3</sup> The statute also requires the disclosure of other types of activities—such as contributions to Presidential library foundations and to entities sponsoring retreats or conferences that may be part of an overall government relations program, but which are not regulated by the FEC and were not previously subject to disclosure.<sup>4</sup> In addition to these enhanced disclosure requirements, the law mandates that the individual or entity filing these semi-annual reports certify that they have read and are familiar with the provisions of the House and Senate ethics rules relating to gifts and travel

<sup>8</sup>*Cleveland v. U.S.*, 531 U.S. 12 (2000).

**[Section 18:13]**

<sup>1</sup>Honest Leadership and Open Government Act of 2007 § 211, 2 U.S.C.A. § 1606 (2007).

<sup>2</sup>2 U.S.C.A. § 1604.

<sup>3</sup>2 U.S.C.A. § 1604(d)(1)(D).

<sup>4</sup>2 U.S.C.A. § 1604(d)(1)(E) & (F).



*and* that they have not provided any gifts that they knew to be impermissible under those rules (which include specific rules regarding participation in fundraising and campaign events).<sup>5</sup> Most significantly, the new statute also created a five-year felony offense for “knowing and corrupt” violations of the LDA.<sup>6</sup>

Thus, in addition to exposure under the various FECA and other criminal provisions discussed earlier in this chapter, registrants and lobbyists who engage in campaign-finance related activity subject to the LDA’s new disclosure and certification provisions may also find themselves faced with prosecution under the LDA. The statute extends the reach of the House and Senate gift rules to the private sector, thereby giving prosecutors a powerful new tool. The private sector can no longer afford to leave compliance with the House and Senate ethics rules to Members and staff. In the past, prosecutors had been forced to utilize the gratuities and bribery statutes to prosecute violations of the House and Senate gift rules by registered lobbyists and their employers.<sup>7</sup> The government now has the LDA’s felony provision available to prosecute cases where it may not be able to establish violations of the gratuities or bribery laws.

**§ 18:14 Strategic considerations in defending FEC investigations of campaign finance violations—  
Conducting internal investigations**

A common feature of our current system of justice is that organizations often conduct “internal investigations” of any suspected violation of the law by their employees or agents. This development has been fueled in large part by guidance from the Department of Justice that rewards cooperation by organizations in decisions about criminal prosecution. It is now viewed as imperative for company counsel—at the first hints of any potential violation—to interview employees, review all relevant documents and disclose the results to the government.

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<sup>5</sup>2 U.S.C.A. § 1604(d)(1)(G).

<sup>6</sup>2 U.S.C.A. § 1606.

<sup>7</sup>See, e.g., *United States v. Abramoff*, plea agreement (D.D.C. Jan. 3, 2006) (pled guilty to honest services fraud of public officials and conspiracy to commit bribery).



The desirability of conducting an “internal investigation” is beyond the scope of this Chapter.<sup>1</sup> However, there are at least two unique features of conducting an internal investigation of potential FECA violations that deserve mention here.

First, internal investigations of FECA violations most often involve disclosure obligations to the FEC. As previously mentioned, the FECA contains numerous requirements for reports to be filed with the FEC. Not only are political committees required to be registered,<sup>2</sup> but they are required to file various reports.<sup>3</sup> Indeed, every person other than a political committee who makes “independent expenditures” in excess of \$250 during a calendar year must file a statement with the FEC.<sup>4</sup> Information uncovered during an internal investigation may often require prior reports to be amended or corrected, thereby imposing obligations on counsel conducting the internal investigation that must be considered at the very outset of such investigation.

Second, a primary purpose of most internal investigations is to use the results in forging a global settlement with all government agencies. In many other types of matters, the organization may be able to use the results of its internal investigation to not only resolve any potential criminal claims (through a deferred prosecution agreement perhaps), but simultaneously resolve the accompanying civil and administrative claims of the applicable regulatory or oversight agency. However, it has been the invariable practice of the Department of Justice and the FEC not to jointly resolve concurrent investigations. Rather, as reflected in a Memorandum of Understanding between the Department of Justice and the FEC, the FEC reserves its authority to resolve any potential civil claims under its jurisdiction only after all criminal issues are resolved.<sup>5</sup> Thus, while internal investigations may nonetheless be useful, it is most often possible to resolve

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**[Section 18:14]**

<sup>1</sup>A useful discussion can be found in C. Evan Stewart, *Think Twice: The good, bad and ugly of corporate investigations*, GC New York, Mar. 27, 2006.

<sup>2</sup>2 U.S.C.A. § 433(a).

<sup>3</sup>2 U.S.C.A. § 434(a).

<sup>4</sup>2 U.S.C.A. § 434(c).

<sup>5</sup>In 1977, the FEC and the Department of Justice entered into a Memorandum of Understanding (“MOU”) relating to their respective law enforcement jurisdiction and responsibilities, *see* 43 Fed. Reg. 5441 (1978), and this memorandum is held out as still in effect. *See* Craig C. Donsanto and Nancy L. Simmons, *Federal Prosecution of Election Offenses* 259-61 (7th ed. 2007).

matters with the FEC only after an existing grand jury investigation is first resolved with the Department of Justice.<sup>6</sup>

**§ 18:15 Strategic considerations in defending FEC investigations of campaign finance violations—  
Responding to the FEC civil investigation**

The Federal Election Commission has exclusive authority to enforce the FECA's non-criminal penalties.<sup>1</sup> The Commission's enforcement functions are carried out through a MUR, or Matter Under Review. A MUR is opened once a complaint is filed with the Commission or initiated by the Commission itself. If the Commission determines there is "reason to believe" a violation of the FECA has occurred, an investigation is initiated. The FECA provides a full range of investigative powers to the Commission. Thus, in addition to informal contacts, the Commission, through its Office of General Counsel, can issue subpoenas and orders for production of documents, depositions, or interrogatories.<sup>2</sup> Based on the investigation, the Commission makes a determination of "probable cause" to believe a violation of the FECA has occurred. In the event the Commission finds probable cause and decides to pursue the matter, it may attempt to conciliate the violation, pursuant to a statutorily limited timeframe. Until the termination of the MUR, the Act prohibits making public any investigation conducted by the Commission, without the express written consent of the person under investigation.<sup>3</sup>

Whether or not a respondent should produce documents, testify in a deposition, or answer interrogatories in a FEC MUR is a question that depends on many factors peculiar to each individual case. However, a few strategic considerations are worth

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<sup>6</sup>In 2007, various parties have brought lawsuits alleging that the FEC violated the FECA by "tacitly cooperating and conspiring with" the Department of Justice to circumvent the Act. These plaintiffs contended that the FECA grants the Commission exclusive jurisdiction over criminal violations and bars the Department of Justice from conducting any grand jury investigation unless and until the commission makes a referral. In at least two of these cases, *Bialek v. Gonzales*, No. 07-cv-00321 (D. Colo. June 28, 2007); and *Fieger v. Gonzalez*, No. 2:07-cv-10533 (E.D. Mich. Aug. 15, 2007), the courts found that there was no obligation under the FECA for the FEC to refer criminal cases to the Department of Justice before the Department could proceed. Two other cases raising similar issues, *Beam v. Gonzalezs*, No. 07-cv-1227 (N.D. Ill.) and *Marcus v. Gonzales*, No. 07-cv-0398 (D. Ariz.), remain pending as of November 2007.

**[Section 18:15]**

<sup>1</sup>2 U.S.C.A. §§ 437g(a)(5), 437d(e).

<sup>2</sup>2 U.S.C.A. § 437d(a)(1), (3) and (4).

<sup>3</sup>2 U.S.C.A. § 437g(a)(12)(A).

mentioning when the lawyer has reason to believe a criminal prosecution relating to the FEC investigation is possible or actually knows of a parallel criminal investigation.

First, the lawyer must consider having an individual respondent assert the Fifth Amendment in response to inquiries or subpoenas issued by the FEC. While a collective entity such as a corporation has no Fifth Amendment privilege to assert with regard to the production of records,<sup>4</sup> individuals and sole proprietorships may refuse to produce records if the act of production is incriminating.<sup>5</sup>

Many practitioners are loathe to assert the Fifth Amendment in the context of a FEC investigation for fear of the adverse inference that may be drawn by the FEC as a result.<sup>6</sup> However, these concerns may be exaggerated. First, the adverse inference is arguably not applicable to determinations regarding intent, as are invariably involved in alleged violations of the FECA. Second, the seminal case on the adverse inference, *Baxter v. Palmigiano*, was a case involving the assertion of the Fifth Amendment by a convicted felon in a prison disciplinary context. As the Supreme Court has recently affirmed, the Fifth Amendment serves not only to protect the guilty, but “to protect innocent men . . . who otherwise might be ensnared by ambiguous circumstances.”<sup>7</sup> Thus, the adverse inference applied to the convicted felon in *Baxter v. Palmigiano* may not be appropriate in other, more ambiguous circumstances applicable to fundraising conduct under the FECA. Indeed, courts often prevent an adverse inference from the assertion of the Fifth to be drawn unless other indepen-

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<sup>4</sup>*Braswell v. U.S.*, 487 U.S. 99, 108 S. Ct. 2284, 101 L. Ed. 2d 98, 25 Fed. R. Evid. Serv. 609, 25 Fed. R. Evid. Serv. 632 (1988).

<sup>5</sup>See *Bellis v. United States*, 412 U.S. 85, 87–88 (1974); *Fisher v. U.S.*, 425 U.S. 391, 96 S. Ct. 1569, 48 L. Ed. 2d 39 (1976); *U.S. v. Hubbell*, 530 U.S. 27, 120 S. Ct. 2037, 147 L. Ed. 2d 24 (2000). The Fifth Amendment is always available, of course, in response to a FEC investigative demand. *Lefkowitz v. Turley*, 414 U.S. 70, 77, 94 S. Ct. 316, 38 L. Ed. 2d 274 (1973) (“The [Fifth] Amendment not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.”).

<sup>6</sup>*Baxter v. Palmigiano*, 425 U.S. 308, 96 S. Ct. 1551, 47 L. Ed. 2d 810 (1976).

<sup>7</sup>*Ohio v. Reiner*, 532 U.S. 17, 21, 121 S. Ct. 1252, 149 L. Ed. 2d 158, 55 Fed. R. Evid. Serv. 1171 (2001) (quoting *Slochower v. Board of Higher Ed. of City of New York*, 350 U.S. 551, 557–58, 76 S. Ct. 637, 100 L. Ed. 692 (1956)).

dent evidence demonstrates that the inference is reasonable.<sup>8</sup> Often, independent evidence of the respondent's intent, at least direct evidence, is missing in an FEC investigation and an argument can be crafted that no inference should be drawn by the Federal Election Commission from a respondent's Fifth Amendment assertion not to testify.

Many practitioners may also fear asserting the Fifth Amendment because they believe it will more likely cause the FEC to refer the matter to the Department of Justice Public Integrity Section for criminal investigation. (While the Commission can impose administrative fines and can bring civil enforcement actions in court, it must refer matters for a grand jury investigation premised on violations of the FECA to the Public Integrity Section.)<sup>9</sup> Again, this fear may be exaggerated. Pursuant to the now outdated memorandum of understanding between the Commission and the Public Integrity Section, cases were historically not referred for criminal investigation until the Commission had made a determination that a willful and knowing violation of the FECA had occurred. Assertions of the Fifth Amendment can make such determinations by the Commission more, rather than less, difficult. Further, depending on the respondent's role, the Commission may be more likely to compel the respondent's testimony pursuant to an immunity order under 18 U.S.C.A. §§ 6002, 6004. Alternatively, if the Commission were to make a probable cause determination and not grant immunity, the respondent can always decide to provide testimony during the post probable cause conciliation process, as a prior assertion of the Fifth may always later be withdrawn.<sup>10</sup>

**§ 18:16 Strategic considerations in defending FEC investigations of campaign finance violations—  
Convincing Public Integrity Section not to prosecute**

Effective presentations made on behalf of clients facing potential prosecution by the Public Integrity Section are not re-

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<sup>8</sup>Doe ex rel. Rudy-Glanzer v. Glanzer, 232 F.3d 1258, 1264–65, 55 Fed. R. Evid. Serv. 332 (9th Cir. 2000); National Acceptance Co. of America v. Bathalter, 705 F.2d 924, 930, 36 Fed. R. Serv. 2d 447 (7th Cir. 1983); Farace v. Independent Fire Ins. Co., 699 F.2d 204, 210–11, 12 Fed. R. Evid. Serv. 1043 (5th Cir. 1983).

<sup>9</sup>U.S.A.M. § 85-210.

<sup>10</sup>See Grunewald v. U.S., 353 U.S. 391, 77 S. Ct. 963, 1 L. Ed. 2d 931, 62 A.L.R.2d 1344 (1957) (defendant asserted Fifth Amendment privilege at grand jury and later withdrew it when he testified at trial).

markedly different from effective presentations made on behalf of clients facing prosecution by other Sections of the Department of Justice under other criminal provisions, be they antitrust, healthcare, environmental, or fraud matters. As is the case for any target of a criminal investigation, counsel must focus on the lack of seriousness of the alleged offense conduct, the substantial legal and factual defenses and the likelihood of success by the defense at trial, the client's limited role in the offense, the adverse collateral consequences, the substantial mitigating circumstances, and similar considerations weighing against prosecution. When advocating on behalf of an entity, such as a campaign committee, additional factors set forth in the recently revised "McNulty Memorandum" must be addressed, including the cooperation of the entity in the investigation, its commitment to compliance, and its willingness to resolve the matter on the basis of a non-criminal disposition.<sup>1</sup> While there is no magic to presenting before the Public Integrity Section, experience demonstrates that the section cares about utilization of its limited resources and its independence from purely political considerations.

#### **§ 18:17 Sentencing for federal campaign finance violations**

In *U.S. v. Booker*,<sup>1</sup> the Supreme Court, in a 5-4 decision with Justice O'Connor as the swing Justice, held that a sentencing court violates the Sixth Amendment right to a jury trial if the

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##### **[Section 18:16]**

<sup>1</sup>The McNulty Memorandum is the latest version of the DOJ's guidelines for considering when and whether to bring charges against a corporation. In 1999, then-U.S. Deputy Attorney General Eric Holder, Jr. issued the initial memorandum on the subject. The memorandum sought to provide incentives for corporations to cooperate with the government during an investigation and to provide guidelines for prosecutors for determining whether to bring charges. The memorandum was revised in 2003 by then-U.S. Deputy Attorney General Larry D. Thompson. This version mandated, rather than suggested, factors that prosecutors could consider when proceeding against a corporation. The two factors that prompted the most criticism from the legal and business communities were the requirement that prosecutors consider whether the corporation waived attorney-client and work product protections and whether the corporation advanced attorneys' fees to culpable employees. In response to the criticisms surrounding the Thompson Memorandum, the McNulty Memorandum has softened these requirements. Adam Kamenstein, *The McNulty Memorandum: Revising DOJ Policy for Gauging Cooperation and Bringing Charges Against Corporations*, Washington G2 Reports, available at [http://www.g2reports.com/issues/GCR/2007\\_3/1611798-1.html](http://www.g2reports.com/issues/GCR/2007_3/1611798-1.html).

##### **[Section 18:17]**

<sup>1</sup>*U.S. v. Booker*, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005).

sentence is based upon the finding of a fact (other than a prior conviction) not found by the jury or admitted by the defendant. As a consequence, the Court concluded that the provision of the Sentencing Reform Act of 1984 which established just such a sentencing system,<sup>2</sup> was unconstitutional and that the sentencing guidelines promulgated pursuant to the Sentencing Reform Act of 1984 were advisory only. Thus, the federal sentencing guidelines, which have determined almost all federal sentences since 1987, are no longer binding on federal judges.

Nonetheless, judges still impose sentences in federal court only after determining a presumptive sentence pursuant to the federal sentencing guidelines, and all sentences imposed are subject to review for “unreasonableness.”<sup>3</sup> In *Rita v. U.S.*,<sup>4</sup> the Supreme Court held that federal courts may apply a presumption of reasonableness to district court sentences that are within the properly calculated range of the sentencing guidelines. Thus, the sentencing guidelines, while merely advisory, matter.

The sentencing guidelines for violations of the campaign finance laws point judges in the direction of imprisonment for most campaign finance violations. In 2003, the United States Sentencing Commission, which had not previously provided a specific guideline for campaign finance offenses, implemented the directive in the BCRA to promulgate a guideline for violations of FECA and related election laws. It issued Guideline Section 2C1.8. Consistent with the fact that Congress in the BCRA increased the maximum sentences for the least serious violations of the campaign finance laws from one to two years and changed most violations from misdemeanors to felonies punishable by a maximum sentence of five years, Guideline Section 2C1.8 presumes probation only for the most minor violations of the campaign finance laws. Thus, Guideline Section 2C1.8 carries a base offense (seriousness) level of 8 and provides for five specific offense characteristics which can be used to enhance the base level, the most significant of which increases the number of levels in increments depending on the value of the illegal transaction. Any illegal transaction that exceeds \$5,000 adds a minimum of two additional levels; an illegal transaction that exceeds \$10,000 adds four levels; an illegal transaction that exceeds \$30,000 adds six levels and so on and so forth, with increasing levels for small increments in amount of money involved in the offense. Thus,

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<sup>2</sup>18 U.S.C.A. § 3553(b)(1).

<sup>3</sup>See *Booker*, 543 U.S. at 261.

<sup>4</sup>*Rita v. U.S.*, 127 S. Ct. 2456, 2459, 168 L. Ed. 2d 203 (U.S. 2007).



even in the absence of any other specific offense enhancements or aggravating factors, a first time campaign finance offense involving only \$10,001 would carry an adjusted offense level of 12. Under the current Sentencing Table, the schedule which sets forth in months of imprisonment the range of sentences depending on the defendant's final "offense level" and his/her "criminal history category," a defendant with a criminal history category of zero and an offense level of 12 is presumed to be sentenced to a period of imprisonment of anywhere between 10 and 16 months.

For sentencing purposes, the actual offense for which a defendant is convicted can make a difference. Thus, a violation of 18 U.S.C.A. § 1001, the false statement statute, carries a base offense level of six (6), instead of a base offense level of eight (8) under Section 2C1.8. On the other hand, a conviction for mail or wire fraud involving the deprivation of the intangible right to honest services of public officials under 18 U.S.C.A. § 1346 carries a base offense level of 12. Only through a very careful analysis of all possibly applicable guideline sections can counsel determine if his client would be better served by pleading guilty to a violation of one statute or another. On the other hand, the Sentencing Commission sought to design a sentencing system that was a modified "real offense" rather than a "charged offense" sentencing system, where the prosecutor's choice regarding which statutes to charge would matter little to the presumptively correct sentence.<sup>5</sup> Thus, lawyers may be able to argue for a departure from the otherwise presumptive guideline sentence when the charges for which a defendant has been convicted distort the guidelines and call for an unreasonable sentence.<sup>6</sup> In all events, a lawyer must be knowledgeable of how the prosecutor's charging decisions affect the applicable guideline calculus and no lawyer should attempt to handle a criminal case, much less bargain with prosecutors about a plea of guilty, without a thorough understanding of the federal sentencing guidelines, even under the advisory regime imposed by *Booker*.

### III. FEDERAL PROSECUTION OF VOTING RIGHTS OFFENSES

#### § 18:18 Overview

Prosecution of voting rights crimes protects the constitutional

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<sup>5</sup>See U.S. Sentencing Guidelines Manual § 1A1.1 cmt. background (2006).

<sup>6</sup>*U.S. v. Hemmingson*, 157 F.3d 347 (5th Cir. 1998) (downward departure warranted for money laundering conviction where goal was to conceal a corporate contribution, since money laundering guideline unreasonably high for offense factually closer to FECA misdemeanor violation).



and statutory rights of voters. Chief among these rights are that “all qualified voters have a constitutionally protected right to vote . . . and to have their votes counted.”<sup>1</sup> The Constitution addresses voter qualifications by, among other things, guaranteeing the right to vote to racial and ethnic minorities, women, and other citizens age 18 and older<sup>2</sup> and prohibiting poll taxes and other taxes affecting the right to vote.<sup>3</sup> The Supreme Court will address in the 2007–08 term whether Indiana’s voter identification law burdens the right to vote in violation of the Constitution.<sup>4</sup>

Many federal statutes specifically protect voting rights: the Voting Rights Act of 1965;<sup>5</sup> the Voting Accessibility for the Elderly and Handicapped Act;<sup>6</sup> the Uniformed and Overseas Citizens Absentee Voting Act;<sup>7</sup> the National Voter Registration Act of 1993;<sup>8</sup> the Americans with Disabilities Act of 1990;<sup>9</sup> the Rehabilitation Act of 1973;<sup>10</sup> and the Help America Vote Act of 2002 (“HAVA”).<sup>11</sup> Of these, the Voting Rights Act of 1965 and HAVA have criminal provisions. As with campaign finance offenses, however, prosecutors often turn to the civil rights and fraud laws in Title 18 as vehicles for prosecuting voting rights crimes in the federal courts. The following sections review the major federal laws used to prosecute voting rights crimes and analyzes the growing body of case law in the area.

The federal government has taken a more active role in prosecuting voting rights offenses in the wake of the highly divisive and bitterly contested 2000 Presidential election. Thus in 2002, Congress passed HAVA, which provided federal funds for the purchase by states of new voting equipment, created the Election

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**[Section 18:18]**

<sup>1</sup>Reynolds v. Sims, 377 U.S. 533, 554, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964).

<sup>2</sup>Amendments 14, 15, 19, and 26.

<sup>3</sup>Amendment 24, Sec. 1.

<sup>4</sup>Crawford v. Marion County Election Bd., 472 F.3d 949 (7th Cir. 2007), cert. granted, 128 S. Ct. 33 (U.S. 2007) and cert. granted, 128 S. Ct. 34 (U.S. 2007).

<sup>5</sup>42 U.S.C.A. §§ 1973 et seq.

<sup>6</sup>42 U.S.C.A. §§ 1973ee et seq.

<sup>7</sup>42 U.S.C.A. §§ 1973ff et seq.

<sup>8</sup>42 U.S.C.A. §§ 1973gg et seq.

<sup>9</sup>42 U.S.C.A. §§ 12101 et seq.

<sup>10</sup>29 U.S.C.A. §§ 701 et seq.

<sup>11</sup>42 U.S.C.A. §§ 15301 et seq.

Assistance Commission (a federal agency to assist in the administration of elections), and reinforced federal criminal laws against vote fraud. That same year, the Attorney General established a voting integrity initiative in which federal prosecutors would meet with state and local officials about election fraud and undertake prosecution of voting-related crimes that previously were the domain of state prosecutors.<sup>12</sup> Since 2002, the number of federal voting related prosecutions has increased dramatically,<sup>13</sup> and voting rights criminal law has emerged as a major area for white-collar defense lawyers.<sup>14</sup>

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<sup>12</sup>2002 United States Department of Justice Public Integrity Section Annual Report at 6 (“This initiative included increasing the law enforcement priority the department gives to election crimes”); Memorandum from Attorney General Ashcroft to all United States Attorneys (Oct. 1, 2002).

<sup>13</sup>Interview with Craig Donsanto, Director, Election Crimes Branch, Public Integrity Section, U.S. Department of Justice (Jan. 13, 2006), page 4 of Election Assistance Commission Summary of Expert Interviews for Voting Fraud-Voter Intimidation Research, Appendix B to Election Crimes: An Initial Review and Recommendations for Future Study (Dec. 2006) (“Although the number of election fraud related complaints have not gone up since 2002, nor has the proportion of legitimate to illegitimate complaints of fraud, the number of cases that the department is investigating and the number of indictments the department is pursuing are both up dramatically.”) (emphasis in original). Virtually all federal voting rights/election fraud prosecutions recently have been against individuals for fraud in registering or voting for themselves, rather than prosecutions against systemic election corruption. See, e.g., Eric Lipton and Ian Urbina, In 5-Year Effort, Scant Evidence of Voter Fraud, N.Y. Times, April 12, 2007 at A-1.

<sup>14</sup>In 2006, 90 percent of all U.S. citizens voted on electronic voting machines, which experts have found to be vulnerable to fraud, suggesting a new frontier in voting rights criminal law enforcement. See, e.g., Michael Duffy, “Can This Machine Be Trusted?” Time Magazine, Oct. 29, 2006; Written Testimony of David Wagner, Ph.D., Computer Science Division, University of California, Berkeley, Before the Committee on Oversight and Government Reform, Subcommittee on Information Policy, Census, and National Archives, U.S. House of Representatives, May 7, 2007; Ariel J. Feldman, J. Alex Halderman, and Edward W. Felton, Security Analysis of the Diebold AccuVote-TS Voting Machine (Princeton University Center for Information Technology Policy) Sept. 13, 2006, <http://policy.princeton.edu/voting/>; Brennan Center for Justice, “The Machinery of Democracy: Protecting Elections in an Electronic World,” 2006; Tadayoshi Kohno et al., “Analysis of an Electronic Voting System,” IEEE Symposium on Security and Privacy, 2004; Brad Friedman, “Worm attacked voter database in notorious Florida district,” ComputerWorld (May 16, 2007); University of California Red Team and Source Code Reviews of Diebold Elections Systems, Inc. Hart Intercivic and Sequoia Voting Systems, available at [www.sos.ca.gov/elections/elections-vsr.htm](http://www.sos.ca.gov/elections/elections-vsr.htm), along with decertification/recertification decisions issued August 3, 2007 by the California Secretary of State, which severely restrict the use in California of direct recording electronic

As with campaign finance and patronage crimes, the Public Integrity Section of the Criminal Division of the Department of Justice must be consulted before any charge is brought for “corruption of the electoral process.”<sup>15</sup> That said, prosecutions “to ensure there is no discrimination against minorities at the ballot box . . . [are] supervised by the Justice Department’s Civil Rights Division.”<sup>16</sup>

The statute of limitations applicable to the voting rights offenses described herein is five years as provided by 18 U.S.C.A. § 3282(a). In addition to the prison terms described in this section for voting rights crimes, fines applicable to the statutes discussed herein are provided by 18 U.S.C.A. § 3571. For voting rights crimes, sentencing guidelines research ordinarily will begin with U.S.S.G. § 2H2.1, where the base offense level could fall between 6 and 18, depending on the level of fraud or deceit and on whether the crime was violent or laced with the threat of force.<sup>17</sup>

**§ 18:19 Deprivation of voting rights (18 U.S.C.A. § 242 and 42 U.S.C.A. § 1973j(a))**

Historically, a major source of election fraud has been corrupt government officials and their agents, who abuse their insider access to ballot boxes, vote tallies, and voter registrations. For over a century, federal prosecutors have charged such “insider” election fraud under Section 242 of Title 18, which Congress enacted after the Civil War to, among other things, facilitate the exercise of the franchise by emancipated slaves. Section 242 of Title 18 prohibits anyone “under color of any law, statute, ordinance, regulation, or custom,” from “willfully subject[ing] any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.”

Section 242 is violated if a person (1) acted under color of law, while (2) willfully (3) depriving another of a right secured by the

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voting machines currently on the market due to security and reliability vulnerabilities.

<sup>15</sup>U.S.A.M. 9-85.210.

<sup>16</sup>Craig C. Donsanto and Nancy L. Simmons, *Federal Prosecution of Election Offenses* 21 (7th ed. 2007); see also U.S.A.M. § 8-1.010.

<sup>17</sup>See, e.g., *U.S. v. Smith*, 231 F.3d 800, 818–19, 55 Fed. R. Evid. Serv. 1267 (11th Cir. 2000) (applied base level of 12).

Constitution or laws of the U.S., which includes voting rights.<sup>1</sup> Central to the broad sweep of Section 242 is the constitutional right to vote free from election fraud.<sup>2</sup>

The “under color of law”<sup>3</sup> requirement of Section 242 applies to any public or government official, federal, state or local.<sup>4</sup> Indeed, it applies to anyone whose actions are cloaked with government authority.<sup>5</sup> “Under color of law” also applies to persons who acted with a government agent in committing the crime.<sup>6</sup> Depending upon the circumstances, this requirement could reach government contractors and their agents upon whom governments have become increasingly dependent in the conduct of elections.<sup>7</sup>

The circuits are split over whether the “willfulness” element of Section 242 requires proof of specific or general intent. The Second Circuit has held that the “willfulness” requirement is met

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**[Section 18:19]**

<sup>1</sup>U.S. v. Lanier, 520 U.S. 259, 264, 117 S. Ct. 1219, 137 L. Ed. 2d 432 (1997).

<sup>2</sup>See, e.g., U.S. v. Mosley, 238 U.S. 383, 388, 35 S. Ct. 904, 59 L. Ed. 1355 (1915) (affirming convictions for declining to count legally cast ballots in congressional election). While Section 242 is broadly written, the Supreme Court has held that the law provides fair warning of criminal liability to those who violate the right to vote. See, e.g., U.S. v. Classic, 313 U.S. 299, 321–24, 61 S. Ct. 1031, 85 L. Ed. 1368 (1941) (upholding Section 242 conviction for primary election fraud where prior case law established right to have vote counted in general election).

<sup>3</sup>The Supreme Court has construed “under color of law” in Section 242 and 42 U.S.C.A. §§ 1971 and 1983 alike. See *Dennis v. Sparks*, 449 U.S. 24, 28 n.5, 101 S. Ct. 183, 66 L. Ed. 2d 185 (1980), and *Monroe v. Pape*, 365 U.S. 167, 185, 81 S. Ct. 473, 5 L. Ed. 2d 492 (1961) (overruled on other grounds by, *Monell v. Department of Social Services of City of New York*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978)). Likewise “under color of law” in Section 1973i of Title 42 should be construed in the same way.

<sup>4</sup>See, e.g., *U.S. v. Olinger*, 759 F.2d 1293, 1298 (7th Cir. 1985) (application to election judge who engaged in ballot stuffing).

<sup>5</sup>See, e.g., *Williams v. U.S.*, 341 U.S. 97, 99, 71 S. Ct. 576, 95 L. Ed. 774 (1951) (application to lumber company employee who held a special police officer’s card from city); *U.S. v. Haynes*, 977 F.2d 583 (6th Cir. 1992) (Section 242 applied to party worker authorized under state law to assist in voter registration drive who collected voter registration cards but did not turn them in to proper authority.).

<sup>6</sup>See, e.g., *U. S. v. Price*, 383 U.S. 787, 795, 86 S. Ct. 1152, 16 L. Ed. 2d 267 (1966) (persons joining police officers in committing hate crime assault).

<sup>7</sup>Cf. *Gary v. Modena*, 2006 WL 3741364, at \*4 (11th Cir. 2006) (“To determine whether an independent contractor such as a prison physician has acted under color of law for the purposes of § 1983 liability, a court will look to the medical provider’s function within the state system rather than the precise details of his employment status.”).

when police officers deliberately engaged in conduct that has the effect of depriving a person of a federal right.<sup>8</sup> By contrast, the Eighth and Tenth Circuits require the existence of specific intent on the part of the defendant to violate a known federal right.<sup>9</sup> Convictions under Section 242 are misdemeanors, unless bodily harm is involved, in which case the term of imprisonment could be up to 10 years or, if death occurs, for life. A Section 242 offense may serve as a substantive offense for election fraud conspiracies.<sup>10</sup>

The origin of Section 242 lies in three Reconstruction era Civil Rights Acts, the substantive criminal provisions of which were consolidated into a single statute in 1874 that also deleted enumerated rights, including voting rights, in favor of the expanded reach of the consolidated statute to all deprivations of constitutional rights. Congress added the willfulness requirement in 1909 and has since enhanced the penalties of some violations.<sup>11</sup>

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<sup>8</sup>U.S. v. McClean, 528 F.2d 1250, 1255 (2d Cir. 1976).

<sup>9</sup>See, e.g., U.S. v. Harrison, 671 F.2d 1159, 1161 (8th Cir. 1982) (must have “intent to willfully subject the victim to the deprivation of a constitutional right”); Apodaca v. U.S., 188 F.2d 932 (10th Cir. 1951) (must have “actual purpose of depriving [victim] of constitutional rights enumerated in indictment”).

<sup>10</sup>By its terms, Section 242 would appear to apply to prosecutors or their agents who file indictments or overtly investigate allegations of election crimes on the eve of or during an election, or otherwise use their power of office to suppress the vote or intimidate voters from voting. Other criminal provisions discussed herein may also apply to such conduct. Even where a prosecution is apolitical, the Justice Department has made clear in the past that “[e]xcept where racially motivated conduct is present, there is no statutory basis for federal lawsuits to halt alleged electoral abuse. The role of the Department of Justice in these matters has been not to interfere with ongoing elections, but rather to investigate and prosecute, after the election is over, those who broke the law.” Craig C. Donsanto, *Federal Prosecution of Election Offenses* 41 (5th ed. 1988). The Justice Department further elaborated that “[e]xcept insofar as racial discrimination matters are concerned, the Federal Government does not have authority to station Marshals, FBI Agents or other federal personnel at open polling places. Access to the polls is controlled by state laws, which generally do not allow federal agents inside the polls. Moreover, the stationing of Marshals and Special Agents within polling places may violate 18 U.S.C.A. § 592.” Craig C. Donsanto, *Federal Prosecution of Election Offenses* (5th ed. 1988), U.S. Department of Justice, Criminal Division, Public Integrity Section, at 41. While the Justice Department election crimes manual has since been edited repeatedly, the relevant substantive law has not changed. Section 592 is discussed briefly in § 18:25.

<sup>11</sup>See U.S. v. Lanier, 520 U.S. 259, 264 n.1, 117 S. Ct. 1219, 137 L. Ed. 2d 432 (1997).

The constitutionality of Sections 242 and its conspiracy counterpart, Section 241, were settled in the cases of *Ex parte Coy*<sup>12</sup> and *Ex Parte Yarborough* (“*The Ku-Klux Cases*”).<sup>13</sup>

Sections 241 and 242 are useful to, among other things, address discrimination based on the race, ethnicity or minority language of eligible voters. They have been supplemented for this purpose by a provision in the Voting Rights Act of 1965 directed at deprivation of the right to vote of minorities.<sup>14</sup> In particular, Section 1973j(a) criminalizes deprivation or attempted deprivation of voting rights provided by the Voting Rights Act to racial, ethnic and language based minorities. A Section 1973j offense is a felony, with the possibility of a five year prison term.<sup>15</sup>

### § 18:20 Conspiracy against voting rights<sup>1</sup>

Voting rights prosecutions are often brought under conspiracy statutes, predominantly 18 U.S.C.A. § 241 (conspiracy to violate civil rights), 42 U.S.C.A. § 1973i(c) (conspiracy to vote illegally), 42 U.S.C.A. § 1973j(c) (conspiracy to violate voting rights provided by the Voting Rights Act) and 18 U.S.C.A. § 371 (general conspiracy).

### § 18:21 Conspiracy against voting rights—18 U.S.C.A. § 241

The companion criminal conspiracy civil rights statute to Section 242 is Section 241 of Title 18, which also dates back to the Reconstruction era and which punishes conspiracies to violate civil rights. Section 241 punishes “two or more persons [who] conspire to injure, oppress, threaten, or intimidate any person in any State, Territory, Commonwealth, Possession, or District in the free exercise or enjoyment of any right or privilege secured to

<sup>12</sup>*Ex parte Coy*, 127 U.S. 731, 752, 8 S. Ct. 1263, 32 L. Ed. 274 (1888) (holding Constitution’s Necessary and Proper Clause provides Congress with authority to regulate against activity that corrupts the franchise).

<sup>13</sup>*The Ku Klux Cases*, 110 U.S. 651, 663, 4 S. Ct. 152, 28 L. Ed. 274 (1884) (rejecting habeas corpus claim upon federal election fraud conspiracy conviction).

<sup>14</sup>42 U.S.C.A. § 1973j.

<sup>15</sup>Section § 1973aa-1a of Title 42 specifically protects against deprivation of voting rights of language minorities. 42 U.S.C.A. § 1973aa-1a (prohibiting English only ballots in areas with substantial populations of eligible voters who speak American Indian, Alaskan Native, Asian, or Spanish languages). Section 1973aa-3 also makes criminal voting and voting registration eligibility “test[s] and device[s]” and residency requirements for a Presidential vote.

#### [Section 18:20]

<sup>1</sup>18 U.S.C.A §§ 241 and 371 and 42 U.S.C.A. §§ 1973i(c) and 1973j(c).



him by the Constitution or laws of the United States, or because of his having so exercised the same.”<sup>1</sup>

Like Section 242, Section 241 protects the voting rights of any eligible voter.<sup>2</sup> Also like Section 242, Section 241 has survived constitutional challenge.<sup>3</sup>

The elements of a Section 241 conspiracy are: 1) two or more persons conspire, 2) with the purpose to injure, oppress, threaten, or intimidate one or more persons, and 3) the conspiracy is directed at the free exercise or enjoyment of a right protected by the Constitution or laws of the United States. Like Section 242 of Title 18, Section 241 applies to federal, state and local elections.<sup>4</sup> Unlike Section 242, however, there is no “color of law” requirement for Section 241 conspiracies, although the accused may have acted under color of law. Accordingly, Section 241 prosecutions cast a broader net and implicate purely private actors who allegedly team up to violate the rights of voters.

Section 241 requires the government to establish that there was an agreement between two or more people to accomplish a prohibited objective.<sup>5</sup> Circumstantial evidence of a conspiracy to violate federal rights is sufficient under Section 241.<sup>6</sup> Section 241

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**[Section 18:21]**

<sup>1</sup>18 U.S.C.A. § 241.

<sup>2</sup>See *Felix v. U.S.*, 186 F. 685, 689 (5th Cir. 1911) (rejecting argument that Section 241 is confined to redress grievances of “citizens of African descent” or those “interfered with on account of race, color, or previous condition of servitude”).

<sup>3</sup>*U.S. v. Saylor*, 322 U.S. 385, 1103–04, 64 S. Ct. 1101, 88 L. Ed. 1341 (1944) (upholding Section 241 conviction for casting of fraudulent ballots where prior cases established right to have legitimate vote counted); *U.S. v. Tobin*, 2005 DNH 161, 2005 WL 3199672 (D.N.H. 2005) (declining to dismiss Section 241 count based upon conspiracy to jam on election day the telephone lines of the New Hampshire Democratic Party and the Manchester Professional Firefighters Association to impede or prevent voters with Democratic leanings who needed transportation to and from the polls from voting).

<sup>4</sup>See, e.g., *U.S. v. Stollings*, 501 F.2d 954, 955 (4th Cir. 1974).

In *Anderson v. U. S.*, 417 U.S. 211, 225, 94 S. Ct. 2253, 41 L. Ed. 2d 20 (1974), the U.S. Supreme Court upheld a conviction for conspiracy to cast false votes for offices on a ballot mixed with federal and state elections. The Court left open the application of Section 241 to purely state or local elections.

<sup>5</sup>*U.S. v. Morado*, 454 F.2d 167, 169 (5th Cir. 1972) (unlawful objective of agreement to cast fraudulent absentee ballots).

<sup>6</sup>See *U.S. v. Skillman*, 922 F.2d 1370, 1373, 31 Fed. R. Evid. Serv. 1133 (9th Cir. 1990).



does not require fraud with respect to a particular voter.<sup>7</sup> Nor does Section 241 require the conspiracy to succeed.<sup>8</sup> Appellate courts are split with respect to whether Section 241 requires proof of an overt act, with most that have considered the issue concluding that no overt act is required.<sup>9</sup>

Conviction for a Section 241 offense is a felony with a maximum 10 year term of imprisonment, unless death results or kidnapping or aggravated sexual assault or the attempt thereof, or attempted killing, was involved, in which case a longer prison or death sentence is possible. When a death results, the government must prove that the “death ensued as a proximate result of the accused’s willful violation of a victim’s defined rights.”<sup>10</sup> The accused need not cause the victim’s death; it is enough that an act of a co-conspirator committed in furtherance of the conspiracy had as a natural and foreseeable consequence the victim’s death.<sup>11</sup>

Convictions under Section 241 have been upheld for a wide range of acts that deny or dilute the right to vote, including voter intimidation;<sup>12</sup> imposing literacy test for voting;<sup>13</sup> ballot stuffing;<sup>14</sup> vote alteration;<sup>15</sup> vote destruction;<sup>16</sup> destruction of voter registration applications;<sup>17</sup> impersonation of eligible voters;<sup>18</sup> voting

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<sup>7</sup>U.S. v. Nathan, 238 F.2d 401, 403 (7th Cir. 1956) (object of conspiracy was to cast ballots and disrupt the election process).

<sup>8</sup>See, e.g., *Aczel v. United States*, 232 F. 652, 659 (1916) (upholding conspiracy to, among other things, fraudulently manipulate voting machines).

<sup>9</sup>U.S. v. Crochiere, 129 F.3d 233, 237 (1st Cir. 1997) (no overt act required); U.S. v. Skillman, 922 F.2d 1370, 1375–76, 31 Fed. R. Evid. Serv. 1133 (9th Cir. 1990) (same); U.S. v. Morado, 454 F.2d 167, 169 (5th Cir. 1972) (same); but see U.S. v. Brown, 49 F.3d 1162, 1165, 1995 FED App. 0101P (6th Cir. 1995) (overt act required).

<sup>10</sup>U.S. v. Harris, 701 F.2d 1095, 1101 (4th Cir. 1983) (internal quotations omitted).

<sup>11</sup>U.S. v. Guillette, 547 F.2d 743, 748–50, 1 Fed. R. Evid. Serv. 486 (2d Cir. 1976).

<sup>12</sup>The Ku Klux Cases, 110 U.S. 651, 663, 4 S. Ct. 152, 28 L. Ed. 274 (1884), and *Wilkins v. U.S.*, 376 F.2d 552, 557–59 (5th Cir. 1967) (en banc); refusal to count votes, *U.S. v. Mosley*, 238 U.S. 383, 385–86, 35 S. Ct. 904, 59 L. Ed. 1355 (1915) and *Ryan v. U.S.*, 99 F.2d 864, 866–69 (C.C.A. 8th Cir. 1938).

<sup>13</sup>*Guinn v. U.S.*, 238 U.S. 347, 365, 35 S. Ct. 926, 59 L. Ed. 1340 (1915).

<sup>14</sup>*Ledford v. U.S.*, 155 F.2d 574, 575 (C.C.A. 6th Cir. 1946).

<sup>15</sup>*Walker v. U.S.*, 93 F.2d 383, 385–86 (C.C.A. 8th Cir. 1937).

<sup>16</sup>U.S. v. Townsley, 843 F.2d 1070, 1074–75, 25 Fed. R. Evid. Serv. 476 (8th Cir. 1988), on reh’g, 856 F.2d 1189 (8th Cir. 1988).

<sup>17</sup>U.S. v. Haynes, 977 F.2d 583 (6th Cir. 1992).

<sup>18</sup>*Crolich v. U.S.*, 196 F.2d 879, 880 (5th Cir. 1952)

absentee on behalf of illegally registered voters;<sup>19</sup> and printing ballots so as to keep qualified voters from voting.<sup>20</sup> However, according to one divided court of appeals panel, Section 241 does not reach conspiracy based on voter bribery alone.<sup>21</sup>

**§ 18:22 Conspiracy against voting rights—42 U.S.C.A. § 1973i(c)**

The Voting Rights Act of 1965,<sup>1</sup> contains a specific voting rights criminal conspiracy provision, codified at 42 U.S.C.A. § 1973i(c). Section 1973i(c) makes it a crime to “conspire[ ] with another individual for the purpose of encouraging his false registration to vote or illegal voting” in federal elections. The maximum penalty for a conspiracy conviction under 42 U.S.C.A. § 1973i(c) is five years imprisonment.<sup>2</sup>

Section 1973i(c) is both narrow and broad. Section 1973i(c) is narrow in that at least one appellate court has read it strictly to apply to a conspiracy of two persons only.<sup>3</sup> Yet, the scope of a Section 1973i(c) conspiracy applies to “illegal voting,” which the statute does not define, and which a straightforward reading would apply to any voting that is not legal. Accordingly, for example, Section 1973i(c) would appear to cover prosecutions brought against a person who conspires with another to rig an election or otherwise distort a vote count.

<sup>19</sup>U.S. v. Weston, 417 F.2d 181, 184–86 (4th Cir. 1969).

<sup>20</sup>U.S. v. Stone, 188 F. 836, 840 (D. Md. 1911).

<sup>21</sup>U.S. v. McLean, 808 F.2d 1044, 1048 (4th Cir. 1987) (dissent relied upon Anderson v. U. S., 417 U.S. 211, 227, 94 S. Ct. 2253, 41 L. Ed. 2d 20 (1974) to conclude that bribery, like ballot box stuffing in inconsistent with the constitutional right to an honest vote count.).

In Anderson v. United States, the Supreme Court declared that “every voter . . . whether he votes for a candidate with little chance of winning or for one with little chance of losing, has a right under the Constitution to have his voter fairly counted, without its being distorted by fraudulently cast votes. And whatever their motive, those who conspire to cast false votes in an election for federal office conspire to injure that right within the meaning of Section 241.” Anderson v. U. S., 417 U.S. 211, 225, 94 S. Ct. 2253, 2263-64, 41 L. Ed. 2d 20 (1974).

**[Section 18:22]**

<sup>1</sup>Voting Rights Act of 1965, 42 U.S.C.A. §§ 1973 et seq.

<sup>2</sup>In 1970, Congress expanded the application of 1973i(c) to also apply to false registration and other fraudulent acts by voters who are eligible to vote for President and Vice President of the United States but are otherwise ineligible to vote for local offices due to durational residency requirements. 42 U.S.C.A. § 1973aa-1(i).

<sup>3</sup>U.S. v. Olinger, 759 F.2d 1293, 1299 (7th Cir. 1985).

The person who votes illegally may not be prosecuted for conspiracy under this section, but he or she is a necessary participant in the conspiracy since the prosecution must show that the voter knew that his or her vote or registration to vote was illegal.<sup>4</sup> Jurisdiction under Section 1973i(c) depends upon whether the conspiracy concerns voter registration, in which case jurisdiction exists for any election,<sup>5</sup> or voting, in which case jurisdiction is limited to elections in which a federal candidate is on the ballot.<sup>6</sup>

In 2002, as part of HAVA, Congress made it a crime to conspire to violate the Section 1973i(c) proscription against “false information” about one’s name, address and period of residence in the voting district in data furnished to an election official to establish eligibility to register to vote or vote.<sup>7</sup> As to voting, the prosecution must show that a candidate for federal election was on the ballot for the election in question.<sup>8</sup> This is not required for false statements in registering to vote.<sup>9</sup>

**§ 18:23 Conspiracy against voting rights—42 U.S.C.A. § 1973j(c)**

Another provision of the Voting Rights Act of 1965, as amended, makes a felony conspiring to violate a number of key provisions of that Act. Section 1973j(c) applies to “[w]hoever conspires to violate the provisions of subsections (a) or (b) of this Section, or interferes with any right secured by section 1973, 1973a, 1973b, 1973c, 1973e, 1973h, or 1973i(a) of this title.” One of the sections incorporated by reference into Section 1973j(c) prohibits the failure or refusal by any person acting under color of law to permit any person to vote who is entitled to vote under the Voting Rights Act of 1965, as amended, or is otherwise qualified to vote, or the willful failure or refusal to tabulate, count, and report such person’s vote.”<sup>1</sup> Other sections incorporated into Section 1973j(c) include those that prohibit poll taxes, tests and devices to determine eligibility to vote, violation of the Act’s pre-clearance requirements for election law changes in states with a history of voting rights abuses, and deprivation or attempted deprivation of

<sup>4</sup>See, e.g., *U.S. v. Cianciulli*, 482 F. Supp. 585, 620–21 (E.D. Pa. 1979).

<sup>5</sup>*U.S. v. Cianciulli*, 482 F. Supp. 585, 616 (E.D. Pa. 1979).

<sup>6</sup>*U.S. v. Cole*, 41 F.3d 303, 306 (7th Cir. 1994).

<sup>7</sup>42 U.S.C.A. § 15544(a).

<sup>8</sup>*U.S. v. Cole*, 41 F.3d 303, 306 (7th Cir. 1994).

<sup>9</sup>*U.S. v. Cianciulli*, 482 F. Supp. 585, 616 (E.D. Pa. 1979).

**[Section 18:23]**

<sup>1</sup>42 U.S.C.A. § 1973i(a).

voting rights secured by the Act. Like Section 1973i(c), conviction under Section 1973j(c) may result in a maximum prison term of five years.

**§ 18:24 Conspiracy against voting rights—18 U.S.C.A. § 371**

As previously discussed with respect to campaign finance offenses, the United States frequently prosecutes election offenses in whole or in part under the general criminal conspiracy statute, Section 371 of Title 18. Section 371 makes criminal a conspiracy by two or more persons either “to commit any offense against the United States,” or “to defraud the United States, or any agency thereof in any manner or for any purpose.” Thus, Section 371 is a catch-all statute that does not require some of the elements of the narrower statutes, including Section 241 and Sections 1973i(c) and 1973j(c), while capturing a wider range of activity. Because Section 371 is broadly written, it allows the application to voting rights of statutes prohibiting many other activities, including such things as telephone harassment.<sup>1</sup>

**§ 18:25 Voter intimidation<sup>1</sup>**

Congress has enacted over a dozen specific statutes prohibiting intimidation of voters in addition to Sections 241, 242 and 371 of Title 18, the civil rights and conspiracy statutes that were previously discussed. These specific statutes include 18 U.S.C.A. § 245(b)(1)(A) (banning intimidation of voters), § 592 (barring anyone in the “service of the United States” from ordering, bringing, keeping or having under his authority or control any “troops or armed men” at “any place where [an] . . . election is held” other than to “repel armed enemies of the United States”), § 593 (barring interference by the armed forces with anyone’s voting rights), § 594 (banning intimidation of voters in certain federal

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**[Section 18:24]**

<sup>1</sup>See *U.S. v. Tobin*, 480 F.3d 53, 55 (1st Cir. 2007) (A federal jury convicted former New England Regional Director of Republican National Committee under Section 371 for conspiring to disrupt telephone service to five Democratic Party offices and a firefighters’ ride-to-the-polls program on election day in November 2002 and aiding and abetting related to telephone harassment; defendant was acquitted of a charge under Section 241 of conspiring to injure persons in the free exercise of the right to vote. Conviction was reversed on a jury instruction issue.).

**[Section 18:25]**

<sup>1</sup>18 U.S.C.A. §§ 245(b)(1)(A), 592 to 596, 598, 609 to 610 and 42 U.S.C.A. § 1973gg-10(1).

elections), § 595 (banning interference in federal elections by employees of the federal government), § 596 (banning polling of armed forces regarding voting), § 598 (barring use of federal appropriations to interfere with voting rights), § 609 (banning use of military authority to influence vote of any member of the armed forces in any election), § 610 (banning intimidation or coercion of federal employees to vote or otherwise engage in political activity), and 42 U.S.C.A. § 1973gg-10(1) (banning intimidation of anyone from exercising voting rights).<sup>2</sup>

Sections 245(b)(1)(A), 592, 593, 596, 609 and 610 of Title 18 apply to any election, whereas 18 U.S.C.A. §§ 594, 595 and 42 U.S.C.A. § 1973gg-10(1) are limited to elections in which a candidate for federal office is on the ballot. Violation of Sections 245(b)(1)(A), 592-593, 609-610 or 1973gg-10(1) is a felony. Section 245(b)(1)(A) provides for imprisonment for up to a year, unless bodily injury results, in which case imprisonment could be up to ten years, or, if death results, life. Sections 609 and 1973gg-10(1) permit imprisonment of up to five years upon conviction. Violations of Section 592 or 593 provides up to five years in prison and disqualification “from holding any office of honor, profit, or trust under the United States.” Section 610 offenses allow for imprisonment of up to three years, while Sections 594 to 596 and 598 offenses carry prison terms of one year or less. Sections 594, 610, 245(b)(1)(A) and 1973gg-10(1) are discussed briefly below.

Of these prohibitions, Section 594 is among the most broadly written. Section 594 bars intimidation, threats, or coercion by anyone of another person “for the purpose of interfering with the right of such other person to vote or to vote as he may choose, or of causing such other person to vote for, or not vote for any candidate” for specified federal offices, including the President of the United States and Members of Congress. In 1993, Congress added Section 610 to Title 18, as an amendment to the Hatch Act, to broaden protection of executive branch employees by making a felony political intimidation and coercion by anyone to induce or discourage these public servants in voting or any other “political activity,” whether federal, state or local.

The Civil Rights Act of 1968, as codified in relevant part at 18 U.S.C.A. § 245(b)(1)(A), outlaws the use of violence or the threat

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<sup>2</sup>Political patronage crimes may also violate voting rights. Federal criminal statutes outlawing patronage abuses are discussed more thoroughly in Chapter 14. Specific anti-patronage criminal statutes include those in the Pendleton Civil Service Act of 1883, as amended, which are codified at 18 U.S.C.A. §§ 602 to 603 and 606 to 607, and the Hatch Act of 1939, as amended, which are codified at 18 U.S.C.A. §§ 594, 595, 598, 600 to 601, 604 to 605 and 610.

thereof to intimidate voters in any election. Section 245(b)(1)(A) targets anyone who, “whether or not acting under color of law, by force or threat of force, willfully injures, intimidates or interferes with, or attempts to injure, intimidate or interfere with . . . voting or qualifying to vote.” Prosecution under this section requires advance approval by the Attorney General upon a finding that prosecution is “in the public interest and necessary to secure substantial justice.”<sup>3</sup>

The National Voter Registration Act, which Congress enacted in 1993, subjects to prosecution “[a] person, including an election official, who in any election for Federal office (1) knowingly and willfully intimidates, threatens, or coerces, or attempts to intimidate, threaten, or coerce, any person for—(A) registering to vote, or voting, or attempting to register to vote; (B) urging or aiding any person to register to vote, to vote, or to attempt to register to vote; or (C) exercising any right under this subchapter.”<sup>4</sup>

While the number and sweep of criminal voter intimidation laws is broad, current Department of Justice policy interprets them narrowly. The Criminal Division of the Department of Justice has taken the position that Section 1973gg-10(1) and other criminal voter intimidation statutes “normally” require intimidation accomplished through the use of “threats, duress, economic coercions or some other aggravating factor that tends to improperly induce conduct on the part of the victim.”<sup>5</sup>

With respect to Sections 241 and 242 of Title 18, for example, the Criminal Division takes the position that these statutes “may be used to prosecute schemes to intimidate voters in federal elections through threats of physical or economic duress, or to prevent otherwise lawfully qualified voters from getting to the polls.”<sup>6</sup> This position is narrower than the scope of Sections 241 and 242 because these statutes apply under circumstances of intimidation without physical or economic harm and because they apply to vote suppression that occurs when or after a voter votes, such as ballot box stuffing or ballot destruction.<sup>7</sup>

Accordingly, voter intimidation by other means, such as decep-

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<sup>3</sup>18 U.S.C.A. § 245(a)(1); U.S.A.M. §§ 9-85.200 and 9-2.112.

<sup>4</sup>42 U.S.C.A. § 1973gg-10(1).

<sup>5</sup>Craig C. Donsanto and Nancy L. Simmons, *Federal Prosecution of Election Offenses* 55 (7th ed. 2007).

<sup>6</sup>Craig C. Donsanto and Nancy L. Simmons, *Federal Prosecution of Election Offenses* 59 (7th ed. 2007).

<sup>7</sup>See, e.g., *U.S. v. Classic*, 313 U.S. 299, 308, 61 S. Ct. 1031, 85 L. Ed. 1368 (1941) (vote dilution); *Ex parte Coy*, 127 U.S. 731, 745, 8 S. Ct. 1263, 32 L. Ed. 274 (1888) (ballot destruction), and §§ 18:20, 18:24.



tion, voter challenges that are the product of caging of minority voters, or deliberate deployment of defective, inferior, or insufficient ballots or voting equipment to minority or other targeted voters, does not appear to be a priority for federal criminal prosecutors under current policy. As for minority voters, where a “complaint of election fraud appears to be grounded in discrimination based on race or language minority status [s]uch matters are not handled as election crimes. Rather they should be treated—at least initially—as civil rights matters [subject to] a broad range of noncriminal federal remedies,” according to Craig C. Donsanto of the Public Integrity Section of the Criminal Division of the Department of Justice and author of Justice Department manual on election crimes, *Federal Prosecution of Election Offenses*, which is now in its seventh edition.<sup>8</sup> Thus, notwithstanding the existence of federal criminal laws intended to protect minority voters from election fraud, coupling racial or minority language discrimination with election fraud would appear to diminish the risk of criminal prosecution.

Indeed, civil penalties and injunctive relief are more often sought by the Civil Rights Division of the Department of Justice.<sup>9</sup> Civil relief also may be obtained by private parties.<sup>10</sup> In *Democratic National Committee v. Republican National Committee*, the court enforces a final consent decree from litigation brought in the 1980s, enjoining the Republican National Committee and its agents from directing mass mailings to racial or ethnic minority registered voters and using letters returned undelivered to create voter challenge lists for the purpose of denying the vote to these minorities, a practice that is also known as caging.<sup>11</sup>

The 110th Congress has under consideration legislation to

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<sup>8</sup>See Craig C. Donsanto, The Federal Crime of Election Fraud (undated) at page 7, available at [www.soundpolitics.com/The%20Federal%20Crime%20of%20Election%20Fraud.pdf](http://www.soundpolitics.com/The%20Federal%20Crime%20of%20Election%20Fraud.pdf).

<sup>9</sup>See, e.g., *United States v. North Carolina Republican Party*, No. 91-161-CIV-5F (E.D.N.C. 1992) (political party entered into consent decree enjoining it under 42 U.S.C.A. § 1971(b) and 1973(b) from mailing minority voters postcards that contained false voting information and prosecution threat); and compare U.S.A.M. § 8-2.270-500 (civil enforcement of voting rights laws) with U.S.A.M. § 8-3.000 (no reference to criminal enforcement of voting rights laws).

<sup>10</sup>*Democratic National Committee v. Republican National Committee*, No. 2:81-cv-03876 (D.N.J.).

<sup>11</sup>The final Consent Decree dated July 27, 1987, among other things, enjoins the Republican National Committee from “using” or “appearing to use, racial or ethnic criteria in connection with ballot integrity, ballot security or other efforts to prevent or remedy suspected vote fraud,” and to obtain prior court approval before it participates in, assists or otherwise engages in any “ballot security” efforts, which include any “efforts to prevent or remedy vote fraud.” The Court



specifically prohibit caging.<sup>12</sup> In response to public reporting of an increase in the dissemination of intentionally misleading information about voter eligibility, registration and voting, the 110th Congress has also under consideration legislation to make criminal deceptive practices regarding “the time, place or manner of an election” or “the qualifications for or restrictions on voter eligibility for any such election,” when done “with the intent to prevent another person from exercising the right to vote in that election.”<sup>13</sup> While certain conduct proscribed by the proposed legislation may be captured by existing law, the proposed bills may suggest a gap in current law and grounds for defense in certain types of cases brought under existing statutes. This view is strengthened by the Department of Justice’s current interpretation that campaign dirty tricks generally are not federal election offenses and that voter intimidation requires physical force or economic duress or the threat thereof.<sup>14</sup>

### § 18:26 Voting multiple times in the same election<sup>1</sup>

When Congress in 1975 amended the Voting Rights Act of 1965, Congress criminalized voting “more than once” in any election with a federal candidate on the ballot.<sup>2</sup> Violation of Section 1973i(e) requires (1) a candidate for federal office on the ballot, (2) the defendant to have voted more than once for a candidate, and (3) the defendant must vote knowingly, willfully and expressly for the purpose of having his vote count more than

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found the Republican National Committee in violation of this decree in 1990 and 2004. See Order of November 15, 1990 at ¶ 2. and Order of November 1, 2004 at ¶ 1, for which a stay pending appeal was denied the same day by the Third Circuit Court of Appeals.

<sup>12</sup>See the Caging Prohibition Act of 2007, 5,2305, 110th Cong. (2007).

<sup>13</sup>See The Deceptive Practices and Voter Intimidation Prevention Act of 2007, S. 453, H.R. 1281, 110th Cong. (2007).

<sup>14</sup>According to the Department of Justice, two federal statutes specifically address campaign tactics and practices, both of which are in the Federal Election Campaign Act, 2 U.S.C.A. § 441d (requiring identification of candidate in negative ad against opponent) and § 441h (prohibiting fraudulently representing one’s authority to speak for a federal candidate) and for which criminal (and civil) penalties for the violation thereof are set forth in 2 U.S.C.A. § 437g(a). Craig C. Donsanto and Nancy L. Simmons, *Federal Prosecution of Election Offenses* 80 (7th ed. 2007).

#### [Section 18:26]

<sup>1</sup>42 U.S.C.A. § 1973i(c) and (e).

<sup>2</sup>18 U.S.C.A. § 1973i(e).

once.<sup>3</sup> Prosecutors have used Section 1973(i)(c) to prosecute a ballot forgery scheme where the voter in whose name the vote is cast is not present.<sup>4</sup> Federal prosecutors also have used Section 1973i(e) to prosecute a person helping a voter to vote under circumstances in which the voter was present to instruct the person as to the completion of the ballot and in which the voter then signed his or her own ballot. While at least one appellate court held the statutory language “vote more than once” unconstitutionally vague when applied to such conduct,<sup>5</sup> others have authorized such prosecutions.<sup>6</sup>

An alternative statutory basis to attack ineligible vote casting is Section 1973i(c) of Title 42. Section 1973i(c) proscribes the provision of “false information” about one’s name, address and period of residence in the voting district in data furnished to an election official to establish eligibility to register to vote or vote.<sup>7</sup> This provision reaches both forgeries by outsiders and by election officials or other insiders who stuff the ballot box and to local elections in which a federal candidate is on the ballot.<sup>8</sup>

### § 18:27 Vote buying<sup>1</sup>

Vote buying is one of the more straightforward voting rights crimes to prosecute and there are several statutory options available to prosecutors, including 42 U.S.C.A. § 1973i(c) (barring vote buying), and 18 U.S.C.A. §§ 597 (barring expenditures to influ-

<sup>3</sup>18 U.S.C.A. § 1973i(e); see also *U.S. v. Hogue*, 812 F.2d 1568, 1576 (11th Cir. 1987); *U.S. v. Lewis*, 514 F. Supp. 169, 178 (M.D. Pa. 1981) (upholding indictment which charged defendant with violating statute by casting a bogus absentee vote and a legitimate vote.).

<sup>4</sup>*U.S. v. Olinger*, 759 F.2d 1293, 1297 (7th Cir. 1985) (votes cast for the deceased).

<sup>5</sup>*U.S. v. Salisbury*, 983 F.2d 1369, 1375 (6th Cir. 1993) (focusing on voter consent to ballot completion).

<sup>6</sup>See *U.S. v. Cole*, 41 F.3d 303, 307–09 (7th Cir. 1994) (focusing on physical act of ballot completion) and *U.S. v. Smith*, 231 F.3d 800, 55 Fed. R. Evid. Serv. 1267 (11th Cir. 2000) (same).

<sup>7</sup>42 U.S.C.A. § 1973i(c); see also *U.S. v. Boards*, 10 F.3d 587, 589 (8th Cir. 1993) (holding that an application for a ballot is a prerequisite to voting and, as such, is covered by Section 1973i(c) and that defendants gave false information as to their names by using the names of real registered voters); *U.S. v. Smith*, 231 F.3d 800, 815, 55 Fed. R. Evid. Serv. 1267 (11th Cir. 2000) (each forgery of a voter’s name on an application for a ballot or the ballot itself is a separate offense under Section 1973i(c)).

<sup>8</sup>*U.S. v. Slone*, 411 F.3d 643, 648, 2005 FED App. 0240P (6th Cir. 2005).

#### [Section 18:27]

<sup>1</sup>18 U.S.C.A. §§ 597, 599, 601, 608(b) and 1952 and 42 U.S.C.A. § 1973i(c).

ence voting), 599 (barring promise of appointment by candidate) 601 (barring deprivation of employment or other benefit for a vote), 608(b) (barring paying or offering to pay, or accepting payment, for registering or voting under Uniformed and Overseas Citizens Absentee Voting Act) and 1952 (barring bribery). Sections 597, 599 and 601 offenses are misdemeanors (although “willfulness” doubles the maximum term of imprisonment under Sections 597 and 599 to up to two years), and Section 608(b), while imposing a maximum term of five years in prison, affects only payment or offers to pay for voting or registering to vote under the Uniformed and Overseas Citizens Absentee Voting Act.<sup>2</sup>

Most prosecutions for vote buying utilize Section 1973i(c), which prohibits any payment or offer of payment to either a would-be voter in an election in which there is a federal candidate on the ballot or to a person who is not already registered to vote.<sup>3</sup> A crime occurs if the voter is being paid for voting or registering to vote.<sup>4</sup> Section 1973i(c) does not prohibit payments to transport voters trying to get themselves to the polls,<sup>5</sup> or payments to signature gatherers in voter registration drives, which are authorized under FEC regulations.<sup>6</sup> Conviction for a violation of Section 1973i(c) may result in imprisonment of up to five years.

Until recently, isolated conduct covered by Section 1973i(c) would not have been federally prosecuted. The Sixth Edition of *Federal Prosecution of Election Crimes* provides that

As a general rule, section 1973i(c) should not be used to prosecute isolated instances of illegal registration, vote buying, or fraudulent voting, because such instances do not implicate federal interests sufficiently to warrant federalization of matters otherwise better left to state election administration and law enforcement . . . Prosecution of individual and uncoordinated acts should be considered

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<sup>2</sup>Section 608 also protects the rights of uniformed services and overseas voters by prohibiting anyone from “knowingly depriv[ing] or attempt[ing] to deprive” them of their voting rights, under the Uniformed and Overseas Citizens Absentee Voting Act, and from “knowingly giv[ing] false information for the purpose of establishing the eligibility of any person to register to vote under [that Act].” 18 U.S.C.A. § 608(a) and (b).

<sup>3</sup>See, e.g., *U.S. v. Slone*, 411 F.3d 643, 647, 2005 FED App. 0240P (6th Cir. 2005).

<sup>4</sup>See, e.g., *U.S. v. Garcia*, 719 F.2d 99, 101 (5th Cir. 1983) (payment in food stamps for votes in local races).

<sup>5</sup>See, e.g., *U.S. v. Turner*, 465 F.3d 667, 667 n.1, 2006 FED App. 0377A (6th Cir. 2006).

<sup>6</sup>See, e.g., 11 C.F.R. §§ 106.5, 100.133 and 100.149.

only where they evidence a widespread systemic abuse which jeopardizes the integrity of the voting process in a particular locale.<sup>7</sup>

Similarly, the version of *Federal Prosecution of Election Offenses* ordered to be made public by a federal court in 2005 in *Leadership Conference on Civil Rights v. Gonzales*,<sup>8</sup> provides that “[t]he Justice Department has a long-standing practice of not prosecuting individual voters whose only participation in an election fraud scheme was in allowing their votes to be compromised. Examples include individuals who permitted their votes to be bought, or who impersonated voters at the direction of others.”<sup>9</sup> Notwithstanding this “long-standing policy” and “practice,” the current election crimes manual dated May 2007 presumes prosecution of individual voters, except “in appropriate cases federal prosecutors should consider declining to prosecute them in exchange for truthful cooperation against organizers of such schemes.”<sup>10</sup>

In some instances involving alleged vote buying, prosecutors will resort to general criminal laws. In particular, prosecutors may indict under the Travel Act,<sup>11</sup> which makes criminal the use of interstate travel, mails or wires in interstate commerce in aid of certain unlawful activity and which carries a five year term of imprisonment, unless violence is involved, in which case the prison sentence could be up to 20 years. The Travel Act may reach payment for a vote if the vote buying is classified as a bribery offense under state law or state law outlaws the exchange of a vote for something of value.<sup>12</sup> It also may apply where the mails or wires are used, interstate or intrastate, to further the *quid pro quo* of the bribe, even where the defendant did not actually do the mailing or wiring, providing that the use of the mails or wires was foreseeable.<sup>13</sup> However, the Travel Act requires an overt act, which need not itself be unlawful, by the defendant in

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<sup>7</sup>Craig C. Donsanto and Nancy L. Simmons, *Federal Prosecution of Election Offenses* 30 (6th ed. 1995).

<sup>8</sup>*Leadership Conference on Civil Rights v. Gonzales*, 404 F. Supp. 2d 246 (D.D.C. 2005), appeal dismissed, 2006 WL 1214937 (D.C. Cir. 2006).

<sup>9</sup>Craig C. Donsanto and Nancy L. Simmons, *Federal Prosecution of Election Offenses* 55 (7th ed. 2007).

<sup>10</sup>Craig C. Donsanto and Nancy L. Simmons, *Federal Prosecution of Election Offenses* 32 (7th ed. 2007).

<sup>11</sup>18 U.S.C.A. § 1952.

<sup>12</sup>*U.S. v. Polizzi*, 500 F.2d 856, 872–73 (9th Cir. 1974) (violation of state gambling law came within ambit of § 1952).

<sup>13</sup>*U.S. v. Kelley*, 395 F.2d 727, 729 (2d Cir. 1968) (bookmaker telling clients where they could place an illegal bet).

furtherance of the bribe after the mail or wire is used.<sup>14</sup> Each use of the mails or wires for the bribery scheme may be charged as a separate offense.<sup>15</sup>

### § 18:28 Non-citizen vote fraud<sup>1</sup>

Several criminal provisions address vote fraud by persons who are not citizens of the United States: 42 U.S.C.A. § 1973gg-10(2) and 18 U.S.C.A. §§ 611, 911, 1015(f). These statutes address concerns about voting crimes involving illegal immigrants.

The National Voter Registration Act of 1993, codified in relevant part as Section 1973gg-10(2) of Title 42, makes a false statement as to an applicant's citizenship on a voter registration form in any federal election a felony. The citizenship statement is material within the meaning of the statute because all states presently require U.S. citizenship in order to vote. Since Section 1973gg-10(2) appears to be a specific intent offense, defense counsel may be able to show that the accused either did not know that citizenship was required or that he or she did not understand the requirements for U.S. citizenship. Violations of Section 1973gg-10(2) are punishable by imprisonment for up to five years.

In 1996, Congress enacted Section 1015(f) of Title 18, using its power over nationality, rather than elections, to prohibit false statements or claims of citizenship to register to vote or to vote in any election.<sup>2</sup> In enacting HAVA in 2002, Congress created a companion criminal statute to Section 1015(f) that is codified at 42 U.S.C.A. § 15544(b). Section 15544(b) imposes Section 1015(f) criminal penalties on "[a]ny individual who knowingly commits fraud or knowingly makes a false statement with respect to the naturalization, citizenry, or alien registry of such individual in violation of section 1015 of Title 18." Sections 1015(f) and

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<sup>14</sup>U.S. v. Davis, 780 F.2d 838, 843, 19 Fed. R. Evid. Serv. 1224 (10th Cir. 1985).

<sup>15</sup>U.S. v. Jabara, 644 F.2d 574, 577 (6th Cir. 1981).

McNally v. U.S., 483 U.S. 350, 107 S. Ct. 2875, 97 L. Ed. 2d 292 (1987), the Department of Justice is considering a "cost-of-election" theory to prosecute election crime under the mail and wire fraud statutes, 18 U.S.C.A. §§ 1341 and 1342. See Craig C. Donsanto and Nancy L. Simmons, *Federal Prosecution of Election Offenses* 78-79 (7th ed. 2007), discussing U.S. v. DeFries, 43 F.3d 707 (D.C. Cir. 1995) (cost associated with redo of union election attributable to scheme to defraud in original election); see also § 18:12 for discussion of McNally.

#### [Section 18:28]

<sup>1</sup>18 U.S.C.A. §§ 611, 911 and 1015(f) and 42 U.S.C.A. §§ 1973gg-10(2) and 15544(b).

<sup>2</sup>18 U.S.C.A. § 1015(f).

15544(b) are separate offenses from 18 U.S.C.A. § 911, which generally prohibits falsely and willfully representing oneself as a citizen of the United States. Section 911 differs from 42 U.S.C.A. § 1973gg-10(2), 18 U.S.C.A. § 1015(f) and 42 U.S.C.A. § 15544(b) in that potential term of imprisonment is for three, rather than five, years.

Also in 1996, Congress enacted Section 611 of Title 18 to prohibit voting by aliens in federal elections. Unlike Sections 1973gg-10(2) and 1015(f), which forbid false statements of citizenship, Section 611 criminalizes, punishable by a maximum one-year period of imprisonment, the act of voting by a non-citizen. Since its enactment, Section 611 has contained an exception for when “(1) the election is held partly for some other purpose; (2) aliens are authorized to vote for such other purpose under a State constitution or statute or a local ordinance; and (3) voting for such other purpose is conducted independently of voting for a candidate for such Federal offices, in such a manner that an alien has the opportunity to vote for such other purpose, but not an opportunity to vote for a candidate for any one or more of such Federal offices.” Thus, the act provides a safe harbor for aliens to vote in state and local elections in which such person is authorized to vote. On July 3, 2007, the Court of Appeals for the Eleventh Circuit upheld 18 U.S.C.A. § 611 against a challenge that it was unconstitutionally vague for lack of specific *mens rea* language.<sup>3</sup> The Court held that Section 611 is a general intent crime.<sup>4</sup>

In 2000, Congress softened the impact of two of these laws through the Child Citizenship Act of 2000.<sup>5</sup> Congress amended Sections 611 and 1015 to except from their application situations where “each natural parent of the alien (or, in the case of an adopted alien, each adoptive parent of the alien) is or was a citizen (whether by birth or naturalization), the alien permanently resided in the United States prior to attaining the age of 16, and the alien reasonably believed at the time of [the voting] that he or she was a citizen [of the United States].”

### § 18:29 Voting by felons

When a person convicted of a felony may vote again varies by

<sup>3</sup>U.S. v. Knight, 490 F.3d 1268, 1271 (11th Cir. 2007), cert. denied, 2007 WL 2858977 (U.S. 2007).

<sup>4</sup>U.S. v. Knight, 490 F.3d 1268, 1271 (11th Cir. 2007), cert. denied, 2007 WL 2858977 (U.S. 2007).

<sup>5</sup>Child Citizenship Act of 2000, Pub. L. 106-395, 114 Stat. 1631 to 1633 (2000).



state. In a minority of states, persons convicted of a felony are made ineligible to vote absent restoration of such right by the state in a separate proceeding, which may not even begin for years after the sentence is completed. Therefore, those whose voting rights have not yet been restored could be prosecuted for voting in violation of Section 1973gg-10(2)(B) of Title 42 or other criminal law.<sup>1</sup> Thirty-nine states and District of Columbia, however, permit a person to vote upon completion of his or her felony sentence, if not sooner.<sup>2</sup>

### § 18:30 Federal election record retention laws

To facilitate prosecution of voting rights offenses, Congress enacted criminal statutes to punish election administrators and document custodians for willfully failing to maintain election records for a period of 22 months following any election that included a federal candidate. Section 1974 of Title 42 requires any election administrator or document custodian to retain “all records and papers which come into his possession relating to any application, registration, payment of poll tax, or other act requisite to voting in such election.”<sup>1</sup> Section 1974a of Title 42 prohibits “[a]ny person” from “willfully steal[ing], destroy[ing], conceal[ing], mutilat[ing] or alter[ing]” any record required to be maintained by Section 1974. An offense under either statute is a misdemeanor. The retention period is greater than 22 months in some cases, however. For example, since voter registration applies to all elections, registration information must be kept for 22 months after the registration is no longer active and “custodian’s duty to retain and preserve extends as far back as the earliest date of any record or paper which bears on the eligibility of any

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#### [Section 18:29]

<sup>1</sup>See *U.S. v. Prude*, 489 F.3d 873, 874–75 (7th Cir. 2007) (prosecution for voting as a felon on supervised release.).

Section 1973gg-10(B) of Title 42 provides in relevant part that any person, “who in any election for Federal office . . . knowingly and willfully deprives, defrauds, or attempts to deprive or defraud the residents of a State of a fair and impartially conducted election process, by . . . casting, . . . of ballots that are known by the person to be materially false, fictitious, or fraudulent under the laws of the State in which the election is held,” shall be fine, imprisoned for up to five years, or both.

<sup>2</sup>See, e.g., Kara Gotsch, Op. Ed. *It’s Right to Grant Former Felons the Right to Vote*, *Wash. Post.*, May 13, 2007, at B8.

#### [Section 18:30]

<sup>1</sup>42 U.S.C.A. § 1974.

currently listed voter to vote in such election.”<sup>2</sup>

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<sup>2</sup>Cf. *Kennedy v. Lynd*, 306 F.2d 222, 226–27 (5th Cir. 1962); *U.S. v. Cianciulli*, 482 F. Supp. 585 (E.D. Pa. 1979).

In addition, Section 1973j(b) of Title 42, subjects to criminal fine and incarceration for up to five years, “[w]hoever, within a year following an election in a political subdivision in which an examiner has been appointed (1) destroys, defaces, mutilates, or otherwise alters the marking of a paper ballot which has been cast in such election, or (2) alters any official record of voting in such election tabulated from a voting machines or otherwise.” 42 U.S.C.A. § 1973j(b).